Reportable:	YES / **NO**
Circulate to Judges:	**YES** / NO
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)

CASE NO: **1641/2017**
DATE HEARD: **19 NOVEMBER 2018**
DATE DELIVERED: **23 NOVEMBER 2018**

In the matter between:

W, M Applicant

and

B, E 1st Respondent

W, L E 2nd Respondent

Coram: Olivier ADJP *et* Williams J *et* Groenewaldt AJ

JUDGMENT

Olivier ADJP:

[1.] In July 2017 the first respondent, Mr E B, issued summons against the appellant, Mr M W, and the second respondent, Mrs L E W. Although it appears that they may by then have separated, it is common cause that the first respondent is the father of the second respondent and that the appellant and the second respondent were at that stage still husband and wife, married out of community of property.

[2.] The cause of action set out in the particulars of claim is that the first respondent and the appellant had concluded a verbal loan agreement during March 2016, in terms of which the first respondent would loan the appellant the amount of

R400 000.00, payable into the bank account of the second respondent, and repayable within a reasonable time, alternatively upon request. It is alleged that the first respondent has complied with the agreement and that, despite demand, the appellant failed to repay the amount.

[3.] The particulars of claim also contain an allegation that the appellant admitted his indebtedness in writing, and in this regard a copy of an e-mail that the appellant had sent to the first respondent on 17 October 2016 is annexed to the particulars of claim as annexure "EB1".

[4.] In the particulars of claim judgment is claimed against only the appellant, and the averment is made that the second defendant is only cited "*insofar as she may have an interest in the matter*".

[5.] Annexure "EB1" consists of five paragraphs. The first three paragraphs deal with money which the appellant indeed owed to the first respondent in unrelated matters. The fourth paragraph is the one that was referred to in the particulars of claim as an "*acknowledgement of … indebtedness*". It reads as follows:

> "*Wat die R400k betref vir die huis werk ek nog aan 'n plan en hou Pa op hoogte. Ek glo nie Standard Bank gaan vir my nog geld leen indien ons net 1 inkomste het tussen my en Lize. Kan ek vir Pa 'n plan gee teen einde Desember, die geld kan rente ook oploop?*"

[6.] The appellant entered appearance to defend the action and the first respondent then applied for summary judgment, which the appellant opposed.

[7.] In his opposing affidavit the appellant in essence denied that he had concluded a loan agreement with the first respondent and that annexure "EB1" constituted, or was intended as, an acknowledgement of indebtedness.

[8.] As regards the alleged loan agreement the appellant stated that, although he had indeed approached the first respondent with a view to a loan of approximately R600 000.00 to assist him and the second respondent in the construction of a house, he and the first respondent never actually concluded a loan agreement. He stated that he had in fact, after not having received "*positive feedback*" from the first respondent, approached his brother for a loan.

[9.] As regards annexure "EB1" the appellant stated that he had only during October 2016 become aware of the fact that the first respondent had paid the amount of R400 000.00 into the bank account of the second respondent, and that the negotiations regarding the repayment of that amount had been conducted between the two respondents, and without his knowledge.

[10.] The appellant stated that he realised that the amount would have to be repaid to the first respondent and that he then sent the e-mail (annexure "EB1") to the first respondent "*in an attempt to make arrangements for the repayment*". He explained that he did so because the second respondent was bipolar, addicted to pain medication and "*in general incapable of managing money properly*".

[11.] The court *a quo*, in granting summary judgment and making a costs order against the appellant, found that the relevant paragraph of the e-mail indeed amounted to an acknowledgement of indebtedness. The appellant's explanation was rejected on the following grounds:

11.1 The e-mail contained no reference of the appellant having only in October 2016 become aware of the amount of R400 000.00 that had been paid into the bank account of the second respondent.

11.2 The e-mail contained no mention of the appellant having been unaware of the terms and conditions pertaining to the repayment of that amount. It appears that the court *a quo* found that the fact that the appellant had tendered to have a repayment plan ready by December 2016, and had tendered to pay interest, indicated that he must have been aware thereof.

11.3 No mention was made, in the e-mail, and in making this tender, of the second respondent.

[12.] The court *a quo* concluded, on this basis, that the appellant had not disclosed a defence in his opposing affidavit.

[13.] This is an appeal, with the leave of the court *a quo*, against the granting of summary judgment and the costs order. In his heads of argument Mr Olivier, counsel for the appellant, submitted that there should have been doubt in the mind of the court *a quo* about whether the e-mail "*constitute(d) and unequivocal admission of liability*" on the part of the appellant. He also submitted that the court *a quo* had, in rejecting the appellant's explanation on the basis of the fact that the e-mail did not refer to certain issues, "*set the bar too high*" as regards what was expected from a defendant's opposing affidavit in summary judgment proceedings.

[14.] Mr Van Niekerk SC, counsel for the first respondent, pointed out the following aspects of the e-mail in support of his submission that it indeed amounted to an acknowledgement of indebtedness:

14.1 Just like in the case of the first three paragraphs of the e-mail, the particular paragraph also concerned the repayment, by the appellant, of a loan.

14.2 According to the e-mail it was the appellant, and not the second respondent, who was working on a plan to repay the R400 000.00 to the first respondent.

14.3 The appellant, in the particular paragraph, made reference to his personal inability to obtain a loan from the bank.

[15.] Mr Van Niekerk criticised the opposing affidavit, with reference to the case of **Breitenbach v Fiat SA (Edms) Bpk**[1], as being "*needlessly bald, vague (and) sketchy*"[2]. In this regard he made the following submissions:

15.1 Although the appellant pointed out that he and the second respondent were involved in protracted divorce proceedings, the opposing affidavit was silent on when the divorce proceedings were instituted and, more particularly, on whether it had been before or after the date of the e-mail.

15.2 The appellant's positive statement that the respondents had negotiated the terms pertaining to the repayment of the R400 000.00 themselves

[1] 1976 (2) SA 226 (T)
[2] ***Ibid***, at 228E

was irreconcilable with his statement that this had occurred without his knowledge.

15.3 The appellant failed to explain what the particular paragraph in the e-mail was intended to be, if not an acknowledgement of indebtedness.

[16.] In the absence of an express statement in the e-mail by the appellant that he had loaned the money that was eventually paid into the second respondent's bank account, it must follow that the court *a quo* had, in its observations and conclusions regarding the contents of the e-mail, embarked on an exercise of interpreting its contents. In **Millman NO v Klein**[3] the following was remarked[4] regarding the interpretation of documents when it comes to summary judgment proceedings:

> "*In regard to the misconstruction of the proposed scheme of arrangement, it is of course undesirable that a Judge should embark upon niceties of the interpretation or construction of an agreement or offer or document in summary judgment proceedings where he does not have the terms to be interpreted or construed in the context of the surrounding facts of the case as they existed at the time that the agreement or offer or document came into existence, as he would have after hearing the evidence at a trial. The risk of misunderstanding the intention of persons when looking at their words in vacuo, and not in the setting at the time they were used, needs no emphasis. Where, however, a contention is advanced in summary judgment proceedings which may be refuted by pointing to a palpable misreading of a document and a palpable logical fallacy, and the meaning of the document is clear on the point in debate, whatever the surrounding circumstances may have been, the risk of errors of interpretation of the words used may be so reduced as to be negligible, and the point in issue may be capable of summary decision.*"

[17.] In this case not all of the "*surrounding facts*" that would have been required to interpret the particular paragraph in the e-mail in proper context were before the court *a quo*, and the available information raised certain questions:

[3] 1986 (1) SA 465 (C) (Also reported at [1986] 1 All SA 229 (c))
[4] ***Ibid*** at 480F –I

17.1 What could the reason have been for a term in a loan agreement between the first respondent and the appellant that the money, that was to be advanced to the appellant, was to be paid into a bank account of the second respondent? There may have been a perfectly good explanation for such a term in the alleged loan agreement, but it is not discernible from the particulars of claim. On the other hand, the fact that the payment was made into the account of the second respondent, fits in perfectly with the explanation of the appellant.

17.2 When exactly was the payment made into the account of the second respondent? The date is not alleged in the particulars of claim. Can it really then, in these circumstances, be said that it is improbable that the appellant only became aware of the payment in October 2016? Would the fact that the e-mail was sent during that same month not in fact fit in with the appellant's explanation?

17.3 Were the appellant and the second respondent still together as husband and wife at the time when he wrote the e-mail? The reference in the e-mail to only one income between the two of them would suggest that this may have been the case. The reference in Mr Van Niekerk's heads of argument to the absence of information about when the divorce proceedings were instituted, effectively recognises the relevance of the status of the relationship between the appellant and the second respondent at the time of the e-mail when it comes to considering the probability of him having requested this father-in-law for time to make arrangements for the repayment of an amount which had been paid into the account of his wife (and the daughter of the first respondent). This is the kind of information that would form part of the "*surrounding facts*" referred to in the **Millman** case, and in the context of which the contents of the e-mail, and of the particular paragraph, should be read.

17.4 If the appellant and the second respondent were still together as husband and wife at the time of the email, would it really have been so strange that a husband would have attempted to come to an arrangement with his father-in-law about when money which had been paid into his wife's account would be repaid; particularly in view of his wife's mental condition? If there was only one income between the appellant and the second respondent, the money for the repayment of the amount would in any event in effect have had to come from the funds of the appellant. Against this background it would arguably also not be strange that the appellant would have referred to only his own ability to obtain a loan from the bank

17.5 The fact that, as also appears from the e-mail, the money had gone into the construction of the common home of the appellant and the second respondent, would also be a relevant factor in considering the probability of the appellant being prepared to negotiate the repayment of money that had actually been advanced to his wife, but had gone into their common home. It would in my view, against this background and given the drastic nature of the summary judgment remedy, have been unrealistic, and dangerous, to reason that the appellant would have had no reason to concern himself about the repayment of money that had been advanced to his wife to whom he was married out of community of property.

[18.] As regards Mr Van Niekerk's submission that the appellant did not explain what his intention was with the particular paragraph in the e-mail, if not intended as an acknowledgement of debt, it is in my view clear from the opposing affidavit that the appellant's version is that his intention was to negotiate an extension of time for the repayment of the amount. In fact, this is what the appellant in so many words said in his opposing affidavit, when he stated that he had "*addressed Annexure 'EB1' to (the first respondent) in an attempt to make arrangements for … repayment*".

[19.] If Mr Van Niekerk's submission (in his heads of argument) is correct that the alleged "*acknowledgement of indebtedness*" in the e-mail is not part of the first respondent's cause of action, the reference to it in the particulars of claim would arguably have amounted to the pleading of evidence, and the correctness of the averment that it constituted an acknowledgement of indebtedness would arguably not have been verified in the first respondent's supporting affidavit. It is not necessary to consider this, because even if it could be said to have been pleaded as a distinct cause of action, the contents of the email cannot in my view be said to be clear, "*whatever the surrounding circumstances may have been",* on the issue of whether the money had been paid into the second respondent's account as a result of a loan agreement which had been concluded between the appellant and the first respondent.

[20.] The statement in the opposing affidavit that the second respondent negotiated the terms regarding the R400 000.00 with the first respondent, and the statement that those negotiations had taken place without the knowledge of the appellant, are not in my view, as suggested by Mr Van Niekerk, necessarily irreconcilable. The second respondent, or even the first respondent himself, could have told the appellant what had been agreed as far as repayment was concerned. In my view it could be said that the appellant had in his affidavit simply tried to convey that he had, at the time that the amount was paid into the bank account of the second respondent, not been aware of such negotiations.

[21.] In any event, an opposing affidavit is not supposed to be subjected to this kind of scrutiny. A defendant in summary judgment proceedings "*is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading*", and the question whether a *bona fide* defence has been disclosed is not dependant on a finding, by a court in summary judgment proceedings, that the balance of probabilities favours the version in the opposing affidavit[5].

[22.] In my view the opposing affidavit did indeed disclose a *bona fide* defence to the cause of action of a loan agreement, *viz* that the appellant had never concluded the alleged loan agreement, and the contents of "EB1' cannot necessarily be said to be irreconcilable with that defence, more particularly not in circumstances where not all surrounding facts are at this stage known.

[5] **Maharaj v Barclays National Bank Ltd** 1976 (1) SA 419 (A) (Also reported at [1976] 2 All SA 121 (A)) at 426A - F

[23.] If regard is had to the different addresses of the appellant and the second respondent at the time of the issue of summons, which would confirm that the appellant and the second respondent had in the meantime separated (as also indicated in the opposing affidavit), the fact that the first respondent chose not to claim payment from his daughter and the curious and as yet unexplained fact that, even on first respondent's version, the R 400 000 had not been paid into the bank account of the person who had according to first respondent loaned the money, this would in my view in any event have been an appropriate case to refuse summary judgment, even if the app's opposing affidavit might not have disclosed a defence[6].

[24.] It follows that I am of the view that the application for summary judgment should have been dismissed.

[25.] As far as the costs of the application for summary judgment are concerned, I am of the view that the just costs order would in such circumstances have been that they be costs in the action, so that in the end such costs would in effect follow the finding that is eventually made as regards the alleged loan agreement and the contents of the e-mail.

[26.] There is no reason why the costs of the appeal should not follow its result.

[27.] In the premises the following orders are made:

1. **THE APPEAL SUCCEEDS AND THE ORDERS OF 2 FEBRUARY 2018, GRANTING SUMMARY JUDGMENT AND COSTS AGAINST THE APPELLANT, ARE SET ASIDE AND SUBSTITUTED WITH THE FOLLOWING ORDERS:**

   "1. THE APPLICATION FOR SUMMARY JUDGMENT IS DISMISSED.

   2. THE FIRST DEFENDANT IS GRANTED LEAVE TO DEFEND THE ACTION.

   3. FURTHER PLEADINGS AND NOTICES ARE TO BE FILED AS IF NOTICE OF INTENTION TO DEFEND WAS GIVEN ON 23 NOVEMBER 2018.

   4. *THE COSTS OF THE APPLICATION FOR SUMMARY JUDGMENT SHALL BE COSTS IN THE ACTION."*

2. **THE FIRST RESPONDENT IS ORDERED TO PAY THE COSTS OF THE APPEAL.**

[6] Compare **Gilinsky and Another v Superb Launderers and Dry Cleaners (Pty) Ltd** 1978 (3) SA 807 (C) at 810H

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C J OLIVIER
ACTING DEPUTY JUDGE PRESIDENT
NORTHERN CAPE DIVISION

I concur.

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C C WILLIAMS
JUDGE
NORTHERN CAPE DIVISION

I concur.

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S J GROENEWALDT
ACTING JUDGE
NORTHERN CAPE DIVISION

For the appellant:	**ADV. A D OLIVIER** (oio **Wessels & Smith Inc.** c/o **Duncan & Rothman Inc.**)
For the 1st respondent:	**ADV. J G VAN NIEKERK SC** (oio **Engelsman Magabane Inc.**)