Case No: 957/12

IN THE HIGH COURT OF SOUTH-AFRICA
(NORTHERN CAPE DIVISION)

KIMBERLEY: THE 15TH DAY OF MARCH 2013

BEFORE THE HONOURABLE MR JUSTICE OLIVIER

In the matter of:

NABIL ALI KHALIL — Applicant

And

NEW DIAMOND CORPORATION (PROP) LTD — Respondent

HAVING HEARD Advocate VAN WYK for the Applicant and Advocate GILBERT for the Respondent on the 22nd day of February 2013 and having read the documents filed of record;

JUDGMENT IS RESERVED

THEREAFTER ON THIS DAY

IT IS ORDERED THAT:

1. The application is referred to trial.

2. The notice of motion will stand as a simple summons and the applicant are to file a declaration within one month of the date of this order.

3. The provisions of the Uniform Rules and applicable practice directives regarding pleadings and the conduct of trials will thereafter apply.

4. The costs of the proceedings by way of notice of motion are reserved for determination at the trial

BY THE COURT

MRS. K MINNAAR
REGISTRAR
ABH / D&R

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 High Court, Kimberley)

Case Nr: 957/2012
Case Heard: 22/02/2013
Date delivered: 15/03/2013

In the matter between:

Nabil Ali Khalil **APPLICANT**

and

New Diamond Corporation (Proprietary) Limited **RESPONDENT**

JUDGMENT

Olivier J:

[1]. This is an application for judgment in the amount of R700 000,00, interest thereon and costs of suit. The cause of action is that a loan in this amount was advanced by the applicant, mr Nabil Ali Khalil, to the respondent, the New Diamond Corporation (Pty) Ltd.

[2]. The case made out in the founding affidavit is:

[2.1] that the loan agreement was concluded on 27 May 2010 at Johannesburg;

[2.2] that the respondent was represented by its chief executive Officer, mr Fernando Garcao;

[2.3] that Garcao had been duly authorised to act on behalf of the respondent;

[2.4] that Garcao told the applicant that the money was urgently required to pay people employed by the respondent at the Schmidtsdrift Mine;

[2.5] that R500 000,00 was given to Garcao in cash;

[2.6] that the balance of R200 000,00 was electronically transferred into the respondent's nominated bank account in the name of *"Meepo Investment"*;

[2.7] that it was agreed that the loan would be repaid within two to three weeks from then;

[2.8] that several oral demands have been made for repayment of the loan;

[2.9] that the respondent has never denied owing the money and has in fact made promises to repay it; and

[2.10] that the loan was evidenced by an entry in annexure 'NAK 4' to the founding affidavit, a document *"prepared by the respondent as evidence of the respondent's creditors"*.

[3]. These allegations are disputed by Mr Yosef Shabtay Weltsman, the deponent for the respondent. He concedes that he has no

personal knowledge of whether the money was loaned to the respondent, because he only became a director of the respondent after it had during December 2010 been taken over, as part of the Lonrho group of companies, by Signpost Trading 6 (Pty) Ltd ("*Signpost*"). He relies on documentation which became available to him after he had become a director of the respondent. It is his case, however, that there is no record of such a loan and that he ascertained that the respondent did not at the time employ any staff at the Schmidtsdrift Mine.

[4]. As regards annexure 'NAK 4' Weltsman states:

[4.1] that it was prepared by mr Kotze on behalf of New Africa Mining Limited when the latter sold the entire issued share capital in Lonrho Mining SA (Pty) Ltd ("*LMSA*") to Signpost; and

[4.2] that it was intended to be a list of the creditors of the Lonhro group of companies, which consisted of LMSA and its subsidiaries (of which the respondent company was but one), and not specifically the creditors of the respondent.

[5]. Weltsman also raised the issue of Garcao's authority to enter into such a loan agreement on behalf of the respondent, stating:

[5.1] that had not been a director and had in terms of the articles of association of the respondent not been eligible to be the chief executor officer of the respondent;

and

[5.2] that the respondent at the time had only three directors, mr Kotze, mr Broido and mr Kögl, while the articles of association required a minimum of four directors.

[6]. Mr Gilbert, counsel for the respondent, furthermore submitted that, when the number of directors was below the required minimum of four, the provisions of article 61 of the articles of association would have limited the powers of the serving directors to those there prescribed[1].

[7]. Mr Gilbert also argued that the applicant should be deemed to have been aware of the provisions of the articles of association regarding the requirements that there should be a minimum of four directors and that only an executive director could be the chief executive officer of the respondent, and of the fact that there were only these three directors, and submitted in this regard that the articles of association and the records of the Registrar of Companies (which would have reflected the names of the directors) are public records.

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[1] One of which would not have been the authorisation of any loan.

[8]. With regard to the requirements in the articles of association of a minimum of four directors[2] and that the chief executive officer had to be an executive director[3], Mr van Wyk, counsel for the applicant, argued that the respondent has not shown that the loan agreement would have been *ultra vires*. He pointed out that the relevant provisions are qualified by words like *"subject to the provisions of any shareholders' agreement"*, *"save as may otherwise be stated in a shareholders' agreement"* and *"unless otherwise determined by a general meeting"* and he submitted that the respondent has failed to disclose whether any such shareholders' agreement exists[4] and whether or not any determination regarding the minimum number of directors was made by a general meeting.

[9]. In his replying affidavit the applicant raised *estoppel*, claiming that the directors had negligently represented to him that Garcao was authorised to conclude the loan agreement.

[10]. Although it was not raised in the replying affidavit, Mr Van Wyk also argued that the provisions of section 36 of the 1973 Companies Act preclude the respondent from raising the issue of the minimum number of directors.

[11]. In my view it is not at this stage, and in view of the nature of these proceedings, necessary to consider the issues pertaining to

[2] Articles 59 and 59.1
[3] Article 79
[4] and, if so, whether deals with any of these issues.

Garcao's capacity and authorisation[5] and the minimum number of directors required. The same goes for another issue raised by the respondent, *viz* that the provisions of the National Credit Act[6] would have been applicable and were not applied.

[12]. The starting point should in my opinion be whether it can be found, on the papers, that a loan agreement as described by the applicant had in fact been concluded. In these motion proceedings the validity and enforceability of the alleged agreement need only be considered once it is found that the conclusion thereof has on the papers been proved.

[13]. Mr Van Wyk argued that Weltsman has failed to raise a genuine and *bona fide* dispute of fact in this regard. As already mentioned, Weltsman has no personal knowledge. He therefore has no personal knowledge of whether in fact there was any form of contact between the applicant and Garcao in Johannesburg on 27 May 2010.

[14]. This does not, however, mean that he would be incapable of raising such a factual dispute. As Mr Gilbert pointed out there is more than one way in which a genuine and *bona fide* dispute of fact can arise, one of them being where the respondent *"may concede that he has no knowledge of the main facts stated by the applicant, but ..... deny them, putting applicant to the proof and himself giving or proposing to give evidence to show that that the*

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[5] Ostensible or actual.

[6] 34 of 2005

applicant and his deponents are biased and untruthful or otherwise unreliable, and that certain facts upon which applicant and his deponents rely to prove the main facts are untrue. The absence of any positive evidence possessed by a respondent directly contradicting applicant's main allegations does not render a case ....free of a real dispute of facts"[7].

[15]. In my view this is the position in the present case. Although Weltsman has no personal knowledge, he relies on documentation and information obtained by him after his appointment as a director of the respondent.

[16]. I do not agree with mr Van Wyk's submission that there are no serious and *bona fide* disputes of fact. When regard is had to the papers as a whole there are to my mind a number of disputes and issues which, when viewed as part of the *"broader matrix of circumstances"*[8], do constitute genuine and *bona fide* factual disputes and which in my view cannot be resolved on the papers.

[17]. Weltsman's denial of the conclusion of the alleged loan agreement should not be viewed in isolation. It should be considered with, *inter alia*, the allegation by both the applicant and Garcao that the money was urgently required by the respondent to pay employees. The probability of the applicant being prepared to advance such a substantial sum of money[9] to a company which to

[7] **Room Hire Co (Pty) Limited v Jeppe Street Mansions (Pty) Limited** 1949 (3) SA 1155 (T) at 1163
[8] **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another** 2008 (3) SA 371 (SCA) para [13]
[9] Even when compared to the majority of the other debts reflected in annexure 'NAK4'.

his knowledge was in a financial crisis, and to hand over R500,000.00 thereof in cash, on the basis of an oral agreement and without any record thereof is an issue that could and should be explored in cross-examination.

[18]. In an affidavit annexed to the founding affidavit Garcao confirmed the applicant's version that the money was needed to pay the salaries of employees of the respondent at the Schmidtsdrift Mine, and this was in effect also confirmed by Kotze in his affidavit annexed to the founding affidavit[10], where Kotze claimed to have been "*responsible for the control of authorised disbursements and receipts from and into the banking account used by* (the respondent)".

[19]. This was challenged by Weltsman who, with reference to an affidavit by the respondent's erstwhile financial manager and other documentation procured by him, stated *inter alia* that the respondent had no employees at the Schmidtsdrift Mine at the time of the alleged loan and that the workers there had been in the employ of Schmidtsdrift Mining Enterprises (Pty) Ltd ("SME"), a joint venture between the respondent and the Schmidtsdrift Communal Property Association.

[20]. Although it was submitted on behalf of the applicant that the particular affidavit constituted inadmissible evidence, both Garcao

[10] These affidavits by Garcao and Kotze were deposed to in December 2011, while for some reason the applicant's founding affidavit was only deposed to on 24 May 2012.

and Kotze have since, in further affidavits by them[11], conceded that the respondent had not *"directly"* employed people at the mine at that time. Neither of them, however, explained what this meant and whether the people had actually been in the employ of SME. Either way, however, if Garcao had told the applicant that the respondent had employees who worked at the Schmidtsdrift Mine, that would apparently not have been true.

[21]. According to Kotze the cash amount of R500,000.00 was eventually used to pay workers at the mine. Why is there no record of this? Garcao, who claims to have been the chief executive officer of the respondent at the time, says that the payment of these wages, and the receipt of the amount of R700,000.00, *"were, to the best of* (his) *knowledge, recorded in the books of account of the respondent at the relevant time"*. He gives no particulars of exactly what books or of who would have made the entries.

[22]. Garcao's version appears to be that only the cash amount of R500 000,00 was used to pay employees. Why would he then have told the applicant that the whole of the amount of R700 000,00 was required for those purposes? Why would he not have told the applicant that the balance of R200,000.00 was in actual fact required to pay the *"other expenses"* he now makes reference to in his latest affidavit, but of which he fails to provide any particulars?

[11] Annexed to the replying affidavit.

[23]. In response to Weltsman's statement that the account into which the balance of R200,000.00 had according to the applicant had been paid was that of "*Garcao's personal company*" Meepo Investment, Garcao denies any knowledge of a company by the name of "*Meepo Investment*". This is, however, the name referred to by the applicant as that of the respondent's nominated bank account, in other words the name according to him given to him by Garcao, and it is also the name reflected on the Nedbank Statement Enquiry of which a copy is annexed to the founding affidavit. According to Garcao there are "*several companies that use the word 'Meepo' in their names*". He goes on to say that he was at the relevant time a director of a company by the name of Meepo Investment Consortium (Pty) Limited.

[24]. Kotze, who as already mentioned had according to him been responsible for the control over receipts into and disbursements from "*the banking account used by* (the respondent)" has not revealed any particulars of the "*banking account*" he referred to.

[25]. Be that as it may, Garcao's involvement and interest in whatever account the money had been paid into by the applicant would also be a matter to be investigated.

[26]. The applicant has chosen not to give any particulars of the "*several oral demands*" that were allegedly made or of the alleged promises of payment. Who made the demands and to whom on behalf of the respondent were they directed? When were they

made and what were their contents? Who on behalf of the respondent promised payment and when?

[27]. Not even a statement by Weltsman that no demand for payment had been made since the acquisition of the respondent (as part of the Lonhro Group) by Signpost could prompt the applicant to buttress his case in reply by furnishing further particulars in this regard and possibly by attaching affidavits by whoever made and received the alleged demands and by those to whom the promises had been directed.

[28]. Kotze, Broido, Kögl, and even Garcao, who claims to have been responsible for the daily management of the respondent before the takeover, are silent on this. Not one of them claims to have knowledge of such a demand or promise.

[29]. The statement that no demand at all has in any event been made since the acquisition by Signpost, a period in respect of which Weltsman would have personal knowledge, was not denied. This in itself may be significant. The acquisition took place on 2 December 2010. It would mean that for some reason in the more than sixteen months after that, and before this application was lodged, the applicant never approached the new management of the respondent for repayment of the alleged loan.

[30]. In his founding affidavit the applicant stated as a fact that Garcao had been *"duly authorised"* to act on behalf of the respondent. He did not at that stage allege that Garcao and/or the respondent had

represented to him that Garcao was duly authorised, the case he has now in reply attempted to make out.

[31]. Whether or not Garcao had in fact been authorised is clearly a genuine and *bona fide* factual dispute. Weltsman can obviously not have personal knowledge on this issue, but he challenges the applicant's allegation on the basis that there is no such (written) resolution and that Garcao would in any event not have been competent to be the chief executive officer, the capacity in which he had according to the applicant concluded the loan agreement.

[32]. Garcao admits that there is no *"formal resolution"* which authorised him, but according to his most recent affidavit[12] he had discussed the need for a loan with *"the shareholders and directors"* of the respondent and *"they"* had been very happy when he advised *"them"* of the fact that the applicant was willing to[13] advance the loan.

[33]. Although both Kotze and Broido[14] state that they confirm the contents of Garcao's latest affidavit, neither of them deal with the discussion described by Garcao or claim to have any knowledge of the circumstances under which the loan was obtained.

[34]. Where and when did the discussion described by Garcao take place? Who else was present? Despite Garcao's reference to

[12] Annexed to the replying affidavit.
[13] As opposed to a statement that the applicant had in fact already advanced the loan.
[14] Of whom an affidavit is also annexed to the replying affidavit.

"directors" (in the plural) it is conceded that at least Kögl was never informed of the loan.

[35]. When, on the applicant's version, could such a discussion in any event have taken place? He claims that the loan agreement was concluded, and the amount of R500 000,00 in cash handed over, on the same day that Garcao advised him, in Johannesburg, of the urgent need for the money.

[36]. Why would Garcao have *"pleaded, consulted and discussed"* with the shareholders and directors of the respondent *"for a solution to the shortage of funds to pay salaries and expenses"* if he had in any event generally been authorised to loan money for such purposes?

[37]. In his last affidavit Kotze for the first time makes the rather surprising allegation that he and Broido had in fact authorised Garcao to conclude the loan agreement. Not even Garcao has made this allegation. Such an authorisation would surely have been a *"resolution"* (even if oral), and that would be difficult to reconcile with Garcao's claim that he was in general duly authorised to act on behalf of the respondent and that he needed no *"formal resolution"*[15].

[38]. Kotze does not say when and where he and Broido authorised Garcao and whether the authorisation was oral or written. Broido

[15] How likely is it that a general authorisation to conduct the day to day management of a company would impliedly include the authorisation to incur such a substantial debt on behalf of the company?

does not confirm this allegation[16] and makes no mention at all of having been a party to such a particular authorisation.

[39]. The note *"Nabil Khalil (Loan for salaries and operational costs")... R700,000.00"*, which the applicant in his founding affidavit referred to in *"support"* of his claim, appears under the heading *"Loan Accounts owing by* ***LMSA****"*[17]. On the face of it this could be interpreted to be a reference to a debt of the holding company LMSA, and not necessarily a debt of the respondent, one of apparently several subsidiary companies of LMSA.

[40]. In his replying affidavit he himself states that annexure 'NAK4' is a representation of the *"Lonrho group's creditors"*[18] and he in fact concedes that this document *"is not proof that the respondent owed the loan to* (the applicant)."

[41]. The fact that the respondent has not disclosed financial statements for the relevant period does not in my view mean that the respondent has not done enough to expose a genuine and *bona fide* dispute of fact.

[42]. The applicant has for some reason chosen to utilise the application procedure to enforce a claim sounding in money[19], and its affidavits should therefore *"constitute both the pleadings and the*

[16] His affidavit was in any event deposed to prior to the particular affidavit by Kotze.
[17] My emphasis.
[18] Which would still have included the holding company and all its subsidiaries.
[19] Compare **Arnold v Viljoen** 1954 (3) SA 322 (C) at 329; **London and Lancashire Insurance Co Ltd v Puzyn** 1955 (3) SA 240 (C) at 249; **Miller v Roussort** 1975 (3) SA 876 (R) at 876-877

evidence"[20]. The applicant's founding affidavit contains only the statement that Garcao was authorised and no evidence at all to substantiate it.

[43]. The same goes for the issue of estoppel that has been raised in the replying affidavit. The applicant merely makes the allegation that the directors of the respondent negligently misrepresented that Garcao was authorised. He tenders not a shred of evidence to substantiate it and he gives no particulars of when, where, how and by whom such misrepresentation was made. There is also no allegation, let alone evidence, that the applicant had been reasonable in acting upon the alleged misrepresentation.

[44]. Mr van Wyk pointed out that Weltsman has not attempted to file a further affidavit to deal with the estoppels issue and submitted that what the applicant had stated in this regard in this founding affidavit should therefore stand. I disagree. There simply is no **evidence** of a misrepresentation or of negligence which called for a reply. The applicant's allegation of negligence in effect amounts to no more than a conclusion (with nothing to substantiate it) and, as already mentioned, no details of the alleged misrepresentation are given.

[45]. There was also no need for Weltsman to file a further affidavit to deal with the possibilities that the requirements regarding the number of directors and the position of chief executive officer may

[20] **Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others** 2008 (2) SA 184 (SCA) para [43]

have been the subject of a shareholders' agreement or of a general meeting, because these possibilities were not raised in the replying affidavit. It is in any event, as already mentioned, not necessary to decide them at this stage. I cannot see any sense in deciding whether the loan agreement would have been *ultra vires* on the hypothesis that such an agreement had indeed been concluded.

[46]. Both counsel indicated that, should it be found that there are indeed *bona fide* and genuine factual disputes which cannot be resolved on the papers, regarding whether a loan agreement had been concluded and, if so, whether Garcao had actually been authorised to do so, and should the matter not be decided and disposed of on the basis of any of the respondent's technical defences, the application should be referred to trial.

[47]. Although I find it strange that the applicant appears to have waited for a further period of sixteen months after the acquisition of the respondent by Signpost to pursue its claim, and also more than four months after it already had the initial supporting affidavits by Garcao and Kotze, I cannot at this stage, and on the available information, find that the applicant should reasonably have foreseen a serious dispute of fact[21].

[48]. The issues are relatively wide-ranging and in view of the above it is not at this stage possible to *"know how wide a field of evidence the*

[21] Compare **Standard Bank of SA Ltd v Neugarten and Others** 1987 (3) SA 695 (WLD) at 699A

disputed (issues) *will cover"*[22]. A referral to oral evidence would therefore not have been appropriate.

[49]. The argument based on the provisions of section 36 of the 1973 Companies Act was, as already mentioned, not raised in the replying affidavit. The possibility exists that, should it be ordered that pleadings be filed, it may be decided to raise this issue by way of an exception. The applicant also did not, in his founding affidavit, deal with the issue of the applicability or inapplicability of the provisions of the National Credit Act. Then there are also the submissions made by Mr Gilbert regarding constructive knowledge on the part of the applicant and the provisions of the articles of association. I am therefore of the view that, despite the fact that some issues may be clear on the affidavits, the proper course would be to order that pleadings be filed so that the "*issues* (can) *be defined*" properly[23].

[50]. To cater for the possibility that it may yet be shown that the applicant should not have utilised the application procedure in the circumstances of this case, costs of these proceedings will be reserved for determination at the trial.

[51]. In the premises I make the following orders:

1. The application is referred to trial.

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[22] **Oblowitz v Oblowitz** 1953 (4) SA 426 (C) at 434G
[23] **Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd and Others** 2006 (4) SA 458 (SCA) para [19]

2. The notice of motion will stand as a simple summons and the applicant is ordered to file a declaration within one month of the date of this order.

3. The provisions of the Uniform Rules and applicable practice directives regarding pleadings and the conduct of trials will thereafter apply.

4. The costs of the proceedings by way of notice of motion are reserved for determination at the trial.

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

For the Plaintiff:	Adv A M Van Wyk
Instructed by:	Adrian B Horwitz & Associates, KIMBERLEY
For the Respondent:	Adv B Gilbert
Instructed by:	Duncan & Rothman, KIMBERLEY