

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

**CASE NO: EL 1530/2011
ECD 2766/2011**

Date Heard: 19 October 2011

Date made available: 3 November 2011

In the matter between:

SIGN & SEAL TRADING 206 (PTY) LTD

PLAINTIFF

and

BLACK GINGER 327 (PTY) LTD

FIRST DEFENDANT

LAMAN (PTY) LTD

SECOND DEFENDANT

MCEBISI RUDOLF MLONZI

THIRD DEFENDANT

SIYASANGA MLONZI

FOURTH DEFENDANT

SUMMARY JUDGMENT - REASONS

MAGEZA AJ:

On the 19th October 2011 at East London Circuit Court, I heard argument herein and made an order granting Summary Judgment in favour of Plaintiff with costs on an attorney and client scale. These are my reasons for the order.

- 1] Plaintiff issued Summonses against the Defendants for monies lent and

advanced pursuant to an Agreement of Loan concluded between Plaintiff and the First and Second Defendant entities represented by Third Defendant. Third and Fourth Defendants in turn are married in community of property. The material terms of the agreement as set out in paragraph 6 of the Plaintiff's particulars of claim are that Plaintiff:

- i) lent and advanced to First Defendant the capital sum of R3 000 000.00 based on an Agreement of Loan;
- ii) First Defendant, a juristic person, warranted that either its net asset value or annual turnover exceeded R1 000 000.00 and that accordingly the National Credit Act No. 34 of 2005 was not of application to the transaction;
- iii) First Defendant undertook to pay an administrative fee in the sum of R270 000.00;
- iv) First Defendant undertook to pay a (legal) fee in the sum of R25 000.00;
- v) the capital sum of the loan would accrue interest at the rate of 2.25% per week calculated and compounded monthly;

- vi) in the event of First Defendant failing to make payment of any amount due in terms of the Agreement of Loan, Plaintiff would be entitled to charge interest on the sum outstanding at the rate of .66% per day calculated daily and compounded weekly;
- vii) the capital sum of the loan and accrued interest would be repaid by First Defendant by it making payment to Plaintiff of four equal instalments of R190 000.00 to be paid on 23 April 2011, 23 May 2011, 23 June 2011 and 23 July 2011 and a final payment of R3 645 404.67 on 3 August 2011;
- viii) in the event that First Defendant failed, for any reason whatsoever, to make payment of any amount due in terms of the Agreement of Loan, the full sum outstanding in terms of the Agreement of Loan, together with accrued interest, would immediately fall due and payable;
- ix) the indebtedness of the First Defendant to Plaintiff would be determined and proved by way of a Certificate signed by an authorised signatory of Plaintiff and which Certificate would serve as *prima facie* proof of First Defendants indebtedness to Plaintiff;
- x) in the event of Plaintiff incurring legal costs in the

enforcement of its rights First Defendant undertook liability to Plaintiff in respect of those costs on a scale as between attorney and client;

First Defendant consented to the jurisdiction of the Court having jurisdiction over Plaintiff's address;

(xi) Plaintiff complied with its obligations in terms of the Agreement and, on the 23 March 2011 paid the sum of R3 000 000.00 less the administration fee of R270 000.00 and the fee of R25 000.00 to Second Defendant in accordance with an instruction from First Defendant.

2] An alternative claim, applicable only in the event of a finding that Plaintiff's payment to Second Defendant was not authorised by First Defendant, is couched in the following terms, that:

"Consequent upon a bona fide mistake Plaintiff paid to Second Defendant the sum of R3 000 000.00 less the administrative fee of R270 000.00 and the legal fee of R25 000.00 on the 23rd March 2011, without any obligation to do so and in the absence of any entitlement on the part of Second Defendant to such payment. Second Defendant has accordingly been unjustly enriched at Plaintiff's expense and Plaintiff has been impoverished in the sum of R3 000 000.00".

3] In addition to the foregoing, on the same date of signature of the principal agreement, the 23rd March 2011, Second Defendant represented by one

Robert Keith Ross and Third Defendant as directors thereof, signed and executed a written Deed of Suretyship in favour of Plaintiff in terms of which it became bound as surety and co-principal debtor with First Defendant to Plaintiff for the sum loaned together with the further obligations set out therein. Third and Fourth Defendants also on the same day, executed a written Deed of Suretyship in favour of Plaintiff wherein they each bound themselves as sureties and co-principal debtors in respect of the capital sum of R3 000 000.00 together with interest and costs on an attorney and client scale. The Defendants renounced the benefits of the legal exceptions of no cause of debt, no value received, revision of accounts, errors of calculation and excussion.

- 4] Plaintiff furthermore sets out in its particulars that on the 23 April 2011, First Defendant made payment of the first instalment; that First Defendant failed to pay the instalments for the months of May and June 2011; paid a sum of R380 000.00 on the 2 July 2011 and; thereafter failed to make any further payments on due date or at all.
- 5] The affidavit in support of the Application for Summary Judgment is deposed to by one Jacobus Bernhadus Booyens as Managing Director of the Plaintiff and the Plaintiff's representative with whom the Defendants negotiated and concluded the Agreement of Loan and Suretyships referred to heretofore. A duly completed Certificate of Balance is annexed to the Plaintiff's papers.

6] Summons was served on the 1^{5th} September 2011, notice of appearance to defend on the 26 September 2011 and the application for Summary Judgment launched some 4 days after.

7] Defendants' opposing affidavit is deposed to by Third Defendant who affirms that he is a director of both the First and Second Defendant entities and is also authorised to do so on behalf of all Defendants including the Fourth Defendant. The Defendants oppose the Plaintiff's application for Summary Judgment on briefly the following grounds, that:

7.1 whereas there are two alternative causes of action outlined in Plaintiff's particulars of claim, Plaintiff in its founding affidavit only swears positively to "the cause of action". Plaintiff does not in Defendants' view state which of the two it seeks to verify thus rendering the application for Summary Judgment defective.

7.2 Defendants admit that Plaintiff and First Defendant concluded the Agreement of Loan as per Plaintiff's particulars of claim but deny that Plaintiff advanced any part of the capital sum under the Agreement of Loan either to First or Second Defendant. Defendant's furthermore deny that an instruction emanating from First Defendant was conveyed to Plaintiff to pay the capital sum loaned into the account of Second Defendant.

7.3 an entity known as Profit Partners advanced a sum of R2 705 000.00

to the Second Respondent on the 24th March 2011. Defendants attach bank statements of Second Respondent reflecting this deposit. Defendants allude to this that Profit Partners is an entity somehow associated with Plaintiff although they do not know the nature of the relationship. They further detail and assert therein that Profit Partners paid the sum to purchase building materials from the Second Defendant, a manufacturer of cement blocks.

7.4 Defendants deny that they made the payment alleged by Plaintiff in paragraph 9.1 to 9.4 of the particulars of claim.

7.5 the Plaintiff has contravened the *in duplum* rule in advancing the sum of R2 705 000.00 and the alleged deductions from the R3 000 000.00 and suing for R6 000 000.00.

8] Rule 32 of the Uniform Rules provides for relief by way of Summary Judgment on *inter alia*, a liquidated amount in money. A Defendant who wishes to resist an application for Summary Judgment must, unless he or she furnishes security,

“satisfy the Court by affidavit ... that he or she has a *bona fide* defence to the action, and such affidavit ... shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.”

What is clearly required of a Defendant in terms of Rule 32 (3) (b) is that he must set out in his affidavit, facts which if proved at the trial, will constitute an answer to the

Plaintiff's claim. If he does not do so, he can hardly satisfy the Court that he has a defence.

The purpose of the Rule is well known. It is a procedure aimed at the Defendant who, although he has no *bona fide* defence to the action brought against him, gives notice of intention to defend solely in order to delay the grant of judgment in favour of Plaintiff. In a case where that is what the Defendant has done, the Summary Judgment procedure serves a socially and commercially useful purpose. The relevant Rule should, therefore, not be interpreted with such liberality to defendants that the purpose is defeated. See *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (TPD) at 227C.

In this decision, the Court went on to state that it is equally important to guard against the injustice that may be occasioned a Defendant called upon at short notice and without discovery or cross examination, to satisfy the Court in terms of sub-rule (3) (b).

At 228B the Court commented that:

“It will suffice... if the Defendant swears to a defence, valid in law, in a manner which is not inherently and seriously unconvincing.”

9] In *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA), the Court observed that:

“The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of his/her day in court ... In the Maharaj case at 425G-426E, Corbett JA, was keen to ensure first, an examination of whether there has been sufficient disclosure by a defendant of the nature of the grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both *bona fide* and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.”

- 10] Whether or not a case is made out for Summary Judgment is a matter that must be determined on the basis of the papers before Court. In this regard it has been held that:

“... a decision as to whether a plaintiff’s case is unanswerable or not must be founded on information before the Court dealing with the application. This information is derived from the plaintiff’s statement of case, the defendant’s affidavit or oral evidence and any documents that might properly be before the Court.” *Per Van Winsen J in Gilinsky v Superb Launderers and Dry Cleaners (Pty) Ltd* 1978 (3) SA 807 (C) at 811 E-G; See also *Soil Fumigation Services v Chemfit Technical Products* 2004(6) SA 29 (SCA) at p35 para 11.

11] It goes without saying that where Plaintiff places before Court evidence detrimental to the Defendant's denial of liability, these allegations by Plaintiff must be fully dealt with by a Defendant in its opposing papers. Where these are avoided and are not dealt with *seriatim*, then a Court hearing the application is entitled to regard these as being without an answer and thus of necessity true.

12] Having read the Defendants opposing affidavit and heard argument, there is in my view, firstly no merit in the Defendants' assertion that Plaintiff has failed to verify the claim in the alternative. This it argues is so only by dint of the fact that the verification is in respect of a "cause of action" and not "causes of action". Such a requirement is only strictly speaking necessary where there are two claims based on allegations which are mutually destructive. In *Diesel Power Plant Hire CC v Master Diggers (Pty) Ltd* 1992 (2) SA 295 (W) at 297C, Zulman J found that:

"It is apparent to me from a reading of the *Threeball* case, as also of the judgment of Booysens AJ (as he then was) in the *Barclays National Bank* case which is referred to by Stegman J, that emphasis is placed on the proposition that the summons contains not only alternative claims but alternative claims which are based on mutually destructive alternative versions of the cause of action. It follows from this, the way I read the cases, that it is perfectly in order to verify a cause of action based on alternative claims. What is objectionable is verifying a cause of action based on two mutually destructive alternative versions of the cause of action."

See also *Visser v Incorporated General Insurances Ltd* 1994 (1) SA 472 (T).

- 13] Plaintiff's case is set out comprehensively in its papers and is supported by the necessary documentary material setting out all the terms on which Plaintiff relies. When one has regard to the terms of this Agreement of Loan, it is very evident that the terms are weighty and punitive. Financing entities assess clients on the basis of their risk profile. There are many privately owned finance companies who offer high risk clients funding at substantial cost to mitigate risk. In many instances, such borrowers are business entities with certain constraints and these at times resort to such loans out of a lack of alternatives occasioned, at times by a need to conclude an imminent transaction or because of their own unattractive credit profiles. In this transaction it is very evident that the Defendants were prepared to go the proverbial extra mile to access the capital admittedly borrowed. Not only did the Defendants bind themselves as Sureties as outlined but they ceded the shares held in both First and Second Defendant as well as an interest in immovable property owned by First Defendant to Plaintiff. The Defendants are business owners who knew fully well what they were binding themselves to. They are not ordinary individuals, they are building material suppliers and the Court must accept that all the implications of the transaction and consequences of default were at all material times within their contemplation.
- 14] Their opposing affidavit is also inadequate in that Defendants' seek to

confess and avoid by acknowledging the agreement relied upon by Plaintiff whilst denying that Plaintiff advanced the monies or capital sum set out in the agreement. Plaintiff contends that it paid the relevant sum into the Second Defendant's banking account at the instance of Third Defendant's (duly authorised) instructions. Defendants contend that the said amount was paid into such account for reasons other than those alleged by Plaintiff. Curiously, Defendants allege the existence of an unrelated transaction for the supply by Second Defendant of bricks to Plaintiff but does not support this by availing this Court any supporting material. It does not say whether same was pursuant to an oral or written agreement; how the order was placed; whether the bricks were delivered and does not attach delivery note or vouchers, if any. It does not say what invoices were issued by it for the consignment. Of even more curiosity is the fact that the bricks are alleged to have been paid for into the same account Plaintiff says it paid the capital sum into. This, by some unusual coincidence, on the very day the capital was to be paid and in the exact amount alleged by Plaintiff to have been borrowed by First Defendant and paid into Second Defendant's account.

- 15] Defendants also do not even make an attempt to explain why they saw fit to make payment of some instalments, erratic as they may have been, if they never had benefit of the capital sum. These payments point to an effort to stave off a liability it knew was extant and based on a perfected agreement. On its own version, the 'Profit Partners' entity through which the payment was made and reflecting on its bank account is an entity

belonging to Plaintiff. The funds were paid into its account and reflected the very next day of signature of the agreement. The amount paid therein is precisely the amount which accords with the agreement as set out in Plaintiff's papers and annexed hereto. The prospect of an innocent coincidence between the Loan arrangements and the alleged simultaneous purchase of cement blocks by Plaintiff's company in one and the same period is far-fetched and preposterous and has to be dismissed as bogus and contrived.

- 16] As for the Defendants' professed distress founded on the *in duplum* rule, the amount borrowed is R3 000 000.00. Plaintiff's claim is for R6 000 000.00. I fail to see how such is objectionable as the rule, simply stated, is that interest stops once unpaid interest is equal to the 'capital'. The interest contemplated by the rule is "the price of making money available or the penalty for not paying what is owing on the date the payment is due" See *Sanlam Life Insurance Ltd. v South African Breweries Ltd* 2000 (2) SA 647 (W) at 655B.

The 'interest' charged herein is compound interest and not ordinary interest. In the foregoing decision the Court pointed out that the rule is based on public policy and fashioned to protect ordinary debtors being endlessly consumed by charges. Where however the transaction itself is informed by considerations other than ordinary interest, but an agreement based on compounded interest, the application of the rule might depend on what was intended to be achieved by the parties in the first place. At 655D and having considered other decisions dealing with the genesis of the rule,

the Court went on to say:

“In my view the 10% compound interest referred to in clause 2.1 of the SAB agreement is not ‘interest’ in the sense referred to in the *in duplum* rule... There is therefore no question of any party being unduly disadvantaged which requires public policy principles to be resorted to, as in the cases where the *in duplum* rule is applicable. From all the cases quoted and all the authorities referred to in such cases, the *in duplum* rule is confined to arrear interest and to arrear interest alone. In my judgment the reason for this is plain: it is to protect debtors from having to pay more than double the capital owed by them at the date on which the debt is claimed. It is not to punish investors who are entitled to more than double their investment because the addition of interest to their capital investment would produce such a result.”

and at 655J

“Bearing in mind the commercial and economic exigencies which apply in a modern business world, it seems to me that the effect of the *in duplum* rule should be confined rather than be extended. The opprobrium which attaches to money-lending transactions in Roman Law and Roman-Dutch law to a large measure no longer applies. In modern commerce the moneylender is now normally a bank or similar financial institution whose honesty and integrity is not in question. Money lending as a means of affording financial assistance constitutes the very lifeblood of modern commerce, enabling parties with initially insufficient capital to build up profitable and successful

business ventures which they would not have been able to do without the assistance of the loans granted to them. In modern societies, as opposed to that which prevailed in ancient and medieval times, maximum interest rates are normally controlled by central banks established by the State. In the business world of today the rate of interest charged on any transaction depends on principles of supply and demand rather than the so-called 'moral' considerations which applied in the past. It could be argued with some force that the effect of the *in duplum* rule in modern commerce is to provide a legal means for the dishonest debtor to escape his obligations to comply with what he has agreed to pay rather than to alleviate the plight of overburdened debtors."

[17] I align myself with the foregoing observations and in any event, the interest herein at worst, is the equivalent and not in excess of the capital advanced. In the result my view is that the opposing papers do not establish a bona fide defence or defences to the claim and the suggested defences do not collectively constitute an answer to Plaintiff's claim and are not defences with a prospect to succeed were the matter to proceed to trial. Plaintiff is entitled to the relief sought.

[18] Summary Judgment is granted as against the First, Second, Third and Fourth Defendants in favour of Plaintiff for:

- a) Payment of the sum of R6 000 000.00 together with interest thereon calculated at the rate of .66% per day, calculated and compounded weekly, from 11 September 2011 to date of payment;

b) The Defendants are ordered to pay Plaintiff's costs of suit on a scale as between attorney and client; jointly and severally the one paying the others to be absolved.

PT MAGEZA
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

FOR PLAINTIFF:

Mr D de la Harpe, instructed by
Drake Flemmer & Orsmond

FOR DEFENDANTS:

Mr Swartbooi, instructed by
V Gwebindlala & Associates