REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

Case Number: 6374/2020

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 2024-07-15

SIGNATURE:

In the matter between:

LIQ INVESTMENTS CC **APPLICANT**

And

PARKERS STORE LIMPOPO (PTY) LTD **RESPONDENT**

Coram: Kanyane AJ

Heard: 3 April 2024

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' e-mail addresses. The date for the hand-down is deemed to be 15 July 2024.

Summary: Commercial law – Dispute about the terms of a loan agreement – Doctrine of fictional fulfilment.

ORDER

1. The defendant shall pay the plaintiff the sum of R1, 134, 811, together with interest thereon at the prescribed rate from 31 March 2020 to date of payment, both dates inclusive.

2. The defendant shall pay the plaintiff's costs of the action, as taxed or agreed, including the costs of the plaintiff's counsel on scale B.

JUDGMENT

Kanyane, AJ

Introduction

[1] In this action, the plaintiff close corporation sues the defendant company for payment of the sum of R1, 134, 811, which is made up of the sum of R1, 080, 773 allegedly lent and advanced by the plaintiff to the defendant on 26 August 2019, together with the agreed interest thereon of R54, 038.

[2] It is common cause that the plaintiff lent and advanced the sum of R1, 080, 773 by electronic funds transfer to the defendant on 26 August 2019 and that it has not repaid that sum. The dispute is the terms upon which the sum was advanced and specifically whether repayment of the loan is due.

[3] The plaintiff alleges that it advanced the sum of R1, 080, 773 to the defendant as a short-term loan in terms of a partly written, partly oral agreement concluded between them on the same date. According to the plaintiff, in terms of the agreement, the defendant would repay the monies advanced by no later than two weeks hence, together with the agreed interest thereon of R54, 038, being 5% of the funds lent and advanced.

[4] The sole member of the plaintiff, Maxwell Sibanda, was also the sole witness on its behalf. Anthony and Godnows (aka Brian) Munetsi testified for the defendant. Brian Munetsi is the majority shareholder and controlling director of the defendant. Anthony Munetsi is employed by the defendant as its financial manager. Where there is a need to distinguish between Anthony and Brian Munetsi, I refer to them by their first names. I mean no disrespect to either of them.

[5] Instead of chronicling the witnesses' evidence sequentially, I focus on what they were agreed on and where they differ.

The facts

[6] Mr Sibanda and Brian are childhood friends who went to school together in Zimbabwe before entering the financial services industry in South Africa.

[7] On 25 August 2019, Mr Sibanda visited Brian at the latter's residence in Polokwane. At that time Mr Sibanda was resident in Gauteng. The motive for the visit is in dispute. Mr Sibanda testified that he visited at Brian's invitation to come see the latter's business interests in Polokwane. Brian testified that Mr Sibanda had telephoned him to ask to visit, and during the visit had apprised him of developments in his personal life, including that he was experiencing difficulties with his South African visa and, as a result, had to imminently leave the country.

[8] Nothing turns on this dispute, and I need not decide it for purposes of this judgment. Suffice it to say that, during post dinner drinks between the two gentlemen, the discussion turned to matters business.

[9] During that discussion, it soon turned out that Brian had a cash flow problem. The defendant was the sole accredited South African distributor of Parker Hannifin, which supplied hydraulic and pneumatic products to various industries, including mining. In the medium term, the defendant need an injection of equity capital, and Brian was interested in selling off some of his equity in the business to capitalise it.

[10] In the most immediate term, the defendant had received an order from Anglo Platinum, andit needed working capital to fulfil this order. To this end, the defendant had obtained bridging loan funding of R5 000 000 from SEFA at 15% interest for a period of two months. But it was a condition of the SEFA loan agreement that the defendant should provide own-party funding contribution in the sum of R1, 080, 773. The defendant needed immediate bridging financing in the latter sum for the SEFA funds to flow. Without the bridging financing, the defendant could not unlock the SEFA loan funds to flow; without the SEFA funding, the defendant could not fulfil the order placed on it by Anglo Platinum.

[11] According to Mr Sibanda, Brian appealed to him to assist. The discussion continued into the evening and, the next morning, it culminated in a meeting in the defendant's boardroom attended by Brian and Anthony and Mr Sibanda. Anthony initially denied having participated in the meeting, but he is contradicted not only by the objective evidence, but by Brian himself. The meeting was followed by a telephonic discussion between Mr Sibanda and Anthony, as well as a flurry of e-mails. As a result, the plaintiff paid the sum of R1 080 773.00 to the defendant during the afternoon of 26 August 2019.

[12] Before me, the defendant's defence was essentially that it was a term of the agreement that the loan amount would only become repayable to the plaintiff upon the defendant having received payment for goods it had contracted to supply to Anglo Platinum.

[13] Mr Sibanda testified that it was never a term of the agreement that repayment of the loan amount was contingent on the defendant having received payment from Anglo Platinum in respect of the order in issue. The discussion regarding the expected Anglo Platinum payment was about *how* the defendant would acquire the funds to repay the loan.

Evaluation

[14] The Munetsis were poor witnesses who contradicted themselves, each other, and the defendant's pleadings in material respects. Where there is a dispute

between the Munetsis and Mr Sibanda, I prefer the latter's version. This is often unnecessary, as the Munetsis' evidence stands in stark contrast to the objective evidence, which in this case takes the form of e-mail and WhatsApp communications between them and Mr Sibanda which were common cause before me and were referred to extensively in oral evidence and argument.

[15] The objective evidence shows that, at 09h54 on 26 August 2019 (which must have been shortly after the meeting of that morning), Anthony sent an e-mail to Mr Sibanda in the following terms:

> "Dear Mr Sibanda
>
> Thank you for your visit and kindly appreciated and we look forward to have a good working relationship.
>
> **Current order needing financing**
>
> Following our discussion, our main challenge being funding,I have attached a loan facility letter where we are in need of Funding of R1 080 773 as it's a condition for our funders to release the R5 000 000.00 that was approved. We are being charged 12,5% if we borrow this money from some of our funders which is quite a lot, our plea to you is if you will be able to advance this to us at lower rate say 5% we would really appreciate as Anglo will pay our invoices within 7 working days then we can pay back this money including interest. We are supposed to deliver these goods by Thursday.
>
> **Long term orders**. . . .
>
> Please feel free to contact me if you need anything or any clarity."

[16] Mr Sibanda testified that he thereafter had a telephonic discussion with Anthony to clarify the request for short term funding. During this conversation, Anthony reiterated, among others, that the loan was required in the immediate short term to unlock the SEFA funds and would be repaid no later than two weeks hence.

[17] In a response to this e-mail communication at 11h50 on the same day Mr Sibanda said the following:

> "Hi Anthony
>
> Thank you for sending the e-mail below and for our telephonic conversation a short while ago to clarify some of my initial questions. As discussed, my intention is to take up the offer to make an investment into the business and partner with you guys, I am not looking to make any short term loans and place funds at risk as I currently receive good returns from my own unit trust and money market investments with very little risk.
>
> However, after having clarified it with you over the phone, I appreciate that you understand my approach and will supply me with the necessary financial and/or management information on the business that will allow me to work out some form of valuation to determine what long term investment I can propose in exchange for a % of the business. But in the short term, you require immediate funding as per proposal below.
>
> Therefore, in good faith whilst waiting for the financial and/or management information for the purposes of the long term investment, I will assist with the short term funding need. We can proceed in two phases:
>
> **1. First phase (short term loan funding)**
>
> I will provide the loan of R1 080 773 at a rate of 5% meaning the repayment (inclusive of the rate) will be R1 134 811. The repayment will be made shortly after release of your funds from Anglo, which I understand you expect to be made approx. 7 working days after delivery of the goods which should likely be by this Thursday.
>
> **2. Second phase (equity investment)**
>
> . . . .

Both in terms of Phases 1 and 2 above, the likelihood is that I will not do the transactions in my own name but will use a juristic entity. It'll likely that I'll use my 100% owned investment entity i.e. *"LIQ Investments CC"."*

(emphasis in the original text)

[18] At 12h27 on the same day, Mr Sibanda wrote again:

"Hi Anthony

Following on from my mail below as it relates to the First Phase (i.e., short-term loan funding).

If you are comfortable to proceed on this basis, <u>please confirm your banking details so that I can make the EFT.</u> I obtained your banking details from your facility letter as follows:

- **Bank First National Bank**
- **Account number 6[…]**
- **Account name ParkerStore Limpopo (Pty) Ltd**
- **Account Type Cheque/current**

Once, I have received confirmation that the details above are correct. **<u>I will make the EFT transfer for R1 080 773</u>**. Payment will be made from an FNB account for LIQ Investments CC.

I received (and responded to) your separate mail with copies of the financials for the Second Phase."

(Emphasis in the original text)

[19] Brian responded at 12h36 on the same date, confirming the correctness of the account number. At 13h02, Mr Sibanda responded, saying:

> "Hi Brian,
>
> Attached, please find a copy of the EFT confirmation for the payment of R1 080 773.
>
> Funds transferred from an FNB account and therefore should reflect immediately.
>
> I trust you will find all in order. Our business relationship has now commenced."

[20] Brian acknowledged receipt of the funds by e-mail at 13h31 on the same date.

[21] It is common cause that the defendant did not repay the funds as agreed. This caused Mr Sibanda to send an e-mail at 10h48 on 25 September 2019 (one day short of a month since the funds had been advanced) in the following terms:

> "Good morning Gentlemen
>
> I trust you're keeping well. The purpose of my e-mail below is to follow up on repayment of the short-term loan funding. For ease of reference, I've highlighted the relevant sections of our correspondence in this respect that dates back to the 26th of August as below (see sections highlighted in blue). I'm only dealing with the "short-term loan funding" in this mail as I also await your separate response to the long-term funding proposal.
>
> Our agreement In the Monday 26th of August e-mail was that you expected to do the work necessary and deliver the goods by that Thursday the 29th of August. Thereafter, you expected that Anglo would then settle your invoices within 7 working days, meaning by Monday the 9th of September. Upon

receipt of the payment from Anglo, you would then repay the short-term loan I advanced to you, inclusive of the interest agreed.

Brian — I know that you contacted me via WhatsApp in early September to advise that the R5m loan from SEFA was taking longer than anticipated. Therefore, I appreciated that the original timeline described above would likely be affected as a consequence and payment would not be made to me by the 9th of September. I have thus consciously allowed more time, and have waited another 2 weeks (i.e. 10 working days till now).

Please can you provide me with feedback as to the status of the work, and in particular the revised timeline including when I can expect the loan repayment. As you can appreciate, I had assessed the original terms and the timeline you supplied and agreed to assist on that basis (plus the extra time without insisting on payment). I have to adjust my plans based on the feedback you will supply me. I look forward to your response."

[22] Anthony responded in short order at 10h52. He did not deny the agreed terms as recorded by Mr Sibanda. Instead, he said:

"Dear Mr Sibanda,

Apologies for the delay, we had a problem with SEFA releasing the money earlier as the person handling the paper work had not done his homework well. I will give you feedback within the course of the day but it should be released within this week and we deliver and will only get payment by the 4th of October.

Once again my apologies it was beyond our control."

[23] Mr Sibanda responded in the following terms at 11h28:

"Hi Anthony

Ok, I take note. Let me just unpack your e-mail to make sure I understand it correctly.

- You are still expecting the R5m SEFA loan to be released to you this week.

- Thereafter, you can then do the necessary work/delivery of the goods to Anglo.

- Upon completion/delivery – Anglo should pay you by the Friday 4th of October.

- You'll repay me the s-term loan in the week commencing Monday, 7th October.

Have I unpacked the revised timeline correctly? If not, please clarify/correct accordingly."

There was no response to this e-mail.

[24] On 5 October 2019, Brian created a WhatsApp group and invited both Anthony and Mr Sibanda. His first message on this group reads:

"Mr Sibanda, Trust you well

My sincere apology for the silence from our side. I have been down and out with stress, anxiety etc Because things were not just going well. I think from Anthony's side he just didn't know what to tell you.

At anyrate, there is always light at the end of the tunnel.

1) SEFA eventually paid Yesterday

2) Supplier released goods, partial of the stock currently available

3) We received stock this morning

Here with the pictures

. . .

4) We will start consolidating for delivery on Monday

5) The supplier is pushing for the balance of stock to be delivered from the USA

6) We should have that within the next 7 to 14 days

7) Our Order with Anglo will then be settled in full

For records find attached proof of payment from SEFA

Brian Munetsi"

[25] Anthony also sent a message on the group on the same day, saying:

"Again, I would like to extend my apology. As these caught us off guard. It was not what we thought it would be. So financially we are still strapped until full delivery and payment completed."

Mr Sibanda responded to these messages on the same date, appreciating the feedback.

[26] On 26 November 2019, Anthony sent the following message on the WhatsApp group:

"Good day Mr Sibanda

Had a not gud conversation with Mr Munetsi this morning with Regards to how I have gone quite. My apologies for my silence as I was supposed to communicate Finance matters as am the FM.

The issue is due to SEFA having delayed paying Epiroc, Epiroc sold our stock that we has pre ordered and as such the ETA increased again and we haven't even collected some components from them as they are incomplete orders.

Loan facility

After my conversation with Mr GK this morning I found out that you withdrew the money from somewhere where it is supposed to be deposited back ,however , having highlighted the above issue and I don't want to promise on the exact date I was proposing that as long as we haven't paid the I mil back to you ,we will be paying a monthly interest of 100k to you and when we have the 1m then we will pay the 1 Mil plus that month's interest . Share your view on this am open to any suggestion.

Investment

…

Once again my apologies for my silence, please advise if the arrangement will work so that we can move on this matter"

[27] On 29 November 2019, Mr Sibanda sent another e-mail at 11h38 in the following terms:

"Hi Anthony,

Following on from your WhatsApp message to 'Parkerstore Limpopo Funds' (copy of which is reflected below). I requested, & subsequently had a telephone chat yesterday (i.e. 28 Nov). Herewith my summary:

1. As agreed, the essence of our agreement is that on Monday 28 August, I provided a loan of R81080 773. This loan, plus agreed interest of

R54 038 i.e. total repayment of R1134 811 was to be repaid to me approximately by about the 9th of September *(please refer to attached e-mall trail for full details how I had estimated timeline).* Therefore, I understood the loan to be short-term with timeline of approx. 2 weeks.

2. As at today, due to various delays, the loan has not yet been repaid and the time that's elapsed is already sitting @ 13 weeks. It's not clear when the repayment will be made, & hence I do not know final timeline.

3. In our telephonic discussion, you explained to me that the delay summarised above as well as the consequences/implications of this to me, Parkerstore is proposing to pay me with monthly payments of R100k (a form of "extra" interest) until such time as the amount owing i.e. the R1 134 811 is finally repaid to me. This commences October, meaning first payment is for October (R100k), and second for November (R100k).

4. In terms of the R200k now owing (i.e. October & November), these payments are now due. It's likely this will be settled in tranches over next few days - but your target if for the full R200k to be settled by this 10th of December. At the end of our telephonic conversation, you advised that you would examine your budgets/plans and confirm to me, the exact amounts/dates/timing of the payments (i.e. now/or up to the 10th).

5. The R100k "extra" interest will ONLY be due/payable at the end of each month, until the R1 134 811 is repaid (i.e. if the amount owing is still outstanding at end of December, another R100k becomes payable etc.).

6. In your message below, you had requested that I express my view on the terms of this proposal for payment/s of the extra R100k. After you explained it to me (as summarised above) - I understand and therefore accept this proposal, in terms of any payments, (interest and/or repayment of original loan), please make payments to LIQ Investments CC (I attach a copy of the FNB Bank Account confirmation details).

Lastly, in your message below, you also commented on the valuation work I sent on the 10th of September (per second mail attachment) relating to the potential equity investment - please put this on hold for now."

[28] In an e-mail to Mr Sibanda on 10 December 2019, Anthony says the following:

"Dear Max

As per our telephonic conversation, we are committed to paying off the interests components as per agreed, the only stumbling block as explained yesterday is the client from Namibia delaying remitting what is due to us that we had allocated to settle our dues to you. However just got feedback from the customer and they confirmed that they will settle our account before the 28th of December without fail, which can be way before."

[29] Mr Sibanda responded on the same day in the following terms:

"Dear Anthony

Thank you for the response to my 29 November mail (attached), this, following our chat yesterday. It seems you're in agreement with my summary (in the mail) of the way in which you explained how the interest payments will work. Also, thanks for your commitment (below) based on your mail, I should not expect to receive any payment/s until at least 28 December.

It is not clear exactly which payments you are targeting for 28 December (i.e. initial capital, original interest and/or the additional interest for Oct and Nov) – but I'll leave it as it and just diarise to follow up with you around 28 December. Of course, as agreed, if the capital and original interest are still o/standing by 31 December, another month's interest becomes payable."

[30] By letter dated 16 March 2020, the plaintiff's attorneys, P I Uriesi Attorneys, demanded payment of the sum of R1, 634, 811 from the defendant by no later than

31 March 2020. The defendant did not pay. Its attorneys Tyron I Pather Inc. responded on 2 April 2020. The contents of their letter is revealing:

> "We refer to your letter dated the 16th March 2020, handed to us for attention and response.
>
> We are instructed to respond as follows:
>
> 1. Our client does not deny the Loan Agreement, we do however dispute the terms as set out in your letter of demand;
>
> 2. We shall consult with our client after the Lock Down, and we shall respond more fully to all of the allegations.
>
> 3. We believe this is a matter that can be dealt with in terms of the recently promulgated Rule 41A, were the parties could Mediate before proceeding to Litigate
>
> 4. It is our instruction that it is indeed the intention of our client to honour the Loan Agreement.
>
> 5. However circumstances beyond his control has caused or led to his inability to repay the Loan amount, immediately. For your ease of reference we attach hereto the notice of shut down from Anglo American, which shut down has caused our client to be unable to meet his obligations. This will however be a short term hurdle and our client is hopeful to regain his position after the lock down
>
> We trust you find same in order."

[31] The correspondence that went between the parties between 26 August 2019 and 2 April 2020 demonstrates that the parties concluded a loan agreement on 26 August 2019 in terms of which the plaintiff lent and advanced a short-term loan to the defendant. The terms were that the loan amount would be repaid by no later than

about 9 September 2019, together with interest thereon R54, 038, representing 5% of the loan amount. The defendant has failed to repay the loan amount or the interest.

[32] The common cause facts show that the defendant had a contract to supply Anglo Platinum with certain materials. To fulfil this order, the defendant needed working capital, so it sought project funding from SEFA, which offered to provide a short-term (2 months) loan of R5 million to the defendant but required the defendant to make an "own-funding" contribution of R1, 080, 773, which the defendant did not have. Without this contribution, it could not unlock the loan from SEFA and, without the SEFA funds, it could not fulfil the order placed on it by Anglo Platinum. To bridge this gap, the defendant sought and obtained a short-term loan from the defendant.

[33] The correspondence between the parties indicates that the defendant's version about payment from Anglo being a *sine qua non* for repayment of the loan amount is a recent invention. As far back as 25 September 2019, when Mr Sibanda first enquired about the overdue repayment, neither of the Munetsis contended that the repayment was not due. Instead, they made claims of being impecunious, and made repeated promises to pay at some future date, even referring to different creditors of theirs who were expected to remit payments. Their reasons for being unable to pay mutated and became more incredulous over time. When they ran out of excuses, they undertook to pay "extra" interest of R100 000 per month until such time as the loan amount and agreed interest were paid. Even his attorneys, in their letter of 2 April 2020, pleaded their client's poverty claim, saying that their client intended to honour the agreement, but that "*circumstances beyond his control has caused or led to his inability to repay the Loan amount, immediately*".

[34] I accordingly conclude that repayment of the loan was not conditional upon the defendant having received payment from Anglo Platinum. The reference to payment from Anglo Platinum was not concerned with the defendant's obligation to repay the loan, but about how it was going to acquire the funds to repay it. Any astute businessman in the plaintiff's position would have made such an enquiry. This is not a suspensive condition properly so called.

[35] Neither was it a term of the agreement between the parties that the loan amount would <u>only</u> become repayable upon the defendant having received payment from Anglo Platinum in respect of the order in issue, whenever it may come. Such a term would produce unbusinesslike results[1] .

[36] This conclusion means that the defendant's defence must fail. The defendant must be held to its bargain, which was that it would repay the loan within a week or two weeks of its edvancement.

[37] Even if I am wrong on this score, and there was either a condition or a term in the agreement between the parties that made the payment conditional upon the defendant receiving payment from Anglo there is an additional reason why this defence must fail. It is trite that a defendant cannot rely on the non-fulfilment of a condition as a defence for not performing his obligations if he is himself the cause of the non-fulfilment. This is a branch of the broad equitable rule of our law that no one can take advantage of his own wrong, for it is unjust and contrary to good faith that he should do so – see *Du Plessis NO and Another v Goldco Motor & Cycle Suppliers* (Pty) Ltd 2009 (6) SA 617 at para 25 and the authorities there cited; see also *Lekup Prop Co No 4 (Pty) Ltd v Wright* 2012 (5) SA 246 (SCA) at para 11.

[38] During cross-examination, Brian was constrained to concede that the reason that Anglo Platinum had not paid the defendant as agreed was because the defendant failed to deliver the equipment that it was contracted to and had therefore failed to perform its obligations to Anglo Platinum. The result is that Anglo Platinum has no reciprocal duty to pay the defendant. If it was a term of the agreement that the defendant would only be required to repay the loan once it had received payment from Anglo Platinum, then it must have been a tacit term of the agreement that the defendant would perform in terms of its agreement with Anglo Platinum for the latter to pay.

[39] Accordingly, the claim must succeed with costs. Interest will run from 31 March 2020, being the date by which the plaintiff's attorneys demanded payment.

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[1] Endumeni Municipality at para 18

Costs

[40] Costs must follow the result. Mr Mabilo could advance no cogent argument why this should be otherwise. There is no reason to depart from the established rule. Costs of counsel will be awarded on the intermediate Scale B.

Conclusion

[41] In the result, the following order is made:

3. The defendant shall pay the plaintiff the sum of R1, 134, 811, together with interest thereon at the prescribed rate from 31 March 2020 to date of payment, both dates inclusive.

4. The defendant shall pay the plaintiff's costs of the action, as taxed or agreed, including the costs of the plaintiff's counsel on scale B.

TM Kanyane
ACTING JUDGE
LIMPOPO DIVISION, POLOKWANE

Appearances:

For the Plaintiff:	JP Morton
Instructed by:	P I Uriesi Attorneys Sandton DDDK ATTORNEYS Polokwane e-mail: demu@piuriesiattorneys.co.za pa3@dddk.co.za
For the Respondent:	PA Mabilo

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