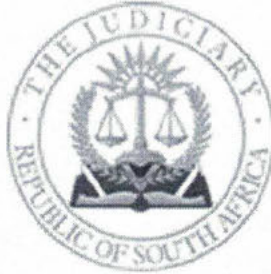


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2023-123982

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
27/02/2025	
DATE	SIGNATURE

In the matter between:

NEIL VAN DER WEELE

First Applicant

KEVIN LIEBENBERG

Second Applicant

and

RAPHAEL GARCIA DA COSTA

First Respondent

EX TEMPORE JUDGMENT DELIVERED VIRTUALLY 24 FEBRUARY 2025

PJ DU PLESSIS, AJ

Introductory comment:

In this opposed motion matter the court inquired from the parties if this matter was correctly placed as an opposed motion and whether it should not have

been an action in the light of the many existing factual disputes and alternative cause of action - unlawful enrichment.

- [1] After hearing the Applicant and Respondent the court delivered the following ex tempore judgment. I requested the original audio file to be typed for revision and to upload same, but it was not forthcoming therefore this reconstruction.
- [2] The joint practice note supplied by the parties has only the following as common cause facts:

23.1 The identity of the Parties; and

23.2 that there was concluded an acknowledgement of debt and settlement agreement.

The existence of Commodus and that it was a failed business venture involving the litigating parties wherein the two Applicants invested the amount(s) claimed as equity capital was only admitted by them in their replying affidavit on respondents answering affidavit on the supplementary answering affidavit.

- [3] The Respondent maintained Commodus' failure was blamed on him. He suggests this is because of the Applicants lack of IT knowledge (which Applicants admit having). Respondent says the equity capital they claimed back was not owed as it was never a loan, but a joint business venture that failed between partners in a business venture where the Applicants put up the money and he provided the skills. Respondent says the capital was used in the development of Commodus and was for services he rendered in that regard. He admits signing the AOD but under duress. He admits signing the settlement agreement saying he did so to avoid legal action. He glaringly omitted to say why he repaid R85 000 on an agreement he says was concluded under duress for money not owed and which is void due to it falling under the National Credit Act.
- [4] The Applicants eventually admitted that the R360 000 at issue was advanced in good faith for business development as per *their discussions with the*

Respondent and was to be converted into equity in Commodus for the Applicants (only) in the percentages of their contributions. They say the lack of progress on the project worried them and eventually they requested their money back which the Respondent couldn't comply with so he signed an AOD and later a settlement agreement without any pressure from their side. They allege their agreement and AOD because of various factors mentioned, is not one that falls under the National Credit Act and aver that if the court finds that it does the Respondent was unjustifiably enriched and still owes them their money. It is unexplained why the Applicants remained silent on the Commodus project until the very last minute. They termed the money owed as a repayment of a loan by the two of them to the Respondent and then later admit it was money advanced for business development to be converted into equity in this business.

- [5] The above shows that there are serious disagreement of fact(s). What is perfectly obvious is that both parties admit the failed business venture. It is however foreseen as they discussed this business venture only, and its parameters and obligations wasn't fixed when ventured into, there will still be many dispute(s) of fact. Verbal agreements can be legally binding, but they are notoriously difficult to prove. Converting such a verbal business agreement into a personal loan and having one partner sign an AOD raises even more serious concerns as to clarity and enforceability. This will no doubt end up in serious factual disputes, rendering this matter to be a trial (action) rather than an application.
- [6] Motion proceedings are meant for legal questions and not factual disputes. The affidavits constitute both the pleadings and the evidence and the issues and averments in support of the parties' cases should appear clearly therefrom (See *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA) at 200D) It is trite that applicants in application proceedings *must* make out their case in the founding affidavit. A litigant should not be allowed to try and make out a case in the replying affidavit. The founding affidavit *must* contain sufficient facts in itself upon which a court may find in the applicant' favour. An applicant *must stand or fall* by his/her founding affidavit

(See *Director of Hospital Services v Mistry* 1979 (1) SA 626 (AD) at 635H – 636D).

[7] The Applicants to my mind should have realised when the matter was opposed and the answering affidavit delivered that they were heading for serious factual disputes on the essence of their application being the loan and the validity of their AOD (Duress and NCA) after the failed business venture Commodus. They did not address the essence of the answering affidavit being Commodus they rather amended their pleadings (Rule 28) to include unjustified enrichment a claim more often dealt with in action than motion proceedings. They eventually in their last replying affidavit acknowledged Commodus. The question can definitely be asked if the Applicants complied with the case law findings quoted supra and why they persisted on motion where it was glaring that action proceedings was called for.

[8] The court was asked by the parties to determine

8.1. Whether the AOD and Settlement agreement are void due to non-compliance with the NCA.

8.2. Whether the AOD and Settlement agreement was signed under duress.

8.3. Whether the applicants are entitled to payment from the Respondent

8.4. Whether the matter should be referred for trial or oral evidence or dismissed.

8.5. Cost

[9] Due to the very claim (loan) being the contention of a serious business dispute which requires resolution in a trial court I do not intend to determine 8.1 – 8.3. I determine per 28.4 that the matter should be referred for trial.

COST

[10] As indicated supra there are a few realisations the applicants should have made as the matter progressed, they did not. I agree with Adv Belger's submission in his heads of argument when he said "the applicants should have withdrawn the application and/or sought agreement from the Respondent to refer the matter for trial. Also on cost when he submitted "... cost should still be awarded to the Respondent as the Respondent has been put to the trouble of opposing this application, when such could have been avoided by an earlier withdrawal or an agreement to refer the matter to trial at an earlier stage.

[11] I accordingly make the following order

Order

1. The Applicant's application under the above case number is referred to trial, in which trial the applicants shall be referred to as the First and Second Plaintiff and the Respondent shall be referred to as the Defendant.
2. The Notice of Motion and Founding Affidavit shall stand as a simple summons.
3. The Answering Affidavit of the Respondents shall stand as a Notice of Intention to Defend the Action.
4. The First and Second Plaintiffs shall within 20 (Twenty) days of this Order deliver its Declaration.
5. The Defendant shall within 20 (Twenty) days of delivery of the Plaintiff's Declaration deliver their plea thereto.
6. The further exchange of pleadings and pre-trial procedures, including discovery and the request for and provision of trial particulars, shall be regulated by the Uniform Rules of the Court in respect of action proceedings. Discovery of

documents not forming part of the application papers shall take place in accordance with the provisions of the Rules of Court.

7. The parties are granted leave to utilise Rule 28 in the event that either of the parties wishes to amend its papers.
8. The Applicants in the Application under the above case number are ordered to pay the costs of the Application on scale A, jointly and severally, the one paying the other to be absolved."



PJ DU PLESSIS
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant:

Adv L Acker

instructed by Stein Scop

For the Respondent:

Adv P W Belger

instructed by Leon Geldenhuys

DATE OF HEARING: 24 FEBRUARY 2025

DATE OF EX-TEMPORE JUDGMENT: 24 FEBRUARY 2025

EX-TEMPORE JUDGMENT RECONSTRUCTED: 27 FEBRUARY 2025 AND
UPLOADED TO CASELINES ON 28 FEBRUARY 2025

Delivered: This Judgment was handed down virtually and is now reconstructed for circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be **24 FEBRUARY 2025**.