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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Not Reportable

Case no: 20897/2024

In the matter between:

APOLLON PROPERTY FUND (PTY) LTD

PLAINTIFF

and

SANDRE MARAIS INCORPORATED

FIRST DEFENDANT

ISHMAIL BOOLAY

SECOND DEFENDANT

Coram: Morrissey AJ

Heard: 21 August 2025

Delivered: 13 November 2025

ORDER

Summary Judgment is granted in favour of the plaintiff against the second defendant for:

- i. Payment of R3,250,000.00;
- ii. Interest on the amount of R3,250,000.00 at the legal rate from 22 July 2024 until date of final payment;
- iii. Costs of suit, including the costs of two counsel where so employed, with the fees of senior counsel not to exceed those per scale C and the fees of junior counsel not to exceed those per scale B.

JUDGMENT

MORRISSEY AJ:

- [1] The plaintiff seeks summary judgment against the second defendant for R3,250,000.00, together with interest and costs.

- [2] Per its particulars of claim, the plaintiff says that the second defendant agreed to pay it 50% of a certain loan; and that he undertook to pay R3,250,000.00 of that indebtedness from the proceeds of a bond he was going to register over certain immovable property he owned. Such a bond was registered on 22 July 2024, but payment was not forthcoming. It became common cause in the summary judgment proceedings that the loan the plaintiff avers that the second defendant agreed to repay was one the plaintiff made to Culture Cars (Pty) Ltd, not the second defendant.
- [3] The second defendant met the plaintiff's claim with a plea. In it he disputes having any indebtedness to the plaintiff at all. He also advances an alternative defence that any indebtedness that he does have is conditional, and the plaintiff's claim is premature because those conditions have not yet been fulfilled. As will be seen, the second defendant also avers that any conditional indebtedness he has to the plaintiff is legally unenforceable. It is not entirely clear that that defence was advanced in the plea, but I shall assume that it was for purposes of this Judgment.
- [4] The plaintiff responded to the second defendant's plea with the summary judgment application that served before me. The plaintiff has verified its cause of action and says that the second defendant's defence does not raise an issue for trial because it is contrived. In explaining that submission the plaintiff says that the pleaded defence contradicts certain contemporaneous documents annexed to the particulars of claim.

- [5] There was no challenge to the plaintiff's right to apply for summary judgment *per se*. Although there is some uncertainty surrounding the concept of a plea not raising an issue for trial as described in rule 32(2)(b), I am in respectful agreement with what was said in *Tumileng Trading v National Security and Fire* 2020 (6) SA 624 (WCC) at [21] that that concept includes the situation where a plaintiff contends that the plea is a sham because the defence pleaded does not *genuinely* raise an issue for trial.
- [6] Rule 32(2)(b) requires an explanation from a plaintiff as to why it considers a plea does not raise an issue for trial. In my view, a plaintiff who avers that a plea is a sham must put up a *prima facie* basis to substantiate that proposition. The degree of substantiation required will depend on the facts of a given case.
- [7] A defendant facing a summary judgment application that meets that requirement must either put up security for the plaintiff's claim, or deliver an affidavit that discloses fully the nature and grounds of their defence and the material facts underlying it.
- [8] Loosely stated, the purpose of such an affidavit is to vouch the truth of the pleaded defence. Precisely what is required will also depend on the facts of the given case. A statement on oath by an appropriate deponent that confirms the facts relied on for the defences advanced in the plea (as opposed to merely confirming that certain defences appear in the plea) will often be sufficient, even if those facts appear improbable. That is because summary judgment proceedings are not

the forum for assessing the probabilities of a defendant's defence or whether it is likely to prevail at a trial. The enquiry is simply whether the pleaded defence is genuinely advanced, as opposed to a sham put up to secure a delay (*Maharaj v Barclays Bank Ltd* 1976 (1) SA 418 (AD) at 426A-F; *Tumileng (supra)* at [22]-[23]).

- [9] If a defendant does not provide the necessary confirmation, or does so in a manner that is needlessly bald, vague or sketchy, then summary judgment will usually be granted (*Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (TPD) at 228E-F). A bald, vague or sketchy opposing affidavit is viewed with caution because it tends to indicate a deponent who does not genuinely believe in the pleaded defence, but is not prepared to lie, or to do so blatantly, by saying that she does. Although dealing with the former version of rule 32, the following explanation from *Breitenbach (supra)* at 228H is apposite:

“The penalty (or one of the penalties) for making a false statement on oath is imposed after a trial for perjury. And in such a trial a man will find it easier to escape conviction if the averment to which he swore was brief, bald and vague, than if it was clear and supported by such detail as an honest deponent might reasonably have been expected to put forward even in a concise reply to a summary judgment application. A dishonest deponent, if he is wise, will present as narrow a front as possible, and (if it is practicable) a blurred one.”

- [10] The plaintiff sought to substantiate its contention that the second defendant's plea was contrived on the basis that, at least on the face of it, it conflicted with certain contemporaneous documents. All of those

documents were relied on in the particulars of claim, with copies attached as annexures.

- [11] The first document was an email authored by the second defendant on 17 June 2024 (“*the 17 June email*”). It reads as follows:

“Good Morning Michael

Attached is an approved loan over by Bishopscourt property. I was waiting on Willie but it seems he merely wants to take out a guarantee over MY property and settle you once sold.

This will take months. I have also NOT received any money directly from Apolon and my company to which the money was borrowed is under liquidation.

I will however honor 50% of the loan on behalf of myself and Kristian and Willie must settle his portion.”

- [12] The second document was an email authored by the second defendant on 2 July 2024 (“*the 2 July email*”). It reads as follows:

“Good Day Michael

I’m only receiving R3.4 from the proceeds of the first registration and additional funds of completion of the project. I will pay the balance of R1mil as soon as it becomes available.”

- [13] The third document, and possibly the most important one, was an attachment to the 2 July email. It purports to be a letter of undertaking dated 2 July 2024 and prepared on the letterhead of attorneys Sandre Marais Incorporated (“*the Undertaking*”). It reads as follows:

*“BOND REGISTRATION: ISHMAIL BOOLAY / CAPITEC
BANK
REMAINDER EARTH 9[...] CONSTANTIA*

*We refer to the above and confirm that we are attending to
the registration of the above transaction.*

*On instruction of our client, Mr Ishmail Boolay, we herewith
undertake to pay to yourselves, on the date of registration of
abovementioned transaction by ourselves in the Cape Town
Deeds Office, the amount of R3 250 000.00 (Three Million
Two Hundred and Fifty Thousand Rand) into the following
account:*

[Account details omitted]

*We anticipate to be ready for lodgement within the 5 to 7
business days, whereafter we anticipate registration to take
place 8 to 10 business days after lodgement.*

*Our undertaking as aforesaid shall be irrevocable, except in
the following instances in respect of which we reserve the
right to withdraw or revoke this undertaking upon notice to
yourselves:*

- (a) Should registration of the above transaction be
unreasonably delayed or not be proceeded with; or*
- (b) We cease to control the funds in this transaction;
or*
- (c) We are by operation of law prevented from doing
so; or*
- (d) Should it appear that the transaction and the
proceeds there from are subject to any preferent
claim by the South African Revenue Services
(SARS) or any obligations on us as Agent for SARS
in terms of Section 99 of the Income Tax Act 58 of
1962 as amended.*

This undertaking is neither negotiable nor transferable and must be surrendered to us against payment of the said sum or cancellation hereof.”

[14] Sandre Marais Incorporated (“SMI”) is the first defendant. The plaintiff advances certain claims against it, one of which is that it failed to honour the Undertaking. SMI has filed a plea. It disputes that it furnished the Undertaking to the plaintiff. It says that it only furnished it to the second defendant, who advised that he had not on-sent it to the plaintiff. SMI’s plea was filed after the plaintiff delivered its application for summary judgment, but before the second defendant filing his opposing affidavit.

[15] As I understood it, a mainstay of the plaintiff’s explanation as to why it considered that the second defendant’s plea was contrived was the fact that the Undertaking was unconditional, was ostensibly issued on the second defendant’s instructions, and contemplated R3,250,000.00 being paid to the plaintiff from the proceeds of a bond that was to be registered over the second defendant’s property. The plaintiff said that those features contradicted the defences raised in the second defendant’s plea, namely, that it was not indebted to the plaintiff, alternatively, that that any indebtedness he did have to the plaintiff was unenforceable and conditional.

[16] The second defendant deposed to the affidavit opposing summary judgment. Much of it is devoted to a critique of the interpretations the plaintiff attaches to the three documents described above and recordals that certain defences are advanced in his plea. What is

noticeably absent is a clear explanation or confirmation by the second defendant of the facts underlying those defences.

- [17] For example, when dealing with his defence that any indebtedness he has to the plaintiff is unenforceable in law, the second defendant explained himself as follows:

“As appears from my Plea, I at all material times denied receiving money from Apollon. I further made it clear that the loan which lies at the heart of this matter was one which Apollon made to a company in liquidation, Culture Cars, for which I have not stood surety and was not legally responsible.

I also stated in my Plea that I had made a gratuitous offer of repaying a portion of the loan, although not obligated to do so. I am advised it is trite that such an offer, made out of generosity and not obligation, does not create binding obligations and it not legally enforceable. This is manifestly an issue destined to be decided at trial.”

- [18] Phrased in this way, it is unclear whether the second defendant is confirming that he did in fact make a gratuitous offer of repayment, or merely that that is what he stated in his plea.

- [19] Even if I read the affidavit as providing a confirmation of the second defendant having made such an offer, the affidavit contains no explanation as to when or why that offer was made. More significantly, there is no suggestion whatsoever that the second defendant did not consider he was bound by his offer at the time he made it. If anything, the extract cited above suggests that the second

defendant did consider himself bound by it, but was subsequently advised that he was not because his offer was gratuitous in nature.

[20] The second defendant's attitude as to whether he was bound by his undertaking is central to his defence of unenforceability. While it is so that a gratuitous payment is by definition one that is not legally enforceable because it is made without a legal obligation to do so, that does not mean that an offer to make a gratuitous payment is not binding on the person making it.

[21] Applied to the facts of this case, although the second defendant could not be legally compelled to pay a loan the plaintiff advanced to Culture Cars, there is no reason why, without more, an offer by him to pay that indebtedness would not be enforceable by the plaintiff. Conceivably such an offer might have been made with an absence of an intention to be bound (*animus contrahendi*), but in order to advance a defence on that basis it would be necessary for the second defendant to state such an absence of intent. He has not done so in either his plea or his affidavit opposing summary judgment.

[22] What makes matters worse is that the second defendant has omitted to explain how the Undertaking came to be prepared on the terms that it was. All he says about it is that the plaintiff's case has been dealt a "*mortal blow*" by the plea filed on behalf of SMI. I do not understand that submission (at least insofar as it is made regarding the plaintiff's claim against the second defendant) and it was not amplified during argument.

[23] I consider the second defendant's omission is significant because, if he considered he was not bound by his gratuitous offer, why did he go about procuring an undertaking that would enforce it? Why did he not require it to state that it could be withdrawn at any time? Why did he not state that when sending it to the plaintiff? I accept that there may be explanations to these questions. What is significant is the second defendant's omission to provide one, and the account he has provided regarding his gratuitous offer is a scant one.

[24] For these reasons I do not consider that the second defendant has confirmed the facts underlying his allegation of unenforceability, and has refrained from dealing with material facts that tend to contradict that conclusion.

[25] The second defendant approached his defence regarding the conditional nature of any payment obligations he had to the plaintiff in a similar way. Before discussing what he said in his opposing affidavit it is convenient to explain how the second defendant's case on conditionality was advanced in his plea.

[26] Having pleaded (in the alternative) that he made a gratuitous offer to the plaintiff, the second defendant went on to plead that his offer was:

“... dependent on (a) the completion of a housing development project upon which he had embarked and which was at material times in progress, and (b) funds emanating therefrom becoming available.”

[27] The second defendant also dealt with the question of the conditionality of any payment obligations he had to the plaintiff when responding to the plaintiff's allegations regarding the terms of the Undertaking:

“Inasmuch as the ‘undertaking’ does not subject payment to the conditional terms referred to in para 8 above, it does not correctly reflect the terms of the undertaking contemplated by Second Defendant.

In particular, inasmuch as the ‘undertaking’ does not stipulate that payment would be made when funds became available upon completion of the aforementioned housing development project, it does not correctly reflect the terms of the undertaking intended to be made by Second Defendant.

On 2 July 2024, contemporaneously with the transmission of the ‘undertaking’ by Second Defendant to Plaintiff, the latter was informed by Second Defendant of the qualifications subject to which the ‘undertaking’ as presented ought to be read.”

[28] It follows that the second defendant's case is that his gratuitous offer was a conditional one, and that he informed the plaintiff that the terms of the Undertaking were also subject to those conditions on 2 July 2024. Although initially uncertain, by the time his opposing affidavit was filed it was apparent that the second defendant's communication of 2 July was a reference to the 2 July email.

[29] In light of that, I would have expected the second defendant to confirm in his answering affidavit that he notified the plaintiff of the conditionality of his gratuitous offer (presumably at the time he made

it), and to explain, even in brief outline, why he considered that the 2 July email served to impose conditions on the undertaking. Indeed, the second defendant could likely have limited himself to a statement that he drafted the 2 July email with the intention of conveying to the plaintiff that the Undertaking was conditional, even if his phraseology was not as clear as it might have been.

[30] The second defendant did none of those things. Instead, he begins by quoting the 2 July email and then goes on to state the following:

“It is quite clear from the tenor of [the 2 July 2024] email that it referred to a certain context, and that Apollon was aware of that context: that there was a project under completion; that funds would become available from first registration of the project; that further funds would become available upon completion of the project. I submit that there is no other reasonably rational interpretation.”

[31] Later on he goes on to state that (emphasis in original):

“In para 8 of my Plea, I pleaded that my offer of payment to Apollon was gratuitous; I pleaded that the offer was furthermore dependent upon the completion of a housing development then in progress, and funds emanating therefrom becoming available. I respectfully point out how this defence dovetailed with my email of 2 July 2024, and how easy it is to distinguish the payment references made therein from Bauer’s laboured attempt to force the payment references into the ambit of Apollon’s cause of action. This serious discrepancy constitutes and unexplained anomaly in Apollon’s case. This surely justifies referral of the matter to trial.”

- [32] As this quote reveals, the second defendant has again contented himself with stating what it contained in his plea, as opposed to confirming the facts underlying those allegations.
- [33] Benevolently interpreted, the opposing affidavit contains an assertion that the 2 July email communicated to the plaintiff that the payment obligations in the undertaking were conditional.
- [34] The difficulty with this is that there is no explanation as to why the plaintiff would or should or did read the 2 July email that way. As pointed out, there not even a statement that the second defendant intended it to be read that way when he drafted it.
- [35] All the second defendant has done is to aver that the only reasonably rational interpretation of the 2 July email was that it was discussing a housing project from which the second defendant would procure funds in the future. Assuming for the sake of argument that that is the proper interpretation of the 2 July email, it remains entirely unclear to me how that indicates that the Undertaking is subject to conditions.
- [36] I say that because, per the second defendant, the 2 July email discusses money the second defendant anticipates receiving upon the completion of a housing development. The Undertaking is concerned with money the second defendant was going to receive from a bond he was going to register over his property and which would be paid to the plaintiff. There is no obvious reason why the second defendant's mention of one source of money (the housing development) should

have any influence on his payment of money coming from an entirely different source (the bond). The second defendant has not provided such a reason, and has chosen instead to leave that issue in the air.

[37] The unconditional nature of the Undertaking and the second defendant's omission to provide any explanation as to how it came to be prepared is also significant regarding the conditionality defence. I raised this with *Mr Van den Berg*, who appeared for the second defendant. I understood him to fairly accept that the opposing affidavit does not devote any explanation to how or why the Undertaking came to be prepared, but to submit that may have been due to oversight as opposed to an intentional omission. I cannot discount the possibility that the omission was an accidental one, but in my view I cannot assume that gaps in the affidavit were due to oversight as opposed to design.

[38] As was the case regarding his defence of unenforceability, I consider that the second defendant's approach to vouching his defence of conditionality also fails to meet the threshold of by rule 32(3)(b), and that his opposing affidavit on that question is unduly vague and sketchy.

[39] For the reasons mentioned above, and on a reading of the opposing affidavit as a whole, it seems to me that the second defendant does not have a genuine belief in the defences he has raised in his plea, but is not prepared to be untruthful in his affidavit by confirming facts necessary to sustain them. He has instead limited himself to stating that certain defences are alleged in the plea and to making certain

submissions about the meanings of documents. The result in an opposing affidavit that, on a proper review, does not do what rule 32(3)(b) requires.

- [40] A further issue that requires consideration is whether the second defendant's attack on the plaintiff's cause of action should have any bearing on the outcome of the matter. This is particularly so regarding the attack on the plaintiff's interpretation of the 2 July email, which is central to its cause of action. The plaintiff says that in that email the second defendant:

“... acknowledged his liability for the debt and undertook to discharge a portion of the same out of the proceeds of the bond [to be registered over his immovable property].”

- [41] I agree with *Mr Van der Berg's* submission that that interpretation is not only a difficult one to sustain on the express wording of the 2 July email, it is also contrary to the interpretation the second defendant has placed on it in his opposing affidavit.

- [42] The upshot of this is that a key element of the plaintiff's cause of action has been placed in dispute by the second defendant. I consider that that may have been significant if the second defendant resisted the claim purely on the basis that it was not indebted to the plaintiff. But that is not the case here.

- [43] A difficulty created by the alternative defences pleaded by the second defendant is that he cannot confirm those alternatives in his opposing affidavit because he can have only one factual version. For instance,

the second defendant cannot dispute having any indebtedness to the plaintiff whatsoever, but also state that he made a conditional and unenforceable offer to pay a debt owed by Culture Cars.

[44] Although the second defendant has tended to record the defences appearing in his plea as opposed to confirming the facts underlying them, it seems to me that there is in truth no real dispute that he undertook to pay the plaintiff a loan it had advanced to Culture Cars (or at least a portion of it), and that the Undertaking was procured to discharge that indebtedness, either in whole or in part. Rather, the heart of the second defendant's defence is that the indebtedness he had is legally unenforceable and conditional. I have explained why I consider his opposing affidavit does not satisfactorily "*vouch*" those defences in the manner I described above.

[45] While it is conceivable that the Undertaking related to an entirely different debt to the one the plaintiff alleges (a portion of 50% of the loan it says the second defendant agreed to pay), I do not consider that the second defendant can rely on that possibility to resist summary judgment. In my view, his opposing affidavit has at best indicted that the Undertaking was to effect payment in full of the loan he undertook to pay, not just a portion of it.

[46] Should the plaintiff seek to sue the second defendant for any balance it contends is owing in future proceedings (I express no view on whether it would be entitled to do so), there would be no reason why the second defendant could not resist those proceedings on the basis that that debt has been discharged by a payment directed in this

application. All that an order granting summary judgment will serve to do is to provide judicial confirmation of the second defendant's indebtedness to the plaintiff in a certain amount.

[47] A final issue that bears mention concerns a submission made by *Mr Dickerson*, who appeared with *Mr Robertson* on behalf of the plaintiff.

[48] As I understood him, *Mr Dickerson* contended that the plaintiff could rely exclusively on the Undertaking for the relief it seeks. That was because the Undertaking amounted to an acknowledgement of indebtedness by the second defendant coupled with an obligation to pay it, which provided the plaintiff with a complete cause of action. *Mr Dickerson* relied on the decision in *Chemfos Limited v Plaasfosfaat (Pty) Ltd* 1985 (3) SA 105 (A) at 115 (AD) in support of that submission.

[49] I respectfully agree with the submission that an acknowledgement of liability coupled with an obligation to pay gives rise to an independent cause of action. Indeed, that is why the second defendant's gratuitous offer was, without more, enforceable. I am however not convinced that the plaintiff can be granted summary judgment on the strength of the Undertaking alone.

[50] Firstly, part of the second defendant's pleaded defence is that conditions were imposed on the Undertaking. Thus even if it did give rise to an independent cause of action, the conditions would have to be fulfilled before payment could be demanded. I have explained

above why I do not consider that the second defendant has confirmed his belief in the defence of conditionality.

[51] Secondly, it is not clear to me that an undertaking prepared by SMI can be construed as an acknowledgment of indebtedness by the second defendant. While it certainly provides evidence of such indebtedness (for why else would the second defendant instruct SMI to prepare it?), I have difficulty with the submission that it can be treated as a source of the second defendant's indebtedness.

[52] Thirdly, a similar issue arises regarding the *Chemfos* requirement of an undertaking to pay. The Undertaking purports to be given by SMI and it is that firm, as opposed to the second defendant, that undertakes to pay. Indeed, SMI's non-payment was the principal basis on which the plaintiff sued it. Again, and as I see it, the Undertaking constitutes *prima facie* (and contemporaneous) evidentiary material that the second defendant has an indebtedness to the plaintiff that is due and payable, but is not itself the source of that indebtedness. As stated at the outset of this Judgment, the pleaded source the plaintiff relied on was an undertaking by the second defendant to pay a portion of 50% of the loan that the plaintiff advanced to Culture Cars. The Undertaking was a mechanism to discharge that indebtedness.

[53] Even if I have misunderstood *Mr Dickerson's* submission, that is of no moment as I am satisfied that summary judgment should be granted without taking it into account.

[54] As regards interest, the plaintiff seeks *mora* interest from 22 July 2024, the date on which it alleges the bond was registered. That allegation is made in the particulars of claim and repeated in the affidavit filed in support of summary judgment. The second defendant has pleaded no knowledge of that allegation and has thus not admitted that fact. The issue is not dealt with in his opposing affidavit. It seems to me that although there might have been an earlier date by which payment might have been due, by 22 July 2024 it certainly was. In my view *mora* interest can should thus run from that date.

[55] As far as costs are concerned, the plaintiff seeks the costs of two counsel where so employed, on scale C. I consider that the retention of two counsel was justified, but that the costs of junior counsel should be limited to scale B.

[56] In the circumstances, the plaintiff will be granted summary judgment as follows:

- a. Payment of R3,250,000.00;
- b. Interest on the amount of R3,250,000.00 at the legal rate from 22 July 2024 until date of final payment;
- c. Costs of suit, including the costs of two counsel where so employed, with the fees of senior counsel not to exceed those per scale C and the fees of junior counsel not to exceed those per scale B.

MORRISSEY AJ
Acting Judge of the High Court

APPEARANCES

Counsel for the Plaintiff:

Adv J Dickerson SC
Adv D Robertson

Instructed by:

Werksmans Inc.

Counsel for Second Defendant:

Adv J Van Der Berg

Instructed by:

Liddell, Weeber & Van der Merwe
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