

SOUTH AFRICA / JUDGMENT

Enforced Investment (Pty) Ltd and Others v Verifika Incorporated and Another (599/2021) [2023] ZASCA 5 (25 January 2023) [2023] ZASCA 5

COURT

Supreme Court of Appeal

BEFORE

Ponnan, Makgoka, Gorven, Nhlangulela, Salie

CASE / FILE NUMBER

599/2021

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 599/2021

In the matter between:

ENFORCED INVESTMENTS (PTY) LTD FIRST

APPELLANT

FATIMA PEREIRA TORRES SECOND

APPELLANT

JOHN ROBERT WOODNUTT THIRD

APPELLANT

and

VERIFIKA INCORPORATED FIRST

RESPONDENT

BERNARD JOHN LAFERLA SECOND

RESPONDENT

Neutral citation: Enforced Investment (Pty) Ltd and Others v Verifika Incorporated and Another (599/2021) [2023] ZASCA 5 (25 January 2023)

Coram: PONNAN, MAKGOKA and GORVEN JJA and NHLANGULELA and SALIE AJJA

Heard: 9 November 2022

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via e-mail, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down are deemed to be delivered on 25 January 2023.

Summary: Contract – loan and repayment agreement – whether demand for payment valid – whether lender entitled to perfect security and accelerate payment of outstanding amounts.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Dippenaar J, sitting as court of first instance).

1 The appeal under case number 6183/2020 succeeds with costs, including the costs of two counsel.

2 Paragraphs 3 and 4 of the order of the high court are set aside and substituted as follows:

‘(3) In the counter application, the second applicant is ordered to pay to the first respondent an amount of R1 361 704.74 together with interest thereon at the rate of 10% per annum a tempore morae;

(4) The applicants shall pay the costs of the application and counter-application, including the costs of two counsel, jointly and severally, the one paying the other to be absolved, such costs to be paid on an attorney-client scale.’

3 The appeal under case number 14799/2020 is dismissed with costs.

Salie AJA (Ponnan, Makgoka and Gorven JJA and Nhlangulela AJA concurring):

[1] The second appellant, Fatima Pereira Torres (Ms Torres), was formerly the sole shareholder of the first respondent, Verifika Incorporated (Verifika). On 18 March 2016, Ms Torres sold 50% of her shareholding in Verifika to the second respondent, Bernard John Laferla (Mr Laferla). Mr Laferla was then appointed as director of Verifika and although Ms Torres resigned as a director of Verifika, she remained a signatory on its bank accounts. On 6 June 2019, Ms Torres sold the

remaining 50% of her shares in Verifika to Mr Laferla for the sum of R2 million. Mr Laferla paid a deposit of R100 000. On the same date, the first appellant, Enforced Investment (Pty) Ltd (Enforced), represented by the third appellant, John Robert Woodnutt (Mr Woodnutt), lent and advanced an amount of R1.9 million to Verifika. The purpose of the loan was to enable Verifika to expand its business operations. It is common cause, however, that Mr Laferla misappropriated the R1.9 million, which he used to pay Ms Torres for her shareholding in Verifika. She was

however not aware of this when the payment was made to her. As security for the loan, Mr Laferla ceded his shareholding in Verifika to Enforced.

[2] This appeal centres on the legal effect of any one of three breach notices sent by Enforced to Verifika in terms of the Loan and Repayment Agreement (the loan agreement) concluded on 6 June 2019 between Enforced, as lender, and the first respondent, as borrower.

[3] The relevant provisions of the loan agreement are clauses 5, 7 (read with appendix 2) and 11. They provide:

‘5 CESSION

5.1 Laferla hereby cedes and assigns all right title and interest in the Security to Enforced Investments Pty Limited as security for the loans.

5.2 Upon signature hereof Laferla will deliver to the company secretary of Enforced Investments Pty limited the following:

5.2.1 Signed and undated share transfer forms for the Security.

5.2.2 The share certificates in respect of the Security.

5.2.3 His written and undated resignation as a director of Verifica Inc.

5.3 Laferla upon signature hereof agrees to the company secretary giving transfer of the security from his name into the name of Enforced Investments Pty Limited or its nominee in the event of a default as set out in paragraph 11 below.

...

7 LOAN: INTEREST AND PRINCIPAL REPAYMENTS

7.1 For each Interest Period the Loan Principal shall accrue interest at the Loan Interest Rate. The aforesaid interest shall:-

7.1.1 accrue on a day-to-day basis; and

7.1.2 be calculated on the actual number of days elapsed and on the basis of a 365 (three hundred and sixty five) day year, irrespective of whether or not the applicable year is a leap year.

7.2 The Borrower shall repay the Loan Principal and interest to the Lender in accordance with the Payment Schedule set out in Appendix 2.

11 EVENTS OF DEFAULT

11.1 An Event of Default shall occur if any of the following events, each of which shall be several and distinct from the others, occurs (whether or not caused by any reason whatsoever outside the control of the Borrower)

11.1.1 the Borrower fails to pay to the Lender any amount which becomes payable by it pursuant to this Agreement strictly on due date, and the Borrower fails to remedy such default within 3 (three) Business Days of written demand;

11.2 If an Event of Default occurs the Lender shall be entitled, without notice to the Borrower accelerate or place on demand all amounts owing by the Borrower to the Lender under this Agreement, whether in respect of principal, interest or otherwise so that all such amounts shall immediately become due and payable, and call up the Security.'

Appendix 2 reads:

'PAYMENT SCHEDULE

1 The Loan is repayable as follows:

Years one and two

R500 000 per annum

Year three

R1 000 000

payable at each year end.

2 Interest payable monthly on the outstanding balance.'

[4] By 30 June 2019, interest in the amount of R14 054.79 was due and payable by Mr Laferla to Enforced in terms of the loan agreement. This amount had escalated to R32 343.19 by 31 July 2019 and led to the first letter of demand on 8 August 2019. On that date, Mr Woodnutt, on behalf of Enforced, personally delivered by hand to Verifika's chosen domicilium citandi et executandi the following letter:

'Arrears Interest payment: R32 343.19

The foregoing amount remains unpaid and needs to be settled immediately in respect of your loan to Enforced Investments (Pty) Ltd. Please note that in terms of the loan agreement any failure to pay is an act of default. For ease of reference the following amounts, based upon current interest rates are due and payable at each month end.

...

Please ensure that the arrears are settled immediately and that all future payments are made on due date.'

[5] Enforced made further written demands on 18 October 2019 and 24 January 2020 respectively, claiming payment of the arrear interest. On 28 January 2020, Enforced called up its security by entering Ms Torres' name in Verifika's securities register and she was appointed a director of Verifika. On 31 January 2020, Enforced sent a letter of demand to Verifika claiming payment of the full amount due in terms of the loan agreement. Mr Laferla

made his first payment of arrear interest on 24 February 2020. Mr Woodnutt was appointed as a director of Verifika on 10 March 2020. On 11 March 2020, a special resolution was passed by Verifika, and signed by Ms Torres, for the voluntary winding up of Verifika on the basis that it was insolvent. At that time, it appeared to Mr Woodnutt and Ms Torres that Verifika did not have sufficient funds to pay its liabilities because unbeknown to them, Mr Laferla had in fact been depositing Verifika's funds into a separate bank account.

- [6] This breakdown in the relationship between Ms Torres and Mr Woodnutt, on the one hand, and, Mr Laferla, on the other, led to several applications and counter-applications being launched. On 25 February 2020, Verifika and Mr Laferla brought an urgent application under case number 6183/2020 before the Gauteng Division of the High Court, Johannesburg (the high court) against Enforced and Ms Torres, seeking interim relief pending a final order that the entire shareholding of Verifika be restored to Mr Laferla and that the cession activated by Enforced, in terms of the loan agreement, be set aside (the main application). The main application was postponed to 4 May 2020, but an interim order issued by consent on 11 March 2020, which inter alia reinstated Mr Laferla as a director of Verifika.
- [7] The main application was opposed by Enforced and Ms Torres, who also brought a wide-ranging counter-application under the same case number on 4 May 2020. An urgent application by Verifika and Mr Laferla followed on 29 June 2020 under case number 14799/2020. They sought to set aside the resolution to place Verifika in voluntary liquidation (the liquidation application). That application prompted a conditional counter-application on 3 July 2020 by Ms Torres and Mr Woodnutt, seeking the final winding up of Verifika. On 14 July 2020, an interim order was granted by the high court (per Yacoob J) setting aside the voluntary liquidation of Verifika.
- [8] The two applications led to a consolidated hearing before Dippenaar J in the high court. On 18 January 2021, the learned judge issued the following order:

‘Case number 14799/2020

- [1] The first and second respondents' taking possession of the second applicant's shareholding in the first applicant is set aside;
- [2] The voluntary winding up of the first applicant is set aside;
- [3] The fourth respondent is directed to reinstate the first applicant to an enterprise status of "in business";
- [4] The second respondent's appointment as a director of the first applicant is set aside;
- [5] The first and second respondents are interdicted and restrained from interfering with or altering the status of the first applicant;
- [6] The first and second respondents' counter-application is dismissed with costs;

- [7] The first and second respondents are directed to pay the costs of this application jointly and severally, the one paying the other to be absolved, including the costs of two counsel where employed.

Case number 6183/2020

- [1] The first and second respondents' taking possession of the second applicant's shareholding in the first applicant is set aside;
- [2] The second applicant's entire shareholding in the first applicant is restored.
- [3] The first and second respondents' counter application is dismissed with costs, including the costs of two counsel
- [4] the first and second respondents are directed to pay the costs of the application jointly and severally, the one paying, the other to be absolved, including the costs of two counsel where employed.'
- [9] The appeal by Enforced, Ms Torres and Mr Woodnutt (as the first to third appellants respectively), with the leave of this Court, is directed at paragraphs 3 and 4 of the order issued under case number 6183/2020 and the costs order in paragraph 6 that followed upon the dismissal of their counter-application under case number 14799/2020.
- [10] The question therefore in the appeal under case number 6183/2020, as the high court recognised, is whether any of the three demands triggered the entitlement of Enforced to claim the acceleration of all amounts and to call up the security. The respondents contended that the breach notices were defective. Inasmuch as they were not clear and unequivocal as to the consequences of a failure on their part to perform timeously. Their argument was that if cancellation was intended, it ought to have been expressed in the notice.
- [11] Dippenaar J's reasons for rejecting reliance on the first demand were:
- 'Even if it was not necessary to specify a time. In the notice, as I have concluded, the applicants were not notified of the consequences if the breach was not remedied. The letter further did not unequivocally and unconditionally state Enforced's intention if the breach was not remedied. In those circumstances, I conclude that the first demand was not in compliance with the lex commissoria and was defective.'
- [12] The reasoning of the learned judge, with respect, does not withstand scrutiny. Once there was an event of default, there was no duty on Enforced to notify Verifika that it intends to call up the security as one of the options available to it.[1] Importantly, what Enforced conveyed was not an intention to enforce a lex commissoria, but an indication that there was a breach and a demand for payment of the arrears. Three business days after this written demand, absent the breach having been remedied, an event of default occurred. Accordingly, Enforced became entitled to accelerate payment of all amounts owing and to call up the security in terms of clause 11.2 of the loan agreement. An event of default had

occurred inasmuch as no interest had been paid by Verifika between the advance date (6 June 2019) and 24 February 2020. The decision to accelerate payment and perfect the security was taken by Enforced on 28 January 2020. Verifika only paid the arrear interest on 24 February 2020. By then the security had been perfected and the total amount, including interest, had become due.

[13] Once the first written demand was valid, Enforced could perfect the security on 28 January 2020 and accelerate payment of the amounts outstanding, as it had done. In the circumstances, Dippenaar J ought to have held in the main application that upon the failure by Verifika to pay the arrear interest within three business days of the first written demand, Enforced became entitled, in terms of the provisions of the loan agreement, to accelerate payment of the full amount then owing and to call up its security without further notice. This conclusion renders it unnecessary to consider the legal effect of the two further written demands. It follows that the appeal under case number 6183/2020 must succeed with costs, including the costs of two counsel.

[14] Turning to the appeal in respect of the costs of the counter-application under case number 14799/2020. The high court found that the application for Verifika's winding up was fatally defective on the basis that no valid certificate of security in terms of s 346(3) of the Companies Act 61 of 1973 had been filed. The appellants have not sought to assail that finding. The high court dismissed the counter-application on that basis alone, without having to consider its merits. In the circumstances, it follows that the order as to costs was correctly granted, and the appeal in respect thereof must fail.

[15] As to costs: Insofar as the costs of the counter application under case number

6183/2020 are concerned, those must obviously follow the result. The costs of the main application are less straightforward. The main application succeeded in having Ms Torres' shareholding in Verifika set aside and restored to Mr Laferla. To that extent the main application was successful. However, sight cannot be lost of the fact that what precipitated the dispute between the parties, was Mr Laferla having deliberately caused Verifika, a personal liability company of which he was a director and shareholder, to breach its obligations to Enforced by failing to effect payment when due. Ms Torres had made plain in her answering affidavit, that she was intent on avoiding costly and protracted litigation. According to Ms Torres, Mr Woodnutt had personally delivered the first demand to Verifika's chosen domicilium. That was confirmed by the latter on oath. Those allegations in Ms Torres' answering affidavit, had been preceded by a version in Mr Laferla's founding affidavit that whilst he did have knowledge of all three demands, they had not been sent to him; were not 'proper' breach notices according to the loan agreement and had not been sent to the chosen domicilium. In his replying affidavit, Mr Laferla contended that the first demand was not a breach letter; that there was no proof of delivery – he asserted that there was no confirmatory affidavit from Lynn, despite the fact that Ms Lynn worked as the receptionist at Verifika's chosen domicilium; that both Ms Torres and him were overseas at the time and that the demand was not given to him. As mentioned already, the first demand did however comply with clause 11.2 of the loan agreement.

[16] In his founding affidavit, Mr Laferla asserted:

‘43.2 It was an express; alternatively tacit; further alternatively implied term of the agreement that the amount of interest would be communicated to me on a monthly basis, and demand would be made for same.

43.3 Alternatively, in accordance with commercial practice, the amount of interest would be communicated to me on a monthly basis, and demand would be made for same.

43.4 I was therefore entitled to receive demand for the outstanding interest, in order to effect payment of same.’

As a qualified chartered accountant and auditor, it was disingenuous for Mr Laferla to assert that further notice was required before payment became due and payable. Mr Laferla had, in effect, borrowed the money in his personal capacity from Verifika presumably upon the same or similar terms to those afforded by Enforced. He would accordingly have been obliged to make monthly interest payments to Verifika in respect of those obligations. The monthly interest charges, he would have had to raise upon himself and receive in Verifika in his capacity as Verifika’s accountant and financial director. Once Verifika received the monthly payments from Mr Laferla, it logically would have been obliged to pay those on to Enforced. Thus, however, one looks at it, Mr Laferla ought to have been fully aware of his obligations as to payment, yet refused to honour same, by raising what may be described as untenable dilatory defences. Verifika had not paid either the interest or any part of the capital until 24 February 2020, yet Mr Laferla had enjoyed the benefits of the loan agreement. Accordingly, the unreasonable refusal on the part of Mr Laferla to make good his obligations bordered on the dishonest. In these circumstances, despite their partial success in the main application, Mr Laferla and Verifika should jointly and severally be liable for those costs. It is also appropriate that, as contended on behalf of the appellants, they be paid on a punitive scale, because in terms of clause 16.1 of the loan agreement all legal costs incurred by either party in consequence of any default shall be payable on a punitive scale.

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

‘(3) In the counter application, the second applicant is ordered to pay to the first respondent an amount of R1 361 704.74 together with interest thereon at the rate of 10% per annum a tempore morae;

G SALIE

ACTING JUDGE OF APPEAL

Appearances

For appellants: S Burger SC (with him S Georgiou)

Instructed by: Hahn & Hahn Attorneys, Pretoria

Webbers, Bloemfontein

For respondents: C Georgiades SC (with him R Bosman)

Instructed by: Messina Incorporated, Johannesburg

Honey Inc, Attorneys, Bloemfontein.

[1] See *Winter v South African Railways and Harbours* 1929 AD 100 at 105-6; *Chesterfield Investments (Pty) Ltd v Venter* 1972

(3) SA 777 (T) at 780F-H.

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