

SOUTH AFRICA / JUDGMENT

IPH Finance (Pty) v Masilela (19877/2021) [2023] ZAWCHC 143 (13 June 2023)

[2023] ZAWCHC 143**COURT**

Western Cape High Court, Cape Town

BEFORE

B P Mantame

CASE / FILE NUMBER

19877/2021

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IN THE HIGH COURT OF
SOUTH AFRICA
(WESTERN CAPE
DIVISION, CAPE TOWN)
Case No: 19877/2021

In the matter between:

IPH
FINANCE (PTY)
Applicant
vs
MAKWE
WINDSOR MASILELA
Respondent
Matter Heard: 1 June
2023
Judgment Delivered: 13
June 2023

JUDGMENT

MANTAME J

Introduction

- [1] This is an application for summary judgment in which the plaintiff seeks payment from the defendant of R1 966 417.65 with interest and costs. The claim arise from a loan agreement that was entered into between the plaintiff and the defendant on 27 February 2020.

- [2] The defendant entered an appearance to defend and filed a plea and a special plea on 6 July 2022. On 28 July 2022, the plaintiff proceeded with an application for summary judgment. An affidavit resisting summary judgment was filed by the defendant on 31 January 2023.

Background summary

- [3] In summary, the plaintiff asserts that on / or about 27 February 2020 the plaintiff and the defendant entered into a written loan agreement. The terms thereof were that:

3.1 The plaintiff would loan and advance R1 500 000.00 to the defendant to enable him to purchase subscription shares.

3.2 In terms of the agreement, the said loan would be paid by the plaintiff directly to the venture capital company, Pepperclub Hotel Investments (Pty) Ltd (“the Pepperclub”), and this would constitute due, valid and final advance of the monies to the defendant by the plaintiff.

3.3 The monies were dealt with as a R675 000.00 “bridge loan” and R835 000.00 “term loan.”

3.4 The “bridge loan” amount was repayable by 30 September 2020 and the “term loan” would be repaid by way of instalments over a period of five (5) years out of distributions made to the defendant by the Pepperclub based on the shareholding obtained.

3.5 In the event of the defendant failing to make payment of any amount due to the plaintiff in time or in full, the full amount outstanding on the loan would become immediately due and payable, and

3.6 A certificate signed by a director or manager of the plaintiff would be prima facie proof of the outstanding amount on the loan.

- [4] The defendant denied the assertions made by the plaintiff on the basis that the agreement from the outset is unusual for the following:

4.1 The plaintiff did not advance the loan directly to the defendant, but instead deposited the funds into the Pepperclub account.

4.2 The terms of the “bridge loan” are such that the defendant had to make payment of a “bridge loan amount” of R675 000.00 plus interest by 30 September 2020, where after he had to make additional monthly instalments. The quantum of the aforesaid instalments is in turn linked to the distributions that the Pepperclub was to make from time to time.

4.3 That failure to make a due payment will afford the plaintiff a right to accelerated payment, which is to include the capital, interest and costs.

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- [5] According to the plaintiff, the defendant failed to repay the full amount that was due and payable by 30 September 2020 and the full amount of the loan accordingly became due and payable. Essentially, the plaintiff's claim is premised on the defendant's default, which activated the said acceleration clause.

Defences

- [6] In resisting this application for summary judgment the defendant raised three (3) defences, that:

6.1 First, that this Court lacks jurisdiction as the defendant does not reside in the Western Cape and that the agreement central to this application was not concluded in the Western Cape;

6.2 Second, that the agreement was induced by material misrepresentation by the plaintiff and that the defendant has chosen to cancel the agreement;

6.3 Third, that the defendant has a counterclaim against the plaintiff.

Jurisdiction

- [7] The plaintiff contended that the plaintiff's defences are not bona fide or valid in law. With regard to the first defence, it was argued that in terms of Section 21 of the Superior Courts' Act 10 of 2013, a High Court has jurisdiction in respect of all causes arising within its area of jurisdiction. This does not only include contractual matters where it can be said that the contract has been concluded in the area of the court's jurisdiction, but

also where performance in terms of that agreement has to take place in the court's area of jurisdiction. In *IPH Finance Proprietary Limited v Agrizest Proprietary Limited*,^[1] the plaintiff submitted that a similar defence was put forward and the Court said:

"21 Section 21 of the Superior Courts Act 10 of 2013 provides that a high court has jurisdiction over in relation to "all causes of action arising ... within its jurisdiction." In setting out the grounds upon which the High Court will exercise jurisdiction, the Court in Van Wyk t/a Skydive Mossel Bay v UPS SCS South Africa (Pty) Ltd^[2] held as follows at para [53]."

"The jurisdiction of the High Court, therefore, under Section 21 of the [Supreme Court] Act, is also determined by reference to the common law. And in such determination regard must be had to: (a) the jurisdictional connecting factors, or rationes jurisdictionis, recognised by common law; and (b) attachment to found or confirm jurisdiction. According to the learned authors, at A2 – 103 to 104, which also finds application in this case: "The jurisdictional connecting factors or rationes jurisdictionis recognized by the common law include residence, domicile (ratio domicilii), the situation of the subject-matter of the action within the jurisdiction (ratione reistae) cause of action (ratio rei gestae) which includes the conclusion or performance of a contract (ratio contractus) and the commission of a delict within the jurisdiction (ratio delicti) (Emphasis in the original).

22. It is trite that, in the case of High Courts, the cause of action need not arise wholly within the jurisdiction of the relevant Court in order for that Court to have jurisdiction based on the ratio rei gestae (*Gallo Africa Ltd v Sting Music (Pty) Ltd* 2020 (6) SA 392 (SCA) at 333 C; *Vital Sales Cape Town (Pty) Ltd vs Vital Engineering (Pty) Ltd and Others* 2021 (6) SA 309 (WCC) at para [19].
23. There is a factual dispute between the parties as to whether the contract was concluded in Cape Town. The plaintiff says that it was concluded in Cape Town; the defendant contends that it was concluded in Gauteng. I do not have to resolve this dispute. Performance of the defendant's obligations under the loan agreement was clearly to be made in Cape Town as the defendant was required to make repayments of the loan into the plaintiff's bank account situated in Cape Town.
- ...
25. I am in agreement, however, with Counsel for the plaintiff's submission that the place of performance of part of the agreement constitutes a jurisdictional connecting factor, even if the contract was concluded outside of the jurisdiction of the Court: see *Travellex Limited v Maloney* ZASCA 128 (27 September 2016) at para [22]: "A court in whose area of jurisdiction a contract must be performed has jurisdiction, as well as the court in whose area of jurisdiction part of a contract has to be performed."
- [8] In this instance, it was said, the defendant had an obligation to make payment of the amounts due to the plaintiff who is in Cape Town; the plaintiff had effected loan payment to the Pepperclub in terms of the loan agreement in Cape Town. In fact, it was argued that the defendant submitted to the jurisdiction of this Court by filing his notice of intention to defend, he filed an exception without raising the issue of jurisdiction. As such, it was submitted that the jurisdiction defence is bad in law and shows that the defendant has no bona fide defence.
- [9] Despite the defendant not having abandoned this defence, it elected not to make any submissions in this regard.

Misrepresentation

- [10] The defendant relied in the main on the misrepresentation defence. He stated that the loan agreement was induced by way of intentional material misrepresentation, and as a result thereof he cancelled the agreement. In essence, the plaintiff and Pepperclub are running a joint venture in terms of which it persuades would-be "investors" to commit to a "loan" in which is evidently not a loan in the true sense of the word, but in fact a scheme to defraud the fiscus and the unwitting participants in the scheme. For instance, instead of making payment directly to the so-called recipients of the loans, the monies are deposited into Pepperclub account. Moreover, the repayment terms are premised on the distributions made by the Pepperclub and are not based on the actual amount owing. In return, the plaintiff would gain a direct benefit from the earning of the investment. The scheme

is a far cry from the run-of-the-mill bridging finance where there is an arm's length between the financier and the subject of the investment.

- [11] Most instructive, is that both entities at some point shared the same notable director, Mr Jeffrey Solomon ("Mr Solomon"). Mr Solomon is the common denominator in the scheme. The defendant, in addition stated that the respective entities share the same shareholders. These are the hallmarks of entities acting as alter egos of each other.
- [12] In substantiation of the claim, it was stated that Mr Solomon represented both the plaintiff and Pepperclub at a seminar where the products were marketed. The misrepresentations were made by Mr Solomon and Mr Amaresh Chetty ("Mr Chetty"). They both procured that the defendant act as a "distributor" or agent of the scheme that was run by the plaintiff and Pepperclub, so as to entice the would-be investors. This was done using a seminar and a brochure. It is for this reason that the defendant stated that he had a counterclaim against the plaintiff for unpaid commission.
- [13] When the plaintiff proceeded to demand immediate payment of the loan, on 27 November 2021, Mr Chetty wrote an email to apologise. The defendant observed that if this was not a joint scheme, there would be no need for Mr Chetty to apologise. The promise by Mr Chetty to speak to Mr Solomon in order not to hold investors and those procured by the defendant liable, underscores the defendant's version that this was in fact a joint venture scheme between the plaintiff and Pepperclub.
- [14] The defendant alluded to this credit agreement as a "simulated transaction" to which the defendant was an unwitting party. A "simulated transaction" was defined as a transaction where the parties to the transaction do not intend it to have as between them the legal effect it purports to convey. The purpose thereof is to deceive by concealing the real transaction – substance rather than form determines the nature of a transaction (plus valet quod agitur quam quod simulate concipitur).[3]
- [15] In canvassing this point further, the defendant submitted that where the purpose of a transaction is to achieve an object that allows tax invasion, the transaction will be regarded as simulated. The fact that the parties performed in terms of the contract does not show that it is not simulated : the charade of performance may be to give credence to their simulation. [4]

Reckless Credit

- [16] Moreover, the plaintiff it was said purported to prove that a credit assessment was performed and the defendant was able to meet his financial obligations in terms of the credit agreement. In fact, the affordability assessment merely shows that the defendant's disposable income was R41 322.62 after expenses. A substantial lump sum was repayable by a certain date. In such circumstances, it was incumbent upon the plaintiff to satisfy itself that the defendant would be able to make the repayment of the lump sum and not just the monthly repayment. The plaintiff in its own version, illustrates that the defendant did not

have the financial means to repay the lump sum. In addition, the plaintiff had to ensure that the defendant could meet the payment for the entire outstanding sum, in order to satisfy itself as required by Sections 81(2) and 83(1) of the National Credit Act 34 of 2005 (“the Act”). However, the plaintiff failed to do so.

- [17] In the said circumstances, it was submitted that the defendant has presented the Court with triable, bona fide defences. The application for summary judgment should be refused and the defendant be granted leave to defend.

Discussion

- [18] The plaintiff stated that this Court should discard the argument related to the link between the loan company and the investment company, as it was not afforded an opportunity to address this aspect.
- [19] Further, the defendant has not complied with the principles of misrepresentation as a defence. For instance, where a contract is induced by a material misrepresentation of the other party, the innocent party will have an election to rescind (cancel) the contract upon becoming aware of the true facts.[5] The innocent party has to make such election within a reasonable time and may not change her mind once it has made such election (either by way of conduct or expressly).[6] Upon cancelling a contract on the basis of misrepresentation, the innocent party is no longer bound to the provisions of the agreement but as a general rule is obliged to return that which she received in terms of the contract or at least tender such return.[7]
- [20] Furthermore, the allegation that the defendant acted as an agent and a distributor in this scheme, entitled him to a full statement of account and debatement thereof, by both the plaintiff and Pepperclub in respect of the investors who were referred by him, so that the outstanding commissions due to him may be calculated and claimed, was raised for the first time in the defendant’s answering affidavit and had no opportunity to deal with it. Similarly, the contention that there was no proper assessment done on the defendant’s affordability of the loan, this was therefore a reckless credit was made herein for the first time. Equally, the allegation that the scheme was made to evade tax was not made either in the defendant’s plea nor in his answering affidavit resisting summary judgment, the Court should therefore reject the allegations and grant summary judgment.
- [21] Rule 32 of the Uniform Rules of Court requires the plaintiff to identify any point in law and facts relied upon which his claim is based. In addition, for it to secure the order, it has to explain why the defence pleaded does not raise any issues for trial. It appears that it is not enough to simply allege that the defendant does not have a bona fide defence in this amended rule.

- [22] With regard to the first defence that the Court lacks jurisdiction as the defendant does not reside in the Western Cape and that the agreement central to this application was not concluded in the Western Cape, this Court is compelled to deal with it as it was not withdrawn. The only omission is that, the defendant elected not to address this defence.
- [23] As the plaintiff has pointed out, it is trite that the cause of action need not arise wholly within the jurisdiction of the relevant Court in order for that Court to have jurisdiction.[8] Besides, Section 21 of the Superior Court Act is instructional in this instance. In *Travelex Ltd* (supra), it was clearly stated that a court in whose area of jurisdiction a contract must be performed has jurisdiction, as well as the court in whose area of jurisdiction part of a contract has to be performed. It appears that the defendant's defence that he does not reside in the Western Cape does not hold. It is my considered view that this Court has jurisdiction to hear the matter.
- [24] Gathering from the submissions by both parties, it appears that there is a dispute on the second defence which in fact is the main defence. The question on whether there was an intentional material misrepresentation by the plaintiff and whether the agreement was indeed cancelled by the defendant. That alone raises a question of whether there is a triable issue.
- [25] The defendant in resisting an application for summary judgment filed a comprehensive affidavit. Much of what the defendant relied on in its attempt to resist summary judgment is that there was misrepresentation of facts when this investment opportunity was presented to him. In fact, the whole transaction was a "simulated scheme". The scheme enabled Pepperclub and the plaintiff to benefit from the tax deductions or refunds which SARS would owe various investors who earned R1 million or more per annum, which would be channelled to the plaintiff by way of the repayment of the bridging loan and from which the plaintiff and Pepperclub would ultimately both benefit by means of the subscription of shares in Pepperclub. Further, because the plaintiff earns interest on the terms loan over a 5-year period, to be paid by investors from profits generated by Pepperclub, the plaintiff would gain a direct benefit from the earnings on the investments, from the Application of the Section 12(J) refunds or deductions and from the profits which Pepperclub generated from time to time to enable repayment of the term loan.
- [26] The defendant entered this investment scheme with the hope that he would benefit. He proceeded to submit his tax return to SARS as was advised. No refund was allowed by SARS on his R1,5 million investment. He would never have entered the investment if the representations of "no cash outlay" and of the applicability of Section 12(J) had not been made or had somehow been qualified as uncertain. However, that the loan agreement was a scheme – more so a simulated transaction as the defendant put it, was denied by the plaintiff.

[27] The Court agrees with the plaintiff that further defences were raised at a later stage and the plaintiff had no time to deal with them. In light of the fact that the defendant's main defence is heavily disputed, that is a call for this matter to proceed to trial. For instance, in *Tumileng Trading CC v Nation Security and Fire (Pty) Ltd*,^[9] the Court restated the test in summary judgment application as follows:

"... the test remains what it always was: has the defendant disclosed bona fide (i.e. an apparently genuinely advanced, as distinct from sham) defence? There is no indication in the amended rule that the method of determining that has changed. The classical

formulations in Maharaj and Breitenbach v Fiat SA as to what is expected of a defendant seeking to successfully oppose an application

for summary judgment, therefore remain of application. A defendant is not required to show that its defence is likely to

prevail. If a defendant can show that it has a legally cognisable defence on the face of it, and that the defence is genuinely or bona fide, summary judgment must be refused. The defendant's prospect of success are irrelevant."

[28] The defendant in its defence made serious allegations as to the legitimacy and / or the status of the loan agreement. This Court cannot close its eyes and shut out a defendant who can demonstrate that there is a triable issue.

[29] Much was said that the defendant did not set out all its defences in a plea, more especially the third defence that the defendant has counter-claim against the plaintiff, the plaintiff had no opportunity to deal with them. In *Absa Bank Ltd v Meiring*,^[10] the Court said:

"It follows that a defendant in a summary judgment application which has failed to plead all its defences will be required to apply to amend its plea if it seeks to add any for the purposes of its opposition to summary judgment. A defendant's failure to have pleaded such defence initially will be material and, in addition to all the usual requirements to obtain the indulgence of being granted leave to amend, will require convincing explanation if it is to exclude the possibility that a court might infer the delaying tactics and a lack of bona fides. An additional effect will be that such a defendant will ordinarily have to bear the wasted costs of the application for leave to amend and those occasioned by any attendant postponement of the summary judgment application."

[30] It is indeed so that this Court has found that the defendant has a triable issue based on the misrepresentation defence. It is my considered view that if leave to defend is granted, the defendant will still have an opportunity to amend his plea and advance his further defences. Whether that application to amend the plea will be granted or not at that stage is not something this Court should concern with.

- [31] The plaintiff has poked some holes in the plaintiff's stated case. It appears that the new procedure in the summary judgment applications creates some certainty on whether the defendant has a bona fide defence hence the need to file a plea before it is set down for hearing. In this case, the main defence is indeed bona fide.
- [32] As stated above an allegation of misrepresentation is serious and should not be left uninterrogated. To grant summary judgment and thereby subject the defendant in a disputed contract in my view would be a travesty for justice. It is appropriate at this point that the allegation relating to the intentional material misrepresentation be tested at trial.

Order

[33] The following order is made:

33.1 The summary judgment is refused;

33.2 The defendant is granted leave to defend the action; and

33.3 Costs will be the costs in the action proceedings.

WESTERN CAPE HIGH

In the High Court of South Africa

(Western Cape Division, Cape Town)

Coram: B P MANTAME, J

Judgment

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(s) of Hearing: 06/01/23

Judgment

Delivered on: 06/13/23

[1] (21771/2021)

[2023] ZAWCHC 38 paras 21-25 (28 February 2023)

[2] [2020] 1 All SA 857 (WCC) para [53]

[3] S v De Jager (1965)(2) SA616(A) pg 627-628 Skjelbreds Rederi AS v Hartless (Pty) Ltd 1982(2) SA710(A) pg 733

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- [4] Commissioner of SARS v NWK Ltd 2011(2) SA67 (SCA) para 55; Roshcon (Pty) Ltd v Anchor Auto Body Builders CC and Others 2014(4) SA319 (SCA); Commissioner, South African Revenue Services v Bosch & Another 2015(2) SA 174 (SCA) paras 38-41
- [5] See Christie's Law of Contract in South Africa, 7th Ed, p 315 - 316
- [6] See Bowditch v Peel and Magil 1921 AD 56 at 572 – 3; Thomas v Henry 1985(3) SA 889(A) at 896E; Brink v Adbramhovitz 1942 CPD 189 at 193 - 194
- [7] See Feinstein v Niggli 1981(2) SA 684(A) at 700 F - H
- [8] See paragraph 7 above
- [9] 2020
- (6) SA 624 (WCC) at para [13]
- [10] 2022(3) SA 449 (WCC) para [20]
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