

SOUTH AFRICA / JUDGMENT

Lipschitz v Buitendach and Another (23409/2018) [2019] ZAGPJHC 81 (7 February 2019) [2019] ZAGPJHC 81

COURT

South Gauteng High Court, Johannesburg

BEFORE

T J Machaba

CASE / FILE NUMBER

23409/2018

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REPUBLIC
OF SOUTH AFRICA
THE
HIGH COURT OF SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
Case
No: 23409/2018
In

the matter between:

LARRY
LIPSCHITZ Applicant
And
RONALD
JACOBUS
BIUTENDACH First
Respondent
BRIAN
GABRIEL
PETERS Second
Respondent

JUDGMENT

INTRODUCTION

[1]. In this matter, the Applicant sues the First and Second Respondents (“the Respondents”) for repayment of monies advanced and loaned to them in terms of various loan agreements, cessions, and acknowledgments of debts etc. which loan amounts the Applicant pegs at R12million odd.

[2]. Before me, the Applicant was represented by Adv. S J Kaplan, and the First Respondent who is the only respondent opposing the relief sought by the Applicant, appeared in person. The Second Respondent has concluded an acknowledgment of Debt and has deposed to an affidavit substantially confirming the Applicant’s claims against the Respondents. The First Respondent persists with his opposition of this case notwithstanding the foregoing facts.

[3]. In deciding this matter, I will deal with the pleaded facts and submissions, and then deal with the presentation of the matter before Court during the hearing hereof.

[4]. I now turn to the Applicant’s case.

APPLICANT’S CASE

[5]. On 16 September 2015, the Applicant and the Respondents signed a document which on the face thereof bears, in bold, the words “Loan Agreement”. The material term of that agreement is that the parties agreed that the Applicant had provided the Respondents with various loan amounts from 2013 – 2015. The parties further recorded that the Applicant had borrowed and advanced to them amounts of monies totalling R12, 144,002.00 (defined in the said agreement as the “Capital Sum”). The said agreement is annexed as annexure A to the founding affidavit. Annexed to annexure A are proofs of payments of various monies by the Applicant to, inter alia, the First Respondent.

[6]. It is noteworthy that the First Respondent signed the Loan Agreement (Annexure A) on its last page and initialled all the other pages.

[7]. The parties agreed that the Applicant’s certificate signed by a chartered accountant nominated by the Applicant and whose appointment shall not be necessary to prove as to the existence of the amount of the Respondents’ indebtedness to him at any time shall be prima facie proof that the amount owing and the fact that it is due and payable.

[8]. Notwithstanding these, the First Respondent, has failed to pay his portion of the debt or the amount stipulated in the said certificate.

[9]. The Second Respondent, on the other hand, a former co-director of the First Respondent and a founding member of a company known as TAT which I will advert to later herein below, concluded an acknowledgment of debt annexed to the papers as annexure D.

[10]. As mentioned, the Second Respondent also filed an affidavit that is annexed to the replying affidavit confirming the validity of the loan agreements concluded between the Applicant and the Respondents and the fact that the monies they received from the Applicant have always been nothing other than loan agreements. According to him, they received loans from the Applicant and bound themselves to repaying those monies to the Applicant as per the terms thereof.

THE FIRST RESPONDENT'S ANSWERING AFFIDAVIT

[11]. It is important to mention that as the date of 4 September 2018, when the First Respondent filed his answering affidavit, he was represented by attorneys Dyason Incorporated. These attorneys only withdrew as the First Respondent's attorneys on 22 February 2019 and included, in their said notice, the last known address of the First Respondent. The address is consistent with the First Respondent's address as set out in the latter's answering affidavit.

[12]. In that answering affidavit, the First Respondent contends that the Applicant approached him and the Second Respondent and made a business proposition. The proposal was that the Applicant invited them to join his company to attend to the administration of its labour account – which they did.

[13]. Later, the Respondents left the Applicant's company and started their own company. First Respondent states that the Applicant then followed them and expressed interest in being part of the new company and would fund same. He submits that the formation of the said company was discussed by one Hatting and Harris together with the Applicant. He and the Second Respondent played no part in such meetings.

[14]. However, and for some unexplained reasons, the Applicant informed the Respondents (not Hatting nor Harris) of his interest in being part of the company and expressed his willingness to fund same. This, I find, is very strange and is illogical.

[15]. On the basis of the Applicant's proposed funding, the Respondents formed a company called Touch Africa Telecoms (Pty) Ltd ("TAT"). According to the First Respondent, TAT was set up in accordance with the Applicant's advice and instructions.

[16]. The First Respondent contends that on the Applicant's advice, the Second Respondent was the sole director and both Respondents were the directors of TAT.

[17]. In seeking to explain the presence of his signature and initials on the Loan Agreement (annexure A), the First Respondent states that on the day that they signed the said document, the Applicant required that they sign a document which was to confirm, inter alia, that he – the Applicant, was the actual owner of TAT and the business conducted therein. He states that he trusted the Applicant

and signed the said document.

[18]. The First Respondent submits that they requested copies of the signed document and the Applicant refused or failed to provide same to them. He claims to have requested access to various documents in terms of rule 35(14) of the Uniform Rules of Court. I must hasten to state that the rule relied upon by the First Respondent was inappropriate for the purposes of what he sought to achieve. However, I shall accept for the First Respondent's benefit that he filed the said document.

[19]. The copy of the said request for access to document and the Applicant's refusal to provide the demanded documents are

annexed as R1 and R2 respectively to the answering affidavit. Notwithstanding the said refusal, the First Respondent and his legal

representatives, have not filed an application to compel the discovery or production of those documents.

[20]. Instead, the First Respondent filed his answering affidavit.

[21]. In his answer, the First Respondent contends further that they were never in control of TAT, and that in fact, it was the Applicant who was the owner, the manager and the funder of TAT. The Applicant denies this assertion.

[22]. I have perused the papers filed of record but I have not seen any objective proof from the CIPC, or any paper filed to support the First Respondent's contention.

[23]. The First Respondent contends that because of some problems experienced by the Second Respondent's bank account, it was agreed between the three of them that the "start-up capital" of TAT ('contributed by the Applicant') would be deposited in to his account, which was duly done.

[24]. The First Respondent's defence is that the monies that the Applicant provided to him were received by him but were for the establishment of TAT. Such monies were never received by him in his personal capacity, and were certainly not received as loans.

[25]. The First Respondent acknowledges the payments made by the Applicant into his account but insists on the production of the Applicant's financial statements in terms of the botched rule 35(14) process. It is not evident what the relevance of the said statements would have been in this matter. The fact remains that he and his erstwhile attorneys did not pursue his rights in terms of the rules of Court.

[26]. Contrary to what he stated earlier, the First Respondent now submitted that during September 2015 – the date Annexure A was signed, the Respondents approached the Applicant to request the advance of further monies. According to him, the Applicant demanded that they first sign a document under the pretext that the document merely recorded the total amount of monies he invested in TAT.

[27]. He submits that he trusted the Applicant and assumed that the Applicant's Bank Statements speak for themselves.

[28]. Immediately after signing the said document, the Applicant took the document to another room and returned without same. He then informed them that the document they signed contained a clause that he – the Applicant, could call upon the Respondents to repay him, within 30 days, the amount that he had invested. He says that he was shocked. This shock, it appears, was not followed by any positive action from the First Respondent to remedy the situation he found himself in. He did not confront the Applicant for misleading them, he did not seek to cancel that agreement, or anything that would have been consistent with his shock.

[29]. I must also point out two things from the above, first, the document that the First Respondent refers to is the same LOAN AGREEMENT that I have referred to hereinabove, and secondly, he states that he realised soon after signing same that he signed a wrong document or that he was misled into signing a document he would not have signed. In other words fraud or misrepresentation, as he refers thereto in his answering affidavit, was perpetrated on him. As I indicated herein, he failed to do anything pursuant to his shock.

[30]. The First Respondent's failure to take positive and timely steps regarding his 'shock' discovery of the so called fraud perpetrated on him, or at the document he signed in 2015, leads me to conclude that his version of the events of that day is highly improbable. It is false and it falls to be rejected. It simply does not make sense that a person like the First Respondent can just sign a document and not read its contents.

[31]. I also reject the invitation by the First Respondent to find that the above mentioned Loan Agreement was void ab initio or that it has been cancelled. There is no basis at all for the Court to come to the conclusions he has come to and the First Respondent ought to know that contracts cannot just be cancelled at the whims of one of the parties thereto.

[32]. In dealing with various paragraphs ad seriatim, it is important to mention that the First Respondent admitted to staying at number 598 Peacehaven Road, Reitvallereirand, Pretoria. This will be important when I deal with the oral submissions he made during the hearing of this matter in Court.

[33]. In the rest of the affidavit, he repeats his denials of the Loan Agreement, alternatively, he contends that same is void ab initio or that it is cancelled.

REPLYING AFFIDAVIT

[34]. In reply, the Applicant has set out the history of how he and the Respondents met in 2013. According to him, the Respondents approached him to inform him of their proposal to conduct business in the satellite communication business for which they required funding. He, after forming a view that their proposal was sound, agreed with them that he would provide them with monies in their personal capacities for them to start their proposed business. The Applicant submitted that he stood to benefit from this proposal by having his company being the seller of international satellite equipment to the Respondents' company (i.e. TAT). Accordingly, he incorporated a company called Touch Africa International Limited – which company is based in Mauritius and sold such equipment to TAT.

[35]. As stated and despite his persistent submissions that the Applicant was part of TAT, the First Respondent had not produced any evidence of the Applicant being somehow associated with TAT. Applicant contends that he was never part of the TAT. He has never held any shares therein. He is supported by the Second Respondent in this regard.

[36]. Accordingly and in view of such a glaring failure by the First Respondent to support his foregoing submission, I find in favour of the Applicant and find that he was never been a shareholder and/or a director of TAT.

[37]. From time to time, Applicant submits that he provided monies to the Respondents in a form of loans. The Applicant states that he developed this fastidious habit of demanding that parties to the loan agreements he provides sign written acknowledgment of the amounts owing to him. He then referred the Court to annexure A to his replying affidavit (page 78) being a letter dated 28 June 2013 in which the Respondents acknowledged receipt of an amount for R1.2 million from the Applicant. They agreed that they are fully accountable for the said amount of R1.2 million to him. This document is signed by the Respondents and pertinently identifies the First Respondent as a party thereto.

[38]. Other documents of the very same nature are annexure B (page 79) – being a loan agreement signed by the Respondents dated 7 July 2013; and annexure C (page 83) being an acknowledgment of loan signed by the parties including the First Respondent on or about 6 November

2013. This document recorded the Respondents' receipt of an amount of R2,275,000.00 from the Applicant, throughout the year 2013.

[39]. Of importance in the above document, is a paragraph wherein the Respondents state that they "fully acknowledge that this money was loaned to us in our private capacities and is payable in full to Dr Lipschitz according to his terms and conditions." Indeed the contents of this letter echoes the fastidious habit of making creditors sign loan agreements and that they were loaned these monies in their personal capacities.

[40]. Annexure E is a loan agreement signed by all the parties, including the First Respondent on 15 July 2014 (page 88). Annexure F (page 96) is a cession of debts concluded by the Respondents in terms of which they acknowledged amounts loaned and advanced to them by the Applicant. Once again, the First Respondent signed and initialled all the pages of that document.

[41]. Annexure G (page 107) is a loan agreement concluded on 1 December 2014 and is signed and initialled by the Respondents, including the First Respondent.

[42]. Annexure H (page 112) is a letter by the First Respondent to the Applicant demonstrating that the amount of money deposited in his account was a loan which he sought to repay by utilizing money that his wife was soon to receive from the proceeds of a provident fund that was in the process of being cashed.

[43]. In the above letter, the First Respondent records that the Applicant had made a loan of R1,440,000.00 to TAT. He however commits that as soon as he receives the money from the above provident fund, he (not TAT) would transfer the amount of R1.4 million to him.

[44]. I included that words (“not TAT”) because despite the First Respondent stating that the money was secured for TAT, he himself undertook to repay same.

[45]. The Applicant contends that the version by the First Respondent that he did not know that he was signing a Loan Agreement is contrived and falls to be rejected especially in view of the fact that the document boldly stated that it is a Loan Agreement. I have already found so too.

[46]. The Second Respondent’s affidavit is annexed to the Applicant’s replying affidavit (at pages 120 – 151) and it confirms that the monies received by the Respondents from the Applicant were loans and were received in their personal capacities. The Second Respondent submits that they both knew and understood that they received loans from the Applicant. He rejected the First Respondent’s evidence contradicting the position that obtained when these loans were made and received.

[47]. In view of all the papers before me and the Second Respondent’s affidavit, I am compelled to accept the Applicant’s version of events that the Respondents knew that they were signing loan agreements with the Applicant and that they undertook, repeatedly, to repay such monies to him on his terms and conditions.

[48]. I also find that the First Respondent’s version of events and his defence to this application to be so implausible that it is hereby rejected.

ARGUMENTS DURING THE HEARING OF THE MATTER

[49]. During the presentation of the matter, the First Respondent was not legally represented and conducted his own case. He is thus a lay person who, naturally, did not understand Court proceedings and processes. This Court went out of its way to accommodate him and his shortcomings in relation thereto including, amongst others, of repeatedly asking questions of clarity from the Court and engaging in heated exchange of words with the Applicant’s counsel. His misunderstanding of what a draft order is, and the consideration of an email containing a notice of withdrawal of his attorneys of record also became point of some debate.

[50]. The Court explained and answered many of the issues he had raised.

[51]. As an example, at the commencement of his case, the Applicant sought to hand up a document that he stated contained his defence to the Applicant’s case. This was not his answering affidavit or a supplementary affidavit but a further document which appeared to be bulky for the Applicant’s counsel to properly consider same. I enquired as to whether or not he had shared same with his opponents to which he responded in the negative. I ordered him to share the document with Mr Kaplan and wait for the latter’s reaction thereafor before I could admit same into record.

[52]. Counsel for Applicant expectedly, objected to the document being admitted into evidence on the basis that it was late in the day and such information ought to have been filed in accordance with rules of Court dealing with the filing of further affidavits.

[53]. Court explained to the First Respondent that because the document he sought to submit into evidence was late, and that he could not take the Applicant by surprise, it declined to accept the said document – a ruling I had to repeat over and over as the First Respondent kept on straying outside the ambit of the affidavits and prompting numerous objections by Mr Kaplan.

[54]. After I declined to accept the said document, he commenced reading from the same document. In other words, he pretended as if he was addressing the Court in re his case whilst he was now reading same into record. The Applicant's counsel once again objected, correctly so. The Court continued to guide the First Respondent and urged him to argue within the confines of his papers.

[55]. After all was said, his main defence was that the amounts claimed in the notice of motion did not appear anywhere in the affidavits and the annexures annexed thereto. Secondly, he insisted that the document he signed in September 2015 (the loan agreement), was not a Loan Agreement, despite the document expressly saying it is.

[56]. At some stage during his presentation, the First Respondent sought to suggest that the documents he was referred to which bore his signature, were actually not his documents. It was not clear as to whether or not he suggested forgery or fraud or anything of that sort.

[57]. Given the seriousness of the subtle denial of his signatures, the Court asked the First Respondent why did he not timeously instruct his lawyers to file an application to file a further affidavit and formally dispute these documents bearing his signature. His answer was that his lawyers did not advise him thereof. I pertinently asked if he directed his attorneys' attention to the documents he alleged were fraudulently signed by persons who forged his signatures. He stated that his attorneys informed him of the sequence of affidavits to be filed in the motion court and accordingly informed him that there was nothing that could be done.

[58]. I express doubt as to whether the Respondent alerted his attorneys to this serious accusation and that they simply failed to advise him of his rights. I accordingly reject his answer as false. In any event, he admitted that Annexure A to the founding affidavit – being the Loan Agreement in issue was signed at Sandton on or about 16 September 2019.

[59]. I asked of him why did he not go to the police and lay charges of forgery or criminal misrepresentations in relation to his signatures on these loan agreements which he now denied. The First Respondent gave the same answer that he gave to the above question I asked of him herein above.

[60]. Furthermore, it was in the closing minutes of his address, and without forewarning any of the parties herein, that the First

Respondent kept on mentioning a police case he had opened. It is not clear who was the complainant and who was the accused therein. It was not even clear what the charges were. I paid no regard thereto.

[61]. In the end, this Court is not happy with the First Respondent's answers and versions. I come to the conclusion that they are all contrived and intended to delay the finalisation of this matter.

DISPUTE OF FACTS

[62]. Mr Kaplan argued that there were no material dispute of facts in this matter which could be heard on motion proceedings. I agree with him.

[63]. Mr Kaplan argued that it is common cause that the First Respondent signed the loan agreements and other documents referred to herein. On the other hand, the First Respondent claims that he was not the author of these documents, a contention I have already rejected. He, in any event, signed same.

[64]. It further boggles the mind that his co-director – the Second Respondent could know that they (together with the First Respondent), regularly required and were given loans by the Applicant, while the First Respondent claims the opposite.

[65]. It is on that basis that I accept both the Applicant's and the Second Respondent's affidavits as a basis from which I can, on the balance of probabilities, accept the Applicant's version and hold the First Respondent liable to repay the amounts owed to the Applicant.

[66]. There is thus no material dispute of facts which preclude me from deciding this matter on the papers. I rely on the following

proposition of law for my foregoing conclusion:

“[5] In line with Plascon Evans final relief may only be granted in motion proceedings if the facts averred by the applicant which have been admitted by the respondent, justify such an order. In certain instances a denial by the respondent of a fact alleged by the applicant may not be such as to raise a real and bona fide dispute of fact and if the court is satisfied with the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof. In motion proceedings, as a general rule, decisions of fact cannot properly be founded on a consideration of the probabilities, unless the court is satisfied that there is no real and genuine dispute on the papers regarding the facts in question, or that the one party's allegations are so far-fetched or clearly untenable that they may be rejected on the papers or that viva voce evidence would not disturb the probabilities appearing from the papers. See Administrator of the Transvaal and Others v Theletsane and Others [1990] ZASCA 156; 1991

(2) SA 192 (A) at 197A-B.”[1]

NOTICE OF WITHDRAWAL OF ATTORNEYS OF THE FIRST RESPONDENT

[67]. During the presentation of the matter, First Respondent gave an impression that he had last seen his attorneys in October

2018. In fact, this was his answer to a direct question by this Court. According to him, he had been without the assistance of his lawyers since then.

[68]. He accused Mr Kaplan of lying when counsel for the Applicant informed the Court that the said attorneys only withdrew on 22 February 2019.

[69]. Mr Kaplan produced two copies of an email correspondence received from the First Respondent's erstwhile attorneys Dyason Inc. dated 22 February 2019 and emailed to a number of recipients including the First Respondent. This email contained a Notice of their withdrawal as the First Respondent's attorneys.

[70]. When I received the said copy from Mr Kaplan, the First Respondent remonstrated with the Court that I readily accept Mr Kaplan's

email but had refused to accept his above mentioned statement of his defence. To him, this suggested that there was an untoward relations between the bench and Mr Kaplan.

[71]. I explained to him the nature of the two documents and their roles in Court. As I was explaining, the First Respondent appeared to be packing his documents and talking at the same time. I do not think that he appreciated the difference and the import of the explanation I furnished to him as by then, he had begun suggesting that the Court was in collusion with Mr Kaplan, and that he was wasting his time listening to what the Court sought to explain. He even refused to accept a copy of the said Notice from Mr Kaplan.

[72]. Given the importance of the said information i.e. the timing of the withdrawal of his attorneys, and as raised by Court during his presentation, I exercised my discretion to accept the document into record. The Court deemed the Notice of his attorneys'

withdrawal as important in that same demonstrated, conclusively, that at all material times, including when he filed his answering

affidavit, the First Respondent had always been represented by his attorneys, and that their failure to take appropriate steps to protect and advance his case, could only be attributed to his instructions to them.

[73]. Furthermore and as stated above, the said Notice of withdrawal was emailed, inter alia, to the First Respondent's email address to wit bakkies@pro-solution.co.za being the very same email address that he furnished to my clerk for purposes of contacting him for the noting of the judgment in this matter.

[74]. Accordingly, Mr Kaplan was not lying in his submissions on this issue. Instead, the First Respondent deliberately misled this Court when he stated that he had been unrepresented from October 2018 when in fact this was not the case. I am not impressed with his conduct, both towards the Court, this matter, and Mr Kaplan who represented the Applicant.

COSTS

[75]. On the issue of costs, Mr Kaplan submitted that the parties' loan agreements provided for the costs of any litigation in relation to these agreements to be on a scale as between attorney and client. This is different from the usual costs' scale of jointly and several liability.

[76]. Accordingly, so Mr Kaplan's argument went, the Applicant can only recover 50% of the monies claimed from the First Respondent, and the other half from the Second Respondent. The Applicant would thus be entitled to recover an amount of R6,072 001.00 from the First Respondent.

[77]. I have satisfied myself that the loan agreements dealt with herein indeed provide for such a scale of costs, and accordingly accede to the Applicant's request in this regard.

[78]. An appropriate draft order by the Applicant was handed up to Court.

CONCLUSION

[79]. For all the reasons set out above, I am satisfied that a proper case has been made out for the grant of the relief claimed.

[80]. I accordingly, I make an order in terms of the Draft Order handed up by the Applicant which is initialled and signed by me together with the date of this judgment.

[81]. For the avoidance of any confusion, the Draft Order provides that:

81.1. directing that the First Respondent to pay the Applicant:

81.1.1. the sum of R6,072,001.00;

81.1.2. interest on the sum of R6,072,001,00 at the rate of 10.25% per annum, a tempore morae;

81.1.3 costs of suit on a scale as between attorney and own client.

I so Order.

T J MACHABA

Acting Judge

Gauteng Local Division

Date of hearing: 27 February 2019

Date of Judgment: 1 March 2019

APPEARANCES:

For the Applicant: Mr J D Kaplan

Instructed by: Roy Suttner Attorneys

For the First Respondent: In person

[1] See also *Fakie NO v CCII Sytems (Pty) Ltd* 2006 (4) SA (SCA) and *Plascon Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A).

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