REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 13/32676

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

MALETH INVESTMENT FUND (PTY) LIMITED Applicant

and

STUART CAMERON PAGET Respondent

J U D G M E N T

WEINER J:

Background

[1] In 2011, the Applicant ("Maleth") Loaned monies to Scarab

Investments Holdings (Pty) Ltd ("Scarab") and its subsidiaries in terms of various loan agreements.

[2] Scarab is the holding company of, inter alia, Cemlock (Pty) Ltd ("Cemlock"), one of the companies to which reference is made in the present application.

[3] As at the date of signature of the first agreement, the Mezzanine Loan agreement ("the Mezzanine Loan"), the respondent ("Paget") was the sole director and shareholder of Scarab.

[4] Maleth alleges that the Scarab Group, and Paget, in his personal capacity, are indebted to Maleth, jointly and severally, as at 10 August 2013, in the sum of R119 054 822.96.

[5] The indebtedness of the Scarab Group arises from the various agreements concluded between Maleth on the one hand and various other subsidiaries in the Scarab Group, on the other. Paget's indebtedness arises from the Deeds of Suretyship referred to below.

The agreements

[6] The agreements relevant to this application are the following:

6.1. The Mezzanine Loan, concluded between Maleth and Scarab on 21 April 2011. In terms thereof, Maleth made available to Scarab

a facility of US$15 million. Scarab has benefitted from six advances made pursuant to this agreement, which advances are not disputed by Paget.

6.2. The Senior Term Loan Sheet (“The Senior Loan”), dated 21 July 2011. The agreement sets out Cemlock’s obligation to pay to Maleth a commitment fee, a break up fee and a maintenance fee in respect of the loan to be advanced to Cemlock in terms of the Senior Term Facility Agreement (“The Senior Facility”). The commitment fee was payable immediately upon signature of the Senior Loan. In terms of this agreement, Paget, as well as all members of the Scarab Group, are bound as sureties.

6.3. The Senior Term Facility Agreement (“the Senior Facility”), dated 14 August 2011, in terms of which Maleth agreed to advance to Cemlock an amount up to a value of US$13 million in South African Rand for the purposes of refinancing Cemlock’s debt with Standard Bank. This agreement was signed by Paget, who also signed as surety;

6.4. The Senior Term Loan Fee Letter (“the Senior Letter”), dated 14 August 2011. It recorded the fees payable by Cemlock as a *quid pro quo* for the advance of the Senior Loan. In particular it dealt with the maintenance fee, the redemption fee and the break-up fee;

6.5. The Deeds of Suretyship, dated 21 April 2011 and 18 December 2011, which were executed in favour of Maleth by Paget in his personal capacity;

6.6. The Release and Assumption Deed ("the Release Deed"), dated 27 June 2012, which was signed on two occasions. Cemlock undertook, as a co-borrower with Scarab, liability for all of Scarab's payment obligations in terms of the Mezzanine Loan;

6.7. Supplement number 1 to the Mezzanine Loan, concluded between Maleth, Paget and two companies in the Scarab Group as sureties. Supplement number 1 related to 24 Promissory Notes ("the Promissory Notes") signed by Paget on 27 July 2012 for and on behalf of the members of the Scarab Group as further security for the indebtedness of Scarab and Cemlock.

6.8. Deeds of Cession and Pledge ("the Deeds of Cession") dated 21 April 2011 and 17 June 2011, in terms of which Paget ceded and pledged *in securitatem debiti* his shares in Scarab. Various other members of the Scarab Group also ceded and pledged their shares in the subsidiaries to Maleth. These deeds of cession and pledge are the agreements which Maleth alleges enabled it to exercise its "step-in" rights, in relation to the Scarab Group (dealt with below).

[7] Maleth seeks payment from Paget in his capacity as surety and co-principal debtor. In this regard, Maleth refers to:-

7.1. the first suretyship agreement in terms of which Paget bound himself as surety for and co-principal debtor *in solidum* for the payment of all monies and the due performance of all obligations which Scarab owed or would owe to Maleth in terms of, *inter alia,* the Mezzanine loan and ancillary agreements ("the first suretyship").

7.2. the second suretyship agreement ("the second suretyship") in terms of which Paget bound himself to Maleth as surety and co-principal debtor *in solidum* for the payments of all monies and for the due performance of all obligations which were owing and would become owing by Cemlock in terms of the Release Deed, the Senior Loan, the Senior Facility and the Senior Letter. [For the purpose of convenience, the latter three agreements will be referred to as the Senior Loan agreements, when dealt with collectively.]

Admission

[8] In a letter dated 4 August 2013, Paget admitted, on behalf of the Scarab Group, the indebtedness to Maleth in the amount of UDS12.5

million. Paget offered Maleth payment of USD12.5 million "…*in full and final settlement of the debt owed to [Maleth]"*. This amount is in excess of the amount claimed in this application, but does not include amounts Maleth contends are due in the future.

[9] Maleth contends that on the basis of the above agreements and the admission of the 4 August 2013, the Scarab Group, and Paget (as surety and co-principal debtor) are indebted to Maleth in the amount claimed. The detailed calculation of the amount owing is not challenged by Paget.

Defences raised in the Answering Affidavit

[10] Paget deposed to the answering affidavit on 1 October 2013. In the answering affidavit, Paget raised two defences:

10.1. *The Mezzanine Loan Agreement is unconscionable and / or falls to be set aside as it was concluded in circumstances of actual / presumed undue influence and duress.* Paget argues that therefore the suretyship agreements entered into pursuant to the Mezzanine Loan are also unenforceable. Paget stated that the Mezzanine Loan was governed by English law and that such law, based on equity, would render such agreement unenforceable.

10.2. *The Senior Term Loan Sheet and the Senior Loan Agreement (sic.) are unenforceable because they never became unconditional in their respective terms due to non-fulfilment of various conditions precedent contained in the agreements.* Paget contends that it was a condition precedent that Maleth obtain the requisite exchange control approval from the South African Reserve Bank or authorized dealer (as per clause 11.1(l) of the Facility Agreement). He contends this condition was not fulfilled.

[11] In the Answering Affidavit, although Paget referred to English law, he failed to prove same by way of expert evidence.

[12] Paget, after the present proceedings had been set down for hearing, launched an application to refer the matter to trial on the basis that:-

12.1. There are 'disputes of fact' relating to several issues; and

12.2. As the loan agreements are governed by English law, the necessary expert evidence regarding the English law should be presented at a trial.

[13] Paget has taken the position that it is not possible to determine the English law on affidavit. He does not say why this is so. He failed to furnish the Court with any factual basis or expert evidence for the

conclusion that the English law would hold that the Mezzanine Loan was unconscionable.

[14] Maleth had argued that the correspondence after 4 August 2013, the defences raised in the affidavits and the application to refer the matter to trial contradicts the earlier acknowledgement of indebtedness in the amount of US$12.5 million. Maleth contends that such later documentation relating to the defences raised was initiated by Paget in an attempt to create a dispute of fact where none exists.

Events subsequent to the filing of the answering affidavit

[15] Subsequent to the filing of the answering affidavit, the parties agreed to suspend the time periods for the filing of the replying affidavit, in order to discuss the settlement of the matter. It was agreed that such suspension would operate until the 30th of October 2013.

[16] The settlement discussions were unsuccessful. As a result, Maleth took the decision to exercise the 'step-in' rights it held pursuant to the Deeds of Cession. In terms of the Deeds, Maleth was entitled, in the event of a default or breach of the Mezzanine Loan to exercise voting rights in Scarab as if it were the sole shareholder.

[17] The Applicant relied on various breaches and events of default in terms of the Mezzanine Loan in order to exercise its step-in rights, *inter alia:*

17.1. Repayment of the loan was late,

17.2. The Standard Bank of South Africa Limited, as a creditor of Cemlock:

17.2.1. had applied for the liquidation of Cemlock;

17.2.2. had perfected its security in the form of general notarial bonds over the properties of Cemlock;

17.2.3. had taken cession of all of Cemlock's book debts; and

17.2.4. had disposed of all Cemlock's assets.

[18] Maleth submitted that these events constituted breaches and/or events of default in terms of the Mezzanine Loan. As a result, Maleth demanded repayment of the indebtedness from the Scarab Group members and subsequently applied for liquidation of various of these companies, including Cemlock. On Paget's own version, Maleth will not be able to recover any monies from Cemlock. Maleth accordingly exercised its "step-in" rights.

The urgent application

[19] When Maleth elected to exercise the step–in rights, the Scarab Group launched an urgent application ("the urgent application") in terms of which Paget, purportedly acting for and on behalf of the Scarab Group companies, sought to interdict Maleth from "*continuing in its unlawful*

conduct in regard to its attempts at undermining the operation of the applicant companies"; and other related relief.

[20] In the urgent application, Paget contended that the step-in rights could not be exercised by Maleth because the Mezzanine Loan was unenforceable, as it was unconscionable or was concluded under undue influence. The Scarab Group in the urgent application did not dispute the indebtedness under either the Mezzanine Loan or the Senior Loan Agreements.

[21] Paget also contended in the urgent application that the exchange control approval for the Mezzanine Loan was not obtained by Maleth and that the numerous loan and security agreements constituted a scheme for the purposes of exchange control avoidance.

[22] Ultimately, Victor J dismissed the urgent application with a special order as to costs, directing that Paget, as the true applicant in the urgent application, was liable jointly and severally (with the remaining applicants) for costs of the application on the attorney and own client scale. Paget has filed an application for leave to appeal Victor J's judgment.

[23] Paget contends that the noting of the appeal in the urgent application automatically invalidates the findings of the Court in the urgent application and that Maleth cannot rely on the principle of *res juridicata.*

Maleth submits however that, in the present instance, the dismissal of the urgent application is not suspended pending the appeal, because there is nothing that was to operate or upon which execution was to be levied. The findings and order of the Court in the urgent application stand (pending those findings being overturned on appeal). See ***Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others*** [2013] 2 All SA 251 (SCA), where, at [17], Ponnan JA quoted the following *dicta* by Froneman J from *Bezuidenhout v Patensie Sitrus Beherend BPK* 2001 (2) SA 224 (E) at 229 B-C:-

> *'An order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong (Culverwell v Beira 1992 (4) SA 490 (W) at 494A-C). A person may even be barred from approaching the court until he or she has obeyed an order of court that has not been properly set aside."*

[24] Even if this Court does not accept that the issue of the enforceability of the Mezzanine Loan is *res judicata*, Victor J had to have found that an indebtedness on the part of the Scarab Group members towards Maleth existed in order to determine the issue in the urgent application. There would be no other basis upon which Maleth could have exercised its step-in rights. This finding stands unless the judgment is set aside on appeal. As will appear below, even if Victor J's judgment is ignored there is sufficient in the papers before me, for this court to make a finding on the issues relevant to the relief claimed.

The Replying Affidavit and Subsequent Affidavits

[25] When the settlement negotiations failed, Maleth filed a replying affidavit in the present application. Maleth set out the details concerning the urgent application and its outcome. It is common cause that both applications concern the enforceability of the Mezzanine Loan. Maleth, in response to Paget's reference to English law, filed a comprehensive opinion of Doctor QC, a barrister practicing at the bar of England and Wales.

[26] Paget filed a supplementary affidavit on 28 February 2014 alleging that new matter was raised by Maleth in reply. The issue of the urgent application, having interposed itself, obviously had to be placed before the court. Maleth filed a response to Paget's supplementary affidavit on 4 April 2014. Paget also launched the interlocutory application seeking that the matter be referred to trial on 4 April 2014. The answering and replying affidavits have been filed in the interlocutory application. Paget's supplementary Answering Affidavit in the present application dealt with the "new matter". He referred, in the main, to the fact that the expert evidence of Doctor QC constituted new matter. Despite filing that affidavit, and further affidavits in the interlocutory application, he has still not filed any expert evidence to counter that of Doctor QC.

[27] I have considered and taken account of all the affidavits filed in this matter and will therefore not deal with the applications to strike out.

Defences relied upon by Paget at the hearing

Undue influence and duress

The Application of English law

[28] This defence, in relation to the Mezzanine Loan, is that same is unconscionable and therefore unenforceable. There appears to be no factual or legal basis for the allegations of undue influence and duress. Paget relies on the tenets of English law in this regard, as he did in the urgent application. He offers no factual support or expert evidence for such claims.

[29] It is trite that:

"*The content and effect of a foreign law is a question of fact and must be proved… Proof is usually furnished by way of evidence of properly qualified persons who have an expert knowledge of the law in question." See* ***Standard Bank of South Africa Limited and Another v Ocean Commodities Inc. and Others*** 1983 (1) SA 276 (A) at 294.

[30] It is also trite that the party who relies on the provisions of foreign law bears the onus to prove what the position is under that foreign law: "…*as a consequence of the 'fact doctrine' a party pleading foreign law will bear the onus of proving its content and also that the content is*

different from that of the lex fori". See ***Burchell v Anglin*** 2010 (3) SA 48 at 57.

[31] Paget simply makes the statement that the agreements relied on by Maleth fall foul of English law.

[32] Paget concedes that *"English law must be established by way of expert evidence"*. He however states that the establishment of such facts can only be undertaken in a trial, as opposed to application proceedings. He has not adduced any expert evidence regarding the provisions of English law. Had he done so, and had such opinion contradicted that of Doctor QC, there might have been reason to refer that issue to evidence.

The Factual Scenario relating to unconscionability, undue influence and/or duress

[33] Paget signed the Mezzanine Loan (and the documents related thereto) and then proceeded to enter into numerous subsequent agreements (all of which are related to and refer to the Mezzanine Loan). He never raised the issue that the agreement was unconscionable or entered into under undue influence or duress, and never sought to set aside the Mezzanine Loan.

[34] Paget refers to clauses 18.3 and 21.8 of the Mezzanine Loan Agreement. He asks the Court to conclude that these two clauses render the entire agreement an unconscionable bargain. He offers no factual or legal basis as to why the clauses are offensive.

[35] In relation to the contention that the Mezzanine Agreement constitutes an unconscionable bargain, Doctor QC opines that:

35.1. the English courts would be hesitant to undermine the principles of freedom of contract and that *"[I]t must be a rare case where a party to a contract involving the loan of very large sums of money can escape its contractual obligations outside of some specific statutory right to do so";*

35.2. the doctrine of equitable relief for unconscionable bargains, if it applies at all, applies in circumstances where the entire contract is so oppressive that its terms "*shock the conscience of the court*". He cites authorities which consider it doubtful whether the doctrine would be applied in English law to a single harsh term, unless the contract was oppressive in its entirety;

35.3. The scope of the English law doctrine of unconscionable agreements is limited is limited in three ways:

35.3.1. the agreement must be oppressive to the complainant in overall terms;

35.3.2. it only applies where the complainant was suffering from certain types of bargaining weakness; and

35.3.3. the other party must have acted unconscionably in the sense of having knowingly taken advantage of the complainant.

35.4. With reference to those clauses of the Mezzanine Loan specifically referred to by Paget, as examples of an 'unconscionable bargain', Doctor QC states:

35.4.1. clause 18.3 of the Mezzanine Loan Agreement requires Scarab to "*prepay the loan immediately should there be any change in any applicable law or regulation*". On proper interpretation, clause 18.3 is nothing more than a *force majeure* clause, which cannot give rise to the conclusion that the bargain is unconscionable. Paget has failed to provide any facts from which it can be inferred that at the time of the conclusion of the Mezzanine Loan Agreement, Scarab was in some position of disadvantage of which Maleth took advantage. Doctor accordingly

concludes that this argument would be dismissed by an English court.

35.4.2. In relation to clause 21.8 of the Mezzanine Loan Agreement, which provides that any certificate issued by Maleth of the rate or amount due under the loan "*shall be conclusive evidence of such amounts, in the absence of a manifest error*":

35.4.2.1. the clause recognizes that any evidence offered in terms of the certificate would be subject to attack in the event of error or fraud;

35.4.2.2. the purpose of the clause is to obviate the need for calling a witness to testify as to how the amount of indebtedness was calculated;

35.4.2.3. there is no factual averment supporting the conclusion that the clause prejudices the borrower (Scarab) or that it resulted in advantage being taken of Scarab as borrower;

35.4.2.4. the borrower would in any event be free to lead evidence to counter the effect of the certificate.

35.4.3. Doctor concludes that neither clause 18.3 nor clause 21.8 would satisfy the requirements of being an 'unconscionable bargain' for the purposes of English law. Even if the clauses did satisfy the requirements, they would be severed from the operation of the Mezzanine Loan, as opposed to invalidating the entire contract, as suggested by Paget.

35.5. Doctor QC concludes that the clauses are typical commercial clauses which, without more, do not render either the clauses or the Mezzanine Loan as a whole, an unconscionable bargain.

[36] In relation to the defence of duress:-

36.1. Paget suggests that, having to sign Supplement 1 and furnish a promissory note in respect of an existing agreement, amounts to duress and renders the original Mezzanine Loan unenforceable.

36.2. Maleth responds that Supplement 1 (and the Promissory Note) encompassed an amendment to the Mezzanine Loan. The

amendment was concluded at the request of Scarab and Paget and other members of the Scarab Group.

36.3. The purpose of the Supplement/amendment was for Maleth to make payment, on behalf of Scarab, out of the advance of the first draw down, in terms of the Mezzanine Loan, of the amount of R23 075 202.59 to Pretoria Portland Cement.

36.4. In consideration of the undertaking by Maleth to make that payment to Pretoria Portland Cement Company, Scarab together with all the other borrowers and sureties (including, Paget) agreed to provide the Promissory Notes to Maleth.

36.5. The factual scenario flies in the face of Paget's claim that he/Scarab was unduly influenced and/or signed the promissory note under duress.

36.6. Paget does also not explain why even if such defence would apply to the Promissory Note, the Mezzanine Loan should be set aside as unenforceable.

[37] Doctor QC is of the opinion that the basis of duress in English law is not the absence of consent, but the combination of pressure and absence of a practical choice. After a thorough analysis of English law

on the question of duress in relation to the conclusion of commercial agreements, Doctor QC concludes that:

> "*In the present case, Mr Paget does not suggest even one fact as to the alleged threat or pressure that was applied, in support of the assertion that duress took place… An English court would pay no attention to a bald allegation of duress which does not suggest the factual basis on which it is put forward…Even if the court were to conclude that the Supplement Agreement is avoidable as having been entered into under duress, that would not affect the Mezzanine Facility Agreement itself. Furthermore, it is clear that the effect of "duress" is that a contract is voidable, not void. If a person has entered into a contract under duress he must either affirm or avoid it after such duress ceased, and if he has voluntarily acted with full knowledge of the duress, he will be taken to have affirmed it. There is no allegation by Mr Paget that the borrower has avoided the Mezzanine Facility Agreement…"*

[38] Doctor QC further observes that the power to unduly influence the borrower is not assumed in a commercial lender–borrower relationship Accordingly, Doctor concludes that:

> *"…Given that there is no pre-existing relationship of trust and confidence between a commercial lender and a commercial business borrower, facts would have to be alleged as to how the borrower came to be in a relationship of trust and confidence with Maleth. There is nothing in Mr Paget's affidavit to suggest why such relationship should have existed…*
>
> *It is almost impossible to conceive of how such a doctrine could have any relevance to the present case as alleged by Mr Paget. The absence of even a single factual allegation does not make the task any easier. It would obviously be nonsensical for* [Paget] *to suggest that the borrower (Scarab) agreed to become the beneficiary of a very large facility agreement and gain the right to drawdown large sums of*

money for use in its business as a result of undue influence by the lender".

[39] On the basis of the above, it is clear that Paget has failed to prove that the Mezzanine Agreement and/or the Promissory note is unenforceable because of unconscionability/ undue influence and/or duress.

Non fulfilment of conditions precedent in the Senior Loan Agreements

[40] Paget suggests that the Senior Loan Agreements are not enforceable owing to non–fulfilment of the conditions precedent relating to Exchange Control Approval.

[41] It is noted that in the urgent application, Paget contended that the exchange control approval was necessary for the fulfilment of conditions precedent in relation to the Mezzanine Loan, not the Senior Loan agreements.

[42] Maleth submits that the three agreements comprising the Senior Loan agreements, although related, are separate, independent agreements. Each of these agreements gives rise to different obligations.

[43] Cemlock became liable, *on signature of the Senior Loan Term Sheet* (the Senior Loan), to pay a commitment fee equal to 1.5% of the Loan amount, by way of an advance from Maleth to Cemlock in terms of the Mezzanine loan (emphasis added).

[44] The Senior Loan specified that draw down of the Loan would be subject to certain conditions precedent being fulfilled. Maleth was under no obligation to advance the loan (of up to R95 000 000.00) prior to the conditions precedent being fulfilled. However, the commitment fee was payable on signature of the Senior Loan, as a draw down in terms of the Mezzanine Loan, which agreement was already in place. This was unrelated to the fulfilment of the conditions precedent.

[45] As regards the Senior Facility, the conditions precedent are set out in clause 3.3 with reference to clause 11 of that agreement. In terms of clause 3.3: "*the Lender shall not be obliged to disburse the proceeds of the Advance until the Lender is satisfied…".* The clause sets out what should occur before the obligation to disburse the loan becomes effective. When the conditions set out in clause 11 have been met, the loan will be disbursed. However, Clause 11.2 provides that Maleth can make advances *even if the conditions precedent are not fulfilled*. Accordingly, the validity of the Senior Facility as a whole cannot be dependent on the fulfilment of those conditions.

[46] The defence relating to the non-fulfilment of the conditions precedent is, in fact, academic as it is common cause that the Senior Loan Agreements were cancelled at Paget's request, on behalf of Cemlock as the borrower. If the Senior Loan Agreements were ineffective owing

to the non–fulfilment of conditions precedent, as now stated by Paget, there would have been no agreement to cancel.

[47] Maleth's claim in respect of the Senior Loan is limited to the commitment fee and break-up fee stipulated in that agreement. These fees are unrelated to the fulfilment of the conditions precedent. This is evident from what is set out above (in relation to the commitment fee) and from clause 3 of the Senior Letter concluded in terms of the Senior Loan which provides:-

> *"If, for any reason, before or after the Settlement Date, the Borrower or any of the Obligors…withdraw from the refinancing transaction set out in the Senior Loan Agreement, then…Scarab shall be required to pay, immediately upon receipt of the termination notice from the Lender to the Borrower and Scarab, a Break-up Fee equal to twenty (20) percent of the Rand Currency Equivalent of US$13,000,000.00."*

[48] In the circumstances, Paget's disputes regarding the non–fulfilment of conditions precedent of the Senior Loan Agreements are not supported by the language of the agreements. The commitment fee was payable upfront, and the break-up fee was payable on termination. Save for that, the conditions precedent are not relevant to the dispute by virtue of the cancellation of the agreements.

Paget's various changes of stance over the course of the litigation

[49] The present application was launched in September 2013. The application was not pursued during the month of October 2013 and subsequently whilst the urgent application was proceeding.

[50] In the Founding Affidavit of the Urgent Application, Paget stated that:

50.1. The Mezzanine Loan was signed by a person who was not properly authorized and in fact signed the agreement "*as part and parcel of [Maleth's] elaborate scheme to circumvent the exchange control regulations*";

50.2. The only security documents which were executed between the parties were the cession and pledge agreements entered into between (i) Scarab and Maleth and (ii) Derry and Maleth. No suretyship agreements were signed. Paget went as far as to state that if such documents were produced it would be an indication of fraudulent conduct on Maleth's behalf.

50.3. All the agreements were challenged on the basis that they constituted a scheme for exchange control avoidance.

50.4. An expert would be called upon ‘in due course’ to testify in relation to the English law concerning the enforceability of the Mezzanine Loan; and

50.5. The Mezzanine Loan contravenes various exchange control regulations.

[51] Paget’s contentions in relation to the alleged unauthorized signature of the Mezzanine Loan are not raised in the answering affidavit in the present application. This defence was also not pursued at the hearing. It was only in the urgent application (after the answering affidavit in the present application was filed) that the allegation about the Mezzanine Loan not being executed by a duly authorized representative was raised. Similarly, it was also only in the urgent application that there is the allegation that all the agreements constituted a scheme for Exchange Control Avoidance. Neither of these defences were raised in Paget’s answering affidavit in the present application.

[52] Maleth demonstrated, in the urgent application, that numerous security documents, including the suretyships provided by Paget personally, were properly executed. The allegations of fraud are noted and, in my view, have been disproved and warrant a punitive costs order. Maleth contends that Paget deliberately misled the court hearing the urgent application;

[53] In relation to the exchange control defence, Maleth contended that the necessary exchange control approval in respect of the Mezzanine loan was indeed obtained as required. Exchange control approval was required for the purposes of transferring funds from Maleth's offshore shareholder to Maleth. This was in order to advance the loan to the members of the Scarab Group. Evidence of the exchange control approval of the offshore loan was produced and accepted by the Court in the urgent application. Maleth contended, and it was accepted by that court, that the loan made by Maleth to the various members of the Scarab Group of companies was made on shore, and therefore did not require any exchange control approval.

[54] It was argued in the present hearing on Paget's behalf, that Maleth is not resident in the Republic of South Africa and therefore exchange control approval is required for Maleth to repatriate the amounts (paid by Paget) to Maleth's holding company in Malta.

[55] Paget contended that Maleth is a "non-resident" in terms of the Exchange Control Manual as issued by the Financial Surveillance Department of the South African Reserve Bank ("SARB"), which defines a non-resident as follows:-

> *"For the purposes of the application of securities control, a non-resident is defined as a person (i.e. a natural person or legal entity) whose normal place of residence, domicile or registration is outside the CMA."*

[56] Section 3(1) of the Exchange Control Regulations ("the Regulations")

provides for certain procedures to be followed and permission to be granted in relation to, *inter alia,* payments to a person resident outside of the RSA.

[57] Paget submits that in order to comply fully with section 3(1)(c) Maleth would have been obliged to disclose how the remittance of monies to its holding company would occur. In order to do so it would require a normal bank account in compliance with the provisions of the Financial Intelligence Centre Act, 38 of 2001, which details should have formed part of the Exchange Control application.

[58] Maleth contends that this defence is a "red herring". Maleth is registered in South Africa and has a registered office in South Africa. The fact that it conducts business in Malta does not affect its status as a resident company.

[59] The gist of Paget's argument is that because Paget has not been informed of the way in which the repatriation of the funds from Maleth to its shareholder will occur, he is entitled to assume that it contravenes the Exchange Control Regulations and therefore he should be excused from performance in terms of the surety agreements. Maleth submits that this argument and Paget's reliance on the judgment in ***Oilwell (Pty) Ltd v Protec International Ltd and Others*** 2011 (SA) 394 SCA are misplaced.

59.1. The ***Oilwell*** judgment held that a debtor cannot hide behind the allegation of non – compliance with exchange control provisions:

"[17] Reliance on the Regulations in order to escape contractual obligations is not something new. However, as Steyn CJ said nearly 50 years ago, the Regulations are there in the public interest and not to provide "an unwilling debtor with a ready instrument for evading liability" or "to grant a selective moratorium to a particular class of defaulting debtors".

59.2. In addition, Maleth relies upon the judgment in ***Barclays National Bank v Thompson*** 1985 (3) SA 778. The court considered whether the approval by the Treasury of the payment sought by a peregrinus plaintiff from an incola defendant was an essential part of the plaintiff's cause of action. The defendant also contended that, if the approval of the Treasury to 'export' the payment from the plaintiff is not obtained, it would be pointless for the Court to make a judgment which may prove to be ineffective. The Court dismissed both 'defences' raised by the incola defendant.

[60] In the present instance, Paget suggests that the failure to obtain exchange control approval renders the suretyship agreements unenforceable. In ***Barclays National Bank*** *(supra),* the SCA (quoting with approval from A C Beck's article in the South African Law Journal, 1982 (volume 99), at 797 held:-

"…provided that the defendant is resident within the area of the court's

jurisdiction (or some other basis exists for the exercise of jurisdiction) the court will be able to grant an 'effective' judgment against the defendant and, if necessary, order execution against his property. The purely economic requirement of exchange control, it is submitted, in no way fetters the court's jurisdiction or power. The plaintiff is entitled to his judgment, and Treasury permission is a hurdle which can be jumped when it is reached…To conclude: the courts would do better to avoid concerning themselves with the effects of Treasury being granted or withheld. It is not really within the province of the courts to try to weave around the requirement, and in their attempts to do so a great deal of unnecessary hardship has been caused to plaintiffs at the expense of defaulting debtors, which was certainly not intended by the legislature, whose purpose is achieved whenever the permission is given, if at all. Treasury permission has no bearing on the jurisdiction of a court and, in fact, does not even constitute defence to the action - it is merely a limitation on payment, which can be removed by the Treasury at any time, and there is no reason why the plaintiff should have to wait for this before obtaining a judgment."

Conclusion

[61] Paget originally admitted the indebtedness of the Scarab Group (in correspondence of 4 August 2013) and a month thereafter denied liability for such indebtedness in correspondence of 4 September 2013. No reasons for this *volte farce* were provided. In the affidavits in both the present and the urgent applications, the indebtedness is not challenged. Paget also fails to deal with the fact that the Scarab Group has benefitted from numerous advances in terms of the Mezzanine Loan. The Scarab Group has already acted in terms of that agreement by making payments to Maleth.

[62] Paget stated in his affidavit in the urgent application, that evidence would be led, in the present application, regarding the English law and the unenforceability of the Mezzanine Loan. He has not adduced any such evidence in the present application and Doctor QC's testimony in this regard remains unchallenged.

[63] For the reasons set out earlier in this judgment, the arguments against the enforceability of the Mezzanine Loan are both legally and factually untenable.

[64] So too, for the reasons set out earlier, are the defences relating to the failure to obtain exchange control approval without merit.

[65] Various other defences were set out in the supplementary Answering Affidavit (that there was non-compliance with certain sections of the Companies Act of 2008 and non-compliance with the Double Taxation agreement). These were not pursued in argument.

[66] Corbett JA's dictum in ***Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd*** 1984 (3) SA 620 is relevant to the defences raised by Paget in the present application:-

"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. <u>The power of the court</u>

to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact." [emphasis added]

This approach was applied by Cameron JA in ***Fakie NO v CCII Systems (Pty) Ltd*** 2006 (4) SA 326 (SCA).

[67] In my view, Maleth has proved that Paget is indebted to it as claimed. None of the defences raised can be considered as *bona fide* disputes, which would persuade this court to refer this matter to trial.

Costs

[68] The defences raised by Maleth are not only legally untenable, but, in certain instances, the implication is that Maleth acted fraudulently and dishonestly. These allegations were made in relation to:-

68.1. the denial that any suretyships were signed;

68.2. the failure by Maleth to obtain exchange control approval;

68.3. Maleth's contravention of the Exchange Control and Tax Regulations;

68.4. the defence that the agreements constituted a scheme for Exchange Control avoidance.

[69] For these reasons, I am of the view that a punitive costs order is warranted.

Accordingly, the following order is made:

1. The Respondent is to pay the Applicant:-

    1.1. The sum of R119 054 822.96; and

    1.2. Interest in the amount in 1.1. above calculated at a rate of 2.5% per month to be compounded monthly, or at the end of such other period as may be determined from time to time by the Applicant, from 10 August 2013 until the amount in 1.1. is paid in full;

    1.3. Costs of suit on the attorney and client scale.

2. The Respondent's interlocutory application is dismissed with costs.

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WEINER J

Counsel for the Plaintiff: Adv Fine SC with Adv. Milovanovic

Applicant's Attorneys: Bowman Gilfillan

Counsel for the Defendant: Adv Theron

Defendant's Attorneys: Hogan Lovells

Date of Hearing: 22 April 2014

Date of Judgment: 2 May 2014