REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 19/26939

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

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SIGNATURE	**DATE**

In the matter between:

BUSINESS PARTNERS LIMITED Plaintiff

(Reg No. 1981/000918/06)

and

ALBERT DINTJANE MMADI First Defendant

(I.D No. […])

A&J PROPERTY DEVELOPMENT (PTY) LTD Second Defendant

(Reg. No. 2013/095012/07)

REAGETSWE TRADING AND WASTE MANAGEMENT

SERVICES CC Third Defendant
(Reg No. 2005/052400/23)

BABINO TLOU TRADING & PROJECTS CC Fourth Defendant
(Reg. No. 2006/063521/23)

JUDGMENT

INGRID OPPERMAN J

INTRODUCTION

[1] This is an application for summary judgment where the following facts are common cause: On 17 November 2017, the applicant and JJH Supply and Projects (Pty) Ltd ('*the principal debtor'*) entered into a written agreement of loan ('*the loan agreement*') in terms of which the applicant lent and advanced an amount of R27 699 600 to the principal debtor to be repaid in instalments. An addendum was concluded on 27 February 2018 in terms of which the date of the first instalment was amended to 1 April 2018. The monthly instalments were R393 637.27. The finance charge rate agreed was prime plus 1.5%. The monthly instalments increased to R 429 585 in May 2019, when the interest rate increased from 11.75% to 13.75%. On 20 October 2017 each of the four respondents concluded suretyship agreements in terms of which they bound themselves as sureties and co-principal debtors *in solidum* in favour of the applicant for the indebtedness due by the principal debtor to the applicant for an unlimited amount. The principal debtor failed to pay the monthly instalments on the due dates from inception of the loan agreement and when the principal debtor failed to again make payment of the instalments due on 1 June 2019

and 1 July 2019, the applicant invoked the acceleration clause and instituted action against the four sureties on 1 August 2019. The summonses were served between 16 and 20 August 2019. The National Credit Act, 34 of 2005 does not have application.

[2] The transaction history was attached to the applicant's affidavit in support of its application for summary judgment. The correctness of the content thereof was not disputed. The following payments are recorded as having been received after the common cause breaches of 1 June and 1 July 2019 (I am disregarding the dishonoured payments): 15 July 2019 – R393 758.08, 5 August 2019 – R 800 000, 2 September 2019 – R 400 000 and 7 October 2019 - R 921 494.06.

[3] Correspondence relied upon by the respondents, dated 26 September 2019 and attached to the affidavit resisting summary judgment reveal that the arrears plus the October 2019 instalment as at that date was R921 494.06 and this is the amount which was paid on 7 October 2019.

ISSUES

[4] Respondents contend that the applicant was only entitled to charge an increased interest rate and not to invoke the acceleration clause – this is dependant on the terms of the loan agreement. In the alternative, the respondents argue that assuming the acceleration clause was available to the applicant, the principal debtor had remedied the breach prior to demand having been made and this disentitled the applicant to invoke it.

INTERPRETATION OF THE LOAN AGREEMENT

[5] The loan agreement provides in clause 6 that the principal debt and finance charges are repayable in monthly instalments over a period of 120 months from 1 April 2018 (the latter date having been inserted by the addendum).

[6] Clause 5.2 of the loan agreement provides that if any instalment remains unpaid on due date, the total amount payable but unpaid shall bear interest at a rate equivalent to the annual interest rate then applicable to the loan agreement (clause 7.4 of the standard terms and conditions). Clause 5.4 of the standard terms and conditions provides that if the monthly instalments are 30 days in arrears, the applicant may in its sole discretion exercised in good faith have the right to increase the finance charge rate to take account of the increased risk.

[7] Clause 27 of the loan agreement provides:

'Without prejudice to any of its rights in law or in terms of this Agreement, Business Partners shall be entitled to withhold any portion of the loan not paid out and claim immediate payment of the outstanding balance under this loan agreement……if the Borrower fails to comply with any of the terms and conditions……'

[8] Respondents contend that because the applicant has these rights to charge additional interest, clause 5.2 of the loan agreement and clause 5.4 of the standard terms and conditions, applicant is precluded from exercising its rights under clause 27 of the loan agreement, the acceleration clause. Respondent's counsel could not, with reference to the provisions in the loan agreement, explain, if this construction were accepted, at which stage clause 27 could be invoked. The reason for this is plain - clause 27 exists in addition, and not as an alternative, to clauses 5.2 of the loan agreement and 5.4 of the standard terms and conditions. Clause 27 in fact provides for this in express terms – it commences – '*Without prejudice to any of its rights in law or in terms of this Agreement…'* The argument is premised on a construction that the applicant had to elect between two mutually exclusive remedies, acceleration or increased interest, but the text of the loan agreement does not bear out this interpretation

[9] Mr Toma, respondent's counsel, urged this court to grant leave to defend to the respondents, arguing that contextual evidence might lead to another interpretation of the loan agreement. He could not suggest any admissible evidence which could lead to another interpretation, nor refer to any facts in the affidavit resisting summary judgment which would support this argument.

[10] There was no special factual matrix to have regard to at the time that the loan agreement was entered into, at least none that any party relied upon in this matter or drew attention to. The loan agreement should be interpreted within the four corners of the document and within the limited factual information available from the particulars of claim, the plea, the affidavit supporting the application for summary judgment and the affidavit resisting it. Interpretation is a unitary exercise. However, the starting point remains the words of the document which is the only relevant medium through which the parties have expressed their contractual interests. Consideration must be given to the language used in the light of the ordinary rules of grammar and syntax.[1] Interpretation of an agreement does not stop at the literal meaning of the words. Of course, the court must have regard to the context in which the words in the contract were utilised to establish the intention of the parties.[2]

[11] The terms relied upon in the loan agreement are standard terms used every day in loan agreements. The interpretation suggested by the Respondents would lead to an insensible or unbusinesslike result.

[12] It is important to record that Mr Toma did not argue that objectively the agreement of loan was contrary to public policy, nor did he argue that under the circumstances of this case, the terms are not to be enforced as it would be contrary to public policy. The general approach in this regard was succinctly summarised

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[1] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) 593 (SCA) at p 614 A-B.

[2] *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) at [28].

quite recently in *AB and Another v Pridwin Preparatory School and Others,*[3] where Cachalia JA stated that the relationship between private contracts and their control by the courts through the instrument of public policy, underpinned by the Constitution, is now clearly established and that it is unnecessary to rehash all the learning from our courts on this topic. At par [27] he sets out the most important principles to be gleaned from them:

> "(1) Public policy demands that contracts freely and consciously entered into must be honoured;
> (2) A court will declare invalid a contract that is *prima facie* inimical to a constitutional value or principle, or otherwise contrary to public policy;
> (3) Where a contract is not *prima facie* contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;
> (4) The party who attacks the contract or its enforcement bears the onus to establish the facts;
> (5) A court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds;
> (6) A court will decline to use this power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose."

CURING OF BREACH PRIOR TO DEMAND

[13] The sequence of events was as follows: The two admitted breaches occurred on 1 June 2019 and 1 July 2019 and summons was issued on 1 August 2019 and served between 16 and 20 August 2019.

[14] Clause 27 entitled the applicant to accelerate payment. The question which falls for determination is whether payment by the respondents prior to demand could nullify the accrued right of the applicant. This question was definitively answered in

[3] 2019 (1) SA 327 (SCA) at [27]

Boland Bank v Pienaar[4], where it was held that once the right to cancel (or enforce) has been acquired, subsequent payment or the tender of performance will not effect the entitlement of the innocent party to elect to cancel or enforce the agreement.

[15] The right to cancel or enforce the agreement will take effect once it is communicated. If it has not been communicated previously, it takes effect from service of summons[5]. It is clear from the letters attached to the affidavit resisting summary judgment that attorneys Van Deventer & Campher Inc were representing both the principal debtor and the respondents and that at, the very latest, 25 September 2019, the principal debtor had knowledge of the action and the nature thereof. Even at that stage, the principal debtor was in arrears and paid R921 494.06 on 7 October 2019.

[16] It is thus clear from the payment history and all other facts placed before me, that all the arrears had not been paid prior to demand (the issue and service of summons), that the principal debtor had knowledge of the demand as it was represented by the same attorneys as the respondents and that the arrears were only paid well after the applicant's election to enforce the loan agreement and accelerate payment had been communicated. The late payments do thus not save the day.

CONCLUSION

[17] From the aforegoing I am unable to distil a *bona fide* defence, nor am I able to conclude that there exist triable issues which would warrant the granting of leave to defend.

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[4] 1988 (3) SA 618 (A) at 621G – 623I

[5] *Middelburgse Stadsraad v Trans-Natal Steenkoolkorporasie Bpk*, 1987 (2) SA 244 (T) at 249 A- G

ORDER

[18] I accordingly grant the following order:

Summary judgment is granted in favour of the applicant (plaintiff) against the first to fourth respondents (defendants), jointly and severally, the one paying the other to be absolved, for:

18.1. Payment of the sum of R25 565 719.33 together with interest thereon at the rate of 13.5% per annum, calculated daily and compounded monthly in arrears from 26 October 2019 to date of payment, both days inclusive.

18.2. Payment of costs of suit as between attorney and client.

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I OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Counsel for the applicant: Adv CL Markram-Jooste
Instructed by: Strydom Britz Mohulatsi Inc
Counsel for the respondents: Adv K. Toma
Instructed by: Van Deventer Campher Inc
Date of hearing: 4 February 2019
Date of Judgment: 10 February 2019