REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

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SIGNATURE DATE

APPEAL CASE NO: A5052/2019
COURT *A QUO* CASE NO: 17439/2018

In the matter between:

OAKWOOD PROPERTY MANAGEMENT SERVICES (PTY) LIMITED	**FIRST APPELLANT**
MARK MCNAMARA SMITH	**SECOND APPELLANT**
RICHARD JOHN HARMAN	**THIRD APPELLANT**
MICHAEL JOHN FUSEDALE	**FOURTH APPELLANT**
and	
FIREFLY INVESTMENTS 287 (PTY) LIMITED	**RESPONDENT**

JUDGMENT

WINDELL, J (MEYER J AND TWALA J CONCURRING)

INTRODUCTION

[1] This is an appeal against a money judgment granted in favour of the respondent, Firefly Investments 287 (Pty) Limited. Judgment was granted against the appellants, jointly and severally, for payment of an amount of R7 677 186.98, plus interest and costs. As against the first appellant, Oakwood Property Management Services (Pty) Ltd ("Oakwood Management"), judgment was granted for an additional amount of R2 905 321.00, plus interest and costs. The appeal is with leave of the court *a quo.*

[2] The application for judgment was based upon a written loan agreement ("the loan agreement") concluded on 16 March 2015, between the respondent and Oakwood Management (represented by the second appellant) as well as a written Guarantee ("the Guarantee") provided by the second, third and fourth appellants, and addenda to the loan agreement concluded on 21 April 2015 ("first addendum"); 22 May 2015 ("second addendum"); and 5 May 2015 ("third addendum"). The execution of the loan agreement, the addendums and the written guarantees were not placed in dispute. The appellants disputed the application for money judgment on ostensibly legal grounds and contended, *inter alia*, that the documents relied upon by the respondent were invalid. They also disputed the application on the basis of a claim of "set-off' against the respondent.

[3] To put the loan agreement and defences in context, it is necessary to briefly deal with the background facts. During the latter part of 2012, Oakwood Projects (Pty) Limited ("Oakwood Projects") became interested in property owned by, and situated in the Mookgophong Local Municipality ("the municipality") which was suitable for the development of a shopping centre. There was, however, a long lease registered over the property between the municipality and E10 Petroleum SA (Pty) Ltd ("E10"). During August

2013 the lease was extended until 1 January 2047.

[4] Oakwood Projects is a company that carries on business to develop properties for third parties on a turn-key basis. Oakwood Management manages properties for third parties. Neither Oakwood Projects nor Oakwood Management had the necessary capital to take on the development of the shopping centre. Oakwood Projects therefore required financial assistance from an investor who would be capable of paying E10 for the cession of its rights under the lease, and to fund the development of the property. The respondent was approached, and on 1 February 2014 draft "binding heads of agreement" was prepared for negotiation and signature by the respondent, Oakwood Management and Oakwood Capital (Pty) Limited ("Oakwood Capital"). The draft binding agreement, *inter alia*, provided for the respondent to purchase the rights under the lease from E10 for an amount of R9,25 million, and for the respondent to enter into a development agreement with Oakwood Management. The "binding agreement" was only signed on 5 May 2015 and was subject to the fulfilment of certain conditions precedent to be met by 31 August 2015.[1]

[5] In the interim, during November 2014, Oakwood Management instructed Oakwood Projects to appoint a building contractor, namely, D3 Construction CC ("D3"), to carry out the required building work.

[6] On 16 March 2015, E10 ceded its rights under the lease to the respondent for the sum of R9,25 million ("the cession agreement") and the respondent made payment of the non-refundable deposit in the amount of R925 000, 00 to E10 provided for in the cession

[1] The original date for fulfilment was 31 May 2015 but was subsequently extended to 31 August 2015.

agreement. The balance of the cession consideration was payable on 5 May 2015 (the date was later extended to 21 August 2015), failing which the cession would become null and void. The cession also envisaged that the municipality and E10 would sign a fresh notarial deed of lease over the property which would be registered in the Deeds Office.

[7] On the same date (16 March 2015), the respondent and Oakwood Management concluded the loan agreement. Clause 3.6 of the loan agreement stated that the respondent lent to Oakwood Management an amount of R2 968 417. 29, repayable on 31 May 2015, subject to the provisions of Clause 5 of the agreement. Clause 5 of the agreement provided that, if by 31 May 2015 (or on a later date as the respondent may agree) the development agreement had been concluded and the lease had been ceded by E10 to the respondent, the respondent would be entitled, on written notice to Oakwood Management, to permit Oakwood Management to set off the amount of R2 968 417.29 and accrued interest against the first amounts payable by Oakwood Management to the respondent under and in terms of the development agreement.

[8] The agreement further provided that:

i. The loan agreement was entirely conditional upon the respondent being satisfied that Shoprite had committed itself into entering into a lease in respect of premises in the shopping centre to be developed on the property (Clause 3.2), and on the date on which the condition referred to in Clause 3.2 is fulfilled, the respondent shall instruct its bankers to transfer the capital amount to the bank account nominated by the Oakwood Management.

ii. Contemporaneously with the signature of the loan agreement, the second, third

and fourth appellants ("the guarantors") shall sign the Guarantee failing which the agreement shall cease to be of any further force or effect (Clause 4).

iii. Notwithstanding the provisions of Clause 3.6 or Clause 5 (referred to above), any unpaid balance of the amount of R2 968 417.29 together with accrued interest thereon would immediately become due and payable by Oakwood Management breaching any obligation in terms of the agreement and failing to remedy such breach within two days after receiving written notice from the respondent calling upon it do so.

iv. A certificate signed by any director of the respondent (whose appointment of authority need not be proved) stating the amount of Oakwood Management's indebtedness to the respondent and that such indebtedness was due and payable would be *prima facie* proof of the amount owing by the Oakwood Management to the respondent and that same is due and payable (Clause 7).

[9] The condition in Clause 3.2 was fulfilled (Shoprite committed itself to entering into a lease agreement) and, consequently, on 17 March 2015, the respondent made payment in the amount of R2 968 417, 29 to Oakwood Management.

[10] In accordance with Clause 4 of the loan agreement, the second and third appellants signed the Guarantee. The fourth respondent did not, at the time, sign the Guarantee. In terms of the Guarantee, the second and third appellants jointly and severally, irrevocably and unconditionally, guaranteed and undertook, in favour of the respondent, any and all amounts which may be payable and/or which may become payable from time to time to the respondent arising out of and in terms of the loan agreement.

[11] On 21 April 2015, an addendum to the loan agreement was concluded between the

respondent and Oakwood Management. The second, third, and, in this instance, also the fourth appellant, signed the first addendum as guarantors on behalf of Oakwood Management in favour of the respondent. In terms of the first addendum, the amount stated in Clause 2.2.3 of the loan agreement was increased from R2 968 417.50 to R5 111 921.75. The amount of the guarantee was also increased to R5 111 921.75. The appellants each agreed to be principal debtors, together with Oakwood Management, for the increased loan amount of R5 111 921.75. The respondent consequently made a further payment in the amount of R2 143 504.46 to Oakwood Management which the latter was required to pay to D3 construction in accordance with progress certificates.

[12] Subsequently, on 22 May 2015, the parties concluded the second addendum. The second, third and fourth appellants signed the second addendum as guarantors on behalf of Oakwood Management in favour of the respondent. Pursuant to the second addendum, the respondent lent Oakwood Management, an additional amount of R2 473 449.54. In terms of the second addendum the amount in the loan agreement and in the guarantee was increased from R5 111 921.75 to R7 585 371.29.

[13] On 5 May 2015, the respondent and Oakwood Projects and Oakwood Capital concluded the third addendum to the loan agreement. In terms of the third addendum the parties agreed that the date of 31 May 2015 stipulated in Clause 3.6 and Clause 5 of the loan agreement was extended and amended to 31 August 2015.

[14] Later on or about 15 May 2015, the respondent and Oakwood Management concluded the development agreement. The development agreement provided for the development of the shopping centre by Oakwood Management at a cost of R93,6 million and at a development price of R107.1 million. The development agreement provided for

the draw-down of funds by Oakwood Management as the building of the shopping centre progressed.

[15] On 29 June 2015 the respondent lent Oakwood Management and additional amount of R2 905 320.71 in terms of the third addendum, thereby bringing the total amount of Oakwood Management's indebtedness to the respondent under the loan agreement as amended to an amount of R10 490 692.00. The additional amount of R2 905 320.71 was lent by the respondent to Oakwood Management pursuant to an email which the third respondent addressed to the respondent. It is apparent from the email that Oakwood Management required the additional amount for purposes of making payment to D3, the building contractor employed by Oakwood Management.

[16] Mookgophong Square Ontwikkeling (Edms) Beperk ("Mookgophong Square") launched urgent court proceedings on 6 August 2015 against the municipality, E10, Oakwood Projects and the municipal manager to interdict construction on the property and the registration of the notarial lease. It was alleged that the lease was a fraudulent document. The respondent was informed of the application by the third respondent, and a copy of the application was provided to the respondent's representatives.

[17] The appellants alleged that the respondent advised Oakwood Management that it intended to proceed with the development and that it intended to pay E10 the balance of the cession consideration. However, the respondent did not pay the balance of the cession consideration and, as a consequence, so it is alleged, E10 regarded the cession as null and void. On 25 August 2015, Mookgophong Square successfully interdicted the development.

[18] On 16 March 2017, the respondent addressed a demand to Oakwood Management

in terms of section 345 of the Companies Act 61 of 1973 demanding repayment. The respondent's attorneys further addressed a written demand on 16 March 2017 to the second, third and fourth appellants. No response was received from any of the appellants. The respondent accordingly claimed payment in an amount of R14,176,497.46 made up of the capital amount of R10,490,692.00 together with the interest (in accordance with the loan agreement) evidenced by a certificate as contemplated in Clause 7 of the loan agreement and Clause 21 of the Guarantee. The respondent ultimately limited its claim against the second to fourth appellants by excluding the amount advanced to Oakwood Capital in terms of the third addendum to the aggregate capital sum of R7, 677,186.98 together with interest. The additional sum of R2, 905,321.00 was claimed against Oakwood Management only (who is liable for such sum together with the additional sum for which it is liable jointly and severally with the second, third and fourth appellants).

[19] The appellants raised four principal issues: the validity of the loan agreement and the Guarantees; the validity of the respondent's right to re-claim the advance of R2, 905,321.00 which it made to Oakwood Management on 30 June 2015; the "set-off defence" and the relevance of the binding agreement and development agreement on the appellants' indebtedness; and the failure of the respondent to place relevant facts before the court.

The validity of the loan agreement and the Guarantees.

[20] The appellants relied upon Clause 4 of the loan agreement requiring that contemporaneously with the signature of the loan agreement the second to fourth appellants sign the Guarantee, failing which the agreement would cease to be of any force or effect. The appellants contend that given that it is common cause that the fourth

appellant did not sign the Guarantee that the loan agreement is of no further force or effect. This means that Oakwood Management can have no obligation *qua* borrower under the loan agreement and that second, third and fourth appellants can have no obligation as guarantors to the respondent arising from the loan agreement. When the Guarantee was prepared and signed, so it is argued, it in effect became an "addendum" to an agreement that was legally invalid and was consequently equally invalid.

[21] It is common cause that the fourth appellant, due to his unavailability at the time, did not sign the Guarantee on 16 March 2015. Nonetheless, the second, third and fourth appellants subsequently all signed the addenda to the loan agreement. In such addenda the second, third and fourth appellants bound themselves as guarantors in favour of the respondent for the indebtedness of Oakwood Management and confirmed the existence of the loan agreement and its terms. In fact, the first addendum to the loan agreement, as signed by each of the second, third and fourth appellants as guarantors, confirmed their liability as principal debtors together with Oakwood Management in favour of the respondent for the increased amount of R5,111,921.75 being monies lent and advanced in terms of the loan agreement as amended. In addition, the second, third and fourth appellants signed the second addendum once again binding themselves as guarantors and confirming their liability as principal debtors together with Oakwood Management in favour of the respondent for the increased amount of R7,585,371.29 which the respondent lent and advanced to Oakwood Management in terms of the loan agreement, as amended. There is accordingly no merit in this defence.

[22] In any event, the court *a quo* accepted that the effect of the second, third and fourth appellants signing the addenda was, to the extent that the loan agreement might have

lapsed, to revive such loan agreement. This is clearly correct, particularly having regard to the fact that the respondent advanced monies under the loan agreement and each of the addenda which was accepted by Oakwood Management, to the knowledge of all the appellants. It is fanciful for the appellants to contend that the loan agreement was not agreed to by all four of the appellants, having regard to their signature to the first and second addenda. On a plain reading of such addenda they agreed (as did Oakwood Management) to the loan agreement being of full force and effect as read with the addenda.

The claim against Oakwood Management

[23] The appellants contend that the advance of R2 905 320,71 which the respondent made to Oakwood Management on 30 June 2015, was made pursuant to the e-mail of 26 June 2015 and was not made in terms of or pursuant to the loan agreement. This being so, the respondent is not entitled to reclaim this amount from Oakwood Management under the loan agreement.

[24] This argument has no merit. It is not disputed that the amount was advanced to Oakwood Management and that, despite demand it has remained outstanding. The email was sent by the third appellant, wherein he requested the respondent to make payment in an amount of R2 905 321 in order for Oakwood Management to make payment to D3. The first respondent conceded that the agreement was not supported by a guarantee agreement, and it is for that reason that judgment was only sought against Oakwood Management.

Set-off/non-implementation of development agreement and bindingagreement

[25] The appellants rely on an alleged breach by the respondent of the cession agreement

concluded between the respondent and E10 as a basis to contend that the respondent "*would have borne the risk of loss if the development could not lawfully be implemented*". It is contended that in the circumstances the respondent is therefore not entitled to claim from the appellants in the amounts owing under the loan agreement and seek to set-off the amounts owing under the loan agreement *"against the loss and damages Oakwood Management has sustained"*.

[26] In terms of Clause 3.6 of the loan agreement the amount lent by the respondent to Oakwood Management was to be repaid by not later than 31 May 2015 subject to the provisions of Clause 5 of the loan agreement. Clause 5 of the loan agreement provided as follows:

> *"If by 31 MAY 2015 (or such later date as the lender may agree)*
>
> *5.1 the development agreement has been concluded, and*
>
> *5.2 the lease has been ceded by the lessee to the lender,*
>
> *the lender shall be entitled on written notice to the borrower to permit the borrower to set off the capital amount and all accrued interest against the first amount/s payable by the lender to the borrower under and in terms of the development agreement.*

[27] It is common cause that the development and the cession agreement (referred to in Clauses 5.1 and 5.2) were concluded. The appellants, on their own version, contend that the binding agreement and the development agreement contained various suspensive conditions and that these suspensive conditions were not fulfilled in at least one material respect, that being that the respondent was to take cession of the leasehold from E10

such that the cession was capable of being notarised against the title deed. The provisions of Clause 5 would only be relevant to the respondent's cause of action if the events stipulated in Clause 5 had been triggered. It is common cause that it was not triggered. The appellants conceded in their answering affidavit (as well as in their subsequent heads of argument) that although E10 purported to cede and assign to the respondent all of its interest and liabilities in respect of a notarial deed of lease concluded between E10 and the municipality, such purported cession "was vitiated by fraud". On the appellants' own version these agreements were therefore never fully implemented in their terms and Clause 5 of the loan agreement does not feature. Moreover the respondent never gave written notice to Oakwood Management to permit Oakwood Management to set-off the amounts owing under the loan agreement and all accrued interest as contemplated by Clause 5 of the loan agreement.

[28] The loan agreement was of full force and effect and each of the four appellants agreed to this and the second to fourth appellants bound themselves to the respondent for the respondent's indebtedness under the loan agreement and addenda. Not only is there no basis established for any claim but the amounts relied upon by the appellants would not be liquidated and therefore are not capable of sustaining any set-off.

[29] The appellants further contend that the purpose for which the loan agreement was signed, was to provide for the payment of amounts by the respondent to Oakwood Management which it had incurred in respect of the development of the shopping centre and which were later provided for in the development agreement. The appellants' references to the purpose for the various amounts advanced from time to time by the respondent to Oakwood Management do not advance their grounds of opposition and are

irrelevant to the cause of action, or to their opposition. The appellants contend and further seek to place reliance on the fact that as at 22 August 2015 all the conditions precedent in the binding agreement were either fulfilled or would have been fulfilled by 31 August 2015. No evidence is however provided by the appellants of this and the respondent has demonstrated this to be untrue. By way of example, the condition contained in Clause 5.3 of this document (requiring that the respondent takes cession from E10 of its rights and obligations under the lease and that the cession be capable of being notarised against the title deeds) was not capable of being fulfilled. In addition, the Core Tenants (as defined in Clause 4.7 of the document) were not in place. Except for Shoprite, none of the other Core Tenants, had obtained confirmation from their boards of directors as required by Clause 4.7. Such approvals were not in place by 22 August 2015 as alleged and were unlikely to be in place by 31 August 2015. In addition, lease agreements in respect of 70% of the gross lettable area of the centre had not been concluded as required by Clause 5.1 of the binding agreement by 22 August 2015 and such leases were unlikely to have been concluded by 31 August 2015. Although a development agreement had been concluded, the agreement was not capable of being implemented and was not implemented due to the cession agreement being void.

[30] Accordingly, there is no genuine dispute in relation to the appellants' indebtedness. All amounts lent by the respondent to Oakwood Management in terms of the loan agreement are overdue, owing and payable.

Alleged failure to include relevant facts

[31] The appellants contend that the cause of action which the respondent "attempted" to make out in its founding affidavit did not contain the relevant facts and allegations to

sustain a cause of action for the relief sought in the notice of motion. On these grounds alone (and without reference to the answering and replying affidavits) the respondent's application falls to be dismissed with costs. It is submitted that the respondent's founding affidavit failed to place a "myriad of relevant facts" concerning its commercial dealings with Oakwood Management before the court and it was only when the answering affidavit was served, that the respondent's failure to explain the full extent of its interactions with Oakwood Management was exposed. It is submitted that the answering affidavit sets out a narrative that is far removed from the terse claim for money lent and advanced that the respondent attempted to set out in its founding affidavit.

[32] The respondent contends that these "relevant facts" are not in fact relevant to the respondent's cause of action. I agree. It was not necessary for the respondent to set out the background facts in its founding affidavit, as it relies solely on the loan agreement, the addenda thereto, and the Guarantees. These documents permit of no difficulty in interpretation. The only reason why this court dealt with the background facts in more detail is because of the appellants' defences raised. I agree with the respondent that such facts only obfuscate the enquiry and attempts to distract attention away from the clear basis for their liability and clear terms of the loan agreement as read with the addenda. The so-called "narrative" referred to by the appellants in no way assists the appellants to avoid liability under the clear express terms of the agreements and the undisputed facts. The relationship between Oakwood Management, Oakwood Capital and E10 does not impact in any way on the clear loan obligations under the loan agreement, addenda and the guarantee.

[33] In the result I propose that the following order be made:

"The appeal is dismissed with costs including the costs of senior counsel."

L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG
Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 28 April 2020.

APPEARANCES

Attorneys for the appellants:	Cuzen Randeree
Counsel for the appellants:	Advocate W.B. Pye
Attorneys for the respondent:	Werkmans Attorneys
Counsel for the respondent:	Advocate A. Subel SC
Date of hearing:	18 January 2021
Date of judgment:	28 April 2020