

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2020/12981

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
Date: 1/03/2022	

In the matter between :

INVESTEC MARKETS (PTY) LTD

Plaintiff

and

ASHRAF JOOSUB N.O.

Defendant

JUDGMENT

STRYDOM J :

- [1] This is a summary judgment application in terms of which the plaintiff claims against the defendant for payment of the sum of R1,241,129.67 plus interests and costs.

The particulars of claim

- [2] The plaintiff sued the defendant in his official capacity as the trustee of the Halima Tayob Testamentary Trust ("the Trust").
- [3] The relationship between the various role players in this action has been set out in the particulars of claim as follows:
- 3.1 The plaintiff sued the defendant as cessionary to all the rights, duties and obligations of Investec Securities (Pty) Ltd ("Investec Securities") which cession took place from 17 February 2020.
- 3.2 On or about 6 February 2015, Investec Securities concluded a written Prime Service Mandate Agreement ("the Service Agreement") with Vunani Private Clients (Pty) Ltd.
- 3.3 Vunani Private Clients (Pty) Ltd changed its company name to Unum Capital (Pty) Ltd ("Unum") on 14 July 2016.
- 3.4 On or about 11 March 2016, Unum concluded a written Mandate Agreement with the defendant ("the Mandate Agreement").

- [4] Pursuant to the Mandate Agreement, the defendant authorised Unum to open an equity market trading account on its behalf with Investec Securities.
- [5] It is alleged that during the period March 2016 to date, Unum, acting as agent to the defendant, rendered the financial services that it was mandated to render to the defendant under the Mandate Agreement and it did so by utilising Investec Securities and thereafter the plaintiff's prime broking services in accordance with the terms of the Service Agreement. This entailed that the defendant was the "*underlying client*" referred to and contemplated in clause 3.4 of the Service Agreement.
- [6] It is then alleged that from about 4 August 2015, Unum instructed Investec Securities and thereafter the plaintiff to render prime broking services for and on behalf of the defendant, and in particular, to trade in Derivative CFDs.
- [7] As at 10 March 2020, the margin callout on the defendant's account was in a debit balance of R1,478,027.43 which amount became due, owing and payable to Unum on 10 March 2020. Part payment was made by the defendant leaving the balance of R 1 241 129. 67 claimed in this summary judgment application.
- [8] This amount was demanded and the defendant has failed and/or neglected to pay the debit balance of R1,241,129.67.
- [9] In terms of the provisions of clause 3.4 of the Service Agreement, the right, title and interest in the claim that Unum had against the defendant,

upon default, was automatically and immediately ceded to the plaintiff. This formed the basis for the claim against the defendant.

Defendant's plea

- [10] In the defendant's plea, the name change of Vunani Private Clients (Pty) Ltd ("Vuvani") to Unum was not admitted. This became a moot issue as the defendant in its answering affidavit resisting summary judgment admitted the name change. Thus, reference in this judgment would be made to Unum as this is the same entity as Vuvani .
- [11] As far as the cession between Unum and Investec Securities was concerned, the defendant pleaded that it has no knowledge of these allegations and consequently denied them. The same applied to the cession between Investec Securities and the plaintiff.
- [12] Clause 25.3 of the Mandate Agreement was pleaded to the effect that Unum may at any time give the defendant notice in writing that if its accrued debt is not paid within a period of not less than seven days of the date of the notice, Unum may without further notice realise sufficient enough of the defendant's Financial Products to discharge the debt. It was then pleaded that Unum failed to provide to the defendant with the seven days' notice but closed out defendant's Financial Products on the same day the demand was made for payment of the outstanding margin.
- [13] It is pleaded that had Unum provided the defendant with seven days notice to settle the accrued debt, the defendant would have done so and that there was no need to realise the defendant's Financial Products.

- [14] Accordingly it was alleged that Unum did not have a claim against the defendant and was not in a position to cede such claim to Investec Securities. This claim could also not be ceded to the plaintiff.
- [15] The defendant admitted in its plea an allegation contained in paragraph 21 of the plaintiff's particulars of claim stating that from 4 August 2016 Unum instructed Investec Securities and thereafter the plaintiff to render prime brokerage services for and on behalf of the defendant, in particular to trade in derivative Contracts for Difference transactions.
- [16] These allegations pertaining to the lack of the 7 days' notice then also formed the basis of a counterclaim which the defendant pleaded should be set off against the claim of the plaintiff. Insofar as this issue is concerned the defendant, in its answering affidavit, conceded that such set off cannot take place, unless the obligations of Investec Securities were also ceded to plaintiff, and for that reason defendant issued a third party notice to which Unum has pleaded.

The affidavit filed on behalf of the plaintiff

- [17] The plaintiff filed an affidavit in support of its summary judgment application as required by rule 32(2)(b). In this affidavit the deponent swore positively to the facts contained therein and to the facts as set out in the particulars of claim.

- [18] In the affidavit, it is stated that the defences as pleaded by the defendant do not raise any issue for trial. It is pointed out that the denials by the defendant of the cession agreements which were referred to in the particulars of claim were nothing more than bald denials.
- [19] Furthermore, it was alleged that clause 3.4 of the Service Agreement is clear and unambiguous. It provides that upon default by the defendant, all the rights, title and interest of Unum in the claim against the defendant is automatically and immediately ceded to the plaintiff. The defendant did not specifically challenge the conclusion of the Service Agreement save to plea that it had no knowledge of the allegations the plaintiff made in this regard and in consequence denied them.
- [20] The plaintiff also referred to the issue raised by the defendant that in terms of clause 25.3 of the Mandate Agreement, Unum was required to give the defendant seven days notice before selling the defendant's Financial Products.
- [21] Before this court this was the main defence raised by the defendant and will be discussed hereinafter.
- [22] It was stated that the defendant's counterclaim is contrived and was advanced solely in an attempt to defeat the plaintiff's claim for summary judgment; that all the defences raised by the defendant in its plea and counterclaim can on no interpretation constitute a *bona fide* defence to the plaintiff's claim and that a court should order summary judgment.

The affidavit filed by the defendant resisting summary judgment

- [23] The affidavit filed by the defendant restated the defences raised in the plea. It further denied that Mr James the deponent to the affidavit on behalf of the plaintiff has personal knowledge of the facts of the indebtedness of the defendant; denied that the defendant do not have a *bona fide* defence; and that the defendant seeks leave to defend the action merely to delay the legal process.
- [24] Central to the defence is whether there was an obligation to give the defendant a seven day notice of its intention to sell the defendant's Financial Products. This required interpretation of clause 25.3 of the Mandate Agreement. It was then stated that when it comes to interpretation it "*is now an exercise which requires the leading of extrinsic evidence.*" A trial court will be better placed to decide on the interpretative issue. The defendant then submitted that the interpretation advanced by the plaintiff is neither in text, context or purpose faithful and that it plainly does not make commercial sense. Lastly, on the issue whether the counterclaim disclosed a valid cause of action it becomes important to interpret the Service Agreement and that again will required the leading of extrinsic evidence.

The legal position

[25] The defendant had to set out a *bona fide* defence. The nature and grounds of the defence must be stated as well as the facts enabling the court to consider the existence of a *bona fide* defence. In *Breytenbach v Fait SA* (Edms) Bpk¹ with reference to *Shepstone v Shepstone* 1974 (2) SA 462 (N) it was held that “...that no more is called for than this: that the statement on material facts be sufficiently full to persuade the court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff’s claim. What I would add, however, is that the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague, or sketchy, that will constitute material for the court to consider in relation to the requirement of *bona fides*.”

[26] Accordingly, this court will consider the answering affidavit to decide whether a *bona fide* defence was shown which, at the trial, may constitute an arguable defence. If any one of the defences raised points to a triable issue summary judgment should be refused. If no *bona fide* defence is raised then summary judgment should be granted provided that a court has a discretion to refuse summary judgment even if a defence was not properly raised.

[27] The Mandate Agreement was admitted but not the conclusion of the Service Agreement.

The disputed cessions

¹ 1976 (2) SA 226 (TPD) at 228 C-F

- [28] The defendant disputes the cession agreement which goes to the *locus standi* of the plaintiff. The plaintiff averred in its particulars of claim that the plaintiff sued herein as cessionary to all rights, duties and obligations of Investec Securities. The written cession document and acceptance was attached to the particulars of claim. The defendant, as he was entitled to do, denied the cession stating that he has no knowledge of the cession. Not only was the cession disputed but the subject matter of the cession being due and payable. Defendant stated that Unum first had to give him seven days' notice before it could sell defendant's Financial Products. This did not happen and the debt did not become due. Does this, however, constitute a *bona fide* defence? It will depend on the veracity of this defence.
- [29] The defendant denied that Unum and Investec Securities entered into a service provider agreement. Also was denied the subsequent cession. Although defendant was not a party to this cession it, through Unum as intermediary, conducted business with Investec Securities. The Mandate Agreement between Unum and defendant, which was admitted, provided for the appointment of a Financial Service Provider ("SFP"). By denying the existence of this agreement, which was attached to the particulars of claim, in my mind does not constitute a *bona fide* defence.
- [30] To prove the cession from Unum to Investec Securities plaintiff relied on the terms of clause 3.4 of the Service Agreement which provides that upon default by the defendant, all the rights, title and interest of Unum in the claim against the defendant is automatically and immediately ceded to

the Investec Securities. The defendant placed the underlying debt, the subject matter of the cession in dispute. Therefore the plaintiff had to establish the existence of the debt which became due and payable to Unum. I will deal with this debt later in this judgment.

[31] The court is satisfied that Mr Hamish Edward James had sufficient personal knowledge to depose to the affidavit for purposes of obtaining summary judgment. He stated under oath that he was the head of the business unit of Investec Prima Services. He stated that he is the person responsible for managing the business relationship between the plaintiff, Unum and the defendant. He was responsible for managing this business relationship on behalf of Investec Securities prior to 17 February 2020 when plaintiff took cession of the rights and obligations of Investec Securities. He stated that he had personal knowledge of the Service Agreement and its addendum.

[32] The lawfulness of a claim which was capable of being ceded will be dealt with herein below.

The “no notice” defence.

[33] This defence is premised on an interpretation of clause 25.3² of the Mandate Agreement. It was submitted that the “*may*” contained in this clause must be read as a “*must*” and that Unum was required to give 7 days’ notice before it could realize the defendant’s Financial Products.

² Clause 25.3 reads; “*Vunani Private Clients may at any time give the Client notice in writing that if a accrued debt is not paid within a period of not less than 7 (seven) calendar days of the date of the notice the Vunani Private Clients may without further notice realize sufficient of the Client’s Financial Products to discharge the debt. Any sum remaining after such a transaction will be held for the Client’s account subject to the aforesaid terms and conditions.*”

[34] Considering the text and the ordinary grammatical meaning of clause 25.3 then it cannot be found that clause 25.3 is either unclear or ambiguous. Despite this it was argued on behalf of defendant that when it becomes a matter for interpretation of a contract this should not be done at the summary judgment stage. It was argued that the leading of extrinsic evidence was permissible even in a case where a contractual clause was unambiguous. For this proposition defendant relied on the cases of *Natal Joint Pension Fund v Endumeni*³, *University of Johannesburg v Auckland Park Theological Seminary and Another*⁴ and *Capitec Bank Holdings Ltd & Others v Coral Lagoon Investments 194 (Pty) Ltd & Others*⁵. These cases made it clear that in certain circumstances a court can admit extrinsic evidence to assist a court to interpret a contract. For purposes of this judgment in this summary judgment application there is in my view no need to determine whether this is a case where extrinsic evidence should be resorted to to interpret the Mandate Agreement. The reason for this being that in summary judgment proceedings it was expected of a defendant to “disclose fully the nature and grounds of the defence and all material facts relied upon therefor.” What the defendant did was to set out the legal position in great detail but failed to provide facts or refer to any extrinsic evidence which may provide an indication to court that if that evidence is admitted this evidence may move a court to find that clause 25.3 should be interpreted contrary to its ordinary grammatical meaning. What the defendant did was to make reference to an available

³ 2012 (4) SA 593 (SCA)

⁴ 2021 [ZACC] 13

⁵ ZASCA 99 [9 July 2021]

interpretation aid, the leading of extrinsic evidence, when it comes to contractual interpretation but failed to provide any facts to show that this aid should be resorted to in this particular matter. Consequently, the defendant failed to disclose fully the nature and grounds of its defence and all material facts relied upon therefor.

[35] The defendant then referred to clause 13, and more particularly to clause 13.5⁶ of the Mandate Agreement, and argued that on Unum's interpretation clause 25.3 is rendered useless as it is in conflict with clause 13.5. Clause 25.3 has been quoted hereinbefore and provides that Unum may at any time give the defendant notice in writing that if accrued debt is not paid within a period of not less than 7 calendar days of the date of the notice Unum may without further notice realize sufficient of the Client's Financial Products to discharge the debt.

[36] In my view these two clauses are not in conflict. Clause 13 relates to "*Deposits/withdrawals form Client's Account*" which Unum would be authorized to do and clause 13.5 deals with a failure to pay *margin*. If this happens then Unum would immediately be entitled to close any position, trade and/or contracts of the defendant. Clause 25.3 deals with default to pay *accrued debt*.

[37] In my view 7 (seven) day notice was not required to be given upon failure to pay *margin* on call and the defence raised by defendant in this regard will not establish an arguable defence at trial. A *bona fide* defence was,

⁶ 13.5 "Notwithstanding the provisions of clauses 13.3 and 13.4 above, should the Client fail to pay any margin when payment is due as required by Unum, the Financial Product Provider and/or this Mandate, Unum is entitled to immediately close out one, or more or all of the positions, trades and /or contracts of the Clients."

pertaining to this issue, not raised by the defendant. This finding will also render the counterclaim unenforceable and nothing further needs to be stated in that regard.

Should the court nevertheless exercise its discretion not to order summary judgment?

[38] The court has one concern and that relates to an issue which came to the fore after the defendant filed its affidavit opposing the summary judgment application. This pertains to the denial of Unum, in its plea to the third party notice filed by defendant, that defendant was indebted to it. Unum sets out the terms of the Mandate Agreement and pleads that it only acted as an intermediary and agent for and on behalf of the defendant to open a trading account with Investec Securities and later with the plaintiff. If margin was not paid then Investec Securities could claim against the defendant as principal and not as cessionary. Add to this the undefined term “*vested interest*” used in clause 3.4 of the Service agreement describing the interest of Investec Securities in the performance of the “*underlying client*” (the defendant). The nature of this interest is unclear.

[39] This defence was argued before court but was not confirmed under oath. The court is not going to deal with the merits of this defence suffice to point out that the Mandate Agreement appears to provide a mandate to Unum to act as an *intermediary* and not as *principal*. If that is a correct interpretation then it becomes unclear whether Unum had a claim against defendant capable of being ceded. The plaintiff's claim is founded on this claim, originally that of Unum, which was ceded to Investec Securities and

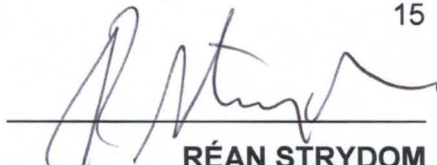
ultimately to plaintiff. The court cannot turn a blind eye to this issue as the possibility exist that the claim against defendant vested with Investec Securities and not in Unum. The party which dealt directly with defendant is stating this. This affects the validity of the cessions and the need for plaintiff to have placed reliance on the cession between Unum and Investec Securities.

[40] A reasonable possibility exists that there is a defect in the plaintiff's claim with reference to which party margin should have been paid. There is no allegation in the particulars of claim or in the plaintiff's affidavit that Unum paid this margin for and on behalf of defendant. Why did it become payable to Unum and not to Investec Securities where Unum conducted defendant's account as intermediary? These questions remain unanswered. This possible defect may have a straightforward answer but at this stage the court is uncertain about it.

[41] In my view the court should under such circumstances not shut the door on the defendant by ordering the drastic remedy of summary judgment.

[42] The following order is made:

- 42.1 Summary judgment is refused;
- 42.2 Leave to further defend this matter is granted to the defendant;
- 42.3 Cost to be cost in the cause.


RÉAN STRYDOM

JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

For the Plaintiff:

Adv. P. Chirone

Instructed by:

Werkmans Attorneys

For the Defendant:

Adv. L. Choate

Instructed by:

Mortimer Govender Attorneys

Date of Hearing:

17 February 2022

Date of Judgment:

01 March 2022