

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 6855/2020

<u>DELETE WHICHEVER IS NOT REPORTABLE:</u>	
1. REPORTABLE:	NO
2. Of interest to other judges:	NO
22/02/2022	
DATE	SIGNATURE

In the matter between:

INDUSTRIAL DEVELOPMENT CORPORATION
OF SOUTH AFRICA

Plaintiff

and

ENERGY FABRICATION (PTY) LTD

First defendant

SOUTHERN PALACE GROUP OF
COMPANIES (PTY) LTD

Second defendant

HARVEY SICELo BUTHELEZI

Third Defendant

LEFU LUCAS TSEKI

Fourth Defendant

MATJYANYANA GLADYS MATITOANE

Fifth Defendant

PAULOS SELLO MAHLANGU

Sixth Defendant

JUDGMENT ON LEAVE TO APPEAL

FLATELA AJ

Introduction

[1] On 16 November 2021 I granted summary judgment against the second defendant in favour of the plaintiff for payment of

- a. R122 008 447.38(Facility Agreement)
- b. R64 487 779.72 (Revolving Credit Facility)

1.1 Interest on the sums aforesaid from date of the certificates of balance, at the rate of 4% above the publicly quoted basic rate of interest per annum, compounded monthly in arrears and calculated on a three hundred and sixty-five-day year (irrespective of whether or not the year is a leap year) from time to time published by FirstRand Bank Ltd as being its prime overdraft rate as certified by any manger or divisional director of its First National Bank or Rand Merchant Bank divisions.

1.2 Costs of suit on a party and party scale.

[2] The Second defendant seeks leave to Appeal against the whole judgement.

[3] It is contended that I erred in granting summary judgement in favour of Plaintiff in respect of a further claim in the sum of R64 487 779.72 (in accordance with Prayer 1b of the Particulars of Claim which was based on the Revolving Credit Facility) which claim was abandoned by Plaintiff. The second defendant contends that the plaintiff advised the court at the commencement of argument that it is abandoning all claims for summary judgement save for its claim in the sum of R122 008 447.38

[4] It is further argued that I erred in not finding that the Application for Summary Judgement in respect of R122 008 447.38 was defective. The grounds of appeal appear in the notice of leave to Appeal, Heads of Argument and they were advanced during the argument.

[5] Section 17 of the Superior Court Act provides as follows:

3.1 '(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

- (a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

.....

.....

[6] On 21 January 2022 when the leave to appeal was argued, there was no agreement between the parties that the court made an error in granting summary judgement in this amount. The counsel for the plaintiff could not recall having abandoned the claim at the commencement of his address to court. I advised the parties that in the absence of an agreement regarding abandonment of claim; I will request the record of proceedings. Unfortunately, the record that was forwarded to me does not start at the commencement of the address by the plaintiff's counsel but starts in the middle of argument of the counsel for the plaintiff.

[7] According to my notes and recollection Counsel for the plaintiff advised the court at the commencement of his argument that the plaintiff was not pursuing any

relief against the first defendant and other respondents. He advised that the plaintiff is pursuing the claim against the second defendant and the plaintiff is seeking an order as it appears in their heads of argument at paragraph 88.1 and 88.2, interest at the rate of 4% and costs of suit on attorney and client scale. Paragraph 88.1 and 88.2 reads as follows:

88. Accordingly, the plaintiff asks this court to make an order in its favour in the following terms:

88.1 for payment of the sum of

88.1.1 R122 008 447.38

88.1.2 R64 487 779.72

[8] In their heads of argument the second defendant argued if one has regard to the definition of finance documents, on proper interpretation the guarantee is limited to the facility agreement and does not extend to the RCF. During his address to court the plaintiff's counsel dealt with this submission. He submitted that once the facility agreement is established then the monies are given in terms of the facility agreement, which is R125 million in this case, then there is a revolving credit that is given to make business operate. He went on to suggest that at best the second defendant should get leave to defend R64 million because there is an interpretation issue.

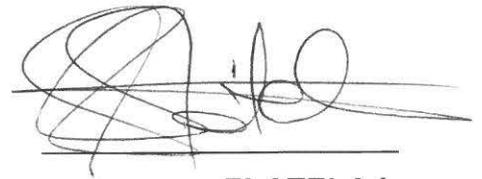
[9] I did not consider the plaintiff's counsel's submission to mean that the plaintiff was abandoning the RCF claim. It is the second defendant's counsel's interpretation of the plaintiff's submissions who suggested that the plaintiff had abandoned the claim. In his closing argument the plaintiff's counsel stated that he will be content with a judgement with the judgement of R122 008 447.38 plus interest.

[10] In my judgement I dealt with the interpretation and considered whether the Facility Agreement extended to RCF. I concluded that it does. To an extent that the summary judgement in the amount of R64 487 779 .72 may have been granted in error, there is a compelling reason why the appeal should be heard. The second defendant's application for leave to appeal in respect of this claim succeed.

[11] The application for leave to appeal in respect of summary judgement in the amount of R R122 008 447.38 is refused. I am of the opinion that the appeal has no reasonable prospect of success.

[12] In the result I make the following order:

1. Leave to Appeal against summary judgement in the amount of R64 487 779 .72 is granted to the full bench of the High Court of South Africa, Gauteng Local Division
2. Leave to Appeal against summary judgement in the amount of R122 008 447.38 is refused.
3. The costs of the application for leave to appeal will be the costs in the appeal.



FLATELA L

ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties' and/or their representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on 22 February 2022.

Date of Hearing:	21 January 2022
Date of Judgment:	22 February 2022
Counsel for Applicant:	Adv Cassim SC wihY. Alli
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