

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

Case Number: 34954/2021

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

28.06.23

In the matter between:

TRANSACTION CAPITAL BUSINESS SOLUTIONS (PTY) LTD Applicant

and

CSS – CRUSHERS SUPPORT SERVICES (PTY) LTD

First Respondent

JACOBUS REINIER FOURIE

Second Respondent

HESTER CATHARINA FOURIE

Third Respondent

JUDGMENT

Mia, J

[1] This is an application for relief in the following terms:

1. Payment of the sum of R109 602.61;

2. Interest on the amount of R109 602.61 at prime plus 8% calculated daily and compounded monthly in arrears on a 365-day year, from 25 May 2021 to date of final payment;

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

[2] The applicant, a credit provider, seeks judgment against the first respondent as the principal debtor as well as the second and third respondents as sureties and co-principal debtors. The respondents oppose the application and have filed a counterapplication seeking the following relief:

- a. requesting a full account supported by documents and vouchers of all of first respondent's debtors ceded to the applicant either collected as an asset or non-asset debt or in respect of which full collection remains outstanding, as well as monies received and disbursed as part of the invoice discounting and debtor maintenance service provided by the applicant to the first respondent during the period 1 November 2018 to date pursuant to the Memorandum of Agreement dated 6 March 2017;
- b. that the applicant be ordered to debate the said account with the first respondents from the date it was rendered;
- c. that the applicant be ordered to make payment forthwith to the first respondent following the debate of the account of whatever amount appears to be due to the first respondent;
- d. that in the event that the parties are unable to agree upon the outcome following the debate, they are ordered to jointly prepare a list of issues and to set the matter down for debate in court in which event the court will decide the matter of whether any monies are owed by the applicant to the first respondent and if so the quantum thereof;
- e. the parties are given leave to approach the court for further directions on the same papers, duly supplemented if need.

[3] The applicant is Transaction Capital Business Solutions (Pty) Ltd, a company duly registered in accordance with the company laws of the Republic of South

Africa, with its registered office at 26 Metlife Centre, 7 Walter Sisulu Avenue, Cape Town Western Cape Province. Its principal place of business is 9 Long Street, Cape Town Western Cape. The applicant was previously known as Rand Trust Financiers (Pty) Ltd. The first respondent is CSS- Crushers Support Serves (Pty) Ltd, a private company with limited liability with its registered office at 40 Sieg Kuscke Street, Sybrand Van Niekerk Park, Meyerton, Gauteng. The second respondent is Mr. Jacobus Reinier Fourie, an adult male businessman, residing at [...]Meyerton, which address is his *domicilium citantandi et executandi*. The third respondent is Mrs. Hester Catherina Fourie an adult female businesswoman who resides at [...], Meyerton, which is her *domicilium citandi et executandi*.

- [4] The following factual matrix is common cause or at least not seriously refuted. The applicant and first respondent, represented by the second respondent, entered into a written revolving credit facility agreement. In terms of the agreement, the applicant made a credit facility available to the first respondent in the amount of R 1 500 000. The interest rate was prime plus eight percent. There was no provision for an initiation fee or a monthly service fee. A review fee was applicable. The contract provided for default costs, including but not limited to tracing fees, debt collectors fees, attorneys fees on an attorney-client scale and collections costs.
- [5] According to the agreement, a default occurred in the event the respondent failed to make a payment on the due date, failed to comply with an obligation in terms of the agreement and persists in such failure. Default also occurred in the event of an act of insolvency, or where the respondent was commercially insolvent, or where the respondent is liquidated provisionally or finally, or steps are taken to commence business rescue proceedings. A further determination of a default is where there is a material deterioration in the first respondent's position as determined by the applicant reasonably exercising its discretion. The agreement also made provision for a certificate of balance signed by a director of the lender to determine the indebtedness of the first respondent. The certificate of balance was to serve as a liquid document.

- [6] In its founding affidavit the applicant stated that it made available the amount of R1 500 000 to the first respondent in terms of the agreement, the first respondent breached the agreement by failing to make payment in terms of the agreement. On 27 March 2020, it sent a notification to the first respondent, advising that it was entitled to demand repayment. It advised the first respondent of the arrear account and demanded payment of the outstanding amount within 30 days by 26 April 2020.
- [7] On 15 April 2020, the applicant sent a letter to the first respondent repeating the demand in the first notice and informed the first respondent of the applicant's election to call up the amounts due. The applicant afforded the first respondent the option of paying the full amount by 26 April 2020 or sixty days post the upliftment of the lockdown, namely 30 June 2020. The demand was repeated on 29 April 2020 and on 17 June 2020. A further option was afforded to the first respondent to either make payment according to the first two options alternately to convert the revolving credit facility to a fixed loan facility over a period not exceeding twenty-four months.
- [8] On 22 January 2021, the applicants, through its attorney, reiterated the demand, including costs and interest. This did not result in a settlement. Consequently, the applicants demanded R1 033 533.86 within seven days from the date of demand. On 21 May 2021, the applicant calculated the outstanding balance to be R 1 092 602.61 together with interest calculated at prime plus eight percent calculated daily and compounded monthly. The applicant relied on a certificate of balance attached to the affidavit and cancelled the agreement.
- [9] The second respondent bound himself as surety *in solidum* as a co-principal debtor jointly and severally with the first respondent for the full amount. The surety was fully enforceable despite that the first respondent might be placed in liquidation, business rescue, sequestration or curatorship. The respondents opposed the application raising five defences, namely that the respondent was not in default and the revolving facility could not be called up; secondly, that the respondent has a damages claim against the applicant for prematurely calling up the revolving credit facility; the third defence, that there may be monies

owed to the first respondent in terms of the invoice discounting agreement and this is to be set-off against the amount due in terms of the credit facility; the fourth defence, that the first respondent has a counter application seeking the rendering of an account and debatement in respect of the invoice discounting agreement; and finally that the applicant's certificate of balance was not signed by one of its directors.

[10] The parties agreed that the following issues were to be determined:

10.1 whether the applicant made out a case for relief?

10.2 whether a dispute of fact exists requiring the matter to be referred to oral evidence/trial?

10.3 whether set off can be applied?

[11] The first issue for determination is considered in relation to the agreement which the applicant has attached the founding affidavit. The respondents raised a number of defences in relation thereto. The defences are considered below.

[12] The first defence that the first respondent was not in default of its monthly repayments and that the credit facility could, therefore, not have been lawfully called up as it is disputed by the applicant. The applicant's response to the first respondents defence is that the credit facility can be called up on demand and that it was not necessary for the applicant to prove prior default on the part of the first respondent. The applicant placed reliance on two decisions: *Damont NO v Van Zyl*¹ and *Trinity Asset Management (Pty) Ltd v Grindstone Inv 132 (Pty) Ltd*². The Court in *Trinity Asset Management* held at para [102] that:

“...[T]he long-standing common-law rule that a loan without stipulation as to a time for repayment is 'repayable on demand'. But what does 'repayable on demand' mean? The court said that 'although by no means linguistically clear', the phrase means that 'no specific demand for repayment is necessary and the debt is repayable as soon as it is incurred'. The practical effect is this. When suing for repayment the creditor doesn't need to allege a demand: demand is not

¹ *Damont NO v Van Zyl* 1962 (4) SA 47 (C)

² *Trinity Asset Management (Pty) Ltd v Grindstone Inv 132 (Pty) Ltd* 2018 (1) SA 94 (CC)

part of the plaintiff's cause of action. After considering English, Canadian, Australian and New Zealand law, the court held that, unless the parties agree otherwise, a loan 'repayable on demand' is repayable from the moment the advance is made and that no specific demand for repayment need be made for the loan to be immediately due and repayable."

[13] Clause 7 of the agreement provides that the outstanding amount must be repaid in full on the expiry of the facility term as set out in Part A of the loan schedule. Part A provided for monthly payment via debit order. The first respondent contends that the facility was linked to an invoice discounting and debtor management agreement in terms of which the applicant collected debts on behalf of the first respondent. The applicant did not account fully to the first respondent for monies owing to the first respondent in respect of purchased invoices and collected invoices which amount to a substantial sum. The sum due to the first respondent is well over the amount due to the applicant by the first respondent. The first respondent relies, in any event, on the defences raised.

[14] According to the first respondent, the applicant required the invoice discounting agreement to be linked to the revolving credit facility as security and to ensure payment as it would have cession of the book debts. The parties never intended that the revolving credit facility would be payable by the first respondent from any other sources. The revolving credit facility would provide for repayment in instalments of R23 250 by way of a fluctuating number of instalments. The applicant was entitled to set off any amount owing by the first respondent by any amount due by the applicant to the first respondent in terms of clause 8 of the agreement.

[15] The first respondent indicates that only in the event of default could the applicant cause a written notice to be sent calling for an acceleration of the payment of the amount outstanding. The revolving credit facility did not provide for an acceleration of payment due under the agreement in the discretion of the applicant and without cause. Thus the first respondent contends the true nature of the revolving credit facility was a loan which the applicant was entitled to pay off at the agreed rate of instalment of R 23 250. In so far as the applicant

alleges the first respondent is in default, it relies on an agreement appended to its replying affidavit. An applicant cannot make out a case in its replying papers. This issue alone is dispositive of the application, and I need not address any of the other defences raised by the first respondent. Moreover, the applicant contends it has complied with the relief sought in the counterapplication in prayer (a) and tenders relief sought in prayers (b), (c), (d) and (e) in view thereof, there appears to be a dispute with regard to the amount due to the applicant and the amount due to the first respondent in terms of its counterclaim. The first respondent has requested that the issues be referred for oral evidence. The applicant did not disclose this in its founding affidavit. An applicant who chooses to proceed by way of application must establish its case in the founding affidavit to enable the respondent to properly respond thereto. The Court said in *Molusi and Others and Voges No and and others*³ at para [18]

“It is settled law that the purpose of pleadings is to define the issues for the parties and the court. In application proceedings, the affidavits do not only constitute evidence, but they also fulfil the purpose of pleadings. In other words, they must set out the cause of action in clear and unequivocal terms to enable the respondent to know what case to meet. This is the reason why an applicant is never permitted to change colours which he/she has pinned to the mast and plead a new cause of action in a replying affidavit. (See *Diggers Development (Pty) Ltd v City of Matlosana and another* [2012] 1 All SA 428 (SCA) at paragraph 18 – *Naidoo v Sunker* [2012] JOL 28488 (SCA)). A party is duty bound to allege in his or her affidavit all the material facts upon which it relies.”

[16] In *Digger Development (Pty) v City of Matlosana and Another*⁴ the Court said at para [18]

Before dealing with the issues we must express our disapproval in the manner in which the appellant compiled its founding affidavit. It is trite that in motion proceedings affidavits serve not only to place evidence before court but also to define the issues between the parties. In *Minister of Land Affairs and Agriculture and others v D and F Wevell Trust and others* 2008 (2) SA 184 (SCA)¹ at paragraph 43 [also reported at [2008] JOL 21213 (SCA) – Ed] Cloete JA stated:

³ *Molusi and Others and Voges No and and others* [2015] 3 All SA 131 (SCA)

⁴ *Digger Development (Pty) v City of Matlosana and Another* [2012] 1 All SA 428 (SCA)

“It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the

conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest - the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. The position is worse where the arguments are advanced for the first time on appeal. In motion proceedings, affidavits constitute both the pleadings and the evidence.”

[17] In view of the first respondent's counterclaim and the tender made by the applicant, the relief sought by the first respondent is necessary in order to determine what is due. The first respondent disputes that there has been a full account rendered with supporting documentation and invoices. Thus, it is necessary to refer the matter to oral evidence.

[18] Consequently, I grant the following order:

IT IS ORDERED THAT:

1. That the applicant shall render a full account within 30 (thirty) days from the date of this order, supported by all supporting documents and vouchers for each transaction of all the first respondent's debtors ceded to the applicant and either collected as an asset or non-asset debt or in respect of which full collection remains outstanding, as well as all monies received and disbursed as part of the invoice discounting and debtor maintenance service provided by the applicant to the first respondent during the period 06 March 2017 to date of this order.

1.1. The account described in 1 hereof to be debated until finality as per the prayers set out in the respondents' Notice of the Counter Application dated 26 October 2021.

2. That the following aspects as per the application and the counter application be referred to Trial:

2.1. Whether the applicant acted in terms of the Revolving Credit Facility Agreement by claiming that the full outstanding amount was due and payable upon demand.

2.2. Whether the applicant's actions in claiming that the full amount was due and payable amounted to repudiation of the Revolving Credit Facility Agreement.

2.3. Whether the amount due, if any, following the statement and debatement as per prayer 1 hereinabove is capable of being set-off against the applicant's claim as sought in the main application.

2.4. Costs of the action.

3. That the cost of the opposed application is hereby reserved for final determination by the Trial Court.

SC Mia
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant:

J.P Steenkamp
instructed by BDP Inc

For the Respondents:

J. Prinsloo
instructed by A Prinsloo Attorneys

Heard: 1 February 2023

Delivered: 28 June 2023