REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

_____ _____
DATE SIGNATURE

CASE NUMBER: 72572/2017

In the matter between

QINISEKA SOLUTIONS CC
(REG NO: 2007/252814/23) **Plaintiff**

and

SHAICON TENDERING SERVICE (PTY) LTD **First Defendant**
(REG NO: 2012/049739/07)

GODFREY THAPELO SHAI **Second Defendant**
(ID NO: [….])

JUDGMENT

MATSEMELA AJ

[1] The plaintiff is Qiniseka Solutions, a close corporation duly registered and incorporated with the provisions of the Close Corporations Act 69 of 1984 with its registered office at 247 President Street Johannesburg. The first Defendant is Chaicon Tendering Services PTY LTD a company duly incorporated and registered in accordance with Companies Act having its chosen *domicilium executandi* at 445 Steyn Street Pretoria North. The second Defendant is Godfrey Thapelo Shai an adult male having hiss chosen *domicilium executandi* at 445 Steyn Street Pretoria North.

[2] The Plaintiff's two claims are based on two loan agreements (hereinafter referred to as either the first or the second loan respectively) entered into between the plaintiff and First Defendant, and which were supported by a suretyship agreement signed by the Second Defendant. The Defendants allege that the loans have been repaid in full and that no monies are due and owing to the Plaintiff.

APPLICATION FOR AMENDMENT

[3] At the beginning of the trial Counsel for the Plaintiff brought an application by the Plaintiff to amend the particulars of claim as follows

"The suretyship agreement is contained in the written agreement already attached hereto as annexure "POC4" and specifically clause 8 thereof, Alternatively to the aforementioned second defendant bound himself as suretyship and co-principal debtor towards the plaintiff for the due and

proper fulfilment of the obligations of the first defendant in respect of the second loan agreement, which liability is extended from the deed of suretyship attached as annexure "POC4" and which liability was confirmed in annexure "POC4"

2

By deleting of the whole of paragraph 22

4

By inserting the following the following new paragraph 25 below renumbered paragraph 25

25.1 On or about 9 January, the first defendant and/or second defendant made payment to the Plaintiff in the amount of R300 000.00in respect of the first loan agreement

5

By replacing prayers 1 and 2 in respect of claim 1 as follows;

"1 Interest on R600 000.00 at a rate of 15% per month, computed monthly from 9 December 2017;

"2 Payment of the amount of R300 000,00 and the interest thereon at a rate of 15% per month, computed monthly from 10 January 2017 until the date of payment"

[4] At the end of the trial I requested both parties not to make oral arguments but file extensive heads of arguments. The Heads of Argument were supposed to be filed on or before the 6 July 2020. The Plaintiff's Heads of Argument were filed timeously however those of the Defendant's are to date not filed. More than a dozen attempts have been done to the Defendant's office via my registrar requesting the Heads of Argument but

to no avail and consequently I decided to proceed and write the judgement without their Heads of Argument.

THE FOLLOWING WERE COMMON CAUSE

[5] (a) The first loan agreement was entered into between Plaintiff and First Defendant on 8 September 2016. Payment was made by the Plaintiff to the First Defendant of R600,000.00. A suretyship agreement was entered into by the Second Defendant in terms of which he bound himself as surety for and co-debtor with the First Defendant for repayment of the loans;

(b) The second loan agreement was entered into between the Plaintiff and First Defendant on 15 December 2016; Payment of R100,000.00 was made by Plaintiff to First Defendant; Repayment towards the loan agreements were made, namely on 29 December 2016 payment of R280,000.00 and on 3 April 2017 payment of R23,000.00[1].

(c) That the first loan agreement was duly entered into and that payment of R600,000.00 was made to the Plaintiff in terms of this loan agreement.

(b) That the second loan agreement was also duly entered into and that the payment of R100,000.00 was made to the Plaintiff in terms of the second loan agreement.

(d) Two payments were made towards the Plaintiff, namely a payment of R280,000.00 on December 2016, and another of R23,000.00 made on 3 April 2017. As to whether these payments were made towards the loan agreements remains in dispute.

---

[1] CaseLines Section 002; page 002-15 and 16

LEGAL ARGUMENTS

[6] A third payment which was made to the Plaintiff by the Defendants in the amount of R410,227.64 made on 24 July 2017[2], was the main bone of contention. The Plaintiff alleges that the payment was made to him by the Defendants in relation to another agreement/transaction between the parties (the so-called "TWF agreement/transaction").

[7] The Defendant's counsel responded by saying that the payments which were made to the Plaintiff were payments towards the loan agreements, and that such payments were the last amounts due to the Plaintiff that settled all its liability vis-a –vis the Plaintiff. If the Plaintiff wanted to amend his particulars of claim as aforementioned, he should have filed a replication.

[8] Defendant's counsel further objected against the fact that the annexures of the plea were not contained in the pleading's bundles. He went as far as to allege that the exclusion of the annexures when they were loaded on caselines was malicious and requested the Court to reject the application to amend the particulars of claim outright.

[9] In reply the Plaintiff argued that a replication would have served no purpose where the Plaintiff would deny what the Defendants alleges (that the loan agreements were paid in full).

EVIDENCE

[10] Sibusiso Gcabashe testified on behalf of the Plaintiff and Godfrey

[2] CaseLines Section 002; page 002-17

Thapelo Shai on behalf of the Defendants.

PLAINTIFF'S EVIDENCE*:*

[11] Mr Gcabashe testified that he is the sole member of the Plaintiff' and the Plaintiff's business entails trucking and project management services. He was introduced to the Defendants via a mutual friend, one Thabang. The Defendants indicated to him that the First Defendant needed money for a certain project, and the Plaintiff indicated a willingness to borrow money to the First Defendant subject to a specific return that the Plaintiff wanted from the money loaned.

[12] To ensure a return on the money loaned, the Plaintiff insisted that a loan agreement be entered into, that interest be payable on the loan amount, and that the Second Defendant enter into a suretyship for repayment of the money in the event that the First Defendant is unable to do so.

[13] The parties entered into the first loan agreement and clause 8 thereof specifically made provision that the First Defendant's obligations are secured by the Second Defendant, as a surety and co-principal debtors.

[14] During December 2016, the First Defendant requested a further loan of R100,000.00 for the project as that the First Defendant was nearly done with. The Plaintiff agreed and insisted on another loan agreement which also contained a clause that secured the loan by having the Second Defendant be a surety for the amount borrowed. The signed suretyship agreement was received by the Plaintiff from the Second Defendant via

email on 29 September 2016. The second loan had the same terms as the first terms.

[15] The Defendants promised to repay the Plaintiff after the project was finished. The First Defendant made partial payment to the Plaintiff by paying R280,000.00 and R23,000.00 only, and the remaining amounts remain due and payable to the Plaintiff. The Plaintiff drafted the loan agreements, and his attorney drafted the suretyship agreement to strengthen the Plaintiff's legal case.

[16] Because of the business relationship between the parties, they entered into another agreement that pertained to a business venture separate from the two loan agreements, namely a project for an agent of Transnet, TWF. In terms of this agreement, the Plaintiff utilized the credentials of the First Defendant to secure a project of TWF, and the Plaintiff then proceeded to do the work on the TWF project under the name of the First Defendant.

[17] He testified that the parties did not agree to certain repayment terms or on a specific commission percentage for the First Defendant for utilizing the First Defendant's credential for the project, but that the Plaintiff would have to be paid for the project upon completion of same and for the work the Plaintiff actually did on the project.

[18] The First Defendant conducted no work on the TWF project except for having the First Defendant's name and credentials utilized. All the work on the TWF project was conducted by the Plaintiff, and the Plaintiff even paid the suppliers on the project directly. After the TWF project, the First Defendant received payment from TWF for the TWF project, and the First

Defendant decided to deduct commission of R18,500.00 from the amount paid, and paid over the remaining money to the Plaintiff.

[19] As a result of the abovementioned TWF project and the R410,227.64 paid to the Plaintiff after completion of the TWF project, the mentioned payment was not made towards the loan amounts, but a separate agreement between the parties pertaining to the TWF project.

[20] He testified that he emailed the Second Defendant and attached a quotation that the First Defendant had to insert onto its letterhead and which was to be sent to TWF. In Whatsapp communications between Mr Gcabashe and the Second Defendant on 5 May 2017, the amount for the quotation was confirmed as being R382,364.21. Mr Gcabashe confirmed the email address of the person at TWF to whom the quotation had to be sent, and the Second Defendant confirmed that it was indeed sent[3]

[21] In Whatsapp communications between Mr Gcabashe and the Second Defendant on 12 May 2017, the Second Defendant indicated that payment from TWF was not yet received. He provided him with the number of the person at TWF that be contacted[4]. Further communication about "the Transnet project" and payment thereof, was held on 24 May 2017[5]. On 30 May 2017, First Defendant was requested to forward the invoice to Transnet[6].

[22] He contracted suppliers on the TWF project and paid them. Then tax invoice of a certain supplier on the TWF project was confirmed. The

---

[3] CaseLines Section 003; page 003-1
[4] CaseLines Section 003; page 003-2
[5] CaseLines Section 003; page 003-3
[6] CaseLines Section 003; page 003-4

invoice was issued to the First Defendant, although the contact person was confirmed on the invoice to be "Ntokozo Hadebe", who is his wife[7]. He made payment of suppliers[8].

[23] He provided the First Defendant with a tax invoice on the 14 June 2017, which the First Defendant had to issue out a tax invoice to TWF. The particulars for the First Defendant's invoice to TWF was provided by the Plaintiff on 14 June 2017, and was for an amount of R428,727.64[9]. The First Defendant issued out an invoice to TWF for R435,872.40. The difference between the amount of R428,727.64 and R435,872.40 was for minor incidentals and expenditure that was incurred on the project, which had to be added to the eventual invoice to TWF.

[24] The final invoice to TWF from the First Defendant was in the amount of R435,872.40, and this amount was paid by TWF[10] [11] on 17 July 2017. On 18 July 2017 the Second Defendant confirmed in Whatsapp communication to him that "*your money was paid"* and that they *"must talk about the commission"*. The Second Defendant proposed that the commission must be R18,500.00. The Second Defendant indicated on 19 July 2017 to him that *"I need to transfer your money"*[12].

[25] On 20 July 2017, he corresponded via Whatsapp with the Second Defendant and indicated that the Second Defendant can deduct the R18,500.00 if he so insists, but requested that payment of the remained

---

[7] CaseLines Section 003; page 003-35-36
[8] Case lime Section 003; page 003-41
[9] CaseLines Section 003; page 003-13
[10] CaseLines Section 003; page 003-40
[11] CaseLines Section 003; page 003-66
[12] CaseLines Section 003; page 003-7

be made as suppliers on the TWF project must be paid[13].

[26] On 20 July 2017 the Second Defendant indicated that commission is payable for using the First Defendant's credentials. The Second Defendant then also requested settlement amounts on the loan agreements[14]. On 21 July 2017, the Second Defendant *again* indicated to him that "*I want to pay in your TWF money"*.

[27] In addition, Second Defendant also requested settlement amounts on the loan agreements[15]. In answer to the request for settlement amounts on the loan agreements, he indicated that he would give same in future, and that giving such settlement figures at that stage would serve no purpose, as the money held by the First Defendant was money in respect of the TWF project.

[28] On 24 July 2017, First Defendant made payment of R410,227.64. On 31 August 2017, after payment of the R410,227.64, the Second Defendant indicated to him that he is still awaiting possible approval of a bank loan and payment from clients, and as soon as something comes through, he will make payment[16].

[29] On 8 January 2018, Second Defendant emailed him and indicated that he has not yet received payments, that he is expecting payment and want to make arrangement pertaining to repayment.

[30] Under cross examination, Mr Gcabashe remained persistent with his

---

[13] CaseLines Section 003; page 003-8
[14] CaseLines Section 003; page 003-8
[15] CaseLines Section 003; page 003-9
[16] CaseLines Section 003; page 003-10

version and was not impugned. He persisted that it was clear that the payment of R410,227.64 was made immediately after payment from TWF was received and

that the money paid to the Plaintiff was for the TWF project's compensation and not repayment in terms of the loans. When the Defendant's version was put to Mr Gcabashe, he reiterated his version. His version was not successfully challenged at all.

[31] In re-examination, Mr Gcabashe confirmed that he did not give the Defendants any settlement amounts on the two loans during the time that the TWF money was received by the First Defendant.

DEFENDANT'S EVIDENCE

[32] The Second Defendant testified that he entered into the two loan agreements with the Plaintiff after having been introduced to Mr Gcabashe via a mutual friend earlier. He believed having repaid the Plaintiff in full in respect of the loan agreements.

[33] He denied having entered into any other *agreement* with the Plaintiff or Mr Gcabashe in respect of the TWF project, and persisted that it was an *arrangement* between the parties, where he assisted the Plaintiff. He indicated that only the two loan agreements existed between the parties, and no one else.

[34] He indicated that if there was any obligation towards the Plaintiff, the Plaintiff ought to have issued out an invoice to him, and he would then have paid. He confirmed that he quoted to TWF on the TWF project on behalf of the Plaintiff as he assisted the Plaintiff to get the project under the name of the First Defendant. He confirmed that Mr Gcabashe made all

the payments of suppliers on the TWF project.

[35] He testified that after the TWF project, the Plaintiff and First Defendant had not agreed on how the profits would be shared and until this day have not decided on how the profit would be shared, and that the parties must still do so. He acknowledges that the First Defendant still owes money to the Plaintiff in respect of the TWF project, but that they must first decide how the money must be shared. [36] He testified that where he made reference to “commission” in the Whatsapp communication, he was referring to the TWF project. He further testified that because no agreement was reached about the commission and the profits, such agreement must still be made until this day. He confirmed that the money paid to the First Defendant on 17 July 2017 was received from TWF for the TWF project. [37] He confirmed having requested settlement figures of the two loan agreements during the time that the TWF money was received, because he was then in a position to settle the loans. He testified that the TWF payment was “at an early stage” and because there was no agreement on how the money must be shared, he was ready to settle the loans. He testified that he wanted to make payment in respect of the loans first and then discuss the sharing of the TWF money.

[38] He testified that he made payment that he believed covered the amount outstanding under the loan’s agreements. He never received a breakdown of the amount payable under the loan agreements. He is still willing to discuss payment terms of the TWF money. He testified that although the references on the payments to the Plaintiff differed, they all

pertained to the repayment of loan agreements.

[39] Before moving on to the aspect of cross-examination, I posed various questions to the Second Defendant during his examination-in-chief, but which questions remained mainly unanswered by the Second Defendant. I even requested the Second Defendant to confirm that he indeed consulted with his own his attorney, as he seemed to not remember answers to questions posed to him by his own attorney.

CROSS EXAMINATION

[40] During cross examination of the Second Defendant confirmed that he entered into a suretyship agreement annexed to the particulars of claim, and that the suretyship covered his liability in respect of both loan agreements.

[41] The Second Defendant confirmed that neither of the Defendants conducted any work on the TWF project, that the Plaintiff conducted all work on the TWF project. The Second Defendant also conceded that the Plaintiff had to be compensated for the work done, subject to commission payable to the First Defendant.

[42] The Second Defendant denied that the commission to be deducted from the TWF money, was agreed upon between the parties and persisted that they did not agree to how it was to be distributed.

[43] He was asked how he arrived at the amount paid to the Plaintiff. He responded by saying that he made the deduction from the TWF money received (R435.872.40). He also made deduction of an interest calculation he made on the loan agreements. He made those deductions on his own volition. However, it was put to him that the amount he indeed paid over to

the Plaintiff (R410,227.64) was the amount of the Plaintiff's first invoice (R428,727.64[17]) minus the R18,500.00 commission he proposed be deducted[18], which equalled to exactly the amount he paid to the Plaintiff. He could not give a clear answer to this submission.

[44] The Second Defendant persisted with the contention that he arrived at the amount of R410,227.64 based on his own interest calculation on the loan agreements, despite it being put to him that this is false and despite him failing to show to Court how such calculation was made or the amount was arrived at.

[45] The Second Defendant persisted that the parties never agreed on what amount should be repaid to the Plaintiff, despite it being put to him that he unilaterally decided to deduct R18,500.00 in respect of commission from the total amount reflected on the first invoice of the Plaintiff, and despite his unilateral decision being proved by documentary evidence. He denied the contention that he is being dishonest in Court.

[46] The Second Defendant was requested to explain the basis upon which he decided that the TWF money he received, could be earmarked for payment of the loan agreements. He initially was very evasive and failed to answer, but then testified that the TWF money could not be distributed yet, as there was no clarity about the payment of VAT and income tax to SARS.

[47] It was put to him that this was not testified about in his examination in chief and that he is changing his version. He did not answer to this contention.

---

[17] CaseLines Section 002; page 002-39
[18] CaseLines Section 002; page 002-7

[48] When he was asked whether the TWF money ever became the money of the First Defendant, he testified that payment in respect of the TWF project could not be made because there was no agreement yet about the distribution amongst the parties.

[49] When he was questioned about the TWF money, he conceded that there was no agreement about how the money should be shared, and despite him conceding that agreement had to be reached, and thus that there was more than just an agreement between the parties, he persisted with his refusal that there was an agreement between the parties.

[50] Despite it being put to the Second Defendant that there was an agreement between the parties where the First Defendant would receive monies on behalf of the Plaintiff, where commission was payable, etc., the Second Defendant remained steadfast that there was no agreement.

[51] In re-examination, the Second Defendant testified that he would never have paid over any money to the Plaintiff before first deducting what is due to SARS.

ANALYS OF FACTS

[52] On the issue of suretyship both Defendants had no less than three versions on it. Both Defendants denied the suretyship agreement in their plea [19].The Defendants then changed their version during the pre-trial conference to allege that the deed of suretyship related to another agreement between the parties[20].Counsel for the Defendants, in his opening address indicated on the morning of the trial, that the suretyship

[19] CaseLines Section 001; pages 001-42 to 001-43
[20] CaseLines Section 006; page 006-7; paragraph 7.3.4

agreement is admitted and not in dispute anymore, and the Second Defendant in his testimony confirmed such.

[53] Mr Gcabashe was a good and credible witness. He testified with sincerity and reliance can be placed on what he told the Court. He did not falter in cross-examination and his evidence was not discredited in any sense. He persisted with his testimony throughout and his testimony was corroborated with the documentary evidence before Court. His version ought to be accepted above that of the Second Defendant's testimony.

[54] The Second Defendant was an extremely evasive witness who failed to give straight answers, and at times simply did not answer the question at all. Furthermore, he failed to sufficiently answer certain questions by elaborating on irrelevant matter in his answers.

[55] Furthermore, even after a certain and obvious impugning of the Second Defendant's version, he simply persisted with it despite glaringly untruthful. If one considers one example would be the manner in which he arrived at the R410,227.64 paid to the Plaintiff: Second Defendant persisted that he made his own interest calculation on the loan agreements, could not recall the calculation, and upon a very simple maths calculation on the TWF transaction was showed exactly how he arrived at the amount, and which showed that he paid over money in respect of the TWF project and not the loan agreements, he still refused to concede that he made payment of the R410,227.64 in terms of an interest calculation he made.

[56] The Second Defendant could not explain to Court why he was entitled to allocate and earmark the TWF money he received to payment towards

the loan agreements. Despite the Court and writer hereof requesting his answer on many occasions, he simply failed to give a proper explanation for same.

[57] The Second Defendant refused to concede or acknowledge that he unilaterally decided to deduct R18,500.00 as commission from TWF money received, and persisted therewith that the parties never reached an agreement about how the TWF money must be shared.

[58] This Second Defendant's version is highly improbable and highly unlikely. It remains unproven and is not corroborated by any documentary evidence. In fact, it is heavily contradicted by the Plaintiff's oral and documentary evidence, the documentary evidence which Defendants did not place in dispute.

[59] There are clear differences between the references on the bank statements in respect of the payments to the Plaintiff. The first two payments are clearly referenced as "loan" and the third, contentious payment is not so earmarked. The Second Defendant's version on this discrepancy is improbable.

[60] The Second Defendant's outright refusal to acknowledge an agreement between the parties in respect of the TWF project (where commission was payable, monies to be repaid to the Plaintiff, etc.), is a further indication of how dishonest witness the Second Defendant was. The Second Defendant's testimony was dishonest, unreliable and improbable and should be outright rejected.

LEGAL FRAMEWORK

[61] In evaluating evidence the following was stated in *Stellenbosch Farmers Winery Group Ltd & Another v Martell ET Cie and Others*[21]*:*

"…The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.

As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.

As to (b), a witness reliability will depend, apart from the factors mentioned under (a)(ii), (iv) AND (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof.

As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step,

---

[21] 2003 (1) SA 11 (SCA) Nienaber JA 14I-J-15A-D

determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[62] It is clear from the evidence that the TWF project and the two loan agreements were never to be consolidated with one another, and that the payment of R410,227.64 very clearly related to the TWF transaction/agreement/ arrangement between the parties. The Defendant intended to pay the Plaintiff in respect of the TWF project alternatively such payment was made in respect of the TWF project and did not relate at all to the repayment of the loan agreements repayment.

[63] It is in my view that the probable chain of events after the TWF money was received by the Defendants, is that the Defendants considered the first invoice provided by the Plaintiff (R428,727.64), unilaterally decided what the commission would be (R18,500.00), communicated this to the Plaintiff, made such deduction, and then made payment of the remainder to the Plaintiff (R410,227.64).

[64] The Defendants have failed to provide the Court with another basis for arriving at the exact amount paid over to the Plaintiff. The Plaintiff never provided the Defendants with a breakdown of the amounts due in terms of the loan agreements. It was not disputed that the money received by the First Defendant on 17 July 2017 is TWF money for the TWF project. The Defendants have failed to give any basis for the Defendants becoming

entitled to unilaterally decide how the TWF money would be distributed.

[65] The Defendants have been deceitful in their initial dealings with the Plaintiff and has continued such deceitfulness in their litigation against the Plaintiff, where they have changed their versions, failed to comply with court rules and persisted to trial with their futile defence.

[66] The Defendants' unilateral decision to earmark the payment of the TWF money for payment towards the loan agreements, is deceitful untruthful and ought to be rejected.

[67] The allegation that the Defendants would not have paid over the money without first deducting whatever is due to SARS does not hold water because:

(a) It is not in line with what the evidence of the Plaintiff shows;

(b) Taxpayers are to pay to SARS such VAT amounts due after having considered all VAT input and output amounts, which is an eventual calculation made at the end of a two cycle, and not an immediate payment;

[68] First Defendant was only entitled to deduct commission. It is the Plaintiff that had to pay VAT to SARS in terms of the money received into its accounts. It is my view that the Second Defendant created such version during cross-examination and that he did not include such evidence in his examination in chief.

[69] The Defendants indicated to the Plaintiff during August 2017 and January 2018 that monies are still due and it is my view that such pertained to the loan agreements outstanding money and not the TWF money.

[70] I am of the view that the evidence of the Defendants should be dismissed on the basis that it is improbable and untruthful. I accept the version of the Plaintiff, which is corroborated by documentary evidence.

THE AMENDMENT SOUGHT BY THE PLAINTIFF

[71] The Plaintiff served a notice of intention to amend its particulars of Claim on 19 June 2020[22]. The Defendants did not file any objection to the proposed amendment. The Plaintiff uploaded the amended pages, containing the proposed amendments, onto the Caselines system[23] on 23 June 2020, in terms of which the parties proceeded with the trial hearing on 29 June 2020.

[72] Counsel for says that in preparation of this trial realised that the amended pages, and specifically paragraph 25.1 thereof, is inaccurate insofar as the payment of R300,000.00 is concerned. Testimony confirmed the payment of R280,000.00 on 29 December 2016 and R23,000.00 on 3 April 2017 respectively, which amounts to payment by the Defendants in the amount of R303,000.00 and not R300,000.00 only. Furthermore, the payments made were not made on 9 January 2017, but as per the date aforementioned.

[73] Furthermore, the Defendants were placed in possession of all the discovered documentation for a substantial period before trial, and could not have been prejudiced by the Plaintiff not filing a replication, as the Plaintiff's documentary evidence was at all times available to the Defendants very well knew about all the facts that the Plaintiff testified

[22] CaseLines Section 005
[23] CaseLines Section010

about**.**

[74] It is trite that the Court may amend pleadings at any time before judgement and the Court was requested to do so. The proposed amendment would not prejudice the Defendants and, in fact, would benefit the Defendants as the claim amount would be lessened by the amendment.

[75] The Court stated in *Myers v Abramson*[24] that there is no reason in principle why an amendment should not be granted, provided it does not result in prejudice or injustice which cannot be cured by an order for costs.

[76] I am of the view that a replication would have served no purpose where the Plaintiff would deny what the Defendants allege (that the loan agreements were paid in full). Furthermore, the Defendants were placed in possession of all the discovered documentation for a substantial period before trial, and could not have been prejudiced by the Plaintiff not filing a replication, as the Plaintiff's documentary evidence was at all times available to the Defendants very well knew about all the facts that the Plaintiff testified about. It is my view that a replication was not necessary and all of the evidence before Court is sufficient to sustain the Plaintiff's cause of action and thus did not need to be elaborated on in pleadings.

[77] The Plaintiff proved the existence of the TWF project and the other agreement between the parties by referring the Court to various discovered documents in the Plaintiff's trial bundle, which has been discussed above. Mr Gcabashe confirmed this, in his testimony by referring to those documents.

[2424] 1951 (3) SA 438 (C)

[78] The oral evidence presented to the Court, is In line with the documentary and the relief sought ought to be amended insofar as paragraph 25.1 and the prayers are concerned. The Court grants the amendment accordingly.

COSTS OF THE RESCISSION APPLICATION

[79] This Court was informed at the trial hearing that costs of an interlocutory rescission application had to be adjudicated at trial as such issue was reserved for argument at trial.

[80] On 16 March 2020, the Acting Deputy Judge Potterill Issued out a directive[25] in terms of which the costs of the interlocutory rescission application ought to be argued at trial. I was requested by the Plaintiff in of the heads of argument that such argument is to be made in writing as opposed to orally.

[81] A bundle with the relevant documents is contained on the CaseLines system under Section 009, where the application to compel, court order and rescission application are contained.

[82] An application to compel was served by the Plaintiff on the Defendants' correspondent attorney on 21 May 2019 (proved by a stamp and dated by the receiving attorneys). The application to compel was based thereon that the Defendants have failed to comply with a Notice in respect of Rule 35(3) since service thereof on 8 August 2018 (failed to comply of more than 1 year).

[25] CaseLines Section 002; page 002-88

[83] The application was proceeded with on that basis and was never opposed; the court order was granted on 2 October 2019. The court order was formally served on the Defendants on 15 November 2019.

[84] A rescission application (seeking to have the order to compel rescinded) was served on 11 December 2019 (almost a month after the court order was served), and the application had an unopposed date of 10 September 2020 (9 months later), whilst the trial was set down for 15 April 2020 (4 months later). The rescission would thus have been heard some 5 months after the trial and might have led to a postponement of the trial, which the Plaintiff avoided by approaching the office of the acting DJP for assistance.

[85] The rescission application was brought on the basis that the application was not served on the Defendants attorneys, which is entirely false. The Defendants attorney has a correspondent on record, where all documents of record thus far were served. In addition, the Defendants indicated that they were willing to comply with the Rule 35(3) notice, and thus the reasoning behind the application was fatally flawed.

[86] It is my view that the application was an attempt to avoid the trial date of 15 April 2020, and that there was no proper basis for the application to have been instituted. The Defendants were properly served and where they failed to comply for more than one year, the Plaintiff was entitled to bring the application. In addition, the Defendants contention that they are willing to comply, indicates that there is no *bona fide* defence showed for a rescission to actually be granted.

[87] The Defendants failed to comply with the notice in terms of Rule 35(3)

for more than one year. The Rule 35(3) notice sought the Defendants to provide the Plaintiff with the First Defendant's bank statement to prove that the payment of TWF was indeed paid into the First Defendant's bank account, and the bank statement formed a crucial part of the trial proceedings.

[88] The Defendants thus failed to show good cause at all by failing to indicate wilful default or *bona fide* defence. The rescission was only agreed to by the Plaintiff in order to avoid an unnecessary postponement of the trial.

[89] The Defendants filed no replying affidavit to clear up any of the issues raised in the opposing affidavit. The Plaintiff has been forced to file opposing papers in a fatally flawed interlocutory application that is based on a falsehood which was clearly disproven.

[90] Counsel for the Plaintiff submitted that the false allegations contained in the rescission application was introduced by the Defendants attorney of record and not the Defendants themselves. The rescission application is litigious and procedural in nature and does not concern the instruction of the Defendants to their attorney.

[91] The rescission application did not have to be served on the Defendants but on the Defendants attorneys of record as they were acting as such. It is Defendants attorneys are to blame for what transpired and for instituting such application, not the Defendants. I agree.

[92] It is trite that where an attorney has displayed a lack of care, the courts have awarded de bonis propriis costs.[26] I am of the view that this is

[26] Masidi v Chemical Industries National Provident Fund Case No: 16/24267 13-12-2016

an ill-considered application which was brought by the attorney and not the party and I therefore grant the costs thereof *de bonis propriis* .[27]

COSTS OF THE ACTION

[93] The Defendants have persisted with their improbable and untruthful defence throughout the litigation, and specifically since the end of 2017. The Defendants have caused the Plaintiff to incur many legal fees to bring an action to finality, and which action was defended on an untruthful and unjustified basis from the start.

[94] Defendants clearly disregarded the Court's rules and procedures throughout litigation, one example being the disregard of a notice in terms of rule 35(3) for more than 1 years, and necessitating an application to compel. The Defendants then went further by launching a fatally flawed and futile rescission application, which is based on literal dishonesties, and which caused the Plaintiff to the approach the Court for assistance to prevent the rescission application leading to postponement of the trial date.

[95] At the pre-trial conference held on 4 June 2020, the Plaintiff requested the Defendants to make a settlement proposal, but the Defendants indicated that there is none[28]. It is my view that the Defendants ought to never have allowed this action to proceed to trial, especially with such an untruthful defence.

[96] As mentioned above, the Defendants had three versions about the suretyship of the Second Defendant. This shows how disingenuous the

---

[27] Le Car Auto Traders v Degswa 10138 CC 2013 JDR 1651 (GSJ)
[28] CaseLines Section 006; page 006-4; paragraph 3.2

Defendants were throughout the litigation. It also caused unnecessary prejudice to the Plaintiff in preparing for the trial, because the Plaintiff prepared for trial on the basis that the suretyship agreement is denied, only for same to be admitted literally a few minutes before the trial's commencement.

[97] It is my view that whilst the Defendants alleged during the pre-trial conference that the suretyship related to another agreement between the parties, the Plaintiff's further discovery affidavit[29] dated 22 June 2020, clearly proved the date on which the Second Defendant sent the suretyship agreement to the Plaintiff, proved it related to the loan agreements, and as such, could not continue to deny same anymore.

[98] The Plaintiff should not be out of pocket by having to compensate its legal representatives for any expenses incurred during the litigation, and same should be paid for by the Defendants, who unnecessarily caused this action to proceed on trial, which ought to never happen in light of the Defendants deceitful defence. I therefore award punitive costs against the Defendants.

[99] I am dissatisfied with the Defendant's conduct throughout the litigation. The suretyship agreement provides that the Second Defendant will be liable for payment of attorney and client costs should the Plaintiff incur costs to implement the surety's obligations.[30] I therefore grant costs of the action against the Defendants on attorney and own client scale.

PROOF OF PAYMENT OF R100, 000.00

---

[29] CaseLines Section 008
[30] CaseLines Section 1; page 001-25; clause 11

[100] During the trial proceedings, and specifically during the Second Defendant's examination-in-chief, the Second Defendant alleged that he has in his possession proof of payment of R100,000.00 that was paid to the Plaintiff.

[101] The Plaintiff did not object to same being handed up. The Defendants did not request the Court or the Plaintiff to obtain the Plaintiff's comment or instruction thereon and the aspect was not persisted with.

[102] I am uncertain about what the Defendants intended to achieve with handing same up. The Defendants did not seek for their Plea to be amended by introducing the payment of R100, 000.00 as further payment towards the loan agreements that the action revolves around.

[103] The payment of the R100, 000.00 was not canvassed with Plaintiff's witness in his cross-examination. It was introduced at the eleventh hour in Second Defendant's examination and where no amendment of the Defendants plea was sought, the proof of payment was not of any real consequences insofar as Second Defendant's cross-examination is concerned. I am going to disregard the proof of payment as it does not form part of the pleadings and is irrelevant to the issues that I have considered.

Having said that I therefore make the following order:

(a) The application for amendment is granted accordingly.

(b) The costs of the rescission application are granted against the Defendant and such costs are to be paid de bonis propriis

(c) Payment of interest on the amount of R600,000.00 from 9 December

2016 to 29 December 2016.

(d) Payment of interest on the amount of R320,000.00 from 30 December 2016 to 3 April 2017.

(e) Payment of R297,000.00 together with interest against the First and Second Defendants jointly and severally, the one to pay the other to be absolved.

_____

MOLEFE MATSEMELA

Acting Judge of the Gauteng Division of the

High Court, Pretoria

Delivered: This judgment 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 e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 20 May 2021.

Date of hearing: 29 June 2020 and 17 July 2020

Date of Judgment: 20 May 2021

For the Plaintiff Adv Keijser

Instructed by EW Serfontein and Associates

For the Defendant Mr Mashele

Instructed by Mashele Attorneys