HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 48631/2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 4 JULY 2022

SIGNATURE

In the matter between:

SMALL ENTERPRISE FINANCE AGENCY SOC LIMITED — Plaintiff

and

RAZOSCAN (PTY) LTD — First Defendant

MENDISWA OEDIRETSE MZAMANE — Second Defendant

Summary: Contract – enforcement of a bridging loan from a state owned entity

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ORDER

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1. The defendants are, jointly and severally, the one paying, the other to be absolved, ordered to pay the plaintiff the amount of R 3 100 726, 46.

2. The above amount shall further bear interest at the rate of 18,8% per annum from 9 December 2015 to date of payment.

3. The defendants are, jointly and severally, ordered to pay the plaintiff's costs on the scale as between attorney and client.

4. The defendants' attorneys shall not be entitled to recover the trial portion of their fees from the defendants, but only that of counsel.

JUDGMENT

This matter has been heard in open court and disposed of in the terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

This case is primarily about how an emerging black businesswoman got done in by an unscrupulous supplier of oranges intended for export. This happened when the businesswoman, to use her own words, decided it was time that a small business like hers "*gets its fair shake from Government*" and she obtained a bridging loan from the Small Enterprise Finance Agency Soc Ltd (Sefa) in 2015.

[2] Procedural history

Sefa instituted action against Razoscan (Pty) Ltd (Razoscan), also trading as BTN Mondial and Ms Mzamane, as its sole director, shareholder and surety. This was done as long ago as 20 June 2016. Since then there has been numerous delays and postponements, changes of attorneys and counsel for the defendants and some procedural lapses on their side. Eventually the case was referred to case management in 2021. This resulted in a proposed hearing in December 2021. At that time, the trial was, yet again, postponed at the request and instance of the defendants. Numerous directives regarding discovery, amendments and the like were breached by the defendants. Eventually, on 17 February 2022, being almost six years after the original plea, the defendants delivered a notice to amend their pleadings. This led to a case managed opposed interlocutory hearing. The proposed amendments which conflated delictual and contractual causes of action, the attempted withdrawal of admissions and the belated raising of a vague counterclaim which has become prescribed, were all refused. This was done in a separate written judgment of 4 March 2022. Due to the seriousness of the nature of a defence based on alleged fraud, the amendments regarding such a proposed defence were allowed. Amended pages of the plea were delivered on 17 March 2022 and the trial commenced on 22 March 2022.

[3] The facts

Despite previous tactical maneuvering and some opaque pleading on the part of the defendants, the essential facts were largely undisputed. Their chronology and the terms of the agreements which were concluded by the parties form the necessary backdrop against which the plaintiff's and the defendants' cases must be adjudicated. These facts can be summed up as follows:

3.1 In 2015 Ms Mzamane decided that it was time to get into the business of

exporting fruit from South Africa to the Middle East. Neither she nor Razoscan had any experience or track record in this or any related business but "everyone" agreed that, as she put it, "*a black businesswoman exporting South African produce will be good business*".

3.2 Her enthusiasm was, however, daunted a bit when her bankers, First National Bank (FNB), declined to extend credit to fund this venture, despite her having spoken to FNB Group CEO at the time. FNB's hesitance had something to do with a lack of proper business plans, absence of security and the fact that no definitive supplier had even been identified at the time. The bank suggested Ms Mzamane obtain some "development funding" and the bank would assist with expertise, banking services and the like and re-assess its position some six months down the line.

3.3 This is how the defendants got to Sefa. Sefa's only witness, Mr Malatji explained that Sefa is a government agency which funds, supports and develops small and medium enterprises. In order to qualify for funding, in the form of a loan or, more specifically in the case of Razoscan, a short term (60 days) bridging loan, one has to jump through many hoops. Similarly as with FNB, those hoops involve the presentation of business plans, calculations of profitability and determination of feasibility. Mr Malatji as an investment officer for Gauteng, tried to put a deal together for the defendants.

3.4 An application for funding is scrutinised by a credit analyst, Sefa's legal section and others. In this instance, where Ms Mzamane had obtained offers to purchase fruit from a buyer in Dubai, the veracity or seriousness of those offers, the availability of suppliers to meet the demand and the verification of the products also had to be checked. For this purpose Sefa relied on advice from the IDC, who has access to experience in these kinds of exports.

3.5 Once an application is complete in all its respects, it is presented to Sefa's decision-making body, its Management Committee (Mancom). For a loan of the size applied for by Razoscan, at least three of the Mancom members must approve it. This did not happen in the first couple of submissions of Razoscan's applications. Ms Mzamane said this and all the hoops Sefa required Razoscan to jump through caused her extreme frustration and the delays allegedly cost her the loss of numerous suppliers.

3.6 Ms Mzamane then even went to the DA shadow minister of small business development who then went to the actual minister who then, according to her, reported "*in Parliament*" that the proposed scheme had less than 1% profitability or 0,04% chance of profitability. She then demanded via FNB a meeting with Sefa where she, according to her in less than five minutes, convinced a senior official from Sefa, Mr Rian Coetzee, that Sefa had it all wrong. According to her Sefa then backtracked. Nothing of this version of Ms Mzamane was put to Mr Malatji in cross-examination and this was all new evidence. Be that as it may for now, Sefa still demanded verification that the product which Ms Mzamane's supplier would supply for export, would match the requirements of the buyer in Dubai. This is when a globally known company, SGS was suggested as an independent verifier. Mr Malatji testified that this suggestion came om Ms Mzamane. She did not dispute this.

3.7 On 24 July 2015, Sefa's Mancom approved Ms Mzamane's application for a bridging loan in order to pay a supplier to export oranges for Razoscan to Dubai. On 6 August 2015 Ms Mzamane accepted the bridging loan.

3.8 The "conditions precedent and undertakings" contained in the letter and accepted by Razoscan, included the following:

- *"A detailed fruit purchase order from the fruit importer, viz Floral Fruit LLC (inclusive of price, fruit specification, volumes, quality etc) to be provided.*

- *Proper invoice from the fruit supplier viz RSA Group International.*

- *An amended Purchase Agreement with RSA Group International ... .*

- *Independent confirmation of alignment of order with the fruit in the containers in terms of variety, quantum and quality by SGS.*

- *Confirmation from FNB that they will manage and disburse funds received from the importer directly to Sefa's account*".

3.9 Razoscan provided Sefa with three purchase orders from Floral Fruit LLC for fresh oranges (Valencia or navel). These were dated 5 – 7 September with proposed shipment dates which ranged from 14 – 28 September 2015.

3.10 Similarly, a Sale/Purchase agreement was produced, entered into between Razoscan and Cosmo Fruit (Pty) Ltd (who apparently replaced RSA Group International as supplier). This agreement was signed by Ms Mzamane on behalf of Razoscan on 8 September 2015.

3.11 Ms Mzamane had sent a proforma invoice from Cosmo Fruit (Pty) Ltd (Cosmo Fruit), issued to Razoscan on 17 September 2015 for 24 tons of oranges at R 2 868 000, 00 (R 119 50 per box of oranges).

3.12 Pursuant to all the above, Sefa and Razoscan entered into a Developmental Bridging Loan Agreement with each other. Ms Mzamane has signed the

agreement on 17 September 2015 and Sefa's authorised signatory counter-signed the agreement of 21 September 2015. Mr Malatji signed as a witness. The relevant clauses to the dispute were highlighted by Mr Malatji to be the following:

Clause 3.1 - Sefa as lender agreed to lend to Razoscan a "loan amount" as a bridging loan.

Clause 1.16 - The "loan amount" was that indicated in the "Loan Sheet".

Loan Sheet – The Loan Sheet was separate document, being Annexure "A" to the agreement. It was also signed on behalf of Sefa and by Ms Mzamane, indicating a loan amount of R 2 868 000,00 and a "total repayment amount" after certain fees and interest had been added, of R 3 100 726, 46.

Clause 5.2 – This provided that "*interest shall be calculated from the date on which the first advance/disbursement of the Loan is made by the Lender to the Borrower and shall be calculated daily on the Amount Outstanding and compounded monthly ...*".

Clause 9 – This clause contains the conditions precedent. Clause 9.1 thereof relates to the furnishing of formal documents, FICA requirements and the like and clause 9.1.4 subjects the borrower (Razoscan) to the "*furnishing (of) the Lender with certified copies of the relevant order(s) and/or contract(s) relating to the transaction being financed ... to the Lender's satisfaction*".

Clause 9.2 – This relevant part of the conditions precedent provides that the Lender (Sefa) "*... shall not be obliged to advance any*

monies ... unless all the conditions precedent have been fulfilled or waived by the Lender in its sole and absolute discretion ...".

Clause 9.6 – This clause confirmed that the purchase of oranges will be from Cosmo Fruit (and no longer the supplier initially mentioned in paragraph 3.8 above).

Clause 9.8 – The condition precedent contained in this clause is one of the most relevant to the dispute in this matter. It reads: "*Independent confirmation of alignment of order with fruit in the containers in terms of variety, quantity and quality by SGS*". This condition was echoed by a similar term contained in the Loan Sheet.

Clause 11 – This clause provided for the method of payment referring to a "drawdown request" from the "Borrower" and contemplated the introduction of a "Nominated Service Provider", which in this case, was First National Bank (FNB). Mr Malatji explained that Sefa was not a commercial bank and could not disburse foreign exchange. The loan would be paid into an account held for Razoscan at FNB who would not only disburse the foreign exchange, but also receive payment and pay Sefa and Razoscan. A separate agreement between FNB and Razoscan was needed to facilitate this.

Clause 11.3 – This obliged Razoscan to repay the loan amount in accordance with the projected repayment schedule which, in turn, projected a repayment date of 15 November 2015.

Clause 11.4 – This clause reads: "*The onus shall rest on the Borrower to*

provide correct and accurate information and the Lender shall not incur any liability for incorrect information provided by the Borrower".

Clause 22 – This clause provided for the production of a certificate of balance, which shall be *prima facie* proof of Razoscan's indebtedness at any given time. It further provided that "... *in the event that the Borrower disputes the correctness or accuracy of any aspect of the contents of the certificate, the Borrower shall be obliged to adduce evidence in rebuttal and the onus to lead and prove such rebuttal evidence shall similarly rest on the Borrower*".

3.13 On the same day that the Development Bridging Loan Agreement was signed, Ms Mzamane provided Sefa with a written Deed of Suretyship. The suretyship was unlimited, witnessed by Mr Malatji and complied with all statutory prescripts.

3.14 On 23 September 2015 the parties agreed to amend paragraph (c) of the Loan Sheet of the agreement which previously read *"Independent confirmation of alignment of order with fruit in the containers in terms of variety, quantity by SGS"* to *"Independent confirmation of alignment of order with fruit containers in terms of variety, quality and quality by Cosmo Fruit (Pty) Ltd Impart-Expert"*. As a result hereof, SGS fell out of the picture as independent verifier. The amendment letter, which was counter-signed by Ms Mzamane on behalf of Razoscan, also provided that *"any disbursement by Sefa, in terms of the agreement, shall only be effected upon receipt of a duly signed Collection Agreement ...*,".

3.15 On 30 September 2015 a Collection Agreement was concluded between Sefa

(as Lender), FNB and Razoscan (as Client). It provided for a separate "CTF Collection Account" to be managed by FNB in the name of Razoscan and described the "Payment process" as follows:

"*3.2.1 The Lender will disburse the loan contemplated in the Financing Agreement on behalf of the Client into the CTF Collection Account upon receipt of written instruction from the Client requesting the Lender to effect such disbursement, and*

3.2.2 FNB will disburse funds from the CTF Collection Account to the Supplier upon receipt of an independent confirmation (by Cosmo Fruit Proprietary Limited) confirming that the Purchase Order is consistent with the goods supplied by it, in terms of variety, quantity and quality".

[4] The chronology relating to the payment

4.1 After all the agreements referred to above had been put into place, an e-mail message from one Nico Vosloo from Sitco Leading Inspection (Pty) Ltd (Sitco) to one Yanni at Cosmo Fruit on 30 September 2015 indicated that a quality control report indicated that citrus fruit had been inspected and found to be of good quality to export to the Middle East. A copy of the report was annexed, detailing the particulars of 30 samples, identified by pallet numbers, reflecting various specifications as to variety, colour and quality.

4.2 Yanni is apparently a reference to Ioannis Ntinos, the managing director of Cosmo Fruit. He forwarded the abovementioned e-mail to Ms Mzamane at 14h28 of 30 September 2015.

4.3 Ms Mzamane in turn forwarded the e-mails to the Head of Sefa's Gauteng Region, one Bonga. Her e-mail read: "*Dear Bonga, the report has been*

done on the sampling of 30 of a total of 600 pallets. The results of the sampling have been summarized below by SITO. The same will be performed in Dubai where random samples of the fruit will be done". Mr Malatji was copied on this e-mail.

4.4 The emails were apparently circulated internally within Sefa up to 6 October 2015, inter alia by Mr Malatji. By that time no disbursements have yet been made.

4.5 On 6 October 2015, Ms Mzamane forwarded the quantity control report again to Bonga (at 18h54) and thereafter to FNB bank officials, copying Mr Malatji and others (at 21h31).

4.6 On 7 October 2015, at 12h58, Mr Malatji reported to Rian Coetzee, FNB and other officials at Sefa as follows: "*I have looked at the email hereunder that Mendi sent to us yesterday. If you go down on the chain letter, you will see a narrative by Nico Vosloo (Sitco Inspection-Quality Manger) where he explains the details of the fruit inspection as he gives account of the inspection. Is this explanation not in line with provision 3.2.2 of the Collection Agreement*"? (Mendi is a reference to Ms Mzamane).

4.7 On 7 October 2015 at 13h48 Mr Ntinos e-mailed Mr Malatji, copying Ms Mzamane, requesting an email response indicating what documents Sefa would need to release payment. This apparently led to a discussion between Mr Ntinos and Mr Malatji.

4.8 Within 20 minutes, at 14h06 Mr Malatji responded by way of sending a letter on a Sefa letterhead via email to Mr Ntinos. The letter reads: "*Thanks for making the time to talk to us regarding finalising the independent confirmation of the fruit order. As mentioned to you, this request for obtaining independent confirmation is guided by clause 3.2.2 of the*

Collection Agreement that was signed by the three parties (Sefa, FNB and Razoscan). The clause reads as follows ... (it is then quoted). It is from this point that the email explanation from Nico Vosloo is not acceptable to Sefa and FNB. As per over discussion, please get an independent confirmation that will:

- *Give independent confirmation of alignment with the fruit in the containers.*

- *State that the above is in terms of variety, quantity and quality.*

- *The letter must be signed by duly authorised signatory and must be on company letterheads (sic).*

Let me know should you need any further information as we look forward to finalising this deal to ensure that funds are released".

4.9 At 14h39, still on 7 October 2015, Mr Ntinos reported to Mr Malatji per email as follows: "*I have sent it to Sitco. Nico has resigned and works for Cape Citrus now. His replacement will do it. Paepae, I do not want any stories regarding time. 15h00 they will do transfer, immediate transfer today, please arrange it now, Paepae*" (Paepae is a reference to Mr Malatji's first name).

4.10 At 16h16 on 7 October 2015, Ms Mzamane sent an e-mail to various addresses at Sefa including Mr Malatji as well as to the Sefa Executive: Direct Lending, Mr Rian Coetzee and others from FNB with the subject: "Letter from Surveyor". The contents of the email reads: "*Dear All, Please find attached letter as per clause 3.2.2 in collection agreement. Please action payment as criteria has been met to your specifications. The fruit needs to go now*".

4.11 The attachment to the above email was a letter on a Sitco letterhead, on the face of it from Sitco's Departmental Manager one Nashlin Stephen. The contents read as follows; "*This letter serves to inform you that we have executed the SITCO inspection on behalf of Cosmo Fruit (Pty) Ltd for the 300 pallets of Oranges (Midnights that are packaged in 15 kg telescopic cartons, wrapped, sizes 72 & 88 and are a category 1) that are allocated to Cosmo Fruit (Pty) Ltd which are stored at ECS Cold Storage in Durban and we confirm that the quality of fruit is good to be exported to the Middle East market since all specifications are in line with the requirement to do the export*".

4.12 At 17h33 on 7 October 2015, Mr Malatji sends an email to FNB, asking as follows: "*We refer to the Inspection Confirmation Letter that we received from Sitco this afternoon and would like to know if all is in order for you to release the finds*".

4.13 The next morning, at 08h54 on 8 October 2015 FNB informed Mr Malatji that "*Sefa needs to confirm to the bank that they are happy with the wording and on Sefa's confirmation that they are happy with the wording, Sefa will then authorize the Bank to pay out the said funds*".

4.14 By 11h52 on the same day a Mr Chauke (who had at all relevant times been copied in all the preceding mails) confirms on behalf of Sefa that "*Razoscan has complied with the provisions of clause 3.2.2 of the Collection Agreement as per the attachments and Sefa hereby according instructs FNB to disburse the funds*".

4.15 Hereafter proof of payment documents confirm that the funds were released to Cosmo Fruit on 8 October 2015 in the amount of R 2 868 000,00.

[5] Failure to repay

5.1 The bundle of discovered documents contained correspondence which follow upon the non-receipt of the expected purchase price from the Middle East and Mr Malatji's unsuccessful attempts at getting a response from Cosmo Fruit. These were, however not referred to directly in evidence. In cross-examination (and follow-up re-examination) two engagements with Cosmo Fruit were dealt with.

5.2 Chronologically, the first of these engagements, was an email sent by Mr Ntinos to Mr Malatji on 14 December 2015 (that is shortly after the expiry of the 60 day bridging period envisaged in the agreements). He wrote: "*Paepae, 30 minutes ago Harvey from FNB called on speaker phone and screaming: what r u going to do? So I repeat myself that the money was given middle October and agreement between Cosmo and BTN Mondial was signed early September so the market change therefore you did not pay on time, you were in bridge of the agreement and BTN Mondial and I will send you a new greener or I will refund you the money due to you and BTN Mondial and when after the opening of our office 18th January 2016*".

5.3 Apparently Cosmo did not make good on its promises and Sefa and Mr Malatji were informed by Ms Mzamane of her responses to Mr Ntinos. These included a letter by her to Mr Ntinos on of 4 January 2016 which reads as follows (Mr Malatji was copied on the letter): "*This letter is in reference to the current status of our agreement. We are expecting a response from you regarding out last telecon and written communication. As Richard Harvey stated on behalf of all of us in attendance at the meeting referred to in your mail, we are demanding our money back. You provided us with a fraudulent letter. We have proof of this both in writing from Sitco and per telecon with them. The balance of funds which you state are with the farmers is another lie and constitutes theft. A forensic audit will be*

performed to prove this. We are giving you the opportunity as Richard of FNB stated, to come clean and tell us when you are repaying the funds. We are all aware of the fraud, theft you have committed from other Cape based entities. The recent removal of logos from your site by Captains of industry we are well aware of. The potential fraudulent claims you have made from insurance we are fully briefed on. Interestingly the mentioning of R1, 4 million as under the table bribe could add the charge of extortion to the list. Government of South Africa has all the tools at their disposal, Hawks/Interpol and the NPA are currently handling this issue as a matter of urgency. You will not steal from us, be rude to us and somehow in your warped thought process, feel you are entitled to get away with it. We want that money back now".

5.4 The "documentary proof" that Ms Mzamane referred to, was apparently a letter from Sitco, dated 7 October 2015, indicating that an inspection "will be executed". It differs in this respect from the letter quoted in paragraph 4.11 above. Another difference was that the Sitco company stamp on this letter is perfectly legible, while on the letter quoted in paragraph 4.11 the stamp is somewhat garbled. Also, where Mr Nashlin Stephen's signature is contained in this letter, on the one referred to in paragraph 4.11, a printed initial appears (which may not even be his). This "documentary proof" has however not been discovered by the defendants and was only included in a bundle of documents belatedly "dumped" on Caselines at a late stage of the trial proceedings. Mr Malatji testified that he had never seen this letter prior to the trial. Neither he nor anyone at Sefa ever been shown this letter. He exclusively relied on the exhortations made by Ms Mzamane and the letter attached to her e-mail (being the one quoted in paragraph 4.11 above) when payment was authorised.

5.5 No action for recovery of the money had ever been instituted against Cosmo Fruit by Razoscan and it has subsequently emerged that Cosmo Fruit was provisionally liquidated on 29 August 2016 and subsequently finally liquidated on 12 October 2016. Razoscan has also not lodged a claim in the insolvent estate, for reasons unknown.

[6] Is there a defence?

6.1 As already previously indicated, the defendants have amended their plea shortly prior to the trial. This amendment was effected on 16 March 2022.

6.2 All the terms of the agreements relied on by Sefa were admitted in the plea, although some of them in a somewhat roundabout fashion. In respect of the due date for repayment, the defendants pleaded as follows: "*The defendants deny the contents of this paragraph and refer to the terms of the development bridging loan. Provisional final repayment date as being 15 November 2015. This is in the light of the pressure imposed by the Plaintiff on the transaction for a time sensitive commodity and potential changes in schedules such as shipping. So the date of final repayment was subject to change as stated in the plaintiff's term sheet. This is further reflected in annexure A26 referred to as the provisional schedule*".

6.3 No evidence was lead about this aspect by the defendant. The only subsequent reference to these dates appear from the calculations reflected in the certificate of balance. In terms of the agreement, interest was calculated on the loan amount at 13,8% pa. This would be on the bridging period of 60 days. Initially this would have expired on 15 November 2015. Thereafter, if the amount was not repaid, penalty interest would be added, raising the rate to 18, 8% pa. The facts, however indicated that, as the loan was only advanced on 8 October 2015, the repayment date would be 8 December 2016.

6.4 The defendants' principal defence and the one which has survived the objections to the amendment to their plea, due to the seriousness of such allegations in respect of a state owned entity such as Sefa, are the following:

> "*12.2 On 7 October 2015, the Plaintiff received a letter from SITCO saying "This letter serves to inform you that we <u>will be executing the SITCO inspection</u> of behalf of Cosmo Fruit (Pty) Ltd for the 300 pallets of oranges ...".*
>
> *12.3 This letter looked regular on the face of it and was duly signed by the Department Manager – SITCO, Nashlin Stephen, and bearing the SITCO stamp.*
>
> *12.4 On the very same date, 7 October 2015, the plaintiff purportedly received a second letter from the SITCO saying "This letter serves to inform you that <u>we have executed the SITCO inspection</u> of behalf of Cosmo Fruit (Pty) Ltd for the 300 pallets of Oranges ...".*
>
> *12.5 The plaintiff was fraudulent or alternatively complicit in the fraudulent act, when its employees simply accepted the second letter confirming execution of the inspection of the fruit issued and dated same as the first one without making any effort to confirm the authenticity of the second letter ...*
>
> *12.6.1 Accordingly, the Defendants submit that:*
>
> *12.6.1 the Plaintiff's loss was due to its fraudulence or complicity in the fraudulent act, and was therefore self-inflicted. Consequently, the*

Defendants had no role and are not liable for the loss suffered by the Plaintiff" (the underlinings were made in the pleading itself)

6.5 This theme of collusion and fraud was repeated twice more in the pleadings in a similar manner.

6.6 The allegations of fraud and collusion were not put to Mr Malatji in cross-examination. They were, despite this, repeated by Ms Mzamane when she testified. They were also repeated even after Ms Mzamane and her counsel had been warned of possible consequences of making defamatory statements without any foundation.

6.7 In respect of the written instructions to disburse the funds and the confirmation of the fulfillment of clause 3.2.2. of the collection agreement referred to in paragraph 4.10 above, the defendants pleaded as follows:

"*16.1 The Defendants deny that on 7 October 2015 or on any other date the First Defendant represented by the Second Defendant instructed Plaintiff or the FNB to disburse the loan amount from the CTF collection account to Cosmo.*

16.2 The email written by the Second Defendant at 16h16 on 07 October 2021 acting on behalf of Razoscan (Pty) Ltd was addressed to the officials of SEFA and not to FNB (but only copied to officials thereof) ...

16.3 Accordingly, the Defendants submit that it is common cause that the request for payment by FNB to the supplier came from the Plaintiff and not from the Defendants, and the Plaintiff was acting fraudulently, resulting in the loss of the bridging loan amount and

profits which First Defendant would have obtained had the wrongful conduct of the Plaintiff not occurred".

6.8 The purported defence pleaded in the abovequoted paragraphs 16.1 and 16.2 not only fails to disclose a defence, but is not supported by the facts and the contents of the e-mail itself. The request for payment by Sefa was as a direct result of the instructions from Ms Mzamane and was made in terms of the agreements between the parties, including FNB.

6.9 The allegation of fraud on the part of Sefa as pleaded, is also at odds with Ms Mzamane's own stated view at the time, namely that it was Cosmo Fruit and Mr Ntinos who had perpetrated the fraud on Razoscan. There is not a single shred of evidence available from the documents generated at the time, that Sefa or any of its officials had acted fraudulently in requesting the disbursement of funds.

6.10 Ms Mzamane was the sole witness for the defendants. She was, to put it bluntly, a bad witness. She was garrulous and argumentative and repeatedly refused to answer the questions put to her. I make this finding with little hesitation as she displayed this attitude and manner of testifying even when doing so in chief and prior to any cross-examination.

6.11 Ms Mzamane testified that, after she had approached the then Group CEO of FNB and after FNB had declined to fund Razoscan's venture, FNB still was "very frustrated" by the issues of profitability raised by Mr Malatji as part of his and Sefa's due diligence exercise. After her meetings with the ministers as referred to in paragraph 3.6 above, she met with the "top guys" in Sefa, including Rian Coetzee. According to Ms Mzamane, Mr Coetzee conceded that Sefa had "stuffed up" (Ms Mzamane actually used more florid language) by not immediately having approved Razoscan's loan application. She testified that, after the eventual approval of the loan, the

search for a new supplier commenced. She then "zoomed in" on Cosmo Fruits.

6.12 In respect of the letter of 7 October 2015, referred to in paragraph 16 of her plea, (and in paragraph 4.10 above) she testified that, despite the wording of her letter, all she had done was to "forward" the letter to Sefa. She said she did it from her i-pad as she was probably "on the road". She alleged that this email was preceded by another email containing "verbage" and that all that Sitco had done, was to put it on their letterhead.

6.13 Ms Mzamane was asked (still in chief) about the reference to clause 3.2.2 in her email. She said this was "the last mile" and "the last thing outstanding" before the funds could be disbursed. She went on to state that, when Mr Malatji had received the letter from Sitco, containing independent "confirmation", that "*this has nothing to do with me. I don't have to tell them how to do their job. Rian said he needed confirmation. I don't need to tell him how to get independent confirmation. I am not involved. It has absolutely nothing to do with me. I don't even know why I'm here*".

6.14 Contrary to the email trial indicating that Sefa and Mr Malatji were not satisfied by the mere production of the inspection report of Nico Vosloo (referred to in paragraph 4.1 above), Ms Mzamane stated that it was the undisclosed letter referred to in paragraph 5.4 above that Sefa was unhappy with. This is the letter that Mr Malatji said he has never seen. Ms Mzamane maintained that there was an email indicating that this letter had been sent. Despite numerous "searches" no such email could be found. At one stage Ms Mzamane even alleged that copying deficiencies in discovered documents indicate that Sefa (or the practitioners who had

prepared the documents) must have excised such an email from the document trail.

6.15 Ms Mzamane testified that she obtained copies of bills of lading prior to the oranges arriving in Dubai and a query from the buyer in Dubai as to why Class 2 oranges were sent and why only 1 container when more had been ordered. She said that she contacted FNB who then "took over from there".

6.16 Ms Mzamane confirmed being present at the meeting with FNB on 15 December 2015 when Richard Harvey confronted Mr Ntinos. After that discussion she said, one Maboa "from IDC legal" said "they" cannot expect Ms Mzamane to pay. She was advised to go to the police and lay a charge of fraud and theft against Cosmo Fruit, which she did.

6.17 Ms Mzamane also went on a diatribe about how a parliamentary portfolio committee has found that 88% of loans to black people to liberate them, "go this way". She explained that this meant that "*it is a trend of Sefa to collude with middlemen*". She them accused Sefa of employing large firms of attorneys such as Werksmans "to muzzle litigants". Needless to say, her evidence prompted numerous objections against her making wild and unsubstantiated defamatory statements.

6.18 After initially being obstructive in cross-examination, Ms Mzamane, after having been taken through the sequence of correspondence listed in paragraph 4 above, conceded that she was "the thread". She said: "its fine, now it is clear". She still maintained, however, that her e-mail mentioned in paragraph 4.10 above was a mere "sharing of information". She also maintained that, despite the wording of the agreements between the parties, Sefa had a "vetting" obligation in respect of Sitco's report. Ms Mzamane did, however, concede that in terms of clause 11.4 of loan agreement she

had the onus to provide correct and accurate information to the Lender. The moment after having made this concession, she contradicted it. She said: "*it may be in the agreement, but the onus is not on me*" and that she was not supposed to be involved in the process of the release of the funds.

6.19 During the remainder of her cross-examination, Ms Mzamane remained arrogant, un-cooperative and obstructive on numerous occasions. She maintained that she and Razoscan had been defrauded by Sefa by allegedly intentionally having accepted a falsified letter from Sitco. She maintained this stance despite she having been the one who insisted that, based on that same letter, the funds be disbursed. Insofar as Mr Malatji's evidence is questioned by Ms Mzamane, I find him, and not her, to be a credible witness.

6.20 After the close of the defendants' case, the matter stood down for argument to 24 March 2022. During the course of this argument, counsel for the defendants conceded that there was "not a shred of evidence" indicating any fraud or collusion on the part of Sefa or any of its officials. In an attempt to ascertain how those allegations came to find its way into the belated amended plea, counsel indicated that it was at the instance of Ms Mzamane but conceded that no evidence had even been pointed out during consultation.

[7] Conclusions

7.1 In my view, Sefa has proven its case on a balance of probabilities. It is clear from the evidence, corroborated by the trail of e-mails, that Ms Mzamane had, on behalf of Razoscan forwarded and submitted the letter obtained from Cosmo Fruit as proof of compliance with clause 3.2.2 of the Collection Agreement. She had the onus in respect of the submission and correctness of documents and she insisted that this document be relied on

and that payment be made. The defendants are bound to the terms of the agreements they had voluntarily concluded. See inter alia *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel & Tour and Others* 2011 (3) SA 511 (SCA).

7.2 Even after the event, when Cosmo Fruit's non-compliance or possible fraud came to light, she (correctly) held the view that Razoscan's recourse lay against Cosmo Fruit. Why this was never pursued, has not been explained. Any fraud on the part of Cosmo Fruit cannot constitute a defence to Sefa's claim. See *Karabus Motors (1959) v Van Eck* 1962 (1) SA 451 (C).

7.3 Ms Mzamane's persistent allegations of fraud and collusion against Sefa and its officials are defamatory and devoid of any evidentiary support.

7.4 There is no dispute about Ms Mzamane's accessory liability as a surety for Razoscan.

7.5 The date of the increased rate of interest must be adjusted from that reflected in the certificate of balance.

7.6 There is no cogent reason why costs should not follow the event. In terms of the agreements between the parties, the scale of costs shall be as between attorney and client.

7.7 Counsel for the defendants laboured valiantly in attempting to pursue the defendants' defence, unmeritorious as it was. He was in this task abandoned by his attorney. At times, when he needed instructions or assistance regarding un-discovered documents, there was none. When asked about this, Adv Mlisana disclosed that the attorney who had handled the defendants' matter had resigned two months prior to the trial and that

"somebody new" had taken over the file. This feeble explanation on behalf of the attorneys is not acceptable and even less does it justify an absence from the trial proceedings. The defendants' attorneys' fees for the trial should be disallowed. See in this regard the considerations mentioned in, inter alia, *De Sousa v Technology Corporate Management* 2017 (5) SA 577 (GJ) from [350] onwards and *Makuwa v Poslson* 2007 (3) SA 84 (TPD) at [15] and the cases listed there.

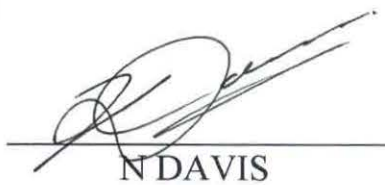
[8] Order

1. The defendants are, jointly and severally, the one paying, the other to be absolved, ordered to pay the plaintiff the amount of R 3 100 726, 46.

2. The above amount shall further bear interest at the rate of 18,8% per annum from 9 December 2015 to date of payment.

3. The defendants are, jointly and severally, ordered to pay the plaintiff's costs on the scale as between attorney and client.

4. The defendants' attorneys shall not be entitled to recover the trial portion of their fees from the defendants, but only that of counsel.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 22 – 25 March 2022

Judgment delivered: 4 July 2022

APPEARANCES:

For the Plaintiff:	Adv L Kutumela
Attorney for the Plaintiff:	Werksmans Attorney, Johannesburg c/o Mabuela Attorney, Pretoria
For the Defendants:	Adv M Mlisana
Attorneys for the Defendants:	N Gawala Incorporated, Pretoria