IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN
Thursday, 10 May 2012

CASE NO: 20105/2011

In the matter between:

ANTHONY BRYN RUSSELL	Plaintiff
and	
ONE VISION INVESTMENT 443 (PTY) LTD	First Defendant
MICHAEL JOSIAS DU PLESSIS	Second Defendant
JOHANNES LODEWIKUS BOUWER	Third Defendant
IGNATIUS LEOPOLDUS ROSSOUW	Fourth Defendant
HENDRIK JOHANNES BASSON	Fifth Defendant

J U D G M E N T

Weinkove A.J.

1. In this matter Plaintiff instituted an action against First Defendant as the principal debtor and Second, Third, Fourth and Fifth Defendants as sureties for payment of the sum of R2.4 million. Defendants entered an Appearance to Defend and Plaintiff applied for summary judgment.

2. Plaintiff's claim is based upon a written agreement of loan which was concluded in April 2011. The terms of that loan agreement was that Plaintiff would lend to First Defendant the sum of R2.4 million and the

capital, together with interest, would be repaid on or before 1 August 2011.

3. The written agreement further provided that repayment had to be made without any deduction or settlement for any reason whatsoever and that First Defendant was not entitled to withhold any payments notwithstanding the existence of any dispute which may arise from any cause whatsoever.

4. Finally, there is an entrenchment clause which records that the written agreement is the whole agreement between the parties and that no variation of that agreement shall be of any force and effect unless it is reduced to writing and signed by the parties.

5. Defendants rely upon a written memorandum of understanding ("MOU") which was concluded on 21 April 2011 and which specifically refers to the written loan agreement concluded between the parties.

6. That MOU gives Plaintiff an option to take up shares in First Defendant. The MOU further provides that it is envisaged that certain further funding would be required by First Defendant and it is envisaged that that funding would be secured by Plaintiff. The MOU furthermore provides that until a new agreement dealing with that funding is concluded, the loan agreement is to remain of full force and effect. Defendants do not allege that a further agreement was in fact concluded, but rely on exchanges in correspondence between the parties to the effect that Plaintiff certainly

had a future intent to provide funding. I agree with Plaintiff's Counsel that the MOU is a recordal of a future intent and that in the absence of a final agreement between the parties, the terms of the loan agreement remain of full force and effect.

7. The loan agreement unequivocally obliges Defendants to effect payment of the debt on 1 August 2011 and that that payment cannot be set off or delayed for any reason otherwise than in terms of a new formal agreement. That agreement was not finalised, it was not concluded and it was certainly not reduced to writing in any manner which would amend the terms of the main loan agreement.

8. Mr De Vries on behalf of Defendants, sought leave to appeal against my judgment *inter alia* on the basis that I had rejected the contention that the MOU created binding rights and obligations. He relied on clause 9 of the MOU which provides as follows:

> "9. **The terms of this Memorandum of Understanding shall be in force until such a time as the Parties enter into an agreement in writing that will set out the future relationship between the Parties and that agreement shall incorporate the principles and terms as set out herein.**"

To my mind, this clause underscores my belief that the MOU is of a provisional nature and that a written agreement will be necessary to create binding obligations between the parties. It is nothing more than an understanding between the parties of their future intention.

9. I am also unpersuaded by the contention that the fact that Plaintiff purchased a 50% share in First Defendant created an obligation to secure funding for certain projects. Clause 3 must be read in the context of the whole MOU and it is merely a recordal of Plaintiff's intention to seek funding for certain projects.

10. As far as my failure to find that Defendants have a counterclaim for specific performance is concerned, I am unpersuaded by Counsel's submission that it is not necessary for the purposes of opposing summary judgment to detail the counterclaim in all its respects. In support of this contention Counsel relied upon the case of ***Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 (6) SA 29 (SCA)**. That case neutralises this argument because in paragraph 10 of the Judgment (p 34), the Court held as follows:

> "**In order to be successful in a defence, the defendant must, of course, comply with the provisions of Rule 32(3)(b), which requires a full disclosure of the nature and the grounds of the counterclaim as well as the material facts upon which it relies.**"

The Court emphasised that failure to comply with the said sub-rule does not preclude the Court from the exercise of its discretion to refuse summary judgment.

In the present case, the lack of particularity and detail in connection with this counterclaim is such that far more detail is necessary to establish a binding obligation on behalf of Plaintiff to secure the funding referred to and to show that Plaintiff deliberately or negligently or recklessly failed to

secure such funding. The other terms of the MOU point convincingly to the agreement that the securing of this funding was envisaged and, if successful, would require further agreements to be concluded.

11. In paragraph 25, p 39 of the ***Soil Fumigation*** matter, the Court recorded that it:

> **"should be less inclined to exercise its discretion in favour of a defendant in a matter such as this where the answer to plaintiff's claim is raised in the form of a counterclaim as opposed to a defence to the plaintiff's claim in the form of a plea. Moreover, and in any event, a Court can only exercise its discretion in the defendant's favour on the basis of the material placed before it and not on the basis of mere conjecture or speculation."**

Applying this test, the Appeal Court held that the counterclaim did not have merit and the summary judgment was rightly granted.

12. I am satisfied that the MOU is a statement of a future intent and is not a binding or enforceable agreement to invest large sums of monies for particular developments. No dates are furnished for this funding and the "Vinyard" proposal is so vague and improbable as to proclaim its own absurdity. How does one arrive at a figure of R107 million by funding R200 000.00 per month? Why has there been no formal demand by Defendants in connection with Plaintiff's alleged failure to provide funding as agreed? Also, how can Defendants rely on the email dated 9 May 2011 which states that:

> **"We obviously would prefer to have you as a partner and allow you to provide the financing as soon as possible. Please let**

us know what your current expectation is regarding the availability of the payment guarantee.....".?

These words are not commensurate with the suggestion that the MOU is a final and binding agreement as opposed to a statement of future intent.

13. Counsel for Plaintiff correctly points out that whereas the loan agreement is specific and comprehensive in its terms, the MOU contains no repayment terms, no terms relating to security, no dates for the commencement of any projects and the other clauses that one would expect to find in a final and binding agreement.

14. I am not satisfied that any other Court could reasonably conclude that the MOU overrides the terms of the loan agreement or that a final agreement was concluded between the parties which had the effect of overriding the terms of that loan agreement. In the result, i am not satisfied that another Court could reasonably find that the application for summary judgement should be refused.

15. In the result, the application for leave to appeal is dismissed with costs.

Weinkove, A.J.