IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 3918/12

In the matter between:

EDEN COURT HOLDINGS (PTY) LTD

and

MUHAMMAD RIDWAN KHAN

JUDGMENT DELIVERED THIS 7TH DAY OF DECEMBER 2012

DOLAMO, AJ

[1] This is an opposed application for summary judgment. The Plaintiff's claim against the Defendant is based on an acknowledgement of debt. It is alleged that on or about the 16 February 2010 the Defendant acknowledged in writing that he was lawfully indebted to the Plaintiff in the sum of R1 828 826 in respect of money lent and advanced. Paragraph 4 of this loan agreement read as follows:

> *"As per agreement there is currently no interest being charged on the loan. If I am to leave the employment of Oasis Group Holdings (Pty)Ltd for any reason before the loan is fully paid, the lender has the right to charge me interest at prime rate less 5%. This interest is maintained as a contingent liability on the loan of which the balance*

as on the 28 February 2010 will be R418.286 (FOUR HUNDRED AND EIGHTEEN THOUSAND TOW HUNDERED AND EIGHTY SIX RAND). This balance will increase over time and is calculated on the capital amount outstanding."

[2] Paragraph 5 of the acknowledgment of debt stipulated that the Defendant agreed to settle the entire loan by not later than March 2028. Paragraph 6 provided as follows:

"6. Should I wish to settle the loan beforehand the loan will be settled by the repayment of the capital amount due. The contingent liability as per clause 4 above will be maintained as a contingent liability for 36 months after date of settlement. Should I leave the employ of Oasis Group Holdings (Pty) Ltd during this 36 month period, the lender has the right to recover from me the accumulated interest on the loan as at the date the capital balance of the loan was repaid."

[3] The Defendant further acknowledged in paragraph 11 that should he leave the employ of the Plaintiff for any reason whatsoever and the loan remains outstanding and payable the outstanding amount of the loan together with any and all interest will become due and payable within 30 days of resignation from employment. He also renounced and waived the right to raise the legal exceptions of *excussionis et divisionis, non mumerate pecunias, non causa debiti, errore calculi, de duobos vel plumbus re debendi,* revision of accounts, value received and admitted to be fully aware and had acquainted himself with their meaning and effect. The Defendant also acknowledge that a certificate issued by the Plaintiff shall serve as *prima facie* evidence of the outstanding balance due by him to the Plaintiff as at

the date indicate on the certificate.

[4] On or about the 4 May 2010 the Defendant paid in full the outstanding balance of the loan. He subsequently resigned from Plaintiff"s employment in writing on the 27 August 2010. In his letter of resignation he pleaded with the Plaintiff not to charge him interest as the full extent thereof would amount to a large sum of money which will erode almost all of his retirement fund.

[5] In its particulars of claim The Plaintiff alleged that as at the date of resignation the contingency interest on the loan was the sum of R445 682-00. The amount certified as payable was said to be the sum of R509 495-00. The Plaintiff also alleged that in so far as the National Credit Act 34 of 2005 (the "NCA") may be applicable notice in terms of Section 129 thereof was given to the Defendant.

[6] The Defendant, in resisting the application for summary judgment, raised a number of defences. In the first place the Defendant argued that, in terms of clause 4 of the acknowledgement of debt, the Plaintiff's right to levy interest on the loan amount would have arisen only if the Defendant left the Plaintiff's employment prior to payment in full of the loan amount. Since he paid this amount in full prior to resignation no contingent liability arose and therefore no liability for interest. In the alternative the Defendant submitted that should it be argued that the contingent liability for interest arose, which would be a penalty, then Sections 2 and 3 of the Conventional Penalties Act 15 of 1962 find application. Defendant argued that

Section 3 of the Penalties Act, in particular, made the summary judgment procedure wholly inappropriate in the circumstances. The Defendant further argued that the loan was a credit facility in terms of the NCA in that the Plaintiff advanced a sum of money to the Defendant as a loan and payment thereof in monthly instalment was deferred to march 2028. Since the Plaintiff was not registered with the National Credit Regulator as a credit provider, as required by Section 40(b) of the NCA, the loan agreement was in terms of Section 8 (2) (a) unlawful. Lastly the Defendant argued that the certificate attached to the particulars of claim, alleged to be the prima facie proof of the balance due and owing in terms of the acknowledgement of debt, was unsigned.

[7] The question for determination is whether the Defendant has raised any *bona fide* defence to Plaintiff's claim which will entitle him to leave to defend the action.

[8] I need to point out at the outset that the acknowledgement of debt on which the Plaintiff relied for its claim against the Defendant was not drafted in clear language. I am constrained to state that the language leads to ambiguity regarding the parties' intentions. Having said that it remains apposite to determine whether the Defendant has raised a *bona fide* defence to the Plaintiff's Claim to qualify for leave to defend. Any of the defences raised, if *bona fide,* will entitle him to leave to defend.

[9] The purposed of summary judgment is to assist a Plaintiff when a Defendant who cannot set up a *bona fide* defence or raise an issue to be tried enters

appearance simply to delay the inevitable. What would constitute a *bona fide* defence was authoritatively stated by Colman J in *Breitenbach v Frat S.A.(Edms) Bpk* 1976(2) SA 226 (TPA) at 227A-228B as follows:

> *"Sub-rule (4) provides that the plaintiff may adduce no evidence, except in the form of the brief formal affidavit referred to in sub-rule (2), and that neither party may cross-examine any person who deposes to an affidavit or gives viva voce evidence. In sub-rule (5) it is provided that if the defendant does not find security or satisfy the Court as provided in sub-rule (3) (b), the Court may enter summary judgment for the plaintiff.*
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> *The purpose of the procedure known as summary judgment is well-recognised. It is, indeed, implicit in the portion of Rule 32 which prescribes the contents of the affidavit which must be filed on behalf of the plaintiff. It is a procedure aimed at the defendant, who, although he has no bona fide defence to the action brought against him, gives notice of intention to defend solely in order to delay the grant of judgment in favour of plaintiff. In a case where that is what the defendant has done, the summary judgment procedure where that is what the defendant has done, the summary judgment procedure serves a socially and commercially useful purpose. The relevant Rule should therefore, not be interpreted with such liberality to defendants that that purpose is defeated.*
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> *It is, however, even more important to guard against injustice to the defendant, who is called upon, at short notice, and without the benefit of further particulars, discovery or cross-examination, to satisfy the Court in terms of sub-rule (3) (b). If the requirements of that sub-rule are too stringently applied, a defendant who has a defence to the action brought against him may be denied, unjustly, an opportunity of establishing that defence by the ordinary procedure of a civil suit. It was because of that that MARAIS, J., in Mowschenson and Mowschenson v Mercantile Acceptance*

Corporation of S.A.Ltd., 1959 (3) S.A. 362 (W), went so far as to say that the doors of the court should be closed to a defendant only if,

"there is no doubt but that the plaintiff has an unanswerable case".

That is a dictum, which, if I may say so with respect, seems to me to go too far in favour of defendants; but it embodies a necessary and important warning for the guidance of Courts which have to determine the rights of litigants in applications for summary judgment. I shall return later to that aspect of the matter.

One of the things clearly required of a defendant by Rule 32 (3) (b) is that he set out in his affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim. If he does not do that, he can hardly satisfy the Court that he has a defence. The sub-rule, however, requires that the Court be satisfied that there is a bona fide defence, and the qualification gives rise to some difficulty. On the face of it, bona fides is a separate element relating to the state of the defendant's mind. A man may believe in perfect good faith that he has a defence, and may state honestly the facts which he relies upon, yet the law may be against him, or he may be honestly mistaken about the facts. He is bona fide, but he has no defence. Another man may make averments which, if they were true, would be an answer, in law, to the plaintiff's claim; but, to his knowledge, the averments may be false. He is not bona fide.

If, therefore, the averments in a defendant's affidavit disclose a defence, the question whether the defence is bona fide or not, in the ordinary sense of that expression, will depend upon his belief as to the truth or falsity of his factual statements, and as to their legal consequences. It is difficult to see how the defendant can be expected, in his affidavit to "satisfy the Court" (I use the words of the sub-rule), not only that what he alleges is an answer to the plaintiff's claim, but also that his allegations are believed by him to be true. There is no magic whereby the veracity of an honest deponent can be made to shine out of his affidavit.

It must be accepted that the sub-rule was not intended to demand the impossible. It cannot, therefore, be given its literal meaning when it requires the defendant to satisfy the Court of the bona fides of his defence. It will suffice, it seems to me, if the defendant swears to a defence, valid in law, in a manner which is not inherently and seriously unconvincing."

[10] Rule 32 therefore does not require a Defendant to show that he is *bona fide*. It only requires him to depose to a defence which is *bona fide* and whether it is *bona fide* or not depends upon the merits of that defence as raised in the opposing affidavit.

[11] While I agree with the Defendant that this court need not determine the issue of the validity of the loan agreement I am obliged to determine whether the Defendant has deposed to facts which if accepted as the truth or proved at the trial, under admissible evidence, would constitute a defence to the Plaintiff's action.

[12] One of the defences raised by the Defendant is that the agreement constituted a credit agreement for the purposes of the NCA as it was a credit facility as defined in Section 8(3) of the NCA. In this respect he argued that the Plaintiff advanced a sum of money to the Defendant as a loan, payment thereof was deferred to March 2008 and the Defendant was obliged to pay it in monthly instalments. This according to the Defendant made the NCA applicable to the agreement and the Plaintiff a credit provider as defined in section 1 of the NCA. Since the Plaintiff was not registered as a credit provider as required by section 40(b) of the NCA, the

Defendant argued, the agreement was in terms of section 89(d) unlawful as the NCA required the Plaintiff to be registered. Defendant however submitted that it was not necessary at this stage to declare the agreement void as from the date it was entered into and the Plaintiff to refund the Defendant all the amounts paid. This can be done by the trial court once evidence has been led to establish the facts.

[13] The Plaintiff, on the other hand, argued that the NCA was not applicable to the parties' agreement and was exempted by virtue of the provisions of section 4(1) read with 4(2)(b)(iv)(aa) since the parties were not independent of each other and consequently did not strive to obtain the utmost possible advantage out of the transaction. The Plaintiff pointed to the fact that the loan was made by an employer to an employee on the most favourable terms to the employee. This, according to the submission was indicative of the fact that the parties were not dealing with each other at arm's length and that the Plaintiff did not seek to derive the utmost possible advantage out of the transaction as set out in section 4(2)(iv)(aa).

[14] The above argument raises the further question of whether these parties were dealing with each other at "arm's length" and/or whether it can be inferred, from the employer-employee relationship that they were not independent of each other and did not strive to obtain the utmost possible advantage out of the transaction. In seeking to find answers to these questions it is important to bear in mind that section 2 of the NCA enjoins a court to interpret the NCA in a manner that gives effect to the purposes set out in section 3 of the NCA which are, *inter alia,* to promote and advance the social and economic welfare of South Africans; promote a fair,

transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry and to protect consumers. It achieves these lofty goals by *inter alia*, ensuring consistent a treatment of different credit products and different credit providers and providing responsibility in the credit market. It was held in *ABSA Bank Ltd v De Villiers* 2010(2) All SA 99(SCA) at paragraph [27] that when the NCA is interpreted it must be remembered that a purposive construction is called for and that the Act's provisions should be read in the light of the subject matter with which they are concerned to enable the court to arrive at the true intention of the legislature. For these reasons it would serve as a useful starting point to determine what the phrase "at arm's length" entails. Since the NCA is silent on its meaning authorities on the interpretation of this phrase in other legislative context would be appropriate. In *Hicklin v Secretary for Inland Revenue* 1980(1) SA 481(AD), a case dealing with the interpretation of section 103 of the Income Tax Act, Trollip JA at 494H-495D has the following to say about an agreement concluded "at arm's length"

> *"For "dealing at arms" length" is a useful and often easily determinable premise from which to start the inquiry. It connotes that each party is independent of the other and, in so dealing, will strive to get the utmost possible advantage out of the transaction for himself. Indeed, in the Afrikaans text the corresponding phrase is "die uiterste voorwaardes beding". Hence, in an at arms' length agreement the rights and obligations it creates are more likely to be regarded as normal than abnormal in the sense envisaged by para (ii). And the means or manner employed in entering into it or carrying it out are also more likely to be normal than abnormal in the sense envisaged by para (i). The next observation is that , when considering the normality of the rights or obligations created or of the means or manner so employed, due*

regard has to be paid to the surrounding circumstances. As already pointed out s 103 (1) itself postulates that. Thus, what may be normal because of the presence of circumstances surrounding the entering into or carrying out of an agreement in one case, may be abnormal in an agreement of the same nature in another case because of the absence of such circumstances."

[15] It is a normal consequence of a loan agreement that the lender, for the risk he assumes, will charge interest as compensation. It is abnormal for a lender to put R1 828 826 at risk without a corresponding benefit of interest, satisfying himself only with a contingent arrangement for the payment thereof. I am in the circumstances of the view that the transaction between the Plaintiff and the Defendant displays elements of parties who were not dealing with each other at arm's length. The charging of interest was made contingent on the Defendant leaving the employment of the Plaintiff before payment in full of the loan amount. As such the Plaintiff appears to have not been focused on striving to get the utmost possible advantage out of the transaction for itself and therefore not dealing with each other at arm's length. But in my view these are the issues which need to be ventilated in full through evidence and be adjudicated and determined at the trial. The summary judgment procedure is therefore not suitable for this purpose. For this reason alone I would grant the Defendant leave to defend.

[16] As to the question of costs the Defendant argued that this was a matter that justified the court granting an order of costs in terms of Rule 32(9)(a) of the Uniform Rules of Court. It was argued that the Plaintiff was made aware of the Defendant's

defences well in advance of the hearing, knew that these defences would give the Defendant a *bona fide* defence which will entitle him to leave to defend yet failed to disclose this fact to the court. That the Plaintiff further failed to disclose that it was holding back the same amount of money it was claiming from the Defendant.

[17] Indeed Rule 32(9)(a) makes provision for a cost order to be granted against a Plaintiff who brings an application for summary judgment where the case is not within the terms of Rule 32(1) or where, in the opinion of the court, knew that the Defendant's contention will entitled him to leave to defend. Such costs may be on an attorney and client's scale and the court may stay the action until the costs are taxed and paid. In my view this is not a case which is contemplated in Rule 32(9)(a). The action is one which is covered by Rule 32(1) and in my view the Plaintiff could not have anticipated that any defence raised by the Defendant will as a matter of certainty succeed. In exercising my discretion I decline to make a cost order against the Plaintiff.

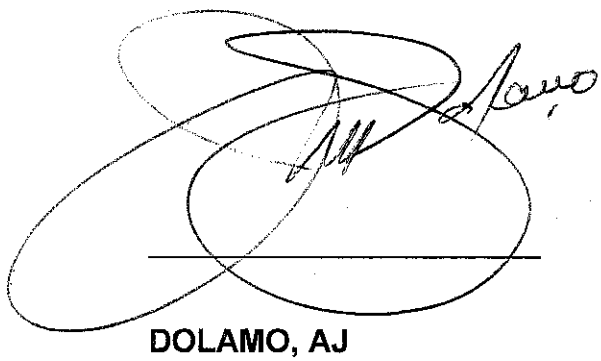
[18] I am satisfied that the Defendant has raised a *bona fide* defence to the application for summary judgment.

[19] Consequently the order I make is the following:

19.1 the application for summary judgment is dismissed.

19.2 the Defendant is granted leave to defend.

19.3 costs to be costs in the course.



DOLAMO, AJ