Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. 11054/2019[1]

Before: The Hon. Mr Justice Binns-Ward

Hearing: 15 and 19 August 2019
Judgment: 22 August 2019

In the matter between:

JANET ELIZABETH SANTORO	First Plaintiff
CARLO SANTORO	Second Plaintiff
STEVEN ANDREW SANTORO	Third Plaintiff

and

MORTGAGE SECURED FINANCE (PTY) LTD	First Defendant
LOXFIN TRADE FINANCE (PTY) LTD	Second Defendant
ALPHA ASSET FINANCE (PTY) LTD	Third Defendant

JUDGMENT

BINNS-WARD J:

Introduction

[1] The plaintiffs have applied for summary judgment in their action against the first, second and third defendants. The application is opposed. A single opposing

[1] Some of the papers bear the incorrect case number, 19196/19. Case no. 11054/2019 appears on the file cover and the notice of set down issued by the registrar.

affidavit was deposed to by one Etienne Elwyn de Beer ('De Beer') on behalf of the first and second defendants at least, and possibly also the third. The opposing affidavit was delivered one day late in terms of the timeframe prescribed in the rules of court.

[2] Despite the fact that by agreeing to accept the opposing affidavit out of time, as they could have in terms of rule 27, thereby facilitating the hearing of the application on the date it had been set down to be heard in early March, the plaintiffs instead insisted that the defendants formally apply for the condonation of their non-compliance with the rules. This meant that the application was postponed for three weeks, initially in the third division motion court, and thereafter transferred to the fourth division for the hearing, several months later, of (i) the application for condonation, (ii) an application for the striking out of certain averments in the replying affidavit delivered in the condonation application and (iii) assuming that condonation were to be granted, the opposed summary judgment application.

[3] Western Cape High Court Practice Note 46 prescribes that heads of argument must be filed in every opposed application set down for hearing in the fourth division. Any matter in which this requirement has not been complied with is susceptible, pursuant to the further provisions of the Practice Note, to being struck from the roll. When the matter came up before me in that division on 15 August, heads of argument had been filed by both sides only in respect of the condonation application. There were no heads of argument in the summary judgment application. Furthermore, the opposing affidavit that had been delivered in the summary judgment application in early March had not been included in the paginated papers. Indeed, it was altogether missing from the court file.

[4] When I bridled at this unsatisfactory state of affairs, counsel informed me that they had thought that the condonation application, including the associated striking out application, would be disposed of discretely from, and before, the summary judgment application; the idea being that the latter application would be entertained on an opposed basis only if the condonation application were granted.

[5] Whilst there might, in abstract, be a grain of logic in the approach conceived by counsel, it was indefensible in the realm of reality. The notion that the court would hear and determine the applications discretely could be propounded only by

someone who laboured under the misapprehension that court time was available in abundance and was heedless of the expense entailed in such approach, not only to the litigants but also in the use of public resources.

[6] Had common sense prevailed it should have been obvious that all of the applications fell to be heard together, and that the parties should have come to court prepared on that basis. Indeed, the very order that they had obtained enrolling the matter for hearing in the fourth division directed in terms that '*the summary judgment application, including the application for condonation*' was to be heard there on 15 August 2019.

[7] In the event, the parties could consider themselves fortunate that the profligacy with which the matter had been prosecuted was not further exacerbated by the matter being struck from the roll on 15 August on account of their failure to file heads of argument in the summary judgment application. It was only because of my concern not to be seen to be contributing to a latter day analogue of *Jarndyce v Jarndyce*[2] that I agreed to hear the matters at the commencement of my duty week in the third division on Monday, 19 August, after counsel had been afforded the opportunity to cure their omission to file heads in the summary judgment application.

[8] The matters should in point of fact never have left the third division. Opposed summary judgment applications and opposed applications for interim relief *pendente lite* are the only types of opposed application that are ordinarily heard in the third division. The reason for that practice is obvious. It is because of the desirability that those applications be disposed of expeditiously and cost effectively. (The position might well be different in respect of applications for summary judgment under the very different procedure in terms of the recently substituted rule 32, but that is a subject for another day.)

[9] The differences between the cost of litigating an opposed application in the ordinary third division motion court and on the fourth division opposed motion roll and the time scales entailed are significant. I have had occasion to remark on this more than once before and to deprecate, as I do again in this matter, the practice of too easily allowing matters that should be dealt with in the third division to be transferred to the fourth division; see *Absa Bank Ltd v Walker* [2014] ZAWCHC 92

[2] C. Dickens, *Bleak House*, (1852-53) Bradbury & Evans.

(17 June 2014) at para. 18 and *Absa Bank Ltd v Future Indefinite Investments 201 (Pty) Ltd and Others* [2016] ZAWCHC 118 (12 September 2016) at para. 27. Not only does it unnecessarily drive up the cost of litigation with oppressive consequences for access to justice by the majority of people who can ill afford it, it also means that litigants whose cases properly belong in the fourth division are kept waiting longer for a hearing there than they should be.

Condonation

[10] The court enjoys an unfettered discretion, obviously to be exercised judicially, to condone non-compliance with its rules and procedures. It is in general expected that an applicant for condonation should show good cause for the indulgence to be granted. The courts have been careful to refrain from delineating the parameters of 'good cause' in finite terms. Factors to which a court will have regard in weighing whether condonation should be granted in a given case include the nature of the non-compliance in issue, its effect on the other litigants and the administration of justice, and the explanation given for it. The interests of justice might require overlooking a poor explanation when the party seeking condonation is able to show prima facie that it has a meritorious cause or a sound defence in the principal case. Indeed, the interests of justice are the overriding consideration in the determination of such matters. A weighty consideration is that the doors of the court should not too readily be closed on a non-compliant litigant if the soothing balm of a costs order can adequately assuage any prejudice that the non-compliance might have occasioned. The courts should also be astute to discourage litigants who are not materially prejudiced by the technical non-compliance by their opponents with the rules from unnecessarily driving up costs and wasting the court's time by insisting, on an undiscriminating basis, that their opponents bring formal applications for condonation.

[11] As mentioned, in the current matter the opposing affidavit was delivered marginally out of time and timeously enough to have allowed the summary judgment application to have been argued on an opposed basis in the third division on the day it had been set down to be heard there. The prejudice occasioned by the late delivery of the affidavit was therefore negligible. The plaintiffs' insistence on a formal application for condonation in the circumstances was ill advised and counterintuitive. Their approach actually subverted the advantage of expeditious determination that the

summary judgment procedure (at least in terms of rule 32 in the form it was when this application was launched) is designed to afford to a plaintiff with a liquidated claim who believes that the defendant does not have a defence and has entered the lists only to achieve delay. (Any notion that the plaintiffs could derive a tactical advantage in the summary judgment proceedings from evidence extraneously introduced in the course of the condonation proceedings, as the plaintiffs' counsel appears to have apprehended,[3] was misplaced; cf. *Stocks & Stocks Properties (Pty) Ltd v City of Cape Town* 2003 (5) SA 140 (C) especially at para. 18-19.)

[12] Condonation for the late filing of the opposing affidavit will be granted. I have not found it necessary in the circumstances to deal with the application to strike out passages in the replying affidavit; for even if they were struck out, as the defendants' counsel conceded they might be, that would not have had any impact on my decision to grant condonation.

[13] Consequent upon my assessment that a formal application for condonation should not have been insisted upon in this matter, the defendants will be ordered to pay the costs of the application only on an unopposed basis; and there will be no order as to costs in respect of the postponements that became necessary as a result of the plaintiffs' insistence on the application. There will also be no order in the striking out application.

Summary judgment

[14] The claims against the second and third defendants pleaded in the summons are for specific performance by the second and third defendants of certain investment contracts in terms whereof the plaintiffs had invested sums of money with the defendants for an attractive return, payable monthly. According to the pleaded case the capital invested was redeemable on 30 days' notice. It was alleged that the second and third defendants had been represented by De Beer and a certain Derek van Zyl in concluding the investment contracts.

[15] The plaintiffs alleged that the defendants had defaulted on certain of the interest payments and thereafter failed to repay the capital after 30 days' notice had

[3] Predicated on his understanding of the judgments in *South African Breweries Ltd v Rygerpark Props (Pty) Ltd* 1992 (3) SA 829 (W) and *Bloemfontein Board Nominees Ltd v Maloney's Eye Properties BK en 'n Ander* 1993 (3) SA 442 (O). The import of those judgments has, in my respectful opinion, been set forth correctly in this court's judgment in *Stocks & Stocks Properties (Pty) Ltd v City of Cape Town* 2003 (5) SA 140 (C). Properly understood, they do not support plaintiffs' counsel's reading of them.

been given to terminate the contracts. The plaintiffs annexed to the summons copies of confirmatory letters that had been addressed to them in respect of each investment. So, in respect of the investment contracts allegedly concluded with the second defendant, Loxfin Trade Finance (Pty) Ltd, letters signed by De Beer were addressed in each case as follows under the letterhead of Loxfin (Pty) Ltd:

> We refer to the abovementioned matter and confirm that the amount of [the given sum] was received by Loxfin Trade Finance on [date]. A copy of their receipt is attached hereto for your records.
> Attached hereto please find a copy of all the application documents for safe keeping (*sic*), a copy of all documents has been forwarded to Mr Derek Van Zyl.
> We confirm that interest shall be paid on the 1st day of the month.
> We thank you for your support and trust that your investment into Loxfin Trade Finance (Pty) Ltd will fulfill (sic) your financial needs.
> Yours faithfully
> [signature]
> E.E. De Beer
> Director
> Aa [afskrif aan] Derek Van Zyl

[16] An identically worded letter under the letterhead of Alpha Asset Finance was addressed by De Beer in respect of the investment allegedly made by the second plaintiff with the third defendant, Alpha Asset Finance (Pty) Ltd. A notable point of distinction between the letters addressed to the plaintiffs by Loxfin (Pty) Ltd and that by Alpha Asset Finance was that whereas the former reflected details of a physical address and telephone number for the second defendant, the latter reflected only a post office box number.

[17] In his affidavit opposing the summary judgment application, De Beer testified that he is the managing director of the first defendant and 'authorised to be responsible for and to conduct the business and all the administration of the First [Defendant's] affairs'. As to the second defendant, he averred 'I am the sole director of Second [Defendant] and as such hold the authority to depose on behalf of Second [Defendant].' With reference to the third defendant, De Beer's affidavit stated 'I am not a director of the Third [Defendant], but I was involved in its incorporation and have knowledge of the basis for its intended operations'. De Beer notably does not state that he was authorised to depose to the opposing affidavit on the third defendant's behalf.

[18] De Beer admits receipt of the funds that were allegedly invested by the plaintiffs, but denies that this was in terms of any investment contracts as alleged in the summons. He averred that all of the funds had in point of fact been received by the second defendant to be held for the purposes of the establishment of a co-operative bank to be registered under the name 'Alpha Co-operative Bank Ltd' ('ACB'). He proceeded as follows in para. 12.2 – 12.11 of his affidavit:

> 12.2 Applicants [i.e the plaintiffs] are members of ACB [which it will be recalled has not yet been established] and have been actively involved at the meetings and in the decisions minuted. Applicants are deemed to be at least familiar with the decisions and the content of the minutes.
>
> 12.3 Derek van Zyl, a member of ACB and financial advisor under the business name of "dvz your insurance guy" was mandated by the steering committee of ACB to recruit the funds for the start-up of ACB which entails substantial costs.
>
> 12.4 I was appointed and mandated to attend to the establishment of ACB and sign all documents for the pre-incorporation agreements. Funds were recruited by and between members and shareholders, *inter alia*, Derek van Zyl, for start-up costs, but owing to the fact that ACB could not open a bank account and since I was the responsible person in terms of the establishment of ACB (pre-incorporation), it was determined to be a prudent measure to utilise an entity of which I am the sole director so as not to frustrate the process for the utilisation of funds for start-up costs to expedite the incorporation of ACB.
>
> 12.5 Second Respondent was identified as the vehicle into which the start-up funding would be received and effectively ring-fenced for identification purposes, owing to the fact that it had the requisite clearances with the relevant authorities.
>
> 12.6 The funds as sourced by Derek van Zyl and other parties have been deposited into the bank account of Second Respondent and similarly payments for start-up costs have been made from the same bank account.
>
> 12.7 I am not a director nor member of ACB and my involvement has only been as responsible person mandated to attend to the incorporated process of ACB.
>
> 12.8 My original formal mandate expired / lapsed during November 2017 and a new replacement mandate was concluded with Alpha Invest Society (Pty) Ltd during February 2018. I am neither director nor member of this entity.
>
> 12.9 ACB has not been formally incorporated and the reasons for the delays since the original estimated time is (*sic*) well documented and all the minutes of the various meetings are available at the administrative offices of ACB in Hermanus and is (*sic*) available for inspection by its members at any time.

12.10 The minuted time for repayment to the "lenders" of the start-up costs will be after date of incorporation of ACB as a claim against ACB and after pre-incorporation agreements have been ratified by an ordinary resolution at a general meeting.

12.11 It is therefore in the interest of all such start-up "lenders" to expedite the incorporation of ACB.

[19] De Beer sought to explain the position of the second and third defendants (to which he referred by the acronyms LTF and AAF) as follows in paras. 14 and 15 of his affidavit:

14. Loxfin Trade Finance (LTF) (Second Respondent)

14.1 LTF is a commodity trade company.

14.2 LTF is completely unrelated to ACB, save for the fact that LTF has been used as the bank account vehicle for the start-up funds as alluded to above.

14.3 Evidence of this is that payments intended for the ACB start-up, such as the payments received from the Applicants, were received in the bank account of LTF, notwithstanding that there may be documentation suggesting an alternative.

14.4 Factually, the payments from all three Applicants were received in the bank account of LTF as per the mandated account for receipt of start-up costs.

14.5 LTF has no contractual or investment relationship with Applicants and is not indebted to the Applicants for repayment of the amounts received as LTF is only the bank account vehicle for the receipt of funds pertaining to [the non-existent] ACB who (*sic*) is the resultant debtor to the Applicants.

15. Alpha Asset Finance (AAF) (Third Respondent)

15.1 AAF is an entity created to participate in a service level agreement with ACB after its incorporation.

15.2 The use of "Alpha" is to denote in some way an affiliated service provider.

15.3 AAF is only incorporated, still not active and it has no bank account. This entity and bank account will only be activated upon the successful incorporation of ACB.

[20] De Beers addressed the alleged investment agreements at paras. 17-20 of the opposing affidavit:

17. I deny that any Respondent [i.e. any of the plaintiffs] concluded any investment agreement with any of the Applicants [i.e. defendants].

18. I deny that DVZ [Derek van Zyl] represented any Respondent in any transaction.

19. I confirm that Second Respondent did make interest payments from its bank account to the start-up funders, as part of the payment mandate for start-up costs, and until replaced by the Alpha Invest Society.

20. I deny that any Respondent has breached any investment agreement with any Applicant.

[21] Rule 32(3)(b) entitles a defendant who seeks to avoid summary judgment to satisfy the court by affidavit that he has a bona fide defence to the action. The affidavit is required to fully disclose the nature and grounds of the defence and the material facts relied upon therefor. The explanation given by De Beer is entirely irreconcilable with the content of the aforementioned letters annexed to the particulars of claim that were signed by him purportedly as director of the second and third defendants, respectively. And the manifest contradiction between what he represented in that correspondence and what he sets out in the opposing affidavit is nowhere addressed. Notably he does not offer any explanation of why, on behalf of the second and third defendants, respectively, he thanked the plaintiffs for their investments into those companies.

[22] It hardly needs spelling out that what a defendant is required to deal with, if its affidavit in opposition to an application for summary judgment is to pass muster, depends to a material degree upon the manner in which the plaintiff's claim which it is seeking to answer is formulated; see *Breitenbach v Fiat S.A. (Edms) Bpk* 1976 (2) SA 226 (T) at 229B-C, citing *Gruhn v M. Pupkewitz & Sons (Pty) Ltd* 1973 (3) SA 49 (A). De Beer's failure to explain his subscription to correspondence bearing out the plaintiffs' case is obviously material and results in an affidavit that falls far short of the requirements of rule 32(3)(b).

[23] The averment that the interest payments made to the plaintiffs were 'part of the payment mandate for start-up costs, and until replaced by the Alpha Invest Society' was enigmatic to say the least. What was the 'the payment mandate'? What were its terms? Why did the interest payments cease to be made? These were all questions that called for answers if there was to be any indication of a valid basis for not acceding to the plaintiff's demand for repayment, at least of the capital sums they had paid over. The affidavit does not give any.

[24] The affidavit does not give any reason why the second or third respondents should be entitled to retain the capital amounts paid to them by the plaintiffs. If, as is claimed, the amounts were received merely to be held pending the formation of an entity which has yet to be established, and in respect of which the defendants have no interest, rather than in terms of certain investment contracts as alleged by the plaintiffs and supported in the letters written by De Beer, why should the plaintiffs not be entitled to receive their money back if they ask for it, which is essentially what

they do in the action? The opposing affidavit gives no answer and the defendants' counsel found himself hard-pressed to offer one, even conjecturally. It does not explain that the defendants are bound to any third party to hold on to the funds if the plaintiff wants them back. It is not claimed that the defendants are party to an executory contract with the plaintiffs for the benefit of a third party that has not yet been brought into being. On the contrary, the opposing affidavit emphasises the complete lack of involvement of either the second or third defendants in the alleged scheme to apply the funds in a co-operative bank. It alleges only that the second defendant accepted a role as a depositary pro tem.

[25] Whereas the denial that the defendants were party to the investment contracts (improbable as that seems in the absence of any explanation for the correspondence signed by De Beer suggesting the contrary) might support a defence in respect of liability for the payment of interest on the capital amounts paid over by the plaintiffs, it does not make out any basis upon which the defendants could lawfully resist complying with a demand for the repayment of the capital itself. It has been denied that the defendants received 30 days' notice for repayment, but that is irrelevant if they deny the existence of the contracts that provided for it. The summons stands as a demand; the fact that the demand is based on facts that the defendants dispute does not, on the defendants' own version of events, entitle them to refuse it (at least in respect of the capital).

[26] Insofar as it is denied that that the third defendant received any payment from the second plaintiff, it is not clear, as I mentioned at the outset, that De Beer made the opposing affidavit on that company's behalf or that he had been invested with the authority to do so. Assuming, however, that the omission of any allegation that he deposed to the affidavit also on the third defendant's behalf was due to inept drafting, the affidavit nevertheless fell short of compliance with the requirements of rule 32(3)(b) by reason of the failure to explain the letter addressed by De Beer, ostensibly in the capacity as a director of Alpha Asset Finance, acknowledging receipt of payment, thanking the second plaintiff for his investment into the company, and confirming that interest would be paid on it monthly. The failure to deal with this issue at all meant that the court could not be satisfied that the company might have a bona fide defence.

[27] In the circumstances I am persuaded that the plaintiffs are entitled to summary judgment against the second and third defendants for payment of their capital sum claims against those companies. Adopting a perhaps unduly generous response to a palpably inadequate opposing affidavit, I shall allow those defendants the opportunity to defend the claims for interest based on the alleged investment contracts at trial.

[28] The first plaintiff's claim against the first defendant stands on a different footing. It is based on a deed of cession of book debts. According to its tenor the cession was intended to stand as covering security in respect of an indebtedness to the first plaintiff up to the amount of R2 780 000. The difficulty, as pointed out by De Beer in the opposing affidavit, is that there is no identified underlying *causa* for the cession *in securitatem debiti*. The first defendant is not indebted to the first plaintiff in any amount and it has not been alleged in the particulars of claim that it has stood as surety or guarantor for payment of any debt by any third party to the first plaintiff. The execution of the deed in those circumstances was an act bereft of any assurance whatsoever. For that reason I am inclined to agree with De Beer's allegation that the claim pleaded against the first defendant is excipiable. Summary judgment against the first defendant will therefore be refused.

[29] For the reasons given earlier, the costs of the summary judgment application shall be awarded on the basis that they shall be taxed as if the application had been argued as an opposed matter on the third division motion court roll; see the judgments cited in paragraph 9 above.

[30] In the result, the following order is made:

1. Condonation is granted for the late delivery of the defendants' opposing affidavit in the summary judgment application.
2. The defendants are ordered, jointly and severally, to pay the plaintiffs' costs of suit in respect of the condonation application on the basis of an unopposed application.
3. No order is made in the application to strike out passages in the defendants' replying affidavit in the condonation application.
4. There shall be no order as to costs in respect of the postponements of the summary judgment application occasioned as a consequence of the application for condonation.

5. Summary judgment is granted in favour of the first plaintiff against the second defendant in the sum of R2 200 000.

6. Summary judgment is granted in favour of the second plaintiff against the third defendant in the sum of R500 000.

7. Summary judgment is granted in favour of the third plaintiff against the second defendant in the sum of R100 000.

8. Summary judgment is refused against the first defendant, and also against the second and third defendants in respect of the balance of the plaintiffs' claims against those defendants; and consistently with, and to the extent of such refusal, the defendants are given leave to defend the action.

9. The second defendant is ordered to pay the costs of suit of the first and third plaintiffs in the summary judgment application, such costs to be taxed on the basis as if the application had been argued as an opposed matter on the third division motion court roll.

10. The third defendant is ordered to pay the costs of suit of the second plaintiff in the summary judgment application, such costs to be taxed on the basis as if the application had been argued as an opposed matter on the third division motion court roll.

11. The costs of the application for summary judgment against the first defendant shall stand over for determination in the action.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Plaintiffs' counsel:	**R.J. Steyn**
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