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

Case number: 21771/2021

In the matter between:

IPH FINANCE PROPRIETARY LIMITED Plaintiff

and

AGRIZEST PROPRIETARY LIMITED Defendant

JUDGMENT DELIVERED ON 28 FEBRUARY 2023

VAN ZYL AJ:

Introduction

1. This is an opposed application for summary judgment brought under the provisions of Rule 32 of the Uniform Rules of Court.

2. The plaintiff's claim is based upon a loan agreement concluded between the parties on 28 February 2021. In terms of the loan agreement, the plaintiff lent and advanced to the defendant a bridge loan amount of R2,250 million, and a term loan amount of R2,750 million. These were the amounts pleaded in the particulars of claim and admitted in the plea as they served before the Court at the hearing of the application. In the course of argument an issue cropped up in relation to these amouts which I shall address in detail later. It suffices for present purposes to say that the agreement upon which the plaintiff sued was not the final version of the agreement concluded between the parties.

3. In any event, it is common cause that the purpose of the loan was to allow the defendant, as “borrower”, to borrow funds in order to acquire subscription shares in a company known as Pepperclub Hotel Investments Limited (referred to in the loan agreement as the Venture Capital Company or “VCC”), which shares would be ceded as security to the plaintiff, as “lender”.

4. The bridge loan, together with interest thereon, was repayable in four instalments, the last being payable on 29 February 2024. The term loan was repayable on 1 March 2026. The defendant was required to pay instalments in respect of the terms loan outstanding to the plaintiff on each distribution date. This required the defendant to pay amounts equal to the net distribution received form the VCC to the plaintiff on the dates that such amounts were distributed.

5. The defendant breached the terms of the loan agreement in that it failed to make payment of the first and second instalments, as was required, on or before 31 March 2021 and 28 February 2022 respectively.

6. The defendant does not dispute the failure to pay. In its plea it raised essentially three defences, namely:

6.1 that the Court lacks the jurisdiction to determine this application;

6.2 an attack on the plaintiff’s registration as a credit provider under the National Credit Act 34 of 2005; and

6.3 fraudulent misrepresentation by the plaintiff inducing the defendant to conclude the loan agreement, upon which a counterclaim is based.

7. It is common cause on the papers that the National Credit Act is not applicable to the loan agreement. The defendant – correctly so - abandoned the second defence.

8. Before addressing the remaining defences, I briefly set out the principles governing applications for summary judgment.

The applicable principles

9. The object of rule 32 is to prevent a plaintiff's claim, based upon certain causes of action, from being delayed by what amounts to an abuse of the process of the court. In certain circumstances, therefore, the law allows the plaintiff to apply to court for judgment to be entered summarily against the defendant, thus disposing of the matter without putting the plaintiff to the expense of a trial. The procedure is not intended to shut out a defendant who can show that there is a triable issue applicable to the claim as a whole from laying his defence before the court (see *Majola v Nitro Securitisation 1 (Pty) Ltd* 2012 (1) SA 226 (SCA) at 232F–G).

10. Rule 32(3)(b) provides that a defendant in summary judgment proceeding may "*satisfy the court by affidavit …, or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor*".

11. In *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228D-E the Court held as follows in relation to the defendant's affidavit: "… *no more is called for than this: that the statement of material facts be sufficiently full to persuade the Court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. What I would add, however, is that if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the Court to consider in relation to the requirement of bona fides"*. [Emphasis added.]

12. The defendant who elects to deliver an affidavit in opposition to a summary judgment application must thus show that they have a *bona fide* defence to the action. They must fully disclose the nature and grounds of the defence, the material facts relied upon and which they genuinely desire and intend to adduce at trial. The facts should not be inherently and seriously unconvincing and should, if true, constitute a valid defence (see *Breitenbach supra* at 227G-228B; *Standard Bank of*

South Africa v Friedman 1999 (2) SA 456 (C) at 461I-462G).

13. A *bona fide* defence is accordingly one that (1) good in law and (2) pleaded with sufficient particularity (*Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426C-D).

14. In considering the now amended Rule 32, it was held in *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at para [13] that: "… *Rule 32(3), which regulates what is required from a defendant in its opposing affidavit, has been left substantively unamended in the overhauled procedure. That means that the test remains what it always was: has the defendant disclosed a bona fide (ie an apparently genuinely advanced, as distinct from sham) defence? There is no indication in the amended rule that the method of determining that has changed. The classical formulations in Maharaj and Breitenbach v Fiat SA as to what is expected of a defendant seeking to successfully oppose an application for summary judgment, therefore remain of application. A defendant is not required to show that its defence is likely to prevail. If a defendant can show that it has a legally cognisable defence on the face of it, and that the defence is genuine or bona fide, summary judgment must be refused. The defendant's prospects of success are irrelevant*". [Emphasis added.]

15. The word "may" in Rule 32(5) confers a discretion on the Court, so that even if the defendant's affidavit does not measure up fully to the requirements of subrule (3)*(b)*, the Court may nevertheless refuse to grant summary judgment if it thinks fit (*First National Bank of South Africa Ltd v Myburgh* 2002 (4) SA 176 (C) at 180D–E). The discretion is not to be exercised capriciously, so as to deprive a plaintiff of summary judgment when he or she ought to have that relief (*Jill v Firstrand Bank Ltd* 2015 (3) SA 586 (SCA) at 591B).

16. If it is reasonably possible that the plaintiff's application is defective or that the defendant has a good defence, the issue must be decided in favour of the defendant (*Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 305C-F). If, on the material before it, the Court sees a reasonable possibility that an injustice may be done if summary judgment is granted, that is a sufficient basis on which to exercise

its discretion in favour of the defendant (*First National Bank of South Africa Ltd v Myburgh supra* at 184H).

17. Rule 32(6)(b)(i), on the other hand, provides that the Court "*shall give leave to defend*" in the circumstances set out in Rule 32(6). It has been held that in terms of this subrule, a Court has no discretion to grant summary judgment if the defendant is otherwise entitled to defend; there is only a discretion to refuse (*Gralio (Pty) Ltd v D E Claassen* (Pty) Ltd 1980 (1) SA 816 (A) at 827D).

18. I discuss the defences raised against this background.

<u>This Court's jurisdiction</u>

19. The defendant contends, as a first defence, that this Court does not have jurisdiction to determine the plaintiff's claim as:

19.1 The defendant does not carry on business within the Court's jurisdiction and its registered office is in Gauteng; and

19.2 The cause of action did not arise within the area of jurisdiction of this Court as the loan agreement was concluded in Gauteng.

20. It is not necessary to spend much time of this defence, which is without merit. It is correct that the defendant's registered office is in Gauteng and that it carries on business there. The cause of action, however, arose in the jurisdiction of this Court.

21. Section 21 of the Superior Courts Act 10 of 2013 provides that a high court has jurisdiction over in relation to "*all causes of action arising ... within its jurisdiction*". In setting out the grounds upon which the High Court will exercise jurisdiction, the Court in *Van Wyk t/a Skydive Mossel Bay v UPS SCS South Africa (Pty) Ltd* [2020] 1 All SA 857 (WCC) held as follows at para [53]:

"The jurisdiction of the High Court, therefore, under section 21 of the [Supreme Court] Act, is also determined by reference to the common law.

And in such a determination regard must be had to: (a) the jurisdictional connecting factors, or rationes jurisdictionis, recognised by the common law; and (b) attachment to found or confirm jurisdiction. According to the learned authors, at A2-103 to 104, which also finds application in this case: "The jurisdictional connecting factors or rationes jurisdictionis recognized by the common law include residence, domicile (ratio domicilii), the situation of the subject-matter of the action within the jurisdiction (ratio rei sitae), cause of action (ratio rei gestae) which includes the conclusion or performance of a contract (ratio contractus) and the commission of a delict within the jurisdiction (ratio delicti)." [Emphasis in the original.]

22. It is trite that, in the case of High Courts, the cause of action need not arise wholly within the jurisdiction of the relevant Court in order for that Court to have jurisdiction based on the *ratio rei gestae* (*Gallo Africa Ltd v Sting Music (Pty) Ltd* 2020 (6) SA 392 (SCA) at 333C; *Vital Sales Cape Town (Pty) Ltd v Vital Engineering (Pty) Ltd and Others* 2021 (6) SA 309 (WCC) at para [19]).

23. There is a factual dispute between the parties as to whether the contract was concluded in Cape Town. The plaintiff says that it was concluded in Cape Town; the defendant contends that it was concluded in Gauteng. I do not have to resolve this dispute. Performance of the defendant's obligations under the loan agreement was clearly to be made in Cape Town, as the defendant was required to make repayments of the loan into the plaintiff's bank account situated in Cape Town.

24. Counsel for the defendant persisted with the contention that, because the money initially advanced to the defendant by the plaintiff under the loan agreement were paid into a bank account in Gauteng, that meant that performance took place in Gauteng. Counsel's view did not change when reminded that the defendant's obligation under the loan agreement – repayment of the loan – was part of the scope of performance of the agreement.

25. I am in agreement, however, with counsel for the plaintiff's submission that the place of performance of part of the agreement constitutes a jurisdictional connecting factor, even if the contract was concluded outside of the jurisdiction of the

Court: see *Travelex Limited v Maloney* ZASCA 128 (27 September 2016) at para [22]: "*A court in whose area of jurisdiction a contract must be performed has jurisdiction, as well as the court in whose area of jurisdiction part of a contract has to be performed*".

26. In these circumstances, this Court has the necessary jurisdiction to determine this application. The defence based on lack of jurisdiction is not good in law.

The misrepresentations inducing the conclusion of the loan agreement

27. The defendant's third defence (the second defence having been abandoned) is that the defendant only entered into the loan agreement as a result of certain fraudulent misrepresentations made by the plaintiff (and/or the VCC), which representations were false, material, and which were intended to induce the defendant to conclude the loan agreement.

28. The plaintiff argues that the defence has no merit, for two reasons.

29. The first reason is that the defence is raised in a manner that lacks detail and is needlessly bald, vague or sketchy. The defendant does not state who, on behalf of the plaintiff or the VCC, made the alleged misrepresentations, when those misrepresentation were made, or how they were made (whether orally or in writing). For this reason, the plaintiff argues that the defendant has failed fully to disclose the nature and grounds of its defence, and the material facts relied upon.

30. The second reason is that the loan agreement itself precludes reliance upon any representations made, in that it, *inter alia*, contains a non-representation clause.

31. The defendant, however, pleads that the purpose of the loan was for the defendant to receive certain tax benefits under section 12J of the Income tax Act 58 of 1962, via the acquisition of subscription shares in the VCC. It pleads that, prior to the conclusion of the agreement, the plaintiff and/or the VCC represented to the defendant (amongst other alleged misrepresentations) that they would register the defendant in order to obtain tax credits as afforded by the section 12J fund. The

reason for the defendant seeking the registration and benefit was that it had not submitted tax returns for certain years, and needed the benefit of the section 12J fund to reduce its tax liability with the South African Revenue Service.

32. It is common cause that the defendant has not been registered to receive such benefits, and that it has not received those benefits.

33. The defendant acknowledges that the correct position might be, as counsel for the plaintiff has submitted, that the defendant cannot be registered because it has not filed its tax returns. The defendant pleads, however, that the plaintiff and the VCC knew what the correct position was, but fraudulently misrepresented to the defendant that it would nevertheless be eligible for the section 12J benefits. The misrepresentation was material and induced the defendant to conclude the loan agreement so as to obtain shares in the VCC.

34. As the VCC is alleged to have been a party to the misrepresentation, the defendant has caused a third party notice to be issued so as to involve the VCC in the action. The third party notice and annexure forms part of the pleadings serving before the Court.

35. A party relying on fraud must plead and prove it clearly and distinctly, and fraud is not easily inferred (*Courtney-Clarke v Bassingthwaighte* 1991 (1) SA 684 (Nm) at 689G; *Gilbey Distillers & Vintners (Pty) Ltd v Morris NO* 1990 (2) SA 217 (E)).

36. It is so that the defendant did not plead detail in relation to who on behalf of the plaintiff or the VCC made the alleged misrepresentations, when exactly those misrepresentations were made (although by necessary implication they must have been made prior to the conclusion of the contract), or how they were made. I nevertheless think, on a consideration of the plea read with the affidavit opposing summary judgment, and having regard to the content of the third party notice and annexure, that the defendant has made the essential allegations for a defence based on fraud (see, for example, *Quartermark Investments (Pty) Ltd v Mhkwanazi and another* 2014 (3) SA 96 (SCA) at para [14] in relation to the pleading of fraud; and

see *Maharaj v Barclays National Bank supra* at 423H: *"The principle is that, in deciding whether or not to grant summary judgment, the Court looks at the matter 'at the end of the day' on all the documents that are properly before it*").

37. The fact that the loan agreement contained a non-representations clause does not stand in the way of the defence of fraud being raised (*Seven Eleven Corporation of SA (Pty) Ltd v Cancun Trading No 150 CC* [2005] 2 All SA 256 (SCA) at para [35]).

38. As set out earlier, the defendant does not have to show at this stage that the defence will prevail at trial: see *Tumileng Trading CC supra* at para [13]:" *If a defendant can show that it has a legally cognisable defence on the face of it, and that the defence is genuine or bona fide, summary judgment must be refused. The defendant's prospects of success are irrelevant".*

39. I have also mentioned earlier that if, on the material before it, the Court sees a reasonable possibility that an injustice may be done if summary judgment is granted, that is a sufficient basis on which to exercise its discretion in favour of the defendant (*First National Bank of South Africa Ltd v Myburgh supra* at 184H). I think that there may be a possibility of injustice should summary judgment be granted in these circumstances.

40. In the light of the conclusion to which I have come on the defence of fraud, it is not necessary to discuss the defendant's counterclaim. I also do not have to discuss what appears, on the plea, to be an invitation to the Court to pierce the corporate veil as between the plaintiff and the VCC. It seems that the allegations in that respect are in fact aimed at supporting the fraudulent misrepresentation defence.

The agreement upon which the plaintiff sued

41. In the affidavit in support of the summary judgment application it is alleged that, after the loan agreement relied upon by the plaintiff had been concluded and payment made by the plaintiff in terms thereof, the defendant requested that the

plaintiff increase the loan amount to an amount equal to the deposit that the defendant had paid for the subscription shares in the VCC. The parties thus amended and re-executed the schedule to the loan agreement, which set out in the increased amounts owed. It does not appear from the pleadings whether the repayment arrangements were also amended. This re-execution of the loan agreement was done in March 2021. The plaintiff has, however, not sued upon the amended agreement.

42. Prior to the hearing of this application there was no dispute on the papers that the agreement upon which the plaintiff relies was the correct agreement – this was admitted both in the plea and in the affidavit opposing summary judgment. In the course of argument, however counsel for the defendant took the point that the loan agreement upon which the plaintiff relies is not the final agreement. After the conclusion of argument, the defendant delivered a notice of intention to amend its plea to withdraw its earlier admissions.

43. Counsel for the plaintiff has suggested that the application for summary judgment should be postponed to allow the plaintiff to deal with the notice of intention to amend, and with the amended plea, should the amendment be granted.

44. I do not have to enter into a debate as to whether such an amendment should be granted. The proposed amendment will have to be dealt with in due course. I have taken note of the authority to which I have been referred by the plaintiff's counsel, namely *Absa Bank Ltd v Meiring* 2022 (3) SA 449 (WCC), in which it was held at para [20] that:

> "*[20] It follows that a defendant in a summary judgment application which has failed to plead all its defences will be required to apply to amend its plea if it seeks to add any for the purposes of its opposition to summary judgment. A defendant's failure to have pleaded such defences initially will be material and, in addition to all the usual requirements to obtain the indulgence of being granted leave to amend, will require convincing explanation if it is to exclude the possibility that a court might infer delaying tactics and a lack of bona fides. An additional effect will be that such a defendant will ordinarily have to bear*

the wasted costs of the application for leave to amend and those occasioned by any attendant postponement of the summary judgment application."

45. In the *Absa Bank* case the defendant had failed to deliver a general plea and sought initially to rely only upon his special pleas and an opposing affidavit to overcome a summary judgment application. He sought to rely, in his affidavit, on defences that should have been incorporated in a general plea. The Court granted him the opportunity of delivering a general plea prior to the hearing of the application for summary judgment.

46. The current matter is different, as I have concluded that summary judgment should be refused on the basis of one of the defences already pleaded, namely that of fraudulent misrepresentation. This is not a matter in which summary judgment can be granted for a part of the plaintiff's claim (the misrepresentation defence to the main claim and the defendant's counterclaim being inextricably linked). I therefore do not have to decide whether a defence based upon the validity of the loan agreement is a *bona fide* defence in the context of summary judgment. For that reason, it will serve no purpose to postpone the summary judgment application pending the outcome of the dispute in relation to the proposed amendment.

Costs

47. The plaintiff argues, with reference to the belated notice of intention to amend the plea, that the application for summary judgment was brought on the basis of the admissions in the defendant's plea, confirmed under oath in the opposing affidavit. The defendant's unexpected about-turn as regards the validity of the loan agreement sued upon has resulted in the waste of the plaintiff's and the Court's time and resources, and the defendant should thus pay the costs of the summary judgment application on a punitive scale.

48. There is merit in the plaintiff's argument. It seems to me that, had the defendant denied the validity of the loan agreement attached to the particulars of claim from the outset, the plaintiff would probably not have sought summary judgment. The defendant has now embarked on the difficult path of retracting an

admission. Having caused unnecessary litigation, the defendant should bear the costs of this application. I do not, however, think that the matter warrants costs on a punitive scale.

Order

In the circumstances, it is ordered as follows:

49. **The application for summary judgment is refused and the defendant is given leave to defend the action.**

50. **The defendant shall pay the costs of the summary judgment application.**

P. S. VAN ZYL
Acting judge of the High Court

Appearances:

For the plaintiff: E. Nel, instructed by Oosthuizen & Co. Attorneys

For the defendant: N. Riley, instructed by Michael Marshall Attorneys