IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

22/8/16 .....

Case number: 42079/2012

In the matter between:

INVESTEC BANK LIMITED	**Plaintiff**
and	
ISINDA 154 (PTY) LTD	**First Defendant**
MATSILELE EPHRAIM SONO	**Second Defendant**
MPULENY GAIL SONO	**Third Defendant**
LUNGILE JOHN KONKI	**Fourth Defendant**
ANNE MORERI KONKI	**Fifth Defendant**
KRISH NAIDOO	**Sixth Defendant**

JUDGMENT

SATCHWELL J:

INTRODUCTION

1. Plaintiff sues defendants for payment of a sum in excess of 9 million Rand (nine million Rand). That claim is based on a loan agreement as described in paragraph 8

of the particulars of claim. Plaintiff now seeks to amend that paragraph 8 to which proposed amendment three out of six of defendants have opposed.

2. The background to this application and the proposed amendment and opposition thereto is a loan document which provided for a loan of the sum of R 14 million Rand (fourteen million Rand) to defendants on certain terms and conditions. The loan was paid over. Certain repayments were made by defendants. Plaintiff now sues for the balance of the loan.

3. Plaintiff submits that the proposed amendment is no more than a reformulation of the already extant first two averments in the particulars, namely that the loan was in writing and that it was tacitly accepted, together with the introduction of a third basis for its claim against defendants, namely the existence of a tacit agreement. Defendants' objection is founded upon the absence of a signature by plaintiff to the loan agreement as required, the consequent inability of plaintiff to rely upon an unsigned document with the result that the proposed amendments do not set out a cause of action in any of the alternatives.

AMENDMENTS

4. With respect, I must associate myself wholeheartedly with the many authorities which have endorsed the approach that amendments are allowed in order "to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done".[1] Court hearings are not a game in which the parties conceal facts behind rules or procedures or punish one party for a mistake by not allowing that party to present the true dispute and issues involved[2]. No court should be hamstrung by rules and process to such an extent that it is unable to render a just verdict on a true and complete account of what has or has not taken place.

5. I appreciate that defendants take the view that the proposed amendments are of such a nature that they are unsustainable in fact and in law. The upshot would therefore be that the pleadings may be excipiable because the particulars of claim would contain averments which could not sustain a claim.

6. When I balance these two interests – full and proper dispute of all issues versus the possibility of a claim which a trial judge may find is (in law) unproven or unprovable – I must also take into account whether or not any prejudice or inconvenience which may be occasioned to defendants could be resolved by an appropriate order for

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[1] *Cross v Ferreira* 1950 (3) SA 443 (C) at 447.

[2] *Whittaker v Roos and another; Morant Roos and another* 1911 TPD 1092 at 1102-3. See also *J R Janisch (Pty) Ltd v W M Spilhaus & Co (WP) (Pty) Limited* 1992 (1) SA 167 (C) at 169.

costs. I must also consider the additional time, effort, argument and costs which may be occasioned should it indeed be the case that the grant of these proposed amendments would necessarily lead to successful exception proceedings.

THE PLEADINGS AND PROPOSED AMENDMENTS

The pleadings

7. The current paragraph 8 in the particulars of claim read as follows:

> "On or about 23rd July 2007 and at Johannesburg, alternatively at Cape Town, the Plaintiff represented by a duly authorised official, and First Defendant, duly represented by the Fourth Defendant, concluded a written Loan Agreement being loan agreement no 241612/0011 (hereinafter referred to as 'the Loan Agreement'). A copy of the Loan Agreement is annexed hereto marked 'POC1'.
>
> 8.1 The Loan Agreement includes as part of the agreement a Deed of Pledge and Cession, a copy of which is included in annexure 'POC1'hereto.
>
> 8.2 The Plaintiff's written acceptance of the Loan Agreement appears from the signature of its authorised official on the Deed of Pledge and Cession; alternatively, the Plaintiff, represented as aforesaid, conveyed its acceptance of the Loan Agreement to the First Defendant verbally and/or by its conduct in implementing the Loan Agreement.
>
> 8.3 The parties have fully implemented the Loan Agreement"

8. The three defendants pleaded to this paragraph to the effect that the loan agreement has not been signed by plaintiff, that the signature of the deed of pledge and cession does not constitute signature of the loan agreement, and that a proper interpretation of the loan agreement would result in a finding that the loan agreement is not valid and binding unless and until it is signed by both parties. Accordingly, it has been pleaded that the agreement is not binding upon the parties and plaintiff is not entitled to proceed against defendants in terms of the loan agreement.

9. As can be seen paragraph 8 of the particulars currently pleads either that the loan agreement was accepted in writing by signing a deed of pledge and cession alternatively by verbal acceptance and conduct. So lengthy are the proposed amendments that I am not going to repeat them word for word. In essence:

a. Paragraph 8.1 summarises the case by the words "the Plaintiff's express and written acceptance thereof, alternatively its tacit acceptance thereof, alternatively by way of a tacit agreement on the same terms and conditions as set out in annexure POC1 mutatis mutandis."
b. Paragraph 8.2 states that on a proper construction of the written offer it is clear that written acceptance by plaintiff is a permissive option solely for the benefit of plaintiff who could elect to accept and be bound by the agreement without reducing such acceptance to writing.
c. The tacit acceptance of the offer is set out in paragraph 8.3 to the effect that the offer was accepted in accordance with internal procedures, defendant was advised thereof, payment of the loan was both authorised and paid out.
d. Alternatively, as set out in paragraph 8.4, the written acceptance of the offer is to be found in internal documentation which includes the written authority to make payment and the signature on the deed of pledge and cession.

It would seem that these new paragraphs 8.3 and 8.4 are not much more than elaboration of the earlier paragraph 8 to which defendants have pleaded.

10. The proposed paragraph 8.5 is a new and alternative basis which sets out provision of the written offer, acceptance of that offer by plaintiff in accordance with internal procedures, advice of such acceptance, authorisation of payment and making of payment, implementation of the loan agreement which accordingly amounts to conclusion of a tacit contract on the same terms and conditions as those set out in the written loan agreement. It is clear that the proposed paragraph 8.5 is an entirely new ground giving rise to the action.

Antecedent Binding Agreement

11. Insofar as the proposed paragraphs 8.2 and 8.3 are concerned, defendants have argued that where it is clear that the parties intended that the contract should be embodied in writing then the contract could only come into existence when the written document has been signed by both parties. Plaintiff is not permitted to waive the requirements as they may appear from the written document. Accordingly, there would be no binding agreement unless and until plaintiff had signed the document.

12. For the purpose of this ruling on the proposed amendments, I am not going to deal with the relevant clauses of the loan agreement and interpretation thereof. I do not consider that I am here determining the merits of the action itself.

13. Defendants relied upon *Meter Motors (Pty) Ltd v Cohen* 1966 (2) SA 735 (T) for this argument and sought to distinguish the later judgment of the Supreme Court of

Appeal in *Pillay & Another v Shaik & Others* 2009 (4) SA 74 (SCA). *Pillay supra* is, of course, both a later judgment and one of the Supreme Court of Appeal. I propose therefore to first have regard to *Pillay supra* in which case there was a dispute whether or not a standard-form agreement headed "Agreement for the Purchase of a Members Interest in a Close Corporation" was binding on the parties only when both parties had signed the document. Defendants argued that *Pillay supra* was distinguishable because the document in question did not provide that it would not be binding unless and until signed by both parties whereas defendants maintain that the loan agreement in the present matter can only be read to that effect. As I have indicated, I do not need to decide the correct reading of the loan agreement between the litigants in this matter. The principle clearly enunciated in *Pillay supra* is not dependant upon the facts.

14. Writing as a matter of principle and not confined to the facts of that matter, the court in *Pillay supra* stated[3] that

> "In my opinion it is clear from *Goldblatt and Freemantle, supra*, and the authorities cited therein that, in the absence of a statute which prescribes writing signed by the parties or their authorised representatives as an essential requisite for the creation of a contractual obligation (something which does not apply here),[4] an agreement between parties will be held not to have given rise to contractual obligations only if there is a pre-existing contract between the parties which prescribes compliance with a formality or formalities before a binding contract can come into existence" (at page 83 F – H).

15. In *Pillay supra*, the Supreme Court of Appeal held that the passage in *Meter Motors supra* upon which reliance had been placed was "incorrect".

16. There is no suggestion before me that such a pre-existing contract exists which requires the formality of writing before a binding contract, such as the loan agreement, could come into existence.

17. I must repeat that I am not, at the present time, determining the meaning of certain clauses of the loan agreement. I am merely examining whether or not it is axiomatic that the loan agreement cannot be relied upon and that such reliance is therefore inevitably excipiable in the present litigation.

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[3] At paragraph [50].

[4] Nor does it apply in the case presently under consideration.

18. I find that that to allow the proposed amendments 8.1, 8.2, 8.3 would not necessarily and obviously lead to a finding of excipiability and are therefore allowed.

The Tacit Agreement

19. The proposed amendment set out in paragraph 8.5 relies upon a series of external manifestations and some documentation to aver a tacit agreement between the parties.

20. Defendants again submit that any tacit agreement would be struck by the same problems of non-signature by plaintiff as was previously argued.

21. The absence of a pre-existing contract prohibiting any contract until such time as all parties have signed the subsequent document has already been dealt with.

22. The opportunity to consider all surrounding circumstances, whether prior, contemporaneous or subsequent, to determine the intention of the parties has been clarified and applied in *Endumeni Municipality* 2012 (4) SA 593 (SCA), *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA), *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport Bpk 2014* (2) SA 494 (SCA) And most recently in *Novartis SA v Maphil Trading* 2016 (1) SA 518 (SCA). Neither this, nor any other court, is confined solely to the linguistics of the loan agreement between these litigants to determine whether or not the parties intended to bind themselves contractually. As was said in *Novartis supra* "that inevitably requires an examination of the factual matrix – all the facts proven that show what their intention was in respect of entering into a contract: the contemporaneous documents, their conduct in negotiating and communicating with each other, and, importantly, the steps taken to implement the contract" [at para 35].

23. I can see no impediment to the plaintiff now seeking to amend its particulars of claim so as to be able to rely upon those averments set out in the proposed paragraph 8.5 to plead a tacit agreement on the same terms as are set out in the loan agreement.

24. Accordingly, the amendment proposed in paragraph 8.5 is allowed.

COSTS

25. Since I propose to grant the application for all the amendments to the particulars of claim, it would seem logical that costs should follow the result.

26. I certainly would not penalise defendants by reason of the alleged dishonesty on the part of one of defendant for which plaintiff argued. That can be decided by the trial court.

27. I have decided that, since seeking of one or more amendments is an indulgence and since defendants' opposition was not without merit and since that opposition might yet even translate into an exception or into a successful defence to the action itself, that the costs of this interlocutory application should be reserved. The trial court can decide what merit there has been in the amendments and what merit there was in the opposition thereto.

ORDER

It is ordered that:

1. Paragraph 8 of plaintiff's particulars of claim are deleted and the new paragraph 8 (including 8.1, 8.2, 8.3, 8.4, 8.5 are substituted therefore.
2. Annexures POC 1A, POC1B, POC1C are added to the particulars of claim.
3. The costs of this opposed application are reserved.

DATED AT JOHANNESBURG 23rd AUGUST 2016

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SATCHWELL J

Counsel for Plaintiff: Adv J Muller SC and with him Adv A D Brown.
Attorneys for Plaintiff: Minde Schapiro & Smith.
Counsel for Defendant: Adv N Segal.
Attorneys for Defendant: Cranko Karp & Associates Inc.
Dates of hearing: 16th August 2016.
Date of judgment: 23rd August 2016.

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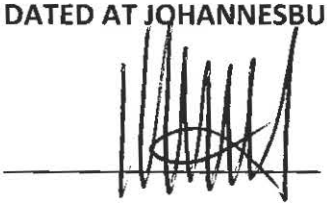

SATCHWELL J

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