

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 13166/2017

In the matter between:

ANDRIES FREDERICK COETZEE N.O.

Applicant

and

**TOTAL AUCTIONEERING SERVICES AND SALES CC
t/a CONSOLIDATED AUCTIONEERS**

1st Respondent

EGIDIO FILIPE GONCALVES DA SILVA

2nd Respondent

JUDGMENT SUMMARY

Application – loan agreement – non-repayment of loan – enforcement of security – loan agreement not signed by creditor – signed by debtors – as parties complied with terms of loan agreement, agreement enforceable – defence – purported subsequent sale agreement superseded loan agreement – oral sale agreement for acquisition by creditor of 50% member's interest in a CC in lieu of repayment – dispute regarding existence of sale agreement – debtors had acknowledged indebtedness – failure to respond to letters of demand from creditor for repayment – inference to be drawn from failure to respond is an admission of the facts contained therein – no genuine dispute of fact – enforceability of non-variation clause in loan agreement – debtors claimed that enforceability of non-variation clause contrary to public policy – alleged waiver of right to rely on loan agreement by creditor – evidence of waiver must be clear and unequivocal – failure by respondents to prove waiver – principal debtor in liquidation and unable

to repay loan amount – no order can be granted against business in liquidation – not necessary to excuss principal debtor first – order directing realisation of security.

Background

The applicant was the executor of the estate of the late Mr Andre Marius Botha (Botha). The applicant's claim was based on a loan agreement entered into between Botha, the first respondent (Total) and the second respondent (Da Silva). Da Silva signed the loan agreement on behalf of Total and in his personal capacity.

In terms of the loan agreement, Botha lent and advanced R2.5 million to Total, which was to be repaid by Total, together with interest. As security for the repayment of the loan, Da Silva ceded his right, title and interest in several properties in favour of Botha. Total failed to repay the loan, and the estate of Botha sought to realise the security provided by Da Silva.

Legal submissions

The loan agreement had not been signed by Botha. However, the existence and validity of the loan agreement could not be disputed given that the parties acted in terms of the agreement – Botha had paid the loan amount to Total, and Total had accepted this payment.

The respondents argued that the loan agreement had been superseded by a subsequent oral agreement purportedly entered into between Da Silva and Botha. In terms of this oral agreement, Botha acquired a 50% member's interest in a close corporation (of which Da Silva was a member) for the purchase consideration of R2.5 million, thus extinguishing the debt to be repaid to Botha. The existence of the oral agreement was disputed, and Botha's acceptance of a 50% member's interest in the CC in lieu of the repayment of the loan was in question.

The applicant argued that, in addition to a lack of evidence proving the existence of the oral agreement, the loan agreement contained a non-variation clause which required any alterations to the agreement to be reduced to writing and signed by all the parties thereto. Therefore, reliance on a subsequent oral sale agreement would be impermissible. The Court held that the non-variation agreement was enforceable despite the agreement not being signed by Botha, and the sale agreement would be of not force and effect.

The respondent contended that the enforcement of the non-variation clause would be contrary to public policy, as Botha had waived the reliance on the loan agreement by accepting the 50% member's interest in the CC in lieu of the repayment of the loan. The Court stated that clear and unequivocal evidence of waiver must be presented, as a party is not likely to be deemed to have waived their rights. The respondents failed to prove a waiver of rights by Botha. In addition, such a waiver would be contrary to the non-variation clause.

Da Silva contended that the application should be dismissed as it raises an irresolvable dispute of fact in respect of whether or not the oral agreement existed. Prior to the filing of their answering affidavit the respondents had, on numerous occasions, failed to dispute the obligation to repay the loan, or even mention the oral agreement. In considering the consultations and correspondence between the parties, it was evident that the respondents had acknowledged their indebtedness to the applicant. Furthermore, the respondents had failed to reply to the letters of demand which they had received from the applicant, and the Court drew the inference that the lack of response amounted to an admission of the facts stated in the letters i.e. the indebtedness of the respondents. The Court held that the respondents' version of events was untenable and there was no genuine dispute of fact.

ORDER: Da Silva was ordered to transfer the properties into the estate of the late Mr Andre Marius Botha and was ordered to pay the legal costs in respect of the proceedings.

Coram: Weiner J

Heard: 29 August 2018

Delivered: 25 February 2019