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

REPORTABLE

CASE NO: 15837/2016

In the matter between:

INGRID DIANE STERLING Plaintiff

and

BRIAN ALAN MYERSON Defendant

JUDGMENT DELIVERED ON 25 NOVEMBER 2016

GAMBLE, J:

INTRODUCTION

[1] The parties to these proceedings were once married to each other. Upon their divorce in the United Kingdom in March 2008, the Family Division of the High Court of Justice in London ordered the defendant to pay an amount of GBP 11 million to the defendant. Over the years he discharged payment of a substantial part of his indebtedness to the plaintiff; in October 2013 the outstanding balance on the debt was the sum of GBP 618 000.

[2] Upon being pressed for payment of the outstanding balance by the plaintiff's husband[1] the defendant acknowledged his liability in the aforesaid amount and on 22 October 2013 executed an acknowledgement of debt ("an AOD") in favour of the plaintiff. At that time both of the parties were resident in Cape Town and the AOD was drawn up by a director of the plaintiff's attorneys of record. The AOD provided for payment by the defendant of his outstanding debt in various tranches, all of this to occur by latest 4 November 2013. Certain payments were made by the plaintiff subsequent to the conclusion of the AOD but as of 1 September 2016 he was still indebted to the plaintiff in the sum of GBP 396 525.

[3] The defendant having ignored the plaintiff's demand for payment of that amount, on 2 September 2016 summons was issued for payment of the outstanding balance together with interest and costs on the scale as between attorney and client. When the defendant entered an appearance to defend the plaintiff filed an application for summary judgment in the aforesaid amount. The defendant opposed the application and filed a fairly comprehensive affidavit in reply thereto.

[4] Flowing from that reply, it is apparent that the extent of the defendant's indebtedness to the plaintiff is not in dispute. What is in issue is whether the amount is due and payable. At the hearing of that application on 22 November 2016 the plaintiff was represented by Adv I.J.Muller SC and the defendant by Adv P.S. van Zyl. The court is indebted to counsel for their helpful heads of argument and oral submissions.

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[1] It is common cause in these proceedings that Mr Simon Sterling acted as the plaintiff's agent.

THE APPROACH TO ADJUDICATING DEFENCES IN SUMMARY JUDGMENT PROCEEDINGS

[5] Counsel were, generally, *ad idem* as to how this court should approach the defences put up by the defendant in this matter. The point of departure remains the seminal judgment of Corbett JA in *Maharaj*[2] , while the more recent judgment of Navsa JA in *Joob Joob*[3] provides a useful contemporaneous setting of the applicability of the summary judgment procedure in the constitutional era. Whereas some earlier judgements (including *Maharaj*) had described summary judgment as a drastic remedy, urging caution in the application thereof, Navsa JA [4] articulated the contemporary approach thus:

> *"[31] …(I)n South Africa, the summary judgement procedure was not intended to 'shut (a defendant) out from defending', unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.*
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> *[32] The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings*

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[2] Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A)

[3] Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009(5) SA 1 (SCA)

[4] At 11G

can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the Maharaj case at 425G - 426 E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgement. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.

[33] Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are "drastic" for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the Maharaj case at 425G-40 6C."

[6] In argument Ms van Zyl stressed , with particular reference to *Marsh*[5], that –

[5] Marsh and Another v Standard Bank of South Africa Ltd 2000 (4) SA 947 (W) at 949 D

> *"2. At the summary judgment stage of the proceedings it is not for the Court to decide any balance of probabilities or determine the likelihood of the deponent's allegations being true or false."*

Counsel pointed out that this approach closely follows the *dictum* in *Maharaj*[6].

[7] Mr Muller SC found no fault with this approach but went on to remind the court that in assessing whether the defence was raised *bona fide* one had to contextualise it against the entire factual matrix before the court at the stage of summary judgment. Accordingly, although at first blush it may appear to be a consideration by the court of the probabilities of the defendant's version being put up, in finding that the defendant's allegations do not sit comfortably with the remainder of the case, including, for instance documentation relied upon, the court would essentially be assessing the defendant's *bona fides* in advancing such a defence.

THE DEFENCES PUT UP

[8] In the first place the defendant claims that he is entitled to rectification of the AOD and says that he wishes to file a counterclaim if permitted to continue with the proceedings in this matter. At its core the rectification defence contemplates the introduction of a paragraph in the AOD suggesting that the defendant will only be liable to pay the agreed amounts on the stipulated days in the event that he is able to so pay. If he is unable to pay, it is said that it was agreed that he would be excused from paying until he is able to.

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[6] 426B

[9] The second defence put up is reliance on a *pactum de non petendo,* that is to say an agreement which suspends the ability of the plaintiff to enforce the AOD either for a specified period or until the occurence of some particular contingency.[7]

RECTIFICATION

[10] The principles applicable to a claim for rectification are not in dispute. Accordingly the defendant bears the onus of establishing that the AOD does not express the terms which he and Mr Sterling agreed upon when the document was drawn up by the plaintiff's attorney.[8] Accordingly, the defendant must show the facts which entitle him to such relief "*in the clearest and most satisfactory manner".* And, in assessing whether there is potential merit in such a defence, a court will bear in mind that, ordinarily, parties are precluded from relying on an alleged agreement which is at odds with an agreement which they have chosen to reduce to writing.[9] Usually a claim for rectification will contain an allegation to the effect that *"at all material times the parties were of the common continuing intention that"* a term not contained in the agreement was agreed upon but excluded in error. What does the defendant say here?

[11] In the affidavit opposing summary judgment the defendant says that :

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[7] Van der Merwe *et al* Contract , General Principles (4thed) at 456.

[8] Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd 2004 (6) SA 29 (SCA) at [21]

[9] Affirmative Portfolios CC v Transnet Ltd t/a Metrorail 2009(1) SA 196 (SCA) at [13]

[11.1] *"[The plaintiff] then requested me to sign the acknowledgment of debt which had been prepared by her attorney…I therefore signed the acknowledgment of debt under enormous pressure….";*

[11.2] *"However, during that period, and in particular before and after signature I reminded Mr Sterling that I would only be able to pay if and when in a financial position to do so - if my ability to do so, concurred with the deadline set out in the acknowledgement of debt, then the document was in order. If, however, I was unable to pay, then complying with the unduly strict prescriptions of the document - which allowed me less than two weeks after signature to come up with a balance owing - would obviously be impossible."*

[11.3] *"Mr Sterling indicated that he understood my position, but requested me to sign the document nonetheless, in the hope that it would all work out for the best in the end. It was on that basis that I signed the acknowledgement of debt. At that time, and in return for the release of the second mortgage over the immovable property by the plaintiff*[10]*, I was in a position to pay the sum of GBP 428 475.00 (as set out in paragraphs 5 and 7 of the particulars of claim). I therefore duly made such payment. Unfortunately, I was not able to pay the balance by 4 November 2013, as stipulated in the [AOD] document. I have not, since, been in a financial position to pay the plaintiff."*

[10] The AOD reflects that the Plantiff in fact held a fourth mortgage bond over an immovable property owned by Golden Mask Properties 23 (Pty) Ltd and that in exchange for the provision to her of bank guarantees totalling some R8,3m, she agreed to the cancellation of the said fourth bond.

[12] These then are the facts upon which the defendant relies to suggest that the AOD does not reflect the "*common intention"* of the parties. I agree with Mr Muller SC that the facts as alleged do not come close to making out a case for rectification. Indeed, the defendant provides no detail whatsoever as to when, where and in what manner he and Mr Sterling came to such agreement. Much like the appellant in *Soil Fumigation,* the defendant has done no more than to record now (some 3 years later) his unilateral understanding of what he describes as a term of the agreement orally expressed at the time. It is really no different to the position pithily described by Brand JA in that matter at 38 H - J :

> *"..(O)n a proper interpretation of the letter, it does not purport to be the manifestation of an agreement or even the recording of the terms of the agreement. On the contrary, its stated purpose was to establish a recordal of* [K's] *unilateral understanding of what he described as an oral agreement which was (allegedly) entered into nine months before…(The) letter…predated the credit agreement relied upon.. When this objection to the written agreement argument became apparent, the defendant's counsel changed direction by relying on the defence of rectification. Though this deserves some credit for ingenuity, it is clear that the remedy of rectification is not one which easily lends itself to a fallback position by way of afterthought."*

In my considered view then the defendant has not satisfactorily articulated the claim for rectification with the clarity which our courts have come to require so as to enable him to avoid summary judgment.[11]

[13] There is, in any event, a serious *lacuna* in the opposing affidavit which renders the rectification defence similarly unsustainable. The defence now being advanced – "*I will pay you when I can"* – is difficult to square with the extensive detail set out in the AOD as to the envisaged terms of payment. Those terms contemplate payment of large amounts of money on specified dates in the very near future: approxiamately 2 weeks hence. Yet the defendant offers no explanation for the manifest inconsistency in agreeing to pay a substantial sum within just a fortnight, and at the same being let off the hook by the plaintiff in the event that he is unable to come up with that amount. In ***Hoosain***[12] Seligson AJ observed, with reference to established authority[13] that " *an unduly sparse or unclear exposition of facts which should be within the defendant's knowledge may raise serious doubts as to his bona fides ."*

[14] In the circumstances I am of the view that the defendant's affidavit does not pass muster in relation to the rectification point.

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[11] Bushby v Guardian Assurance Co 1915 WLD 65 at 71; Bardopoulos and Macrides v Miltiadous 1947 (4) SA 860 (W) at 863 ; Levin v Zoutendijk 1079 (3) SA 1145 (W) at 1147H – 1148 A.

[12] District Bank Ltd v Hoosain and Others 1984 (4) SA 544 (C) at 548 B

[13] Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T) and Standard Merchant Bank Ltd v Rowe and Others 1982 (4) SA 671 (W)

THE PACTUM DE NON PETENDO DEFENCE

[15] Mr Muller SC complained at the outset that the second line of defence was inconsistent with the first: how, if the parties had agreed that the defendant need not pay the agreed amounts if he was in not in a position to do so, could he rely on an agreement not to recover if he was not in a position to pay what was due? Ms van Zyl pointed out, correctly in my view, that it was entirely permissible to plead conflicting causes of action in the alternative.[14] The problem, however, for the defendant on this score is similarly one of clarification: a failure to explain under oath how the obvious tension that these competing legal contentions throw up arose in the circumstances.

[16] In *Hoosain* [15] Seligson AJ confirmed the existence of the *pactum de non petendo* defence and Mr Muller SC did not baulk at the fact that such a defence may be raised at this stage. But, as Seligson AJ pointed out, when the defence is taken it must be articulated with sufficient clarity and particularity lest it be considered vague and uncertain and therefore unenforceable. In *Total South Africa*[16] Smalberger JA described the operation of the *pactum* thus:

> "*an undertaking not to sue Van Vuuren* [the principal debtor] *conditional upon the due and punctual performance by Fourie* [a party who had

[14] Cilliers *et al* Herbstein & Van Winsen's The Civil Practice of the High Courts of South Africa, Vol 1 at 594.

[15] At 548 I – 549 B

[16] Total South Africa (Pty) Ltd v Bekker NO 1992 (1) SA 617 (A) at 626 E-G

subsequently agreed to discharge van Vuuren's obligation to the creditor] *of the obligations inposed upon him."*

I turn again to the opposing affidavit to asses whether the defendant has established this defence which, it must be stressed, is an agreement to suspend the enforcement of the defendant's obligation to pay the plaintiff and not the discharge thereof.

[17] The defendant articulates the *pactum* defence as follows:

"*13. I respectfully submit that the plaintiff has, in any event, agreed to suspend the enforcement of the acknowledgement of debt until I was in a position to pay. I have been advised that a so-called pactum de non petendo exists between us, and I intend to raise the existence of this agreement as a defence in my plea.*

14. As mentioned above, I have met with Mr Sterling…on various occasions to discuss the matter. On each of those occasions the conclusion reached between us was that I would use my best endeavours to make payment to the plaintiff, and that I would do so when I was financially able to - and, in the meantime, the plaintiff would not take formal steps against me to enforce payment. The rationale for this agreement was obvious: there would be little sense in litigating against me if I was not in a financial position to meet the claim. I did not (and still do not) own any property that could be liquidated to pay the claim, and a judgment against me would be hollow."

[18] In this affidavit the defendant further mentions 4 meetings with Mr Sterling (with dates and places described) at which successive *pacta* were allegedly concluded. The outcome of each of those conversations as recorded in para 14 of the opposing affidavit to was that "*the* ***conclusion****"* that was arrived at was that the defendant would do his best to pay the plaintiff what was due to her, while the plaintiff "*would not take formal steps against..[him].. to enforce payment".*(Emphasis added) What the defendant does not say is that the parties reached an agreement on specific terms. It is axiomatic that such an agreement is fundamental to the proof of a *pactum* and absent proof of an agreement, concluded *animo contrahendi* that the plaintiff would not take formal steps to enforce payment of that which was due to her on expressly stipulated conditions, the *pactum* defence does not get off the ground.

[19] As with the rectification defence, the factual matrix before the court suggests that the defendant is not *bona fide* in raising this defence. In the first place one finds a letter written to the defendant by the plaintiff's attorneys on 24 May 2016 demanding payment within 10 days of capital amounts of SAR2m and GBP 257 000, legal costs incurred in relation to the conclusion of the AOD in the sum of SAR112 366 and interest. There is no sign of any written response to this letter nor does the defendant deal with the demand in his affidavit. To be sure, there is no indignant retort on record that nothing is due and payable by virtue of the (most recently concluded) *pactum de non petendo*

[20] The defendant says in his affidavit that he and Mr Sterling met in London on the morning of 15 June 2016 where, he claims, Mr Sterling agreed that there would be "*no point in going the legal route"*. Subsequent to this there is a letter

from the defendant's attorneys to the plaintiff's attorneys dated 20 June 2016 in which reference is made to a more recent letter from the former dated 17 June 2016 - just a day after the aforesaid alleged meeting in London. The letter of his attorneys of 20 June 2016 is at variance with the defendant's reliance now on a *pactum de non petendo*: it says no more than that there was an agreement that the defendant would pay the plaintiff "*such amounts when he can".* Importantly, the letter does not assert the fundamental component of any *pactum* – that the plaintiff undertook not to enforce the AOD.

[21] This correspondence, considered in the context of the absence of any other contemporaneous documentary recordal of an alleged *pactum* having been concluded, suggests likewise that the defence of a *pactum de non petendo* has not been raised *bona fide* by the defendant. In all the circumstances, I am driven to conclude that the *pactum* defence has not been established either with the requisite degree of proof. It follows that summary judgment may be granted against the defendant.

[22] There is one final consideration that should be raised. In terms of *Joob Joob*[17] and *Jili* [18] (the latter following, *inter alia, Breitenbach*) a court would still be entitled to refuse to grant summary judgment if an injustice was likely to result. But where (as in this case) a defendant's liability is not disputed, and where it is similarly clear from the affidavit opposing summary judgment that the defendant has no reasonable prospect of succeeding at trial, the position is clear: there is no room to

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[17] At [24]

[18] Jili v Firstrand Bank Ltd t/a Wesbank 2015 (3) SA 586 (SCA) at [13] – [14]

exercise a residual discretion to refuse summary judgment. As far as costs are concerned, there was no debate: the AOD provides for the payment of all legal costs to be made on the scale as between attorney and client.

ORDER OF COURT

A. Summary judgment is granted and the defendant is ordered to pay to the plaintiff;

    i. The sum of GBP 396 525 (Three Hundred and Ninety Six Thousand, Five Hundred and Twenty Five Pounds Sterling);

    ii. Interest on the aforesaid sum of GBP 396 525 at the prescribed rate *a tempore morae,* with effect from 2 September 2016 to date of payment in full.

B. The defendant shall pay the plaintiff's costs of suit on the scale as between attorney and client.

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GAMBLE J