



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

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| (1) REPORTABLE: No |
| (2) OF INTEREST TO OTHER JUDGES: No |
| (3) REVISED: No |

Date: 03 December 2021	Signature: N ADAM
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Case number 2021/5768

In the matter between:

BRAND CONTACT CONSULTANTS (PTY) LTD

(Reg. No.: 2016/169951/07)

Applicant

and

LUJU PICTURES AND PRODUCTIONS CC

(Reg. No.: 2009/095828/23)

First Respondent

LINEO EDWINA SEKELEOANE

(ID No.: 770718 0467 089)

Second Respondent

JUDGMENT

ADAM AJ:

Introduction

- [1] This is an application for summary judgment against the first and second respondents jointly and severally (*the respondents*), the one paying the other to be absolved, for (1) payment of R 1 731 500.00 (one million seven hundred and thirty-one thousand five hundred rand, together with (2) interest at the rate of 9.75% per annum, calculated from 23 February 2018 to date of final payment and (3) costs.
- [2] The respondents oppose the summary judgment application on the basis that firstly all but one claim has prescribed and secondly that the covid19 restrictions led to the unsuccessful launch of the movie. The respondents allege that it was a condition for the advance of the loan that the movie was successfully marketed at the cinemas and theatres. This was not possible due to the restrictions during the covid19 lockdown.

The facts

- [3] The applicant and respondents concluded an oral agreement in terms of which the applicant advanced bridging finance to the respondents for the production of the movie "My Zulu Wedding". The applicant states that the respondents undertook to repay the money from time to time awaiting the release of the movie but that the full outstanding balance would fall due on the official release of the movie.
- [4] The respondents paid an amount of R162 000.00 on the 23 August 2016 and a further amount of R100 000.00 on the 15 September 2018. The movie was released in cinemas nationwide on 23 February 2018 by Ster Kinekor Entertainment. The respondents made no further payments towards the loan and are in breach of the agreement.
- [5] In the respondents' plea the agreement is admitted as well as the amount that remains outstanding. The respondents however aver that the amount claimed is not due and payable as there existed a term in the

agreement that the film produced would need to be both locally and internationally released.

[6] This is different from the defences raised in the affidavit opposing summary judgment.

[7] It is trite that in its opposing affidavit a defendant must disclose fully the nature and grounds of its defence and the material facts relied upon therefor with reference to the plea (*Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at paragraphs 22–27) In other words, the nature and grounds of the defence and the material facts relied upon therefore in the affidavit should be in harmony with the allegations in the plea.

[8] Notwithstanding the above, the defence raised in the plea as well as the additional two defences raised in the affidavit opposing summary judgment will be considered further.

The respondents' defences

[9] In respect of the defence raised in the plea with regard to the release of the movie, annexure 'B' attached to the particulars of claim makes no mention of the release of the movie both locally and internationally. This clearly supports the applicant's version as pleaded in the particulars of claim (paragraph 6.5 read together with paragraph 12). Furthermore, the respondents did not persist with this defence in the affidavit opposing summary judgment and did not pursue this defence during the hearing of the matter. The court will therefore not take the defence any further as the respondents themselves failed to expand on it in their affidavit opposing summary judgment.

[10] The plea of prescription was not raised in the plea but was raised in the affidavit opposing summary judgment. The respondents submit that the

monies advanced would be due from the date of the loan and therefore all the monies, apart from the amount of R100 000 advanced on 15 September 2018, has prescribed.

[11] The Prescription Act, 68 of 1969 states in section 12(1) that “(1) *Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.*” It is common cause between the parties that the debt would only become due on the official release of the movie. The respondents aver that the debt would only be due once the movie was released both locally and internationally. The applicant on the other hand says it was released on 23 February 2018. In the circumstances, the debt would not be due for payment until the official release of the movie and the earliest date that this occurred is 23 February 2018. In the circumstances the prescription defence does not assist the respondents.

[12] The final defence raised by the respondents in the affidavit opposing summary judgment and during the hearing is that the respondents’ business was unsuccessful due to the restrictions emanating from the corona virus lockdown.

[13] The respondents’ counsel argued that the respondents were unable to perform due to the restrictions emanating from the lockdown. The operation of the doctrine of supervening impossibility of performance has been explained on the basis of a term that is implied into the contract that if performance becomes impossible, the contract shall not remain binding.

[14] In the English authority of *Tamplin Steamship Co v Anglo Mexican Petroleum Products Co Limited* L.R. 1916 2 AC 422, Lord Parker said:

“My Lords in considering the question arising on this appeal it is, I think, important to bear in mind the principle which really underlies all cases in which a contract has been held to determine upon the happening of some event which renders its performance impossible. This principle is

one of contract law depending upon some term or condition to be implied in the contract itself and not on something entirely dehors the contract which brings the contract to an end." (my emphasis)

[15] Lord Loreburn in the same English authority said that:

"An examination of the decisions confirms me in the view that, when our Courts have held innocent parties absolved from further performance of their promises, it has been upon the ground that there was an implied term in the contract which entitled them to be absolved. Sometimes it is put that performance has become impossible and that the party concerned did not promise to perform an impossibility. Sometimes it is put that the parties contemplated a certain state of things which fell out otherwise." (my emphasis).

[16] This defence was not pleaded as a term of the agreement in the respondents' plea. As stated above, the only defence that the respondents raised in their plea is that the movie had to be released both locally and internationally. In the circumstances this defence holds no merit.

[17] In *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA), Navsa JA states at paragraph 31:

"[31] ...in South Africa, the summary judgment 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."

Conclusion

[18] The respondents raised no bona fide defence to the summary judgment application. As all three defences raised above have no merit, the applicant is entitled to the relief claimed in the application for summary judgment. The interest amount claimed is the mora interest payable on the amount due from the 23 February 2018.

Costs

[19] In this matter there is no reason why the costs should not follow the result.

Order

[20] Summary judgment is granted against the first and second respondents, jointly and severally, the one paying the other to be absolved for:

- 1) payment of R 1 731 500.00 (One Million Seven Hundred and Thirty-One Thousand Five Hundred Rand);
- 2) interest on the amount of R 1 731 500.00 (One Million Seven Hundred and Thirty-One Thousand Five Hundred Rand) at the mora interest rate, calculated from 23 February 2018 to date of final payment;
- 3) costs of suit.

N ADAM
*Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg*

