REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 7753/2015

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

..... **.....11/10/2022.....**
SIGNATURE **DATE**

In the matter between:

ABSA BANK LIMITED **Applicant**

and

LONGCHAMP TURF INVESTMENTS (PTY) LTD (Registration No: 1991/006362/07) **1st Respondent**

OLGA KOTZE N.O. **2nd Respondent**

COMPANIES AND INTELLECTUAL PROPERTY COMMISSION **3rd Respondent**

PODLAS, HILDA BETTY N.O. **1st Intervening Party**

CAMBOURIS, SHAWN N.O. **2nd Intervening Party**

JUDGMENT

MANOIM J:

[1] This is an application for leave to appeal an order I granted on 12 August 2022 for the final winding up of Longchamp Turf Investments (Pty) Ltd ("Longchamp") at the behest of ABSA Bank Limited ("ABSA").

[2] In that matter apart from Longchamp, there were two intervening parties, Hilda Podlas and Shawn Cambouris. Longchamp together with these intervenors seeks leave to appeal that decision. For convenience I will simply refer to the three as Longchamp as they make common cause on all the issues.

[3] ABSA's grounds for winding up Longchamp were based on two claims. First what is referred to as the term loan (a claim for R 10 million secured by a mortgage) and second for repayment of an overdraft facility (R 5 million). I found for ABSA in respect of both claims and gave a final order for winding up. Longchamp in its notice for leave to appeal deals with the term loan and overdraft facility separately and I will approach the issues in the same way.

Term loan

[4] Longchamp raises two defences to the term loan. First it alleges that the term loan was never concluded and hence there is no *sine causa.* Longchamp contends that its liability here is dependent on a term loan agreement that ABSA

has not established. ABSA, it contends, was not able to produce the original of this agreement claiming it had been destroyed in a fire. Instead, ABSA put up a document which it said is a replica of the document that was destroyed. Longchamp raises two challenges here. The document is not proven. Even if it is a replica the document contains a reference to a further document. The further document should be the term loan agreement. But it is not in the record. Hence argues Longchamp there is no *causa*. Moreover, it argues that the person alleged to have attended to the all the documentation, its then relationship manager Lashner Ciorovich, has not filed a signed affidavit to confirm the existence of these agreements. Indeed, the argument is that without Ciorovich's affidavit the case against them must fail.[1]

[5] The *sine causa* argument did not get much emphasis during the main hearing. For that reason, I did not give it the attention it now occupies in Longchamp's application for leave to appeal. However, in fairness to Longchamp it is raised in the papers. For instance, the deponent for Longchamp states:

> *"It is denied by the first respondent that any term loan was entered into or that same had been lost or destroyed in a fire as claimed by the applicant"*

[6] In another affidavit the following is stated by Longchamp's deponent:

> *"It is reiterated that the terms of the unsigned facility letter were never agreed to by the 1st respondent and nor was the term loan. It is admitted however that a mortgage bond was registered over the property in*

[1] The fact that Ciorovich had not signed the affidavits in the record was not something argued in the main hearing. Indeed, much was made of what he stated, in what purports to be a confirmatory affidavit by him. See paragraph 28 of the first and intervening parties updated heads of argument Case Lines 53-10.

anticipation of the 1st respondent receiving an advance from the applicant to pay off the indebtedness of Good Hope Diamonds Limited to the Applicant."

[7] The document that does appear in the record is annexure FA 5.[2] This is a letter dated 4 December 2007 from Ciorovich to Longchamp's directors. It is attached to ABSA's affidavit. ABSA says it did not have a copy of this due to a fire at its premises and it got the copy in the record from Longchamp's attorneys. According to Longchamp, ABSA has elided what had to be two different documents. First it points out that FA 5 is a letter not an agreement. For instance, in FA 5 Ciorovich states:

"This letter is not a formal agreement of the facilities, merely a letter outlining our offer to you. Once the terms of the facility have been finalised, our formal facilities letter will be delivered to you by the writer"

[8] The letter in fact contemplates that there will be another agreement for the term loan. Also, Ciorovich states in the letter that Longchamp must sign the letter and return it. FA 5 is unsigned, and Longchamp denies signing it. There is no affidavit from Ciorovich to refute this. Longchamp relies in this regard on a decision in the matter of *Africa Solar Pty Ltd v Divwatt Pty Ltd* (365/2000) (SCA) March 2002. In that matter there was a dispute of fact as to whether the parties had the requisite *animus contrahendi*. The court held that if at the end of all the evidence there was uncertainty about whether *animus contrahendi* had been established the plaintiff had to lose. [3]

[2] Case Lines 1-45.
[3] See Africa Solar paragraph 33.

[9] To sum up the *sine causa* argument is this. ABSA relies on a facility agreement. But there is no record of this agreement in the papers as ABSA alleges it was destroyed in a fire. The only document in the record is the one that Longchamp furnished. This is a letter from Ciorovich which requires that two prior steps needed to be taken before an agreement could be reached; first the letter needed to be signed by Longchamp but ex facie the one in the record it appears it was not; second, the letter itself makes clear that it did not constitute the term loan agreement, but one was to follow. There is no such document in the record and Longchamp denies knowing about it. What Longchamp does admit is that it signed the necessary documentation so that a mortgage bond could be registered over the property. But it states ABSA acted precipitously in advancing the money to it before the documentation was completed. Put differently Longchamp argues ABSA jumped the gun. It thus paid out money without an underlying *causa*.

[10] ABSA first argues that the only reason the agreement is not in the record is that it was destroyed in the fire. It has referred me to the decision of the full court in *ABSA Bank Ltd v Zalvest Twenty (Pty) Ltd and Another* 2014 (2) SA 119 (WCC) where from the court's reasons it appears that the fire that impacted upon ABSA was well known to the judges of that division. Here, as this extract makes evident, the court adopted a pragmatic approach:

> *"The judges of this division (and no doubt of other divisions) will be very familiar with the allegations made by the plaintiff in the present case regarding the destruction of documents in the fire which took place on 28*

> *August 2009. Hundreds if not thousands of default and summary Judgments have been granted in favour of this particular plaintiff where it has made similar allegations. While this does not affect the principle, it does highlight the absurdity of the defendants contention, implying as it does that a very large part of the plaintiff's debtors book …was, overnight, rendered irrecoverable merely because the plaintiff's documents were destroyed in a fire. It is gratifying to be able to conclude that the law is not such an ass."*

[11] Next ABSA argues that Longchamp has never disputed the existence of the agreement. It quotes the following passages from Longchamp's affidavits in support of this contention:

> *"If the aforesaid misrepresentation had not been made by the Applicant the 1st Respondent would not have taken a loan to pay off the debt..."*

[12] Lest it be though that this reference to the loan is a reference simply to the mortgage, the following passage makes it clear that Longchamp understood them to be separate documents:

> "*The Applicant intentionally misrepresented to the 1st Respondent that it would grant and had approved further finance for a Hospital Project if it took a loan of R10 000 000.00 ... and executed a mortgage bond...*'".

[13] Further the term loan letter required various forms of security to be given by Longchamp. These were the mortgage over the property and certain suretyships. These it is common cause were concluded, making it likely that they were

concluded pursuant to the term loan agreement. Further payments were made pursuant to these agreements a fact not adequately explained by Longchamp. These facts distinguish this case from that in *Africa Solar.*

[14] Whilst Longchamp is correct that I erred in stating in my reasons that it was the mortgage bond which was destroyed not the term loan agreement I do not consider this makes a difference to the outcome. The reasons advanced by ABSA as to the likelihood of the existence of a term loan agreement albeit there is not one in the record, are highly persuasive and rely in part on Longchamp's own contentions. Moreover, in attempting to avoid the consequences of the term loan agreement Longchamp advances two defences which are inconsistent with one another. On the one hand it seeks to assert that there was no *sine causa*. On the other, it asserts that the agreement was induced by a fraudulent misrepresentation. The former presupposes no agreement, the latter that it existed but was unlawfully induced.

[15] On these facts I do not consider another court would come to a different conclusion about these two defences. But even if it did there remains the issue of unjust enrichment where again Longchamp has changed the emphasis of its argument. Longchamp now argues that there no loss to ABSA because the R 10 million advanced was simply 'round tripped' back to ABSA via the El Shaddai Trust and then Good Hope Diamonds. On this argument Longchamp has not been enriched and ABSA not impoverished. But as Mr Horn for ABSA points out that strictly in law this is not the case. Longchamp has an enforceable claim against El Shaddai to whom it loaned the money and to that extent Longchamp

has been enriched. Even then as I found in my main judgment the amount of R 92 300.00 remained in Longchamp's account; a fact that Longchamp has not adequately refuted.

[16] In respect of the second claim which is based on the overdraft facility no new arguments have been raised that were not made before me in the main matter apart from the absence of a signed affidavit from Ciorovich. Here the dispute between the parties was whether the request from ABSA to register a mortgage bond of R 5 million over the property was done to secure an increased overdraft facility (the Longchamp version) or to prevent the facility from otherwise being called in (the ABSA) version. I found that Longchamp's version suffered the same credibility claims as those made in respect of the first claim. I have not heard anything new in argument on the leave to appeal to suggest another court would come to a different conclusion. On this point too Longchamp must fail.

Conclusion.

[17] The test for leave to appeal in terms of section 17(1)(a)(i) of the Superior Courts Act was set out in the frequently quoted decision in the *Mont Chevaux Trust.* In that case the court explained that the threshold under this subsection has been raised from what it was under the previous statute:

> *"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, …. The use of the*

word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."[4]

[18] It is against that threshold that I examine the prospects of Longchamp in the present matter.

[19] ABSA only needs to succeed in respect of one of its claims. In my view it succeeds on both as well as in the alternative on unjust enrichment. The fact that much reliance has been placed on the absence of a signed affidavit from Ciorovich does not alter my conclusion. It might have, had I not found that an important piece of evidence, the email of 26 February 2008 was in fact authored by him despite ABSA's attempt to disavow it. Beyond that the failure to get a signed affidavit from him does not constitute a material fact in this matter as ABSA is an institution able to rely on others and I have not had to rely on Ciorovich for any of the conclusions I have come to, but rather, the common cause facts, the actions of Longchamp and the most clamant fact of all – its failure to raise these defences until years later. Moreover, its own lack of initiative in setting aside these agreements if they were without cause or premised on misrepresentation, as is now alleged, is not explained. Longchamp is not run by unsophisticated individuals nor deficient in accessing legal resources. It is clear that it did not take action over all these years because it knew it was bound. Only when it ran out of funds and ABSA instituted action against it did these defences get raised years later. I do not consider another court would hold otherwise.

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[4] *Mont Chevaux Trust v Goosen* 2014 JDR 2325 (LCC).

[20] The application for leave to appeal is dismissed.

ORDER:-

[21] In the result the following order is made:

1. The application is dismissed.
2. The respondent in the leave to appeal (which was the applicant in the main matter (ABSA)) costs will be costs in the winding up.

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N. MANOIM

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

JOHNANNESBURG

Date of hearing: 07 October 2022

Date of judgment: 11 October 2022

Appearances:

Counsel for the Applicant: N J Horn

Instructed by.	Tim Du Toit

Counsel for the First Respondent

and intervenors:	W B Boonzaaier
Instructed by:	Potgieter and Associates