



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

CASE NO: 54023/2021

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: NO
	1 November 2023
	DATE

In the matter between:

SHOWROOM CENTRE (PTY) LTD

1st Applicant

**SIYATHEMBANA PROJECT MANAGEMENT &
DEVELOPMENT (PTY) LTD**

2nd Applicant

STEPHEN ZAGEY

3rd Applicant

and

RONALD KAGAN

Respondent

JUDGMENT

Coram NOKO J*Introduction*

[1] The applicants brought an application for the following orders, first, to uplift the bar and secondly, an order for costs against the plaintiff in respect of the application to stay the proceedings.

[2] In this judgment the respondent will be referred to as plaintiff and applicants will be referred to as defendants.

Background

[3] The plaintiff launched several court proceedings against the defendants predicated on the same cause of action, some of which were withdrawn. The proceedings will, for the purposes of this judgment, be categorised into two, as previous proceedings (which were withdrawn) and as current proceedings.¹

Current proceedings

[4] The plaintiff launched proceedings against the defendants for a debt which arose allegedly from a loan agreement which was signed by both parties.² According to the plaintiff the material terms of the agreement were that the plaintiff (acting in his personal capacity) will advance the second defendant (represented by the third defendant) amount of 1 million. The loan would be repaid within a period of 4 years

¹ The defendants have referred to the proceedings as previous aborted proceedings and present action.

² There is a dispute whether the said agreement was signed by both parties.

with interest calculated according to the maximum prime lending rates of the major financial institutions in South Africa, on payment terms as set out in the amortisation table. The agreement further provided that the plaintiff would be allocated 5 percent of the issued share capital in the first defendant. In addition, it was further agreed that the second defendant would be substituted by the first defendant as a borrower in due course.

[5] Pursuant to the above agreement amount of 1million was paid on July 2016 by the plaintiff into the Attorneys' Trust bank account whose details were provided by the third defendant. The 5 percent issued share capital was allotted to the plaintiff on 2 September 2016. The first defendant commenced repayment of the loan at the rate of R20 000.00 per month from 7 February 2019 and the last payment was made in January 2020. The total amount repaid is R220 000,00.

[6] Due to the failure to continue with the monthly repayment the plaintiff launched civil action against the first defendant alone in the previous proceedings which proceedings were withdrawn. The plaintiff has now sued out summons against the first defendant alternatively against the second defendant further alternatively against the third defendant for the same amount though based on different cause of action.

[7] The summonses in the current proceedings were served on the defendants on 17 November 2021 and the defendants delivered notice to defend on 1 December 2021. The defendants' plea was due on 27 January 2022, but defendants failed to deliver same. The plaintiff served notice of bar on the defendants on 13 April 2022 in terms of which the defendants were required to serve their pleas, notice of exception or notice to strike out

within 5 days ending on 22 April 2022 failing which the defendants would be *ipso facto* barred.

[8] Instead of serving the plea (or exception or application to strike out) the defendants served application to stay the proceedings pending payment of the legal costs in respect of the summons/applications which were withdrawn by the plaintiff. The defendants simultaneously served application to uplift the bar. These processes were served on 22 April 2022, being the fifth day after service of notice of bar by the plaintiff.

Previous proceedings.

[9] The plaintiff had previously issued three court processes predicated on the same alleged indebtedness of the first defendant to the plaintiff. The said proceedings were as follows, first, the plaintiff instituted an action, (under case number 4124/2019) against the defendant during February 2019 which action was withdrawn on 19 November 2020. Secondly, the plaintiff launched a liquidation application during March 2021 in relation to the same cause of action and the said application was withdrawn on 3 September 2021(case number 11934/2021). Thirdly, plaintiff launched an urgent application for an order interdicting the plaintiffs to execute on the plaintiff's property which application was withdrawn on 24 August 2021 (case number 4124/2019). The defendants contend that the plaintiff was obliged to pay the legal costs for all withdrawn proceedings. In view of the plaintiff refusing to pay legal costs the defendants launched proceeding to stay the current proceedings.

[10] Plaintiff subsequently paid the legal costs sought in the defendants' application to stay the proceedings but refused to tender the costs for the application itself. The

application before me is for the plaintiff to be ordered to pay those costs and further that the bar be uplifted. The plaintiff has in return sought default judgment against the defendants as the defendants are placed under bar.³

Issues

[11] The issues for determination are as follows:

- 11.1 Whether defendants have made out a case for the uplifting of the bar,
- 11.2 Whether the defendants are entitled to the legal costs in respect of the application to stay the proceedings,
- 11.3 Adjudication of the application for default judgment.

Submissions by the parties

Uplifting of the bar

[12] Defendants' counsel contended that the defendants had an option, upon receipt of the notice of bar, to deliver a plea alternatively to bring the application to stay the proceedings pending the payment of all legal costs. The defendants opted for the latter. Counsel contended further that the conduct of the plaintiff in placing the defendants under bar was unreasonable as it was served in the face of the attempts by the defendants to enforce their rights to legal costs.

[13] It was envisaged, so the argument continued, that for the application for a stay to be effective once served the impugned proceedings should be stayed immediately lest

³ The plaintiff has stated in the joint minutes on Caselines 002-3 that "[O]nly in the event that this Honourable Court does not uplift the bar, the respondent will seek to pursue its application for Default Judgment".

the application will become moot and or academic. In the premises from a pragmatic approach the court should therefore be able, so the argument continued, to state that the stay of the proceedings is effective from the date when the application to stay was delivered. This would ensure that the essence of the application is not defeated. It would have meant, so argument continued, that since the stay application was served before the expiry of the five days of the notice of bar the proceedings were stayed. To this end I was impressed to then uplift the bar and permit the exchange of papers to continue.

[14] The defendants' counsel contended further that there are no legal bases for the contention raised by the plaintiff that the application to uplift the bar is defective since it did not address the requirement that the defendants must show a bona fide defence. This, the counsel argued, is based on the fact that the defences are well known by the plaintiff. Further that the said defences have been clearly raised in the affidavits⁴ deposed to in the *previous proceedings* which affidavits are attached to the plaintiff's papers filed in these proceedings. The said defences have also been accentuated in the defendants' replying affidavit.⁵

[15] In addition to those defences, so the argument continued, the plaintiff's particulars of claim are vague and embarrassing. They are further excipiable as they lacked sufficient averments to sustain a cause of action. In this regard defendants' counsel referred to the draft notice of exception and notice to remove cause of complaint attached to the defendants' replying affidavit.

[16] The plaintiff on the other hand contends that the success of the application to uplift a bar is dependent on the defendants being able to satisfy the requirements decreed

⁴ Deposed to in the summary judgment and liquidation applications in the previous proceedings.

⁵ Ibid at para 12.3, CaseLines 004-7.

for the purpose of uplifting the bar. The defendants are required to show good cause why condonation should be granted for the failure to deliver the plea. Good cause enjoins the court to have regards of two factors, first, that the defendants must demonstrate a reasonable and acceptable explanation for having failed to deliver the plea on time and secondly that the defendants have a bona fide defence or prima facie defence. Both factors are critical, and the court would not readily decide in favour of the defendants if one or none has been satisfied.⁶

[17] Plaintiff's counsel submitted further that the defendants' service of the application to stay the proceeding did not have the force of staying the pending process till order to stay is made. The defendants were therefore mistaken in thinking that the stay application has the effect of suspending the effect and operation of the notice of bar. In fact, so proceeded the argument, the defendants took the risk of ignoring the notice of bar and opted to serve the application to stay.

[18] The plaintiff's counsel contended that the defendants brought the application to uplift the bar but failed to comply with the requirements to uplift the bar, including to set out a bona fide defence. The defences were only raised by the defendants in their replying affidavit. The defendants, so the argument proceeded, should have filed supplementary founding affidavit to obviate the shortcomings in the founding affidavit unlike attempting to set out the defences in their replying affidavit. This is irregular and the plaintiff was denied the opportunity to answer to averments setting out the defences. Without demonstrating that the defendants had bona fide defence or furnishing an explanation for failure to deliver the plea the application to uplift the bar is unsustainable and stand to be dismissed.

⁶ Counsel for the plaintiff referred to judgments in *Chetty v Law Society, Transvaal* 1985 (2) SA 756 A (767J-768A), *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC) at para 86 and *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) at para 12.

Stay of proceedings

[19] The defendants contend that since the legal costs which underlied the application for a stay were paid the defendants' only request is that the plaintiff should be ordered to pay legal costs for the application to stay. The defendants' counsel submitted that costs relative to this application were reasonably incurred, and its objective was to get the plaintiff to pay the costs of the withdrawn matters and the plaintiff having complied therewith the plaintiff had to make a tender for costs associated with the application. The refusal by the plaintiff to tender for the costs, so the argued the counsel, was unreasonable and has no legal basis.

[20] The counsel for the plaintiff contended that the requirements for the stay of proceedings for legal costs to be paid are, first, the defendant should have had taxed the bill of costs, secondly, that there should have been a demand for payment and lastly that the plaintiff should have refused to pay. At the time of the application to stay was served two of the six bills were already taxed and plaintiff settled them. The remainder of the bills were not taxed and would not have properly been used to found a cause of action to apply for the stay.

[21] In respect of the two remaining bills the defendants failed to demonstrate that a demand was made and even if it was made the defendant are required to demonstrate that the plaintiff refused to settle amount.

[22] That notwithstanding, counsel continued, the plaintiff genuinely believed that the amount due for the legal costs could be set off against the judgment which would be obtained against the defendants.

[23] Plaintiff's counsel submitted that to this end the defendants have failed to prove that the plaintiff refused to pay. In any event the defendants have failed to allude to any of the requirements for the court to order a stay of proceedings and hence the application for a stay would have been unsuccessful.

The applicable legal principles and analysis.

Stay of proceedings

[24] It is noted that this application is no longer for the stay of proceedings as the legal costs predicated the application are settled. Instead, the application is limited to the costs of the application itself and the plaintiff having refused to consent to pay the legal costs.

[25] The defendants' cause of action can be linked to the provisions of Rule 41(1) read with Rule 41(1)(c)⁷ of the Uniform Rules of Court in terms of which a party who

⁷ **41 Withdrawal, settlement, discontinuance, postponement, and abandonment**

(1)(a) A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice

a consent to pay costs and the taxing master shall tax such costs on the request of the other party.

(b) ...

(c) If no such consent to pay costs is embodied in the notice of withdrawal, the other party may apply to court on notice for an order for costs.

withdraws court proceeding is required to tender costs failing which the other party may apply to court for an order for such costs.

[26] It was held in *Smit v Venter*⁸ that the requirements to stay the proceedings because of non-payment of legal cost previously incurred are, first, that the further proceedings must cover substantially the same grounds as the former proceedings and must be brought vexatiously. Second, there should be a judgment in favour of the defendant and the costs should have been taxed. Thirdly, there should have been a demand made and proof that the plaintiff wilfully refused to pay the debtor.

[27] Hendricks J⁹ emphasised that the *raison d'être* underpinning the stay of proceedings is to curb the mischief of a party engaging in vexatious litigation. It being noted that the order to stay proceedings may implicate a party's right to access of access to courts.¹⁰

[28] I have noted that there should be a balancing exercise between the right not to be subjected to vexatious litigation and the right to exercise access to courts.¹¹ At the same time I observed that staying the proceeding is within the discretion of the court.

⁸ (2080/2009) [2014] North-West High Court, per Hendricks J. from a historical perspective it was held almost a century ago in *Collector of Customs v Morris* 1913 CPD 140 that a litigant is not allowed to commence proceedings afresh where costs awarded against him in previous abortive proceedings remains unpaid. See Hall J at 449 A-B, in *Argus Printing & Publishing Co. Ltd v Rutland* 1953 (3) SA 44d7.

⁹ See *Smit v Venter* at para 6.

¹⁰ Reference was made of the judgment in *Beinash and Another v Ernst and Young and Others* 1999 (2) SA 116 (CC), where the constitutional court held at para [16] that “[T]he effect of s 2(1)(b) of the [Vexatious Proceedings] Act is to impose a procedural barrier to litigation on persons who are found to be vexatious litigants. That is its very purpose. In doing so, it is inconsistent with section 34 of the Constitution, which protects the right of access for everyone and does not contain any internal limitation of the right. The barrier which may be imposed under s 2(1)(b) therefore does limit the right of access to court protection in s 34 of the Constitution. But in my view, such limitation is reasonable and justifiable.”

¹¹ Hendricks J having noted further at para 7 that Corbett AJ in *Van Dyk v Conradie & Another* 1963 (2) SA 413 (C), that the applicant must prove negligence, blameworthiness or utter indifference of a high degree. Further that a court in the exercising of its discretion should always be slow to place a clock upon a litigant's free access to courts.

[29] Having regard to my findings on the application to uplift the bar as set out hereunder it does not appear that the plaintiff was being vexatious and or abusing the court process. There was a genuine claim being pursued, bar the failure of his legal representatives in not properly crafting his pleadings in the previous court process. In any event, the proceedings for the stay could be construed as *pro non scripto* as the defendants were placed under bar.

Uplifting of the bar.

[30] The process is regulated by rule 27 of the Uniform Rules of court which provides that:

Rule 27 Extension of time and removal of bar and condonation.

“(1) In the absence of agreement between the parties, the court may on good cause shown, make an order extending or abridging any time prescribed by these Rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet”. (underlining added).

[31] The courts have over a period of time crystalised the requirements for good cause to entail the following three requirements, first, that the applicant’s affidavit should provide a full explanation of the default so that the court may assess the explanation.¹² The explanation should help the court consider the applicant’s motives and assess his conduct.¹³

¹² See *Colyn v Tiger Food Industries Limited t/a Meadow Feed Mills (Cape)* 2003 (2) ALL SA 113 (SCA).

¹³ *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A.

[32] Secondly, that the court should be satisfied from the affidavit that the applicant has a bona fide defence.¹⁴ The facts presented should clearly persuade the court that if proved such facts would constitute a defence.¹⁵

[33] Thirdly, that the grant of the indulgence would be compensated by an order of costs alternatively that the granting of the indulgence sought will not prejudice the plaintiff.¹⁶

[34] I will now consider the factors which are highlighted above apropos the defendants' application to uplift the bar. Though the defendants have not specifically dealt with those factors set out above *ad seriatim* I am enjoined to trawl the founding affidavit and decide whether facts have been presented to satisfy those requirements.¹⁷

Explanation for the delay

[35] There are two periods for which the defendants are required to provide explanation, namely, the period between notice to defend and when the plea was due to

¹⁴ See *Dalhousie v Bruwer* 1970 (4) SA 566 (C) at 572A.

¹⁵ *Du Plooy v Anwes Motors (EDMS) Bpk* 1983 (4) SA 212 at 217H.

¹⁶ See *Dalhousie* judgment, *ibid* at footnote 14.

¹⁷ The founding papers states the following regarding the upliftment of the bar:

“89. The other defendants and I do not wish to incur costs in defending yet another court proceeding

in relation to the February 2016 loan. When we did so in the past, we obtained costs orders against the Plaintiff, but they are not paid.

90. *If we were to successfully defend against the Present Action, we believe that we will likewise, and again, not be recompensed for the costs incurred in doing so.*

91. *As such, we resist talking further step in the Present Action until the Plaintiff has paid those past costs which this honourable court has already ordered him to pay.*

92. *Furthermore, a stay is ineffective if at the same time the bar against us is not simultaneously lifted.*

93. *I submitted that it would be practical and reasonable for the court time limits for the defendants*

to deliver a pleading in terms of the notice of bar to be extended so as to allow this application

to be ventilated without prejudicing the Defendant's other rights.”

be served and secondly the period after the notice of bar was served. Makgoka JA stated in *Ingosstrakh v Global Aviation Investments (Pty) Ltd and Others*¹⁸ that:

“[22] With regard to the explanation for the default, there are two periods of default which Ingosstrakh must explain for its failure to deliver plea. The first is before the notice of bar was served on it, and the second relates to the period after the bar was served. This is because the notice of bar was served as a consequence of Ingosstrakh’s failure to plea. With regard to the former, Ingosstrakh served its notice of intention to defend the action on 30 September 2015. It therefore had up to 28 October 2015. There is simply no explanation whatsoever why a plea was not filed during that period.”

[36] The defendants have for some reasons failed to proffer in their papers any explanation for the period ending 27 January 2022. Hiatuses, like this one, consistently and subtly permeates the steps in the defendants’ conducting these proceedings.

[37] Though not clearly set out it appears that the only explanation for not serving the plea is etched in the belief harboured by the defendants that that the service of the application to stay should freeze the court processes and therefore there was no need to serve the plea.¹⁹ Alternatively, that in the long run the court seized with the application to stay will make such an order to be effective retrospectively. This is fortified by the statement in the defendants’ heads of argument that *“the defendants were not in wilful*

¹⁸ (934/2019)[2021] ZASCA 69 (4 June 2021); 2021 (6) SA 353 (SCA)

¹⁹ The application was delivered simultaneously with uplifting of the bar though defendants state in para 87 and 88 (Caselines 010-23) respectively as follows:

“87. This application has been brought prior to the expiry date and before the bar comes into effect.

“88. This application was not brought earlier as the Defendants were waiting for all the relevant cost orders to be taxed and finalised, however unfortunately same have been partially taxed and postponed, and the Defendants’ attorneys advised we couldn’t wait until 12 May 2022 to bring this application, given the Plaintiff has delivered his notice of bar.”

*default of the Rules of Court, particularly the obligation to deliver a further pleading under Rule 22, because they were exercising their right not to plead until such time as the plaintiff paid the costs orders against him.”²⁰ (underlining added). There is no legal basis or authority advanced by the defendants upon which this argument that service of the stay applications *ipso facto* freezes court process is predicated and I could also found none.*

[38] In the premises, the requirement for a satisfactory explanation has not been satisfied and the application to uplift the bar is not sustainable and stand to be dismissed on this basis alone.

Bona fide defence

[39] As it may have been noted from the defendants’ founding papers there is no mention of any defence whatsoever. There is however reference in the paragraphs appertaining to the stay application that the plaintiff knew that the defendants dispute the claim which is based on the loan allegedly advanced in 2016. Defendants’ attempt at setting out their position is in paragraph 38 of the replying affidavit where it is stated that “*the Plaintiff knew the Defendants disputed his claim based on the February 2016 loan and in paragraph 43 where it stated that “[S]ignificantly, the liquidation Application was based upon the February 2016 loan which the Plaintiff knew was disputed.*”

[40] That notwithstanding, with their oversanguine stance the defendants stated that “... *specifically we were not obliged to set out our defences to the purported claim.*”²¹

²⁰ See Defendants’ Heads of Argument Caselines 004-6, para 12.1.

²¹ See para 16 of the Defendants’ Replying Affidavit Caselines 013-11.

The defendants' unfortunate fixation on the purported effect of the service of the stay application derailed their wherewithal to properly prosecute their application and ensure compliance with what is required to successfully apply for the upliftment of the bar.

[41] There has been a concerted endeavour to cure the shortcomings in the replying affidavit and regrettably (for the defendants) the law is unambiguous that the founding papers are a party's bedrock in which the party's case must be set out comprehensively and nothing should be sneaked through in the replying affidavit. It was held in *Director of Hospital Services v Mistry*²² that “[I]t is trite that the applicant in application proceedings must make out his/her case in the founding affidavit. A litigant should not be allowed to try and make out a case in the replying affidavit. The founding affidavit must contain sufficient facts in itself upon which a court may find in the applicant's favour. An applicant must stand or fall by his/her founding affidavit. (own underlining). In view of the fact that the defendants failed to make out their case in the founding affidavit then *cadit questio*. The defendants' application falls to be dismissed outright.

[42] A party is however entitled to file supplementary founding papers subject to a formal application subject to the opponent being allowed to file supplementary answering affidavit. Alternatively, the defendants could have withdrawn the application and launch same anew, but they chose not to confront the misfortunes which beset their application instead of appealing to the court's compassion to come for their rescue.

[43] The defendants have also failed to address the requirement to demonstrate existence of bona fide defence for the upliftment of the bar and the application therefore stand to be dismissed.

²² 1979 (1) SA 626 (AD) at 635H – 636D

Indulgence to be compensated by cost order or prejudice to the plaintiff.

[44] The defendants do not believe that there is a need to even request condonation as envisaged in rule 27 as the defendants categorically stated that they “... *are not seeking an indulgence but rather an enforcement of their right to have stayed proceedings pending payment of the costs in the previous matters.*”²³ Ergo, there is no basis for me to grant condonation as envisaged in the rules of court where none is being sought.

[45] The requirement that the possible prejudice should be compensated by an order of costs has also not been canvassed by the defendants. The costs order would not satisfactorily compensate the plaintiff prejudice. The amount claimed by the plaintiff should have been paid for over a period of 3 years and attendant prejudice would not be assuaged by an order of costs.

[46] Now that none of the requirements for the application for upliftment of bar have been met there is no basis for me to grant an application to uplift the bar. In fact, the defendants had no intention to satisfy any of the requirements for the uplifting of the bar. The defendants in para 9.1 of the founding affidavit clearly stated that no further step will be taken until plaintiff pay for the legal costs and this was repeated in para 12 of the replying affidavit where it is stated that “*[T]he very purpose of the stay application was for us not to incur any further costs, or have to take any further steps in the Present Action until such time as the costs orders in relation to the previously aborted proceedings had been paid.*”

²³ See also para 14 of the Defendants’ Replying Affidavit, Caselines -13-11, where it is stated that “... *we were not seeking forgiveness or an indulgence, but merely an effective stay of the Present Action.*” The application to uplift the bar may have been mature as it was also served before the applicant was under bar.

[47] The defendants had all the time in the universe to regularise their application but were eluded by the stance that they have an automatic right to stay hence failed to advance a formidable legal argument to support their case. Furthermore, the defendants fell short of the standard of *bona fides* because the object of the application for stay was predicated on the refusal by the plaintiff to pay the legal costs. These costs were settled almost more than a year ago but the defendants still wish to contend that they were delayed by the refusal to consent to the costs.

[48] In conclusion and at the risk of being repetitive the defendants' application deserves no audience of this court, it is unsustainable and must be dismissed.

Other issues

[49] Even if the defendants were to be accorded audience and it be considered that the plaintiff knew their defence/s such argument would, as shown below, suffer the same fate. The discussion on the alleged defences below does not negate or take away the conclusion reached above that the plaintiff's right of reply was trampled upon by the defendants in not allowing the plaintiff an opportunity to answer to the averments on defences which were only raised in the replying affidavit.

[50] For the court to consider if there are bona fide defences which prima facie has some prospects of success I would have to evaluate the *facta probanda* on evidence presented by both plaintiff and the defendants. Bearing in mind that in respect of the motion proceedings the affidavits are both pleadings and evidence. It was held in

*Director of Hospital Services v Mistry*²⁴ that:

²⁴ 1979 (1) SA 626 (A) at 635H-636B.

‘When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is ... and as been said in many other cases: “... an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny”.’

[51] Having chronicled the factual exposition of the plaintiff’s claim according to the plaintiff earlier²⁵ I will now traverse the case through the defendants’ lenses. What can be gleaned from defendants’ papers including the affidavits filed in the summary judgment and liquidation applications, the third defendants together with Aubrey Schneider (the director of the second defendant) sought to embark on a development on an immovable property which was registered in the names of the first defendant. They approached Stephen Allan Soskoine and Elke Hannelone Soskoine (Soskoines), who were the directors and shareholders of the first defendant at the time with an investment proposal to ultimately acquire the first defendant.

[52] The third defendant subsequently approached the plaintiff and presented the investment opportunity. The proposal was for the plaintiff to avail 1 million rand as a loan which will be repaid over a period of 4 years with interest at prime to be reckoned as per amortisation schedule which was drafted (together with the loan agreement) by the third defendant. In addition, the plaintiff would be allotted 5% shareholding of the first defendant. The second defendant would be used as a nominal borrower and would be substituted by the first defendant upon acquisition of the shares of the first defendant

²⁵ See para 4 above.

from the Soskoines. The said draft loan agreement was forwarded to the plaintiff for consideration and to insert his particulars thereon.²⁶

[53] The plaintiff subsequently notified the third defendant that the loan agreement was signed and same was delivered to third defendants' office. The third defendant averred that on the assumption that nothing was changed on the suggested terms as per draft loan agreement the terms of the agreement were then put into effect.²⁷ The loan amount was paid to the attorneys of the Soskoines and “[T]he purchase of the first defendant’s shares took place shortly thereafter.”²⁸ Plaintiff was ultimately allotted the 5% shareholding in the first defendant.

[54] Two years²⁹ later, in 2018, the relationship between third defendant and plaintiff soured as the plaintiff sought to be involved in the daily business operations.

²⁶ The relevant paragraphs of the third defendant’s affidavit resisting summary judgment in a *lis* against the first defendant stated on CaseLines 012-119 are as follows:

[12] *The respondent was, and still is, the owner of an immovable property known as 43 Sivewright Avenue, Johannesburg, Erven 765 and 766, New Doornfontein (“Property”).*

[13] *A business associate., Aubrey Schneider (Schneider), and I were interested in buying the property for the purposes of developing it.*

[14] *We made contact with the respondent’s owners, at the time Stephen Allan Soskoine and Elke Hannelore Soskoine (the two Soskoines”), who above the shoulders and directors of the respondent, with a view to negotiating the purchase of the property.*

[15] *Ultimately, we elected to acquire the Property indirectly by purchasing the two Soskoines shares*

and over the course of May and June 2016, we discussed and negotiated the terms of purchase.

[16] *In order to finance the purchase of the respondent's shares, I approached a number of potential investors, of which the applicant was one.*

[17] *The negotiations with the two so Soskoines moved along quickly and the basics of the investment I offered the applicant was that if he invested in amount of R1 million:*

[17.1] he would receive a 5% shareholding in the respondent and ...

[20.3] The applicant would be repaid the amount of R1 million plus interest at the prime rate of interest

in terms of an amortization schedule the parties would agree to and attach to AA2; and ...”.

²⁷ It appears that the terms were implemented though the third defendant had not signed the agreement.

²⁸ See para 33 of the Third Defendants Affidavit resisting summary judgment, CL 012-125.

²⁹ *Ibid*, para 37, Caselines 012-125. The third defendant stated that “[A]lso during the course of 2018, the relationship between the applicant and me soured.”

[55] The third defendant then realised that the loan agreement was amended by the plaintiff who stated that the loan would be repaid with interest at a minimum of the prime rate and the amortization schedule was also changed. To the third defendant's stance (and being legally advised) this was not the acceptance of the offer he made to the plaintiff. To this end, it should therefore be construed as a counter-offer and since it was not accepted it is not binding.

[56] In addition, so the third defendant contends, the loan amount was paid to the attorneys of the previous shareholders of the first defendant and was never paid to the defendants. The current third director of the defendant, named, Gabretsadik Leake Medhanie ("*Medhanie*") would have not accepted the loan amount on those terms³⁰ and the second defendant in whose name the loan agreement was drafted was never substituted by the first defendant as a borrower.

[57] The third defendant qua director of the first defendant deposed to affidavits in the previous proceedings on behalf of the first defendant wherein I opine he was just prevaricating. In one instance he stated that there was no need to raise any defences³¹ in relation to the stay application. The defendants failed to appreciate that the issue of the defences relates to the uplifting of the bar. On the other hand, the defendant contend that the defences as set out in the affidavits in the previous proceedings.

[58] The third defendant now states in the replying affidavit that the plaintiff's cause of action is now predicated on annexure POC1 whereas in the previous proceedings he

³⁰ See Respondent's Answering affidavit, CL 012-125.

³¹ See para 16 of the Defendants' Replying Affidavit, on Caselines 013-11 where it is stated that "[W]e submit in the circumstances that it was not necessary or required of us to do more than make out a case for a stay of the Present Action – specifically we were not obligated to set out our defences to the plaintiff's purported claim." (Underlining added).

relied on a different document constituting the February 2016 loan.³² If the case is now predicated on a different document, it is axiomatic that defences raised before would ordinarily apply to the current proceedings.

[59] The third defendant then raised the defence that irrespective of whether a different annexure is used the defences are remain extant, and are as follows, first, that parties never reached the agreement as draft loan agreement was never signed, secondly, there is no amortization schedule attached and therefore both annexures are incomplete, inchoate and unenforceable. If anything, so contended the defendants, the agreement delivered by the plaintiff is considered a counter-offer and not the acceptance of the offer made by the third defendant.

[60] I find the defence that the loan agreement was not signed (and therefore not binding), that amortisation schedule and the interest were not as agreed to be meritless. It is not a requirement for a loan agreement that it must be in writing and /or signed before it becomes binding between the parties. It is also not an essentialia of a loan agreement that the parties need to have agreed on the interest. It was stated by the SCA in *NBS Boland Bank v One Berg River Drive and Others*³³ that “*an obligation to pay interest is not one of the essentialia of a contract of loan...*”³⁴ Further that “*... a term relating to the payment of interest is not an essentialia, as opposed to a material term, of a contract of loan. There can after all be a perfectly good contract of loan even if it makes no provision for payment of interest.*”³⁵ It therefore leads to an ineluctable conclusion that the contention that there is no loan agreement as there was no interest agreed at is devoid of any legal foundation in our jurisprudence.

³² See Applicants’ Replying Affidavit (current proceedings), CL 013-15 para 30.1.

³³ 1994(4) SA 928 (SCA). (291/98) [1999] SCA (10 September 1999)

³⁴ Ibid at para [7] p5.

³⁵ Ibid at para [17], p11.

[61] Where parties have not agreed on the interest no interest would be paid unless or “... *there is default or mora on the part of the debtor.*”³⁶

[62] In the end the following factors militates against the finding of merits in the defences raised by the defendants, first, the third defendant was not bothered by the fact that loan agreement was not signed when it was delivered in 2016.³⁷

[63] Secondly, despite the averment that Medhanie would not have agreed to the loan agreement on the terms on interest³⁸ as suggested by the plaintiff and further that the relationship with plaintiff soured in 2018 the first defendant started repaying the loan in 2019, a year later and continued with payments for a period of at least 10 months.

[64] In addition, the fact that the first defendant issued shares to the plaintiff and further that repayments of the loan advanced were commenced by the first defendant are indicative of parties discharging their obligations on what was agreed upon. The contention that 1 million rand was paid to the initial shareholders of the first defendant and did not benefit the first defendant or defendants is a red herring as it was paid at the instance and instructions of the third defendant. The payment was for the acquisition of the shares in the first defendant which acquisition was the quintessence of an investment proposal made to both former shareholders of the first defendant and to the plaintiff. The third defendant takes no issue with the averment that the payment was made on his directions.

³⁶ Willies Principles of South African Law, 9th edition, Juta and Co., 2007. At p950.

³⁷ Instead, the agreement was implemented without being signed.

³⁸ Which is not a requirement for a loan agreement.

[65] Thirdly, the third defendant is not contending that the amount of R220 000,00 was paid in error to the plaintiff and should be refunded. It is noted that the repayment started three years after the terms of the agreement were implemented. Fourthly, the contention that Medhanie would not have accepted the loan is also not sustainable as the only issue for which the third defendant predicates the defence is the interest and payment terms thereof which as set out elsewhere in this judgment is not an essentialia for a valid loan agreement.

[66] The first defendant was sued in the previous proceedings for the same debt, and it opposed the application for summary judgment. In an affidavit resisting summary judgment the third defendant admitted indebtedness on behalf of the first defendant. He stated that annexure SZ 6 “... *proves that as at date of issuing summons herein, 6 February 2019, the Plaintiff knew alternatively ought reasonably to have known that in fact, taking into accounts payments from the Defendants, R2 million was not due. In fact only R1 981 668.85 was due.*”³⁹(underlining added). This is an unequivocal acknowledgment of indebtedness at least for the total sum claimed less R18 331.15. Strangely when sued on the basis of the same acknowledgment the third defendant took a *volte face* stance and sought to disavow the acknowledgment. He stated in the affidavit opposing liquidation application that:

44.9 “however, in context, I was demonstrating that in the applicant’s version itself, he was not entitled to the R2 million that he claimed in respect of all his causes of action but only R1 981 666.85, if anything,

44.10 I did not thereby admit that (any of) the respondents owed such amount or that it was due.

³⁹ See para 15.4 of the first Defendant’s opposing affidavit resisting summary judgment on Caselines 012-87.

44.11 *With the benefit of hindsight it would have been clearer had I said, in fact only R1 981 666.65 could be due on the applicant's version" however the applicant cannot turn a rough expression into an admission that was not made;"*⁴⁰

[67] This, in colloquial terms would be like saying '*I was joking or playing*'. No credence should be accorded to this excuse which appears lame. The courts should also not countenance and give credence to such averment as same would be throwing the judicial system into mockery. I desist from associating myself with such acrobatics. The third defendant was legally represented and would not have made such precise calculations when "*he was playing*". In fact it appear that he was being honest.

[68] The important clauses of the agreement bar the interest, are that the loan amount to be (and was) advanced was repayable within 4 years, the shares were allotted to the plaintiff. The motive for the defendants to adopt a Stalingrad defence can only be construed as conduct akin to a party whose *bona fides* are elusive.

[69] In conclusion it is apparent that the basis of the defences as alleged cannot genuinely lead to a successful defence and have been raised to ensure that the plaintiff see no justice. Notwithstanding the fact that the plaintiff was denied the opportunity to interrogate such defences they are clearly unsustainable and are bound to fail. As set out above the defendants' application suffers the same fate.

Default judgment application

⁴⁰ See para 44.7 of the first Defendant's Answering Affidavit (liquidation proceedings) CL -12 – 129. He further said in para 44.6 that the claimed amounts were in fact not yet due and the claims were premature.

[70] Plaintiff has uploaded a damages affidavit in support of the application for default judgment. It is not clear from the affidavit as to the legal basis upon which the affidavit was predicated and further what qualifies the deponent to provide evidence to assist the court in determining the amount due.

[71] The amount said out in the attachments to the damages differs from the amount in the particulars of claim. The affidavit presents no explanation for the disparities, including to explain, inter alia, why the amendment procedure, if applicable, was not followed.

[72] The affidavit fails to identify as to who amongst the defendants should be held liable regards being had of the fact that the claims against the respective defendants are in the alternative. Even if all defendants are liable, the order being sought should state that the defendants should be jointly and severally liable, the one paying the others to be absolved.

[73] This judgment will therefore not pronounce on the merits of the default judgment application and until the issues raised above are attended the court is hamstrung to decide on its merits. To this end the application for default judgment is therefore found wanting and is therefore struck off the roll.

Costs

[74] The costs should follow the results.

Conclusion

[75] I grant the following order:

1. *The applications to uplift the bar and legal costs are dismissed with costs.*
2. *The application for default judgment is struck of the roll.*

Mokate Victor Noko

Judge of the High Court

Gauteng Local Division, Johannesburg

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 1 November 2023.

Appearances.

Counsel for the applicants/ defendants:

Adv W Strobl

Instructed by:

Andrew Garratt Incorporated

Counsel for the Respondent/ Plaintiff:

Adv D Watson

Instructed by
Incorporated

Edelstein Farber Grobler

Date of hearing:

5 September 2023

Date of Judgment:

1 November 2023