

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 4644/2022

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

DATE

SIGNATURE

In the matter between:

ABSA BANK LIMITED

Plaintiff

and

MOROLONG FOODS (PTY) LTD

First Defendant

SHUPING NOBUHLE HYCINTHIA

Second Defendant

JUDGMENT

VAN EEDEN, AJ

1. The plaintiff is ABSA Bank Limited, a public company duly registered according to the laws of the Republic of South Africa. It is also registered as a credit provider in terms of the National Credit Act, No 34 of 2005. The plaintiff applies for summary judgment against the first defendant, Morolong Foods (Pty) Ltd, a private company duly registered in accordance with the laws of the Republic of South Africa. The plaintiff also applies for summary judgment against the second defendant, Ms N H Shuping, based on a deed of suretyship executed for the debts of the first defendant.
2. Mr N Alli appeared on behalf of the plaintiff and Ms Slabbert for the defendants.
3. Various defences were raised by the defendants in their opposition to the application for summary judgment. As it turned out, the focus was on the defence that the plaintiff had agreed to a payment holiday with the defendants during the Covid period. The payment holiday related to an alleged agreement that no monies would be paid for a certain period and that a new repayment schedule would be agreed between the parties. All of this would turn on the reopening of the first defendant's shop, which had to be closed during the Covid period.
4. The second defendant deposed to an affidavit resisting the application for summary judgment. She attached an email as "RSJ11" (Caselines: 017-103) to her affidavit in support of her contentions. The subject matter of the email is reflected as "*Payment holiday*". She referred to conversations and recent emails and stated that "*we have a stronger and better offering this time*

around". She proceeded to request that in view of the above *"can we please request a payment holiday on our facilities with ABSA, until such time that we have bedded down the final touches. I can't assume it will be longer than two months at the most."*

5. In her affidavit the second defendant claims that "RSJ11.1" was received in response to the request of a payment holiday. This email reads as follows: *"Thanks noted and we can be happy to get an anticipated date to open the store"* and emanated from Mr Mzizi, the relationship executive of the plaintiff dealing with the defendants' account and loan facilities. Mr Alli correctly pointed out that the email was not given in response to the request for a payment holiday, but Ms Slabbert stated that the deponent to the founding affidavit had stated that it was so received in response. I do not need to resolve this issue in this application. It is clear a payment holiday was requested.

6. Various further items of correspondence are attached to the affidavit resisting the application. These items of correspondence demonstrate that there were indeed negotiations between the plaintiff and the defendants relating to a payment holiday in the context of the latter reopening the store. "RSJ16" is an email sent on 16 February 2022 by Mr Mzizi. He requested to be sent *"the date for opening and proposed loans repayments"*. It is here where the application for summary judgment finally breaks down. I cannot think that Mr Mzizi would have posed this question if there were not agreement on a payment holiday and restructured loan repayments linked to the reopening of

the store. In the coming trial it will be a triable issue to determine whether the plaintiff issued summons prematurely where the parties had agreed to a restructuring of the payment obligations based on the reopening of the store. It appears that whilst the plaintiff's legal department caused summons to be issued, Mr Mzizi was still negotiating with the defendants.

7. Mr Alli argued that in the event of it being found that a payment holiday exists, it does not apply to claim "B". For this argument he relied on various paragraphs in the particulars of claim that were admitted in the plea. But in my view these submissions lose sight of the general nature of the negotiations reflected by the correspondence attached and the 17 July 2021 request for a payment holiday referring to the defendants' facilities with the plaintiff in the plural. I also do not have to decide this issue in this application.
8. I thus consider that the defendants have raised triable issues in their defence and that the plaintiff is not entitled to summary judgment. In consequence I make the following orders:
 - 8.1. The application for summary judgment is dismissed.
 - 8.2. The costs are ordered to be costs in the cause.
 - 8.3. The defendants are granted leave to defend.

H VAN EEDEN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Counsel for Plaintiff: Adv N Alli
Instructed by: Jay Mthobi Inc

Counsel for Defendants: Adv Slabbert
Instructed by: Weavind & Weavind Inc

Date of hearing: 18 July 2023

Date of judgment: