



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

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

SIGNATURE

DATE: 12 February 2024

Case No. 2023-064985

In the matter between:

SHACKLETON CREDIT MANAGEMENT (PTY) LTD

Plaintiff

and

BRENDAN VAN DER MERWE

Defendant

Summary

Application for default judgment referred for hearing in open court – loan agreement concluded orally on terms memorialised in writing – Registrar declining to grant default judgment because the written terms were not signed – on well-known principles of contract, no signed agreement required – default judgment granted.

JUDGMENT

WILSON J:

- 1 On 7 February 2024, I granted default judgment on two claims brought on behalf of the plaintiff, Shackleton, against the defendant, Mr. van der Merwe. I indicated that I would give my reasons for doing so in due course. These are my reasons.

- 2 Shackleton took cession of two debts Mr. van der Merwe owed to Direct Axis Financial Services. The debts were the outstanding balances due on personal loans Direct Axis advanced to Mr. van der Merwe. A portion of each loan was used to settle Mr. van der Merwe's existing debts. The balance of each loan was then paid to Mr. van der Merwe in cash. Each of the loan agreements was entered into over the telephone. One of Direct Axis' agents offered, and Mr. van der Merwe accepted, a loan on terms recorded in writing in a document sent to Mr. van der Merwe after the telephone call. Such contracts of adhesion are commonplace in the retail financial services sector, in which loan providers are often at pains to make incurring debt as easy as possible.

- 3 One consequence of the way in which these bargains were struck was that the loan agreements entered into between Direct Axis and Mr. van der Merwe were never signed. Indeed, it appears that neither party ever intended a signed written agreement to be generated. The material terms of the loan were agreed to over the telephone and then memorialised, together with a range of ancillary terms, in the document later sent to Mr. van der Merwe.

- 4 In due course, Mr. van der Merwe defaulted on his repayments. Rather than institute proceedings against Mr. van der Merwe himself, Direct Axis sold Mr. van der Merwe's debts to Shackleton, presumably at a price discounted from the amounts actually owed. Again, these arrangements are banal features of the model on which the retail financial services sector presently functions.

5 It was Shackleton that then instituted proceedings in this court against Mr. van der Merwe to recover the amounts owing. It gave Mr. van der Merwe notice of his rights under the National Credit Act 34 of 2005. It served a simple summons on Mr. van der Merwe personally. The simple summons claimed payment of each of the outstanding balances Shackleton sought to recover.

6 Each of the demands for repayment is for “a debt or liquidated demand” within the meaning of Rule 31 (5) of the Uniform Rules of this court. That being so, Shackleton was entitled, once Mr. van der Merwe failed to give notice of his intention to defend its actions for the recovery of the debts, to seek judgment by default from the Registrar.

7 However, the Registrar declined to grant default judgment. He did so primarily on the basis that neither of the loan agreements upon which Shackleton sues is signed.

8 That was, of course, an error. There is no requirement in law for an agreement to be reduced to writing and signed. A signed written contract is evidence of an agreement, not the agreement itself. An agreement (at least in its bilateral or multilateral forms) is a state of mind shared between two or more parties. The attitude required from each party is the intent to be bound by specific and identical terms of exchange. If each party intends to be bound by the same terms governing an exchange, then there is an agreement. Obviously, the best evidence of that shared intent is often a document that embodies the terms of the agreement to which each of the parties has appended their signature.

- 9 But that need not be so. An agreement can be reached in writing without signatures, if it can be shown that each party intended a document they did not sign to embody a contract between them. Agreements can also be reached orally, or by conduct, provided that the parties' oral recitations or outward conduct demonstrate that they each intended to be bound by specific and identical terms of exchange. It is precisely for this reason that the well-known and elementary rules applicable to pleading a contract require a party alleging an agreement either to attach the written terms of the agreement, plead the terms of an oral agreement, or, in the case of an agreement reached entirely by conduct, set out the conduct and circumstances from which an inference of agreement on specific terms must be drawn.
- 10 The value of a signed written agreement is that the signature is usually strong evidence of a party's intent to be bound by the terms set out in the document they signed. But the signature is not the agreement itself, or even conclusive evidence of the existence of the agreement. If the signature is forged, or if a party is induced to sign the contract by threat or another form of duress, then there is obviously no agreement, because the required attitude is absent, and the fact of the signature is of no moment.
- 11 In this case, Shackleton alleges that the loan agreements on which it sues were struck orally over the telephone, and then memorialised in a document that Direct Axis later sent to Mr. van der Merwe. Left uncontradicted, that was clearly enough for the Registrar to be satisfied that Direct Axis and Mr.

van der Merwe agreed that Mr. van der Merwe would be loaned amounts to be repaid on the terms set out in the document on which Shackleton relies.

12 I was informed from the bar that Shackleton regularly sues in this court for repayment of a large number of unsecured personal loans arranged over the telephone. Its business model depends on being able to obtain judgment on the outstanding balances due quickly and cheaply where the terms of the loan and the fact of default are not in dispute. The courts obviously do not exist solely to serve the needs of such commerce, especially where there are questions of unlawfulness, abuse or unfairness raised about the way a company engages legal machinery to coercive ends. However, in this case, on the law as it stands, there can be no question that Shackleton had demonstrated before the Registrar that it was entitled to default judgment. There was no warrant to engage judicial resources in reviewing two straightforward claims for liquid amounts due under loan agreements, the essence of which were clearly identified in Shackleton's papers.

13 In addition to observing that the written terms of the loan agreements were not signed, the Registrar also queried Shackleton's failure to upload an "affidavit in support of default judgment". No such affidavit was necessary. Where default judgment is sought for a debt, the uncontradicted allegation on the face of the summons that a liquid amount is due and payable is sufficient to grant default judgment, provided that the amount is claimed on a recognised cause of action. Rule 31 (2) provides for "evidence" to be led to quantify an illiquid amount. That evidence may obviously be received by

affidavit where appropriate. But Rule 31 (2) does not apply in this case, and there was no other reason to demand an affidavit.

14 It was for these reasons that I granted Shackleton default judgment in the two amounts it claimed.

S D J WILSON
Judge of the High Court

This judgment was prepared by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 12 February 2024.

HEARD ON: 7 February 2024

DECIDED ON: 7 February 2024

REASONS: 12 February 2024

For the Plaintiff: R Stevenson
Instructed by Lynn and Main Inc

For the Defendant: No appearance