REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: ***NO***
(2)	OF INTEREST TO OTHER JUDGES: ***NO***
(3)	REVISED:
Date:	***26 March 2024*** Signature:

CASE NO: 30135/2019

In the matter between:

RIO RIDGE 1121 (PTY) LTD APPLICANT

and

130 FOX STREET INVESTMENT (PTY) LTD FIRST RESPONDENT

FANUEL MOTSEPE SECOND RESPONDENT

Coram: Dlamini J

Heard: 24 January 2024 (Courtroom 9B)

Delivered: 26 March 2024 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, uploaded to

CaseLines, and released to SAFLII. The date and time for hand-down is deemed to be 10:30 on March 2024.

JUDGMENT

DLAMINI J

INTRODUCTION

[1] In this application, the applicant seeks specific performance against the first respondent in the form of payment in terms of a written loan agreement and to hold the second respondent liable for the same debt as the surety and co-principal debtor of the first respondent.

[2] The applicant (Rio Ridge) a financial service provider advanced a loan to the first respondent (130 Fox Street Investment), the second respondent Fanuel Motsepe a businessman and director of the first respondent signed as surety co-principal debtor to the first respondent, collectively(the Parties).

[3] In this case, this court is called upon to determine the contractual rights between the parties, in particular, whether or not the parties had the intention to conclude the Loan Agreement. The requirements of a valid contract need to be assessed to ascertain whether or not such requirements were present and complied with to conclude that the true intentions of the parties were to the effect that a Loan Agreement was indeed concluded.

BACKGROUND FACTS

[4] The facts underlying this application are largely common cause.

[5] The parties on or about 15 December 2017, entered into a written Loan Agreement (the Loan Agreement). On 15 December 2017, the second respondent signed a suretyship undertaking to stood guarantor for the financial obligations of the first respondent and further signed a Special Power of Attorney authorising that a mortgage bond be registered in favour of the applicant for the debts of the first respondent to a maximum amount of R1 000 000.00.

[6] In pursuant to the Loan Agreement the applicant advanced the respondents in different trenches a total sum of R1 000 000.00.

[7] In return and in line with the Loan Agreement the second respondent made certain repayments to the applicants in the sum of R162 589. 75, leaving an oustanding balance of R1 837 918.31.

[8] The applicant testified that the loan amount was repayable to it together with interest thereon at the end of each succeeding month within 12 months of the advance of the loan amount.

[9] Rio Ridge avers that the respondents are in breach of the loan agreement as the respondents have failed and refused to pay the outstanding balance of the loan to the applicant.

[10] The applicant testified that the respondents despite the applicant having so demanded the respondents have not repaid the outstanding balance and hence launched this application.

[11] The application is opposed by the respondents on numerous grounds. For instance the Peculiarity of the bond, the fact that the first respondent has not been placed in *mora* as required in terms of clause 5 of the Loan Agreement, further that the matter be referred to trial due to the alleged existance of material disputes dispute of facts, and finally the alleged Non-compliance with the National Credit Act (the NCA) by the applicant in advancing the loan to the respondents.

ISSUE FOR DETERMINATION

[12] The issue for determination is whether there was a valid loan agreement entered into between the parties. Further, in the determination of the above whether this court should take into account pre and post-signing discussions of the parties.Finally, whether material disputes of facts exist in this application.

AMENDMENT OF THE LOAN AGREEMENT

[13] The applicant contends that the Shiffren principle finds application in the present case. The case made by Rio Ridge is that the various defences raised by the respondents in essence amount to a variation of the loan agreement. That the respondent's defences would only have been effective if these were reduced to writing and signed by the parties. I agree with the applicant's contentions in this regard and shall expand on these below.

[14] The respondents have raised alleged collateral prior inducing agreements, between Illovo Paradiso Four CC **(IPF**) and the second respondents.

[15] Mr. Motsepe avers that the funds were lent to him personally, that the loan will be settled upon the sale and transfer of the first respondent's property

in terms of a partnership/ joint venture agreement, and that he made the three (3) repayments to the applicant.

[16] Further, the respondents contend that the bond in favour of Canara Bank securing the letters loan to IPF was not what was agreed to, more so when the bond recorded that the first respondent stood surety for IPF's loan from Canara Bank in the amount of R26 million.

[17] In sum the respondents insist that the special power of attorney ("the POA"), the IPF suretyship, and the bond are relevant and cannot be discarded based on parol evidence, the principle in Shifren, or the whole agreement clause. That these were suspensive conditions, and that evidence regarding same and assessment thereof is not precluded.

[18] In general, contracting parties possess enough freedom in choosing how they structure their agreements, and it is not the function of the court to protect consenting parties from bad bargains. The established principle of our law of contract is that legal certainty and the notion of *pacta sunt servanda* must always be honored and enforced by our courts.

[19] In determining this case It is apposite to look at the non-variation clause of the Loan Agreement, Clause 9.1 stipulates as follows; -

"This Agreement constitutes the entire agreement between the parties and no variation, alteration, amendment, or suspension thereof shall be valid and binding unless contained in a written document signed by both parties."

[20] The principle of interpretation of contracts in our law is well established and has been pronounced upon in a number of our court's decisions. In ***FirstRand Bank Ltd v KJ Foods*****,**[1] the Supreme Court of Appeal held that

[1] (734/2015) [2015] ZASCA 50(26 April 2017)

in interpreting terms of contract or legislation as the case may be; the principles enunciated in ***Natal Joint Municipal Pension Fund v Endumeni Municipality***[2] and ***Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd***[3] find application. Furthermore, as was said in Endumeni: "*a sensible meaning is to be preferred to that that leads to insensible or unbusinesslike results.*"

[21] The Constitutional Court clarified *Endumeni* with regard to the application of the parol evidence rule while considering contextual evidence in interpreting documents in the ***University of Johannesburg v Auckland Park Theological Seminary and Another***[4] as follows at [88]; -

"*In KPMG and Swanepoel, the Supreme Court of Appeal held that the parol evidence rule remains part of our law, and is one of the caveats to the principle that extrinsic contextual maybe admitted. The essence of the rule was most aptly captured in the case of Vianini Ferro- Concrete Pipes, where it was stated :*

"*Now this Court has accepted the rule that when a contract has been reduced to writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added, or varied by parol evidence"*

[22] In my view the respondent's contention that the Shrifen principle is not applicable in this case is meritless. The aforementioned requirements of the non-variation clause are self-explanatory. A sensible and businesslike interpretation is that unless the terms of the variation as alleged by the respondents (which are denied by the applicants) are reduced to writing

---

2 (920/2010) [2012] ZASCA 13(15 March 2012)

3 (20229/2014) [2015] ZASCA 111(3 September 20150)

4 2021 (6) SA 1 (CC)

and signed by both parties such amendments are invalid. It must therefore follow as it should that the respondent's claims of the existence of prior and post-signing of the agreement are dismissed. I am satisfied unless varied and signed by the parties, the Loan Agreement constitutes the entire agreement between the parties. The Shifren clause was recognized and upheld by the Supreme Court of Appeal in ***SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren and Others***[5] and as I have demonstrated above is applicable and binding in this case.

[23] In an attempt to overcome this huddle, the second respondent in his answering affidavit avers at [17.1] that "*I require that this bond be canceled as a matter of urgency, failing which I intend to bring the application in this Court to have the mortgage bond declared null and void as my signature was obtained through false pretenses. In crude terms, I was duped*." It is significant to note that as at the hearing of this application, the second respondent has not filled any application to set aside the bond. In the result, unless and until it is reviewed and set aside the Loan Agreement and the security bond are binding between the parties.

[24] Significantly, no argument has been advanced by the respondents contending that there was any mistake in the drafting of the Loan Agreement and no order is sought by the respondents seeking rectification of any terms contained in the Loan Agreement.

[25] In light of the above, the respondent's contention of the alleged prior inducing agreements between the applicant and the respondents are of no moment and stand to be dismissed in terms of the whole agreement and non–variation clauses.

[26] It should follow therefore as it must, that the are no material dispute of facts in this case. In ***Plascon -Evans Paints Ltd v Van Riebeeck Paints***

---

5 1964 (4) SA 760

(Pty) Ltd,[6] the court set out this principle as follows; "*In certain cases, the denial by the respondent of a fact alleged by the applicant may not be of such a nature as to raise real, genuine or bona fide dispute of fact*." The Court stressed that far-fetched allegations by the respondents should be rejected on the papers. In my view, the signing of the Loan Agreement by the parties, the Security Bond, the advance of the loan by the applicant to the respondents, and the repayment of the loan to the applicant by the respondents are all common cause facts and are not in dispute. The alleged material disputes of facts by the respondents are bald and unsubstantiated and are only raised by the respondents when the respondents were unable to repay the applicants and just raised to stall the repayment of the debt to the applicant.

THE NATIONAL CREDIT ACT

[27] I now turn to the issue of whether the provisions of the National Credit Act[7] ("the NCA") is applicable in this case.

[28] The case made by the respondents is that the loan was a simulated transaction, in that monies were lent and advanced to the second respondent (a natural person) when the second respondent was in dire financial straights and where there is no suggestion that the applicant is a registered credit provider. That the first respondent could only be surety and the bond could only ever secure the loan to the second respondent limited to R1 million with interest and costs. Therefore, insist the respondents that the NCA is applicable and its provisions must be given effect. Finally, argues the respondents that the loan agreement is therefore not only a simulated transaction but it is also unlawful and unenforceable in terms of the NCA

---

6 1984 (3) SA 623 (A)

7 Act 34 of 2005

[29] The respondent submissions in this regard are meritless. On the evidence and facts before this court, the loan was advanced to the first respondent. The Loan Agreement was then signed by the second respondent on behalf of the first respondent. The second respondent only signed surety on behalf of the first respondent. These agreements are attached as annexures to the applicant's founding affidavit. The Loan Agreement as Annexure ('FA2") The Suretyship Agreement and Surety Mortgage Bond are attached as Annexure ("FA4"). The fact the first respondent requested the applicant to pay over the lent monies to the second respondent is of no moment. Once the loan was approved the second respondent was at liberty to request the applicant to pay over the funds to the second respondent, there was nothing unlawful and illegal in this request. The ineluctable conclusion therefore is that the loan was advanced to the first respondent (a company) and not Mr Motsepe an individual accordingly the provisions of the NCA are not applicable in this case.

NOTICES

[30] The issue for determination in this regard is whether notices were properly issued and served by the applicant on the respondents as required in terms of clause 5 of the Loan agreement.

[31] Rio Ridge contends that it has complied with clause 5 of the Loan Agreement, in that it has sent letters of demand to the respective respondents in terms of or in accordance with their respective chosen *domicilium citandi et executandi* being their nominated email addresses.

[32] The respondent's submission is that Rio Ridge has not complied with Clause 5 of the loan agreement which provides that the applicant should have placed the respondents in *mora* requesting the respondents to rectify the breach within 7 seven days after written notification.

[33] There is no merit to the respondent's contention in this regard. I am satisfied that the respondents were duly notified and the letters of demand were dispatched in terms of the Loan Agreement at the respondent's chosen *domicilium* being the respondent's emails. Moreover, the applicant has attached proof of the emails being dispatched and that the emails were successfully delivered to the respondents. The respondent's contention without more does not constitute proof that the letters of demand were never delivered to the respondents.

[34] In all the circumstances, I am satisfied that the applicant has made out its case and is entitled to the orders that the applicant seeks. There is no reason why the costs should not follow the result and must be paid in terms of the Loan Agreement, which makes specific provisions for costs to be paid on the scale as between attorney and client.

ORDER

In the result, the following order is made: -

1. The First and Second Respondent are to pay the Applicant jointly and severally, the one paying the other to be absolved.

2. The sum of R1 837 918 .31

3. Interest on the sum of R1 837 918 .31 at the rate of 4% per month compounded monthly in arrears from 10 August 2019 to the date of payment, both days inclusive.

4. Costs of suite on the scale as between attorney and client.

J DLAMINI

Judge of the High Court

Gauteng Division, Johannesburg

FOR THE APPLICANT:	Adv R J Bouwer
EMAIL:	rjbouwer@gmail.com
INSTRUCTED BY:	MARTINI PATLANSKY ATTORNEYS
EMAIL:	phillip.marp@law.co.za
FOR THE RESPONDENT:	Adv. C van der Merwe
EMAIL:	dominus.cvdm@gmail.com
INSTRUCTED BY:	KAVEER GUINESS INC
EMAIL:	kaveer@kginc.co.za