REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2023/071165

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

..... **.....**
SIGNATURE **DATE**

In the matter between:

MADI INVESTMENTS (PTY) LTD Applicant

and

AFRICAN TANACITY (PTY) LTD First Respondent

MICHELLE VAN ZYL Second Respondent

JUDGMENT

LABUSCHAGNE AJ

[1] The applicant instituted an application in terms of a notice of motion dated 18 June 2023 for payment of two claims. In the first claim an amount of

R540 416.66 is claimed against the first and second respondents jointly and severally, the one paying the other to be absolved, together with interest at the maximum permissible rate per annum from 30 June 2023 to date of final payment.

[2] The second claim is only against the first respondent and is for repayment of an amount of R703 649.00 plus interest *a tempore morae* at the maximum permissible rate. Both claims include prayers for costs.

CLAIM 1

[3] The applicant contends that negotiations took place in November 2022 between the applicant and the first respondent, represented by the second respondent concerning the possible acquisition by the applicant of a percentage of the issued share capital in the first respondent.

[4] The second respondent informed the applicant's representative, Mr Madi, that the first respondent required funds in the form of working capital to enable it to continue with its business venture. Pending the applicant's decision on the acquisition of shares, the applicant was prepared to lend and advance the sum of R500 000.00 to the first respondent to be used as working capital.

[5] This gave rise to the first oral agreement between the applicant and the first respondent, concluded at Centurion, alternatively Bedfordview during November 2022, with the following terms:

5.1 The applicant would lend and advance to the first respondent the sum of R500 000.00 as working capital;

5.2 The first respondent would be liable to pay interest in the period prior to acquisition by the applicant of any of the issued share capital in the first respondent at the rate of prime plus 3%, which interest was payable on the last day of each calendar month;

5.3 Only in the event of the applicant not electing to purchase any of the shares would the first respondent be obliged to make repayment of the aforesaid R500 000.00 together with interest;

5.4 The first respondent would further be obliged to make the payment to the applicant within thirty days of demand for repayment.

[6] The applicant advanced R500 000.00 to the first respondent in November 2022. On 24 November 2022 the second respondent signed an acknowledgement of debt. In terms of the acknowledgement of debt:

6.1 The second respondent acknowledged that she is indebted to the applicant in the aforesaid sum of R500 000.00, which had been advanced to the applicant to the first respondent as working capital;

6.2 The second respondent would be liable to pay interest to the applicant during the period prior to acquisition of any share capital by

the applicant and the first respondent at the rate of prime plus 3%, payable on the last day of each calendar month;

6.3 In the event that the applicant elected not to acquire any of the issued share capital of the first respondent, the second respondent bound herself to pay the amount of R500 000.00 together with interest within thirty days of demand.

[7] On 30 May 2023 the applicant, represented by its attorneys, transmitted a letter of demand to the respondents, recording:

7.1 That the applicant had elected not to proceed with the acquisition of any share capital of the first respondent;

7.2 The first and second respondents were afforded a period of thirty days to make repayment of the aforesaid amount of R500 000.00 together with interest calculated in the sum of R40 416.66.

[8] The first and second respondents failed to respond to the aforesaid letter of demand. Consequently, the applicant claims payment against the first and second respondents of the amount of R540 416.66 jointly and severally.

[9] In response to the aforesaid claim the first and second respondents contend as follows:

9.1 During November 2022 the parties and Nations Capital Projects (Pty)(Ltd) (“NCP”) entered into negotiations for the acquisition of

shares in the first respondent. NPC and the applicant indicated that they required time for the acquisition of shares;

9.2 During December 2022 NCP and the applicant indicated that they would like to proceed with the transaction and the parties signed a Memorandum of Understanding (MoU) on 8 December 2022;

9.3 The specific provisions pertaining to the aforesaid arrangements are contained in clause 2 and 3 of the MoU. The reference to “Nations” is a reference to NCP. The reference to “Madinvest” is a reference to the applicant and “Afritan” to the first respondent. Under the heading “THE AGREEMENT” the following is stated:

“It is hereby understood and accepted by the parties that:

- *Nations and Madinvest will purchase a 70% equity stake in Afritan for the sum R8,4 million and that Nations and Madinvest will be given an exclusive period of three months to conclude the transaction.*

- *In the meantime, Nations and Madinvest will raise the necessary R8,3 million working capital required by Afritan within the next three weeks from its funders in terms of a mandate agreement to be signed by the two entities.*

- *In the meantime, Nations will advance a loan of R500k to Afritan which is required by Afritan to continue operations until the loan of R8,6 million is secured.*

- *The R500k is advanced as a loan to secure exclusivity for Nations and Madinvest, as the preferred acquirer of the 70% equity interest from Michelle.*

- *Nations will undertake a due diligence exercise of Afritan prior to releasing the interim funding of R500k, which should take no longer than three days.*

- *Upon signing of the sale of shares agreement, Nations and Madinvest will pay Michelle 50% of the asking price and the remaining 50% will be paid in three tranches at the end of each of the following three years upon ensuring that the three-year profit warranty is attained or exceeded.*

- *Should the three-year profit warranty not be attained the purchase price will be adjusted to be in line with the profits attained on a proportional basis.*

- *The procurement of the R8,3 million will render the sale of shares transaction irrevocable pending successful raising of capital by Nations. (Two further bullet points are omitted as they are not pertinent) …*

3. CONDITIONS PRECEDENT

The parties agree that the successful conclusion of the transaction in section 2 above is subject to the fulfilment of the following president conditions:

(a) The successful completion of a technical, legal and financial due diligence on the business of Afritan."

[10] In clause 6(b) of the MoU the following is agreed:

"(b) Each party represents and warrants to the other that the execution and performance of this MoU does not and shall not violate any other contract, obligation or instrument to which it is a party, or which is binding upon it, including terms relating to covenants not to compete and confidentiality obligations."

[11] Clause 8 of the MoU contains an arbitration clause *"in the event of any dispute arising in connection with this MoU."*

[12] The MoU was signed on behalf of the first respondent, the applicant and Nations Capital Projects (Pty) Ltd at Centurion on 8 December 2022.

[13] The respondents contend that the MoU concluded during December 2022 evidences an election by the applicant to proceed with the acquisition of shares in the first respondent. This, so is contended, *"naturally as per the*

terms of the verbal agreement and acknowledgement of debt meant that the monies were not due and payable to the applicant."

[14] In paragraph 18.3 of the answering affidavit the respondents continues: *"The parties further agreed that the monies, being the R500 000.00, would be repurposed as the monies paid for the exclusivity as per clause 2 of the agreement 'AA1' (the MoU). Nations Capital Projects undertook to repay the R500 000.00 to the applicant as the applicant's monies were being repurposed. This brought an end to the verbal agreement and the acknowledgement of debt that was entered into between myself and the applicant."*

[15] The respondents therefore contend that the MoU is an absolute defence to the claim for repayment of R500 000.00 plus interest.

[16] The respondents further contend that the applicant and NCP are in breach of the MoU in that the applicant and NCP failed to provide personal financial information to Spartan Capital.

[17] But based on the aforesaid contentions, the respondents raise a dispute of fact which they contend was foreseeable. They seek the dismissal of the claim.

CLAIM 2

[18] In February 2023 and at Centurion a further oral agreement was concluded between the applicant and the first respondent in terms of which the

applicant would advance R1 000 000.00 to the first respondent in order to enable the first respondent to purchase stock on an urgent basis.

[19] The first respondent would be obliged to repay a total amount of R1 220 000.00 to the applicant in respect of the funds advanced and which amount the first respondent would repay to the applicant at the rate of R46 941.00 per week.

[20] The amount of R1 000 000.00 was then advanced to the first respondent. The first respondent however breached the oral agreement by failing to make the weekly payments, and as at 30 May 2023 the first respondent only made payment to the applicant in the amount of R516 351.00.

[21] By virtue of the aforesaid breach the applicant elected to cancel the agreement and advised the first respondent of such cancellation. As a result, thereof, the second oral agreement was cancelled and the applicant has suffered liquidated damages in the amount of R703 649.00, being the difference between the amount of R1 220 000.00 that was due by the first respondent and the aforesaid amount that had been paid, together with interest thereon from 30 June 2023 to date of payment.

[22] The respondents refer to a meeting of 29 April 2023 between the second respondent, Mr Koyana of NCP and the applicant, during which Mr Koyana acknowledged that the delay in obtaining funds as per the MoU is due to his failure to provide the required financial statement. Due to this he suggested, as an attempt to show his commitment to proceed with the agreement, that

he would take ownership of the loan and would proceed to make payment towards the loan starting May 2023. This offer was accepted by all the parties, contends the respondents. This is however disputed.

[23] In answer to the aforesaid claim for repayment based on the second oral agreement, the first respondent relies on the aforesaid meeting of 29 April 2023 for its contention that the parties had agreed at that meeting that NCP would repay the loan, starting in May 2023. As a result, the second oral agreement, came to an end.

[24] In reply to the aforesaid the applicant advances the following contentions:

24.1 The second oral agreement was concluded during the currency of the condition precedent referred to in the MoU. Notwithstanding the MoU, the first oral agreement, the acknowledgement of debt and second oral agreement would remain intact in termc of clause 6(b) and would only fall away in the event of the MoU becoming unconditional, and thereafter a sale of shares between the applicant, NCP and the first respondent being concluded. If the MoU became null and void, the first oral agreement, the acknowledgement of debt and the second oral agreement would remain intact;

24.2 The condition precedent had to be fulfilled within the three-month period of exclusivity for the conclusion of the sale of shares agreement. This condition precedent was not fulfilled within the three-month period and the sale of shares agreement was also not

concluded within the aforesaid period. Accordingly, says the applicant, the MoU became null and void after three months, on or about 8 March 2023;

24.3 The factual disputes referred to by the respondent are therefore not real factual disputes. As the MoU had become null and void, the applicant contends that it did not have to refer thereto in the founding papers;

24.4 The applicant denies that there was a repurposing of the R500 000.00 advanced in terms of the first oral agreement. Clause 2, bullet point 3 of the MoU does not bear out this repurposing;

24.5 The applicant contends that, when the meeting of 29 April 2023 took place, the MoU had already ceased to be of any force and effect as it had a three-month time limitation for the raising of funds for the share acquisition that the parties envisaged;

24.6 The applicant further contends that reliance on the alleged agreement on 29 April 2023 is misplaced by virtue of it being in conflict with clause 15 of the MoU. Clause 15 reads:

"15. AMENDMENTS

Unless as otherwise expressly provided in this MOU, a variation of any clause of this MOU is not valid unless it is in

writing and signed by a duly authorised representative of each party."

24.7 Further, the first respondent made payment to the applicant in respect of the second oral agreement in the sum of R156 351.00. The schedule of payments received in respect of the second oral agreement recorded payment by the first respondent on 3 May 2023 of R46 941.00. This indicates that the alleged agreement on 29 April 2023 has not been established.

DISCUSSION

[25] The respondents contend that the mere election by the applicant to take up shares in the first respondent, as evidenced by the MoU, discharges the respondents from the liability to repay the R500 000.00 that was advanced to the first respondent, and for which the second respondent signed an acknowledgement of debt.

[26] It is common cause that no acquisition of shares by the applicant in the first respondent took place. Neither did NCP take up shares in the first respondent.

[27] By virtue of the provisions of clause 6(b) of the MoU, the oral agreement in respect of Claim 1 continued to exist independently of the MoU. In terms of that clause the execution and performance of the MoU *"does not and shall not violate any other contract, obligation or instrument to which it is a party,*

or which is binding upon it, including terms relating to covenants not to compete and confidentiality obligations."

[28] The respondents' contention that the R500 000.00 advanced in terms of the first oral agreement was repurposed to pay for a three-month period of exclusivity in terms of the MoU is not a contention that can be accepted. In terms of the MoU a separate amount of R500 000.00 would be advanced *"as a loan to secure exclusivity for Nations and Madinvest, as the preferred acquirer of the 70% equity interest from Michelle."*

28.1 This indicates that the payment of a further R500 000.00 would in itself secure exclusivity, but would be a loan.

28.2 The terms of the MoU and the non-variation clause in clause 15 render the defence of a repurposed R500 000.00 to discharge liability for repayment of the loan made in terms of the first oral agreement, a defence that cannot be upheld. As a matter of interpretation of the MoU, the defence that is pleaded is not a valid defence and therefore does not create a *bona fide* dispute of fact.

28.3 The three-month period of exclusivity for which the MoU provides placed a time limitation on the fulfilment of the condition precedent. It too had to be fulfilled within the three-month period envisaged. As this condition precedent was not fulfilled and as the conclusion of the transaction in section 2 was not achieved within the three-month period, the MoU lapsed and became null and void.

[29] I am therefore satisfied on the papers that Claim 1 must succeed, despite the attempts to create a dispute of fact.

[30] Further, the reliance on the arbitration clause is misplaced. The first oral agreement continued in existence independently of the MoU by virtue of clause 6(b). It is the repayment of that loan which is the subject of Claim 1. It is therefore not a dispute in respect of the MoU. In any event, the alleged repurposing of the R500 000.00 is not borne out by the terms of the MoU and is therefore also not a dispute in respect of the MoU.

[31] The second respondent is not a party to the MoU, and a defence of arbitration is not available to her. The defence of arbitration therefore has not been established.

[32] In the premises Claim 1 succeeds.

CLAIM 2

[33] In respect of Claim 2 the first respondent relies upon a new agreement concluded on 29 April 2023 to supplant its obligations to repay the R1 000 000.00 advanced in terms of the second oral agreement.

[34] The first respondent bears an onus of establishing the second agreement that absolves her from the duty to pay (**Bowden v Fouche and Another** 1969 (4) SA 201 (NC) at p 207 C).

[35] The reliance by the applicant on the non-variation clause in the MoU as a reason why the 29 April 2023 agreement would be invalid cannot be accepted. As the MoU had a three-month lifespan and became null and void on 8 March 2023, the non-variation clause in clause 15 was no longer operative when the alleged agreement was concluded.

[36] What however militates against such an agreement having been concluded is the conduct of the first respondent in making a further payment on 3 May 2023 when the defence advanced was that NCP had agreed to take over the obligation to repay commencing in May 2023. In the premises the defence of a new agreement concluded on 29 April 2023 cannot be accepted as being established on the papers. The contention is so at odds with the first respondent's conduct that I cannot accept it. It is therefore rejected.

[37] Claim 2 therefore succeeds.

[38] In the premises I make the following order:

Claim 1:

1. The first and second respondents are directed, jointly and severally, the one paying the other to be absolved, to pay the applicant the amount of R540 416.66 together with interest thereon at the rate of 11,25% per annum from 30 June 2023 to date of final payment.

2. The first and second respondents are to pay the costs of the application jointly and severally, the one paying the other to be absolved.

Claim 2:

1. The first respondent is directed to pay the applicant the amount of R703 649.00 together with interest thereon at the rate of 11,25% from 30 June 2023 to date of final payment.

2. The first respondent is directed to pay the costs of the application in respect of Claim 2.

_____

LABUSCHAGNE AJ

ACTING JUDGE OF THE HIGH COURT

Appearances

For the applicant	Adv Pincus SC
Instructed by	Mouyis Cohen Inc Attorney
For the first and second respondents	Adv Liebenberg