

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

CASE NUMBER: 20710/22

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGE: NO

(3) REVISED: NO

2 JUNE 2023

In the matter between:

KAINOS MEDICO

Applicant

and

MAKOKGA SEBEI INC.

Respondent

Heard: 30 May 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and uploaded on case lines. The date and time for hand-down is deemed to be 10h00 on 02 June 2023.

JUDGMENT

LE GRANGE AJ:

[1] Before me is an application for summary judgement for the payment of the amount of R 5 596 600-00 with interest and costs, on a scale (as agreed upon) between attorney and client - based upon the breach of an acknowledgement- of- debt-and-instalment-payment-agreement ("contract").

[2] The applicant has raised two issues in *limine*, which I have momentarily disregarded while the focus is solely upon the core question of whether the respondent has set out a *bona fide* defence, at all (in favour of the respondent, in any and all papers filed by the respondent which include its plea, its affidavit opposing summary judgement and heads of argument) i.e.:

' ... (a) whether the defendant has disclosed the nature and grounds of his defence; and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is bona fide and good in law, put differently, if the defendant's affidavit shows that there is a reasonable possibility that the defence advanced may succeed on trial ...

If, for example, the defendant omits facts upon which a defence can be based, or sets out the facts upon which he does rely in such a manner that the court is unable to say that if they are established they will constitute a defence to their action or some part of it, he will fail in his defence.'

(Erasmus Superior Court Practice Uniform Rule 32 subrule (3)(b) RS 16, 2021, D1-410B)

Defence(s)

[3] The defendant's plea consists of:- (i) a special plea of lack of jurisdiction, which has no merits considering the *Superior Court Act* 10 of 2013 and the latest judgement of *Standard Bank of South Africa Ltd and Others v Mpongo and Others* 2021 (6) SA 403 (SCA) at [33]; and (ii) a bare denial as to the merits.

[4] What is most relevant to this proceedings is the respondent's bare denial (in paragraph 4 of the plea) of any knowledge of the contract which is (seen from the opposing affidavit at paragraphs 10-12) not the truth and unacceptable (in terms of Uniform Rule 22).

[5] This plea, which can be labelled as tactical and with the only intention to delay the outcome of the matter, logically and correctly triggered the current application for summary judgement.

[6] The defendant then (with no defence in hand for purposes of summary judgement) filed an opposing affidavit (riddled with argument) wherein it raised two new defences i.e. (i) a plea of non-joinder (of the directors who is jointly and severely liable with the respondent in terms of section 34(7)(c) of the *Legal Practice Act 28 of 2014*), which defence has no prospect of success considering a creditor's right to claim payment from any one and/or all of its debtors where they are jointly and severely liable as fully discussed in *Christie's Law of Contract in South Africa Seventh Edition* at page 296-297; and (ii) a plea of lack of authority in concluding the contract, and with it a point *in limine* aimed at the lack of a germane allegation in the particulars of claim.

In limine: lack of a germane allegation of agency or authority

[7] The respondent (*per* Mr Sebei as the deponent) complains that the applicant failed to allege (in its particulars of claim) that Mr Makokga had the necessary authority to conclude the contract on behalf of the respondent.

[8] As I understand the matter of *Makate v Vodacom (Pty) Ltd 2016 (4) SA 121 (CC)* at [46] - [47], the only allegation that a plaintiff has to prove and thus aver is that - the principal created an appearance that the agent had the power to act on the principal's behalf, whereafter the defendant is at liberty to deny such agency due to a lack in authority.

[9] The applicant in (paragraph 4 of its particulars of claim) aver that the:-

'Defendant, duly represented by ET Makokga, concluded a written acknowledgement of debt.'

[10] I find on authority of the above and that of *Lind v Spice Bros (Africa) Ltd 1917 AD 147* that applicant's averment that the defendant was 'duly represented by' Mr ET

Makokga in concluding the agreement, does constitutes a sufficient allegation of agency by representation.

[11] The respondent on the other hand did not deny authority specifically and unambiguously in its plea (as found to be compulsory in *Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) and *Tuckers Land and Development Corporation (Pty) Ltd v Perpellief* 1978 (2) SA 11 (T) p.16) but only raised the point after it became apparent in the application for summary judgement that its plea will not pass muster.

Lack of authority

[12] The respondent allege in its opposing affidavit that:-

'10. I have not agreed nor authorised Mr Makokga, my co-director, that he should conclude nor sign an Acknowledgement of Debt on behalf of the Defendant.

17. Mr Makokga, my co-director and/or shareholder, had no actual authority to bind the Defendant to the Acknowledgement of Debt which is the subject of the application for Summary Judgement.

18. I refer this Honourable Court to the copy of the Defendant's Memorandum of Incorporation ("MOI"), annexed hereto marked Annexure "MS2". It appears from the MOI that my co-director and/or shareholder has no such authority.

20. In the absence of actual authority, the Plaintiff has to establish ostensible authority which I submit he had no authority. The Plaintiff has to put factual material before the Court. In other words the Defendant requires facts to rely on the *Turquand* rule and Section 20(7)

(Emphasis added in the latter instance)

[13] And then in the FINALE concluded:-

'22. On the basis of what is said above in paragraphs 20 and 21, the Plaintiff is or would be unable to prove ostensible authority.'

[14] The uncertainties that sprung from the above (as more fully discussed hereinunder) is not clarified by the confirmatory affidavit of Mr Makokga, who only slavishly confirms the contents of Mr Sebei's affidavit, and made worse by the fact that the respondent (well knowing of the matter and the court's indulgence to arrange for an appearance) decided not to attend the proceedings.

Does the above mentioned 'alleged facts' constitute a defence

[15] Be that as it may, it seems from paragraphs 10. - 19. above that Mr Sebei (to be taken as correct in this proceedings) did not expressly authorise Mr Makokga to conclude the contract on behalf of the respondent nor did the latter have any such authority granted to him in the MOI, hence him moving at paragraphs 19. -

22. towards the argument (*sic*) of ostensible authority.

[16] Pertaining to the latter, the respondent does not plead, allege or state that no ostensible authority existed in fact, nor did it set out any grounds or facts upon which it relies that no such authority existed.

[17] The respondent only submits¹ that no such ostensible authority existed and then set off on a mission to convince the court that the applicant would:- '22.

... be unable to prove ostensible authority.'

[18] This omission of allegation and fact cannot be regarded as a bona fide defence, but merely a presentation of a catch-me-if-you-can defence of an elusive defendant.

[19] In the premises, I find that the respondent has failed to set out a defence which is *bona fide* and good in law.

¹ Submit:- to commit to the discretion or judgment of another, or to present for determination.

[20] This being so, I find it unnecessary to consider the points *in limine* raised by the applicant.

Order

In the result I make the following order:-

1. The summary judgement succeeds with costs.
2. The defendant is to pay the amount of R 5 596 600-00 with interest and costs on a scale between attorney and client.

AJ LE GRANGE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

APPEARANCES

For the applicant: Adv. C Barreiro on the instruction of Coombe Commercial Attorneys Incorporated.

For the respondent: No appearance.