THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 1068/2015

In the matter between:

ZEPHAN (PTY) LTD	**FIRST APPELLANT**
NICOLAS GEORGIOU NO	**SECOND APPELLANT**
MAUREEN LYNETTE GEORGIOU NO	**THIRD APPELLANT**
JOE CHEMALY NO	**FOURTH APPELLANT**
NICOLAS GEORGIOU	**FIFTH APPELLANT**

and

ANNE-MARIE LEONIE DE LANGE	**RESPONDENT**

Neutral Citation: *Zephan v De Lange* (1068/2015) [2016] ZASCA 195 (2 December 2016).

Coram: Bosielo, Dambuza and Van der Merwe JJA and Schoeman and Nicholls AJJA

Heard: 8 November 2016

Delivered: 2 December 2016

Summary: Summary judgment: in opposing summary judgment application a defendant must set out in the answering affidavit the facts which, it contends, constitute a bona fide defence: where all facts pleaded in the particulars of claim were admitted and no further facts alleged in answering affidavit the bona fide defence could be determined on the papers: contract: acceptance of a *stipulatio alteri* benefit by a third party: the agreement was enforceable against the second party: business rescue proceedings relating to first party to a *stipulatio alteri* contract were irrelevant where the benefit had been accepted the third party.

ORDER

On appeal from: Gauteng Division, Pretoria (Hiemstra AJ sitting as court of first instance):

The appeal is dismissed with costs including costs consequent upon the employment of two counsel where applicable.

JUDGMENT

Dambuza JA (Bosielo and Van der Merwe JJA and Schoeman and Nicholls AJJA concurring):

[1] This appeal, with leave of the court a quo, is against a judgment of the Gauteng Division, Pretoria (Hiemstra AJ) in terms of which summary judgment was granted against the five appellants, jointly and severally, for R520 000 plus interest. The issue is whether, in view of the affidavits filed by the appellants in opposition to the summary judgment application, the court a quo was correct in granting summary judgment. More specifically, whether the facts set out in the appellants' answering affidavit in opposition to the application for summary disclosed a bona fide defence.

[2] Underlying the action brought by the respondent, Mrs Anne-Marie De Lange, against the appellants in the court a quo are two agreements. The first is essentially an agreement of sale or an investment agreement in terms of which Mrs De Lange bought 1 000 shares in a company known as Highveld Syndication No 21 Ltd (HS 21). The terms of the investment agreement were embodied in a prospectus registered with the Registrar of Companies and Close Corporations, on 9 February 2009. The prospectus accompanied an offer by HS 21 to the public for subscription to 1 091 512 ordinary shares with a par value of 100 cents each at an issue price of 100 cents each, plus a linked loan account of R999 per share. The offer opened at 09h00 on 11 May 2009 and closed on 10 August 2009. Although Mrs De Lange's

offer to buy shares in HS 21 was made on 18 November 2008, the investment agreement was only concluded on the issue of the share certificate on 25 June 2009.

[3] In terms of the investment agreement, Mrs De Lange was entitled to sell her shares after purchasing them, but, at the expiry of five years from the investment date, she would be compelled to sell them as provided in a second agreement, the buy-back agreement. Clause 16 of the investment agreement recorded that amongst the material contracts that HS 21 had already concluded since its incorporation on 5 August 2005, was a head lease agreement and the buy-back agreement, both concluded with Zelpy 2095 (Pty) Ltd which subsequently changed its name to Zephan (Pty) Ltd, the first appellant, (Zephan).

[4] The buy-back agreement was concluded on 13 December 2008, which was, again, prior to the opening date of the share offer. It was concluded between four parties, namely, HS 21, Zephan, the N Georgiou Trust (the Trust), and Mr Nicolas Georgiou. In terms of the buy-back agreement Zephan, the Trust and Mr Georgiou, jointly and severally undertook to buy the shares sold by HS 21 five years after the investment date.

[5] Mrs De Lange's investment agreement was one amongst many similar agreements in terms of which individual investors invested inter alia in the HS 21 and Highveld Syndication No 22 Limited (HS 22) (the HS companies). These companies conducted the business of property syndication. The head lease and the buy-back agreement were advertised as 'insurance' for the investment as it provided investors with peace of mind in the knowledge that their money was safe and was assured of guaranteed yields. The investors would earn 12.5 per cent income per annum on their investment, from the date of investment. All costs, including commissions were paid for by the promoter.

[6] In respect of Mrs De Lange's investment agreement, the five year term had expired. She then became one of 46 investors who instituted action against the appellants seeking performance by them in terms of the buy-back agreement. The aggregate amount claimed in the 46 actions is R29 955 000. When the appellants filed notices of their intention to defend the claims, the 46 plaintiffs applied for

summary judgment. In the court a quo the parties agreed that a judgment in Mrs De Lange's case would be determinative of the issues in all other cases.

[7] In opposing Mrs De Lange's application for summary judgment, the appellants advanced, broadly, two defences. The first was that the buy-back agreement created no contractual nexus between Mrs De Lange and the appellants and therefore there was no basis for her claim for specific performance against the appellants. The argument was that, for enforceability the buy-back agreement had to create benefits and obligations for both parties thereto. In this instance it did not – it only consisted of an undertaking by the appellants to the HS companies that they would buy the appellants' shares. But the HS companies could not enforce that obligation, so it was argued. Regarding enforceability, the appellants also contended that for the agreement to be enforceable by Mrs De Lange against them, it would have had to manifest an intention that the HS companies be replaced by Mrs De Lange in the buy-back agreement. The second defence was that, even if the buy-back agreement could be regarded as a proper basis for Mrs De Lange's claim, that agreement had been superseded by the pending business rescue of the HS companies. The contention was that because the majority of the shareholders in the HS companies had voted in favour of a business rescue plan (BRP) which restructured the rights that they had prior to the passing thereof, in favour of the rights set out in the business plan, the buy-back agreement had become unenforceable.

[8] In granting summary judgment the court a quo found that there was no reason why the HS companies would not have been able to enforce the agreement as they would have been obliged to repurchase the shares if the appellants did not honour their obligations under the buy-back agreement. The court also found that when Mrs De Lange accepted the benefit, HS 21 was relieved of its obligation to repurchase the shares and was replaced by Zephan and/or the appellants in respect thereof. The court also dismissed a rather belated argument of unenforceability by the appellants based on the fact that the buy-back agreement had not yet come into existence when Mrs De Lange accepted the benefit. As to the defence relating to restructuring of the shareholders' rights through the BRP, the court a quo found that the BRP could not be a novation or waiver of rights under the buy-back agreement. It

had not been signed by the parties to the buy-back agreement as provided for in the non-variation clause contained in the buy-back agreement.

[9] In this court the appellants' argument was essentially a revamp of the defences raised in the court a quo. Broadly, the appellants' three-pronged argument before us was that firstly, the buy-back benefit could not be validly accepted before it was created. This related to the fact that according to them, the sale of shares was concluded on 18 November 2008, prior to the conclusion of the buy-back agreement on 13 December 2008. The second submission was that, in the light of the contents of the appellants' affidavit resisting summary judgment, the elements essential for establishing *stipulatio alteri* could be impugned by further evidence. Therefore the court a quo should have refused summary judgment so that such further evidence could be led at trial. The third argument was that the finding of the court a quo, that the BRP did not restructure Mrs De Lange's rights under the buy-back agreement was wrong.

[10] It was not in dispute before the court a quo that Mrs De Lange's claim fell within the rubric of claims in respect of which a court may grant summary judgement. The issue was whether the appellants had tendered a bona fide defence. Rule 32 (3) of the Uniform Rules of Court provides that a defendant seeking to avoid summary judgment may satisfy the court by affidavit, that he has a bona fide defence to the action. It is trite that the word 'satisfy does not mean prove'.[1] What is required is that in his affidavit the defendant sets out facts which, if proved at trial, will constitute an answer to the plaintiff's claim.[2]

[11] The facts set out in the appellants' affidavit are not in dispute. Essentially they are a presentation of the terms of the agreements. Having set out 'material background facts' in the answering affidavit, the appellants specifically stated that:

'11. The defendants do not deny:

11.1 The plaintiff's acquisition and ownership of the shares in the relevant Highveld Syndication Company, as pleaded.

11.2 The identity and citation of the defendants.

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[1] D E van Loggerenberg and E Bertelsmann; *Erasmus Superior Court Practice*, (2015) at D1-409, and the authorities cited therein.

[2] Ibid.

11.3 The Court's jurisdiction to adjudicate upon the plaintiff's claim.

11.4 The registration by the then Registrar of Companies and Close Corporations of the prospectus in respect of the relevant Highveld Syndication Company, or the terms of the prospectus as quoted in the plaintiff's particulars of claim.

11.5 *The conclusion and terms of the buy-back agreement relied upon by the plaintiff and attached as an annexure to the plaintiff's particulars of claim.*' (My emphasis.)

[12] Nowhere in the answering affidavits do the appellants allege, as the basis of their defences, facts that are not contained in the buy-back agreement. All their defences are legal points founded on the agreed terms of the buy-back agreement and the contents of the BRP. In this sense the appellants disclosed the nature and grounds of their defence. If there were any facts that could disclose a further defence it was incumbent upon them to disclose such facts. It would have been wrong for the court to consider, without any basis, whether there could be other facts which could disclose a further defence. Such approach would defeat the purpose of the Rule. The inquiry in the court a quo was limited to considering whether the legal conclusions advanced by the appellants as their bona fide defence, based on the terms of the buy-back agreement, constituted a defence good in law.[3] The appellants did not even attempt to suggest what such further evidence or facts could be. Their contention that, in the light of the contents of their affidavit resisting summary judgment, the elements essential for establishing a *stipulatio alteri* could be impugned, is without merit.

[13] The defence that the buy-back agreement was unenforceable, because it was concluded about a month after Mrs De Lange accepted the benefit flowing from it, cannot constitute a defence good in law. The offer made by Mrs de Lange could not have been accepted prior to the opening of the share offer on 11 May 2009. All that happened on 18 November 2008 was that Mrs De Lange made an offer. In the particulars of claim Mrs De Lange pleaded that her application was accepted and share certificate no HFS 212 4500 was issued to her and in so doing she accepted the benefit. The share certificate is dated 25 June 2009. It is incorrect therefore to say that the benefit was accepted before it came into existence.

[3] *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A).

[14] It is clear from the terms of the buy-back agreement that it was intended to benefit Mrs De Lange and other shareholders and that on adoption thereof they became party to the contract. (See *Joel Melamen & Hurwitz Incorporated v Clevelant Estates (Pty) Ltd; Joel Melamen & Hurwitz Incorporated v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A).)

[15] In the preamble the buy- back agreement states that:

> 'WHEREAS the FIRST party had its shares marketed at R1.00 per share with a linked loan account of R999.00 by means of a public placing, and
>
> WHEREAS the SECOND, THIRD & FOURTH parties jointly and severally had given an undertaking to the FIRST party to repurchase all of the shares sold by the FIRST party five years after the investment had been made by the original purchaser; and
>
> NOW THEREFORE WITNESSES:
>
> 1 The SECOND, THIRD & FOURTH PARTY, jointly and severally, hereby irrevocably undertakes to repurchase all of the shares sold by the FIRST party to the original purchasers of the shares five years after the individual initial purchase dates (herein after referred to as the "Repurchase date" at R1.00 per share with a link loan account of R999.00.'

[16] The buy-back agreement is a simple nine clause agreement in which all the terms relate to the buy-back clause (clause 1). It sets out expressly that the second, third and fourth parties (Zephan, the Trust and Mr Georgiou) undertook to the first party, HS 21, to buy Mrs De Lange's shares at the expiry of the five year period. As stated above they confirmed that 'the conclusion and terms of the buy-back agreement relied on by the plaintiff and attached as an annexure to the particulars of claim'. Mrs De Lange accepted this benefit and was therefore bound to look to the appellants for performance of the obligation. The five year term from the purchase date having expired, Mrs De Lange's claim for the appellants to perform in discharge of this obligation was properly made. Contrary to the submission by counsel for the appellants, this obligation was not conditional upon anything else.

[17] Regarding the defence that the rights of the shareholders had been restructured in the business rescue plan, the common cause background was that in 2008 the Governor of the Reserve Bank had, in terms of the South African Reserve

Bank Act 90 of 1989, directed that Pickvest Syndications (Pty) Ltd, which had promoted the offer issued by the HS companies, be investigated on suspicion of having conducted the business of a bank. Zephan then cancelled the head lease agreement referred to above. This led or contributed to the HS companies experiencing financial difficulties. In 2010 the HS companies were placed under business rescue. The business rescue plan was signed and published on 30 November 2011. It reveals that prior thereto, on 21 September 2011, the first meeting of the creditors of the HS companies took place and the business rescue practitioner formed the view that the rescue plan would yield a better return than liquidation. Orthotouch Limited, of which Mr Georgiou was a director, was to buy the HS companies' properties. A further consultation with creditors was due to be convened in terms of s 150 of the Companies Act 71 of 2008 and the offer was to be considered in terms of s 152 of the Companies Act. There is no evidence that such a meeting did take place.

[18] In the part on which the appellants rely, the business plan provides that the fixed interest of 12.5 per cent per annum would now be reduced 6.00 per cent per annum during the first year, 6.25 per cent per annum during the second year, 6,50 per cent per annum in the third year, 6,75 per cent per annum in the fourth year and 7.00 per cent per annum in the fifth year. It further states that:

'The effect of this business plan upon shareholders is that the owners of the linked units on the fifth anniversary of the acceptance of the offer and adoption of this plan, against payment to them of the amount of their investment shall transfer to Orthotouch all their shares and cede to Orthotouch all their claims in and against the companies.'

[19] The BRP relates only to the restructuring of the business of the HS companies and not the appellants. When the HS companies went into business rescue the appellants were the primary carriers of the obligation to buy back Mrs De Lange's shares. The fact that the HS companies might have been in business rescue was irrelevant to the appellants' discharge of their obligations under the buy-back agreement. Neither was the fact that she had accepted payments of the reduced annual interest. Such interest was never part of the buy-back agreement. There could be no basis for a finding that Mrs De Lange had compromised her rights under the buy-back agreement.

[20] In the result, the appeal is dismissed with costs including costs consequent upon the employment of two counsel where applicable.

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N DAMBUZA
JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	P F Rossouw SC and M Mostert Instructed by: Kyriacou Incorporated, Melrose North c/o E G Cooper Majiedt Inc, Bloemfontein
For the Respondent:	A P Joubert SC and L Bolt Instructed by: Le Grange Attorneys, Pretoria c/o Symington & De Kok, Bloemfontein