

SOUTH AFRICA / JUDGMENT

Forsyth v Heydenrych (31749/2011) [2018] ZAGPJHC 568 (18 October 2018)

[2018] ZAGPJHC 568

COURT

South Gauteng High Court, Johannesburg

BEFORE

I Opperman

CASE / FILE NUMBER

31749/2011

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

No. 31749/2011

In

the matter between:

DR

HOWARD BRUCE MORTIMER

FORSYTH Plaintiff

and

GERHARD

CHRISTOPHER

HEYDENRYCH Defendant

JUDGMENT

INGRID OPPERMAN J

Introduction

- [1] The plaintiff, a medical doctor specialising in anaesthesiology, lent his brother-in-law, the defendant, R660 000 in October 2008 so that the defendant, could invest such funds in a company, Blue Moonlight Properties (Pty) Limited (Blue Moonlight). Notwithstanding that both parties foreshadowed that the loan would be of short duration and repaid within mere months, some ten years later the defendant has yet to do so.

The

issues

- [2] At the commencement of the trial on 14 August 2017, the parties agreed that the only issues which the court was called upon to adjudicate were the following:

2.1. When is the loan repayable?

2.2. What is the applicable interest rate; and

2.3. Whether the National Credit Act 34 of 2005 (the NCA) is applicable

- [3] During the course of the trial the defendant sought to contend that the loan to the defendant did not attract any interest at all; despite the agreement on the issues. This necessitated an amendment to the plaintiff's particulars of claim in order to plead out what he contended a proper construction and interpretation of the agreement entailed. In the alternative thereto the plaintiff sought a rectification of the written agreement in question.

- [4] Both the plaintiff and the defendant testified. They called no witnesses.

Background

facts

- [5] The following facts are either common cause between the parties or have not been placed in issue by the defendant (in the sense that the defendant failed to present contrary evidence).
- [6] The plaintiff and the defendant are brothers-in-law; the plaintiff being married to the defendant's older sister for the past 33 years. He has known the defendant ever since he met his wife some 2 years before they were married. During about 2007, the defendant acquired a business; a property holding entity named West Dunes Properties 232 (Pty) Limited (West Dunes) which owned an immovable property. The business plan entailed renovating the immovable property and then renting out rooms to students of the nearby university, for profit. The defendant sought people willing to invest in this business venture. The plaintiff considered the business plan and agreed to invest in the venture. To that end he purchased a percentage of the shares in West Dunes and hoped for a dividend return on his investment.

[7] At a later stage, in about May 2008, the defendant sought to acquire a further immovable property; this time in the name of Blue Moonlight. As before, the defendant sought investors to take up shares in the business so as to fund both the purchase and

renovation of the property in question. The plaintiff initially (in about May 2008) subscribed for 10 of the 100 shares in Blue Moonlight at a cost of R44 000 per share. He later upped his shareholding to 25 shares for a total investment of R1 100 000

(i.e. $25 \times R44\,000 = R1\,100\,000$).

[8] In addition to the plaintiff's investment, West Dunes also sought to acquire shares in Blue Moonlight. It, however, did not have the necessary funds to pay for the shares it sought, nor could it raise such funds from a financial institution. Being aware that the plaintiff had recently obtained access finance from the Standard Bank of SA through a mortgage bond facility over

his home, the defendant, on behalf of West Dunes, approached the plaintiff for a possible loan to West Dunes. The plaintiff

agreed to lend such funds to West Dunes on extremely favourable terms (i.e. prime minus 1.7%) because he saw that as support for his family, the defendant.

[9] Not long thereafter the defendant, cognisant of the plaintiff's access facility and the circumstances surrounding his loan to West Dunes, asked the plaintiff to lend him the R660 000 he required to pay for the 15 shares he (the defendant) had subscribed for in Blue Moonlight at a cost of R44 000 per share.

[10] The plaintiff agreed to assist the defendant and to lend him the money at no benefit or cost to himself (i.e. the plaintiff), hence the interest that was payable would be at the same rate that the plaintiff was paying on the money that he had withdrawn from the access facility on the bond over his home. The parties accordingly signed their agreement in respect of such loan on

12 October 2008, just over a month after a similar agreement in respect of the West Dunes loan had been signed which had occurred on 10 September 2008.

[11] The plaintiff then withdrew the requisite funds from the mortgage bond facility and lent and advanced the sum of R660 000 to the defendant, he having transferred such funds directly into the defendant's bank account. The defendant, in turn, made regular monthly payments. Such payments continued after service of summons, right up until 31 July 2017. The defendant has not made any further payments since 31 July 2017. The defendant has also not sought alternative finance, as contemplated in clause 14 of the written agreement, nor has he paid the full amount of the loan and interest to the plaintiff.

When is the loan repayable?

- [12] The only provision in the written agreement, which speaks to the repayment of the loan, is clause 14. It provides as follows:
14. GC Heydenrych undertakes to do his utmost to obtain alternative finance and to repay all interest and costs on the advance within the shortest time possible.
- [13] On the face of it the provision relates only to the defendant's undertaking to procure alternative finance within the shortest time possible and to pay interest on the loan at the rate and frequency provided for in the bond. It does not say when the loan itself is to be repaid.
- [14] The plaintiff accordingly asserted in paragraph 4.4 of his amended particulars of claim that the agreement, properly construed, means that the loan was repayable within a reasonable time, alternatively on demand. That reasonable period of time, says the plaintiff, was not more than 24 months.
- [15] The defendant denies that the loan was repayable either within a reasonable period of time or on demand; he contended that "the sum was repayable within the shortest possible time." This construction was repeated during argument.
- [16] There is nothing in the agreement to support the defendant's contention. Be that as it may, even if the loan could be said to have been payable "within the shortest time possible", it is impossible to ascertain from the agreement itself what the shortest time possible is. As such, the agreement concerning time to repay is so vague as to be unintelligible, meaning that the term relating to the time for repayment is void for vagueness and the agreement must thus be considered as one without any time clause[1].
- [17] In the absence of a time period there is, strictly speaking, no limitation on the right of the plaintiff to reclaim the loan immediately[2] (i.e. to make demand) but fairness demands that the borrower (i.e. the defendant) be given a period of grace and be entitled to a reasonable time before he can be compelled to repay the money lent[3]. The amount involved usually determines the reasonableness of the period where no date for repayment has been set. It is for the borrower (the defendant) to make out the case that the period is unreasonably short in the light of ordinary everyday experience of affairs, should a claim be instituted against him for immediate repayment[4].
- [18] The defendant has failed to show that the 24 month period contended for by the plaintiff, is unreasonably short. He has also failed to state what he contends a reasonable period would be. Plaintiff submits that, having regard to the sum involved (a loan of R660 000), a period of 24 months is, more than reasonable. This, so the argument continues, all the more so in circumstances where the parties themselves contemplated, at the time the agreement was negotiated and concluded, that the loan would be of short duration; that the defendant would be in a position to acquire alternative finance once his divorce had been finalised and, once so finalised, that the defendant would repay the loan to the plaintiff. Indeed, they both expected that the loan would be paid in full within 3 or 4 months.

[19] That the period of 24 months is reasonable is born out by the conduct of the parties themselves. The defendant not only agreed to vary the interest rate with effect from the expiry of the 24 month period at the end of October 2010, he also implemented such variation, testifying that the loan ought to have been repaid within mere months from the date that his divorce was finalised.

He would only have agreed to the interest variation in regard to both the West Dunes loan and his personal loan because he knew that the time for him and West Dunes to have repaid their respective loans, had passed.

[20] As it turned out, the defendant's divorce was unexpectedly delayed and only finalised in about July/August 2009, in part due to the untimely and tragic suicide of the defendant's son in December 2008. Despite this, almost ten years later, the defendant is yet to "do his utmost to obtain alternative finance", as required by the clause, or to repay the loan to the plaintiff in full. The defendant conceded during cross-examination that he still owed, at the very least, as at 31 July 2017, the sum of R201 903.54. Plaintiff's attorneys made demand upon the defendant by letter dated 22 July 2011. In response thereto, by email dated 10 August 2011, the defendant informed the plaintiff's attorney that his own attorney would react to the letter in due course.

[21] The summons in this action was issued on 22 August 2011 and served on the defendant on 4 October 2011. Summons also constitutes a further demand.

[22] In light of the above, one can safely conclude that the loan was repayable no later than 8 October 2010 (being 24 months after the loan was granted) alternatively no later than 10 August 2011 (being the day that the defendant reacted to plaintiff's attorneys' letter of demand), further alternatively, the day after summons was served (being 5 October 2011).

The applicable interest rate

[23] Clause 13 of the agreement provides as follows:

13. GC Heydenrych agrees to pay interest to HBM Forsyth at the same rate and on the same terms and conditions that are applicable to HMB Forsyth's bond at the Standard Bank of South Africa.

[24] Both the plaintiff and the defendant testified that the applicable interest rate at the commencement of the loan was prime minus 1.7%. It was not disputed by the defendant that prime was then 15.5%.

[25] During the course of defendant's counsel's address to court in respect of an objection raised and during the plaintiff's temporary absence from the witness stand (he having been asked to leave the court), the defendant sought to submit that the defendant is not liable for any interest at all, because the plaintiff does not have a mortgage bond at the Standard Bank of SA in his own name. This assertion, having regard to the agreed and defined issues, came as a bit of a surprise as one of the agreed issues was whether or not the NCA had application

which can only be an issue if interest is payable. If no interest is payable, the agreement is not a credit agreement and thus not subject to the NCA.

The proper interpretation and rectification of the agreement

[26] The current approach to interpretation, which encapsulates the principles applied and refined in the numerous authorities[5] since *Natal Joint Municipal Pension Fund v Endumeni Municipality* [6], is to be found in *Novartis v Maphil* [7], in which Lewis JA held as follows:

“[27] I do not understand these judgments[8] to mean that interpretation is a process that takes into account only the objective meaning of the words (if that is ascertainable), and does not have regard to the contract as a whole or the circumstances in which it was entered into. This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. KPMG, in the passage cited, explains that parol evidence is inadmissible to modify, vary or add to the written terms of the agreement, and that it is the role of the court, and not witnesses, to interpret a document. It adds, importantly, that there is no real distinction

between background circumstances, and surrounding circumstances, and that a court should always consider the factual matrix in which the contract is concluded – the context – to determine the parties’ intention.

[28] The passage cited from the judgment of Wallis JA in *Endumeni* summarizes the state of the law as it was in 2012. This court did not change the law, and it certainly did not introduce an objective approach in the sense argued by Norvatis, which was to have regard only to the words on the paper. That much was made clear in a subsequent judgment of Wallis JA in *Bothma-Botha Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA), paras 10 to 12 and in *North East Finance (Pty)Ltd v Standard Bank of South Africa Ltd* [2013]ZASCA 76; 2013 (5) SA 1 (SCA) paras 24 and 25. A court must examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.

[29] Referring to the earlier approach to interpretation adopted by this court in *Coopers & Lybrand & others v Bryant* [1995] ZASCA 64; 1995 (3) SA 761 (A) at 768A-E, where Joubert JA had drawn a distinction between background and surrounding circumstances, and held that only where there is an ambiguity in the language, should a court look to surrounding circumstances, Wallis JA said (para 12 of *Bothma-Botha*):

‘That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. While the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in

the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding

circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is “essentially

one unitary exercise” [a reference to a statement of Lord Clarke SCJ in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2012] Lloyd’s Rep 34 (SC) para 21].

[30] Lord Clarke in *Rainy Sky* in turn referred to a passage in *Society of Lloyd’s v Robinson* [1999] 1 All ER (Comm) at 545, 551 which I consider useful.

‘Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which the reasonable person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language.’

[31] This was also the approach of this court in *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* [2009] ZASCA 154; 2010 (2) SA 498 (SCA) para 13. A further principle to be applied in a case such as this is that a commercial document executed by the parties with the intention that it should have commercial operation should not lightly be held unenforceable because the parties have not expressed themselves as clearly as they might have done. In this regard see *Murray & Roberts Constuction Ltd v Finat Properties (Pty) Ltd* [1991] ZASCA 130; 1991 (1) SA 508 (A) at 514B-F, where Hoexter JA repeated the dictum of Lord Wright in *Hillas & Co Ltd v Arcos Ltd* [1932] UKHL 2; 147 LTR 503 at 514:

‘Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects.’

[27] The circumstances attendant upon the agreement coming into existence are mostly common cause between the parties. They are, in essence, the following: the plaintiff and West Dunes, represented by the defendant, had executed a written loan agreement only a month earlier, on 10 September 2008. The funds for such loan (to West Dunes) were procured by the plaintiff through a bond facility provided by the Standard Bank of SA over the plaintiff’s home. The defendant was not concerned that a company, Ceefax Properties (Pty) Limited (Ceefax Properties), appeared to be the bond holder. The defendant’s sister

(and plaintiff's wife) had instructed the defendant, in writing on 3 October 2008, to make the monthly payments in respect of the West Dunes loan into Ceefax Properties' bond account at the Standard Bank. The plaintiff did not seek to make a profit out of the loan to West Dunes. The plaintiff merely wanted to cover the costs to which he would be put in procuring and advancing such funds because he saw such as support for the defendant, his brother-in-law and family. The defendant was aware that the monthly payments in respect of the West Dunes loan had to be repaid into Ceefax Properties's bond account. The defendant was completely indifferent to the instruction that the monthly loan repayments in respect of West Dunes were to be paid into Ceefax Properties's bond account. The defendant was equally indifferent to West Dunes' need for good corporate governance in so far as how West Dunes accounted for the payments made by it to Ceefax Properties. The defendant personally sought to borrow money from the plaintiff, which loan the defendant suggested be financed from funds procured from the same bond facility over the plaintiff's home as that advanced by the plaintiff to

West Dunes.

- [28] It is also common cause between the parties that the plaintiff's home is, and was, that situated at 7 Currie Street, Oaklands, Johannesburg. The plaintiff's home is registered in the name of Ceefax Properties. The plaintiff's home is bonded to the Standard Bank of SA, is the only bond over the plaintiff's home now and in 2008, is the only bond for which the plaintiff is responsible and the plaintiff did not have a bond in his own name, whether at the Standard Bank of SA or elsewhere.
- [29] The plaintiff himself understood clause 13 of the agreement as being a reference to the bond over his home held by the Standard Bank. He thus intended and understood that the very words in clause 13 would be a reference to that bond. The defendant could not have cared less in whose name the plaintiff's home was registered. His evidence that it mattered to him that the funds emanated from the plaintiff's bond, and no one else's, does not bear scrutiny as the defendant did not make any enquiries from the plaintiff in regard to the bond, did not ask for a copy of the bond, did not make enquiries regarding the applicable interest rate, did not enquire why the funds were to be repaid to Ceefax Properties, did not enquire why the plaintiff later told him to change payments from Ceefax Properties to the plaintiff himself, says that he simply trusted the plaintiff "not to take him for a ride" and that he paid whatever the plaintiff told him to pay, and to whomever. He has not even bothered to calculate whether the sum he has paid to the plaintiff to date was sufficient to discharge his liability at prime minus 1.7%. Rather, he conceded that it was not sufficient and that he remains indebted for just over R201 000 if the applicable rate is still prime minus 1.7% The ineluctable conclusion to be drawn from such facts is that it was immaterial to the defendant what the source of the funds were which the plaintiff was to lend and advance to him, whether such funds were procured by the plaintiff from winning the lottery, a bond over his home, a loan from a third party or elsewhere[9].

[30] Given that the defendant instructed the drafter of the agreement, Geerts, to draft the agreement; that the terms of the bond were immaterial to him; that he knew there was a bond over the plaintiff's home; that he had no direct knowledge of any bond in the plaintiff's own name (whether at the Standard Bank or elsewhere) and that West Dunes would be paying prime minus 1,7% on its loan from the plaintiff, coupled with the fact that the plaintiff intended and understood clause 13 to be a reference to the only bond he was responsible for, i.e. the one held by Ceefax Properties over his home and which he personally would have to pay, it can not be said that the parties were not *ad idem*. This is further born out by the damning admission by the defendant of the allegation contained in paragraph 5 of the plaintiff's

amended particulars of claim that it was the plaintiff, not Ceefax Properties, who lent and advanced the sum of R660 000 to him.

[31] There can also be no question that the plaintiff and the defendant would still have entered into the agreement if clause 13 had stipulated that the interest payable by the defendant to the plaintiff would be at the same rate and terms as applicable to Ceefax Properties's bond at the Standard Bank, or that it be at the same rate and terms as applicable to the loan agreement secured by a mortgage bond held by the Standard Bank over the plaintiff's home. The reference to a bond was, after all, merely a recordal of where the applicable interest rate could be found. It was the prevailing interest rate that was material; not the document recording the interest rate. The parties could just as easily have stipulated that the interest rate would be prime minus 1.7%. In so far as there is an error in that regard, it is an immaterial and meaningless error with no effect at all.

[32] This being so, and in view of the SCA's imprimatur that a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document[10], clause 13 falls to be constructed and interpreted to mean that the parties agreed that the interest payable by the defendant to the plaintiff would be at the same rate and on the same terms and conditions applicable to a loan agreement secured by the mortgage

bond in favour of the Standard Bank of SA over the plaintiff's home.

[33] That mortgage bond was received as evidence and provides at clause 4.1 thereof for a variable interest rate of prime minus 1.7%. In my view, there can be very little doubt that the reference to the plaintiff's bond in clause 13 of the agreement is not relevant to identifying the source of the funds, but rather the interest rate.

[34] Should I be wrong in this interpretation, then the question arises whether the recordals in the agreement were occasioned by a common error of the parties labouring under a *bona fide* but mistaken belief that it recorded the true agreement between them.

- [35] The defendant conceded in cross examination that there were numerous errors in the agreement. He specifically referred to clauses 11 and 12 where the loan amount was recorded as Six Hundred and Sixty Six Thousand Rands as opposed to Six Hundred and Sixty Thousand Rands. Further, he referred to clause 13 where the agreement referred to “the plaintiff’s bond as opposed to Ceefax’s”.
- [36] The defendant also asserted that it was his intention that the loan to be advanced by the plaintiff to him be advanced by the plaintiff and no one else. These funds, he said, had to be procured from funds which the plaintiff was to access through a mortgage bond over the plaintiff’s home. He did not know that the plaintiff’s home was registered in the name of Ceefax Properties. Had he known that, he would not have entered into the agreement because, he said, he did not want to borrow money from Ceefax Properties. The defendant’s contention does not bear scrutiny. The fact that the plaintiff sourced the funds from a third party could have made no difference as the plaintiff would still have remained the lender of the money.

That the defendant would have found it objectionable had the plaintiff won the lottery and advanced those funds to him, is incredulous and gives the lie to his contention. His assertion that the plaintiff was obliged to procure the funds from his personal bond over his home at the Standard Bank is contrary to the express provisions of the agreement. The clause speaks to the applicable

interest rate. Clause 12, rather, speaks to the plaintiff’s obligation to lend the money to the defendant. Nowhere does the agreement stipulate what the origin of such funds is or has to be.

- [37] The plaintiff himself testified to this fact and asserted that the funds were going to come from an access facility secured by a bond over his home. The only bond being that held by Standard Bank in the name of Ceefax Properties.
- [38] There can be little doubt that the defendant (who instructed the drafter of the agreement) and the plaintiff laboured under a common error; namely that the agreement correctly recorded their intention that the interest rate payable would be the same as that referred to in the mortgage bond held by the Standard Bank over the plaintiff’s home. They thus both signed the agreement whilst labouring under the same error and belief that the agreement correctly recorded their intention.

Agreement to vary the interest rate

- [39] The plaintiff contends that, during about September 2010 the plaintiff and the defendant orally agreed to vary the loan agreement so that, from October 2010, the defendant would pay interest on the loan at the rate of 14.5% per annum, with an increase thereof at a rate of 0.5% every 3 months thereafter until the loan was repaid. In substantiation of the agreement the plaintiff referred to certain email exchanges. The defendant does not dispute either the email exchanges or that he received and sent the emails. The defendant disputes only the date of one of the emails, not the content thereof, because, so he says, the date does not

correspond

with the same email appearing elsewhere. In one exhibit, exhibit G, the date is reflected as ‘28 October 2010’,

whereas in exhibit P the same email reflects the date as ‘2010-10-28’. The defendant is clutching at straws. This discrepancy, if it can even be elevated to such status, certainly does not lay the foundation for the rejection of the variation

agreement because, as already stated, the content of the mails are not disputed save for one feature being that the defendant contends

that the agreement referred to in the email exchanges only pertained to the West Dunes loan. This assertion I reject as the emails refer to ‘loans’ in the plural, the email attaches a schedule which refers to both the West Dunes loan and the defendant’s own loan from the plaintiff; the defendant implemented the agreement to increase the interest rate because he effected the increases for both loans, on the very day (29 October 2010) that he said “That’s what we agreed. I’ll implement immediately...” and the plaintiff’s bank statements for September and October 2010 reflect that the lesser instalments for both loans were paid on 27 September 2010, whilst the increased instalments were paid on 29 October 2010.

[40] During argument, much emphasis was placed on the fact that the plaintiff had failed to call Mr Joubert to corroborate his version relating to what had been agreed to at the meeting regarding increased interest rates. In my view, this was, given the unequivocal admission contained in exhibit ‘G’ read with exhibit ‘H’, unnecessary.

[41] The chronology of events is most revealing. On 28 October 2010[11] the plaintiff wrote to the defendant recording the discussion at their previous meeting being an agreement in terms of which the defendant would pay interest at a rate more appropriate to short term loans as an incentive to the defendant to find the resources to settle the outstanding amounts as ‘rapidly’ as possible. The rate suggested was one which commenced at 14,5% per annum, with quarterly increments of 0,5%. A file of projected instalments, commencing October 2010, was attached to the mail[12]. The payment for October 2010 was R7 975. On 29 October 2010, the defendant responded in a mail and said: ‘That’s what we agreed. I’ll implement immediately....’ On the very same day he paid R7 975 – as undertaken.

[42] The probabilities are overwhelmingly in favour of a finding that the defendant indeed agreed to pay the increased interest rate i.e. 14.5% with effect from end October 2010, with such interest increasing at a rate of 0.5% every three months.

[43] The suggestion that the subsequent conduct of the defendant did not support such a finding, can safely be rejected. Once again the chronology of events tells the full story: The varied interest rate was intended to be an interim arrangement, designed to incentivise the defendant to get alternative financing. The defendant breached the varied agreement in two respects – he failed to procure alternative financing and he failed to make payment of the increased quarterly instalments. The plaintiff caused his attorneys of record to send a letter

of demand to the defendant on 22 July

2011. On 4 October 2011, action was instituted. The reason advanced

by the defendant as to why he paid the increased amount on 29 October 2010 was that he always paid what he was told by the plaintiff to pay and this occasion was one where he was, yet again, told what amount to pay which he did. He could not produce a single document or letter or mail which corroborated his version nor could he explain the existence of mails, some of which he had authored, which supported the plaintiff's version of events.

The applicability of the National Credit Act (NCA)

[44] Section 4(1) of the NCA stipulates that:

Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except-

- a) a credit agreement in terms of which the consumer is-
 - (i) a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7 (1);
 - (ii) the state; or
 - (iii) an organ of state;
- (b) a large agreement, as described in section 9 (4), in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below the threshold value determined by the Minister in terms of section 7 (1);
- (c) ...
- (d) ...

[45] So as to determine whether the NCA applies one must therefore first answer the following questions:

45.1. Is it a credit agreement as defined in the Act?

45.2. Does the transaction relate to a credit agreement that was concluded at arm's length?

45.3. Was the credit agreement concluded in South Africa or does it have effect within South Africa?

45.4. Do any of the exemptions as set out in the Act apply?

[46] The Act defines a credit agreement as being an agreement that meets all the criteria set out in section 8.

[47] Section 8, in turn, differentiates between:

- (a) credit facility, as described in subsection (3);
- (b) a credit transaction, as described in subsection (4);
- (c) a credit guarantee, as described in subsection (5); or
- (d) any combination of the above.

[48] Section 8(4)(f) designates an agreement a credit transaction in the following terms:

An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is-

- (f) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of-
 - (i) the agreement; or
 - (ii) the amount that has been deferred.

[49] The agreement in question clearly meets the requirements of section 8(4). It is a credit transaction. The defendant himself contends that it is a credit agreement.

[50] The next step is to determine whether the parties were dealing at arm's length.

[51] The NCA does not define the term "dealing at arm's length" but merely gives interpretational guidelines in section 4(2)(b). As such, it is useful to bear in mind the provisions of section 2(1) of the NCA which requires the Act to be interpreted in a manner that gives effect to the purpose set out in section 3.

[52] Section 4(2)(b) of the NCA provides:

- (2) For greater certainty in applying subsection (1)-
 - (a)
 - (b) in any of the following arrangements, the parties are not dealing at arm's length:
 - (i) a shareholder loan or other credit agreement between a juristic person, as consumer, and a person who has a controlling interest in that juristic person, as credit provider;
 - (ii) a loan to a shareholder or other credit agreement between a juristic person, as credit provider, and a person who has a controlling interest in that juristic person, as consumer;
 - (iii) a credit agreement between natural persons who are in a familial relationship and-
 - (aa) are co-dependent on each other; or
 - (bb) one is dependent upon the other; and
 - (iv) any other arrangement-

(aa) in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction; or

(bb) that is of a type that has been held in law to be between parties who are not dealing at arm's length;

[53] The guidelines at sub-sections 4(b)(i) and (ii) are clearly inapplicable.

[54] In so far as the provisions of sections 4(2)(b)(iv)(aa) are concerned it would appear that the statement by Trollip JA in *Hicklin v Secretary for Inland Revenue*[13] where he stated the following:

"For 'dealing at arms' length' is a useful and often easily determinable premise from which to start the inquiry. It connotes that each party is independent of the other and, in so dealing, will strive to get the utmost possible advantage out of the transaction for himself. Indeed, in the Afrikaans text the corresponding phrase is "die uiterste voorwaardes beding".

has been codified in section 4(2)(iv)(aa) of the NCA, except that the criteria distilled is expressed in the negative as opposed to the positive.

[55] The defendant placed much reliance on the case of *Beets v Swanepoel*[14], where the plaintiff had lent her daughter the sum of R600 000 in terms of a partly written and partly oral loan agreement so that she could acquire certain property. The issue on exception was whether this loan had occurred at arm's length and, accepting as correct the factual averments in the particulars of claim, the court found that in fact and in law the parties were independent of each other. Given their respective circumstances, he further accepted that they strove to gain the utmost possible advantage from the agreement. In *Dayan v Dayan*[15] Lamont J (with whom Tsoka J and Bizo AJ concurred) explored whether the parties were independent and whether they had been striving to gain the utmost advantage for themselves out of the transaction and applying such criteria, concluded that the two half brothers had not transacted at arm's length.

[56] It is the plaintiff's case that the transaction between the plaintiff and the defendant was clearly not one between parties dealing at arm's length. I too hold this view. This conclusion is supported by the following facts which are either common cause or have not been disputed by the defendant in evidence: The parties are brothers-in-law, they have known each other for in excess of 35 years, they have spent many a Christmas, Easter, birthday and family gathering together, including at the plaintiff's home, which the defendant and his then wife and children attended over many, many years. The plaintiff and his children and the defendant and his children got on very well, they had good family relations. The defendant and the plaintiff were extremely close on an emotional level. The very day that the defendant's son tragically committed suicide, the plaintiff was the first person the defendant turned to for support. The plaintiff had invested in three of the defendant's business ventures because he saw that as support for his brother-in-law. The plaintiff's loan to the defendant was the biggest amount of money he had ever loaned and he testified that

he certainly would not have lent it to anybody but a very familiar family member. The defendant could not obtain finance from any arm's length financial institution due to his impending divorce. The nature of the loan by the plaintiff to the defendant was such that the plaintiff stood to gain nothing from the loan as the defendant would repay the loan amount plus interest that the plaintiff would have paid to the mortgagee (i.e. Standard Bank) on the amount withdrawn from the bond. It is factually almost on all fours with *Cloete v Van Den Heever*[16].

[57] I find as a fact that the plaintiff and the defendant did not strive to obtain the utmost possible advantage out of the transaction. I therefore conclude that the plaintiff and the defendant are not independent of each other, as meant in section 4(2)(b)(iv)(aa) of the NCA, and that they did not strive to obtain the utmost possible advantage out of the transaction.

[58] The NCA accordingly had no application on this loan transaction.

Potential usurious nature of interest rate

[59] During the course of the hearing, I raised with counsel the potential usurious nature of the interest rate in the varied agreement. Mr Williamson referred me to the judgment of *African Dawn Property Finance v Dreams Travel and Tours*[17]. It would seem that the legal position can be summarised as follows: If the NCA is applicable, it dictates the permissible interest rates. If it is not applicable, then the common-law rule governs the position which requires a party to show either extortion or

oppression, or something akin to fraud. This was neither pleaded nor does the evidence in this case support such a finding. I am further mindful of the caution expressed by the Supreme Court of Appeal in *African Dawn* that 'our Constitution and its value system do not confer on judges a general jurisdiction to declare contracts invalid on the basis of their subjective perceptions of fairness or on grounds of imprecise notions of good faith'[18] and that 'judges should approach with restraint the task of intruding upon the domain of the private powers of citizens'[19] and I accordingly take this issue no further.

Conclusion

[60] During October 2008, the plaintiff and the defendant concluded a loan agreement in terms of which the plaintiff lent and advanced R660 000 to the defendant. The loan attracted interest at a rate of prime minus 1.7%. The loan was repayable within a reasonable period (being 24 Months – 8 October 2010) from the date of its advancement, but at the latest, from date of service of summons, being 4 October

2011. The parties agreed to vary the interest rate applicable to the loan with effect from October 2010 because a reasonable period within which to repay the loan, had arrived. The agreement was that the defendant would pay 14.5% with effect from end October 2010, subject to the rate increasing by 0.5% every three months thereafter. By the end of October 2010, when the loan was repayable, the defendant was indebted to the plaintiff in the sum

of R630 289.66, as appears from the defendant's own calculation in Exhibit F. The plaintiff is accordingly entitled to judgment in the sum of R630 289.66 together with interest thereon at the rate of 14.5% per annum, calculated from 1 October 2010, subject to such interest rate increasing by 0.5% every three months to date of payment, less R486 900 paid by the defendant to the plaintiff during the period 30 October 2010 to 31 July 2017[20].

[61] I am most indebted to counsel for their heads of argument and other assistance provided during argument. I have borrowed generously from such workings for which I thank counsel.

Order

[62] I accordingly grant the following order:

62.1. The written agreement, annexure 'A' to the amended particulars of claim, is rectified by substituting the following clauses 12 and 13 thereof with the following clauses:

Clause 12. HBM Forsyth herewith agrees to advance an amount of R660 000 (Six Hundred and Sixty Thousand Rand) to GC Heydenrych for the purpose of obtaining these shares.

Clause 13. GC Heydenrych agrees to pay interest to HBM Forsyth at the same rate and on the same terms and conditions that are applicable to the loan agreement secured by mortgage bond held by the Standard Bank of South Africa over HBM Forsyth's home.

62.2. Judgment is granted against the defendant for:-

62.2.1. the sum of R630 289.66 together with interest thereon at the rate of 14.5% per annum, calculated from 1 October 2010, and increasing by 0.5% every three months to date of payment; less R486 900 paid by the defendant to the plaintiff during the period 30 October 2010 to 31 July 2017.

62.2.2. Costs of suit.

I OPPERMAN

Judge of the High Court

Gauteng Local Division, Johannesburg

Heard: 14 & 15 August 2017

26 March 2018

2, 3 and 4 July 2018

19 July 2018

Judgment:

18 October 2018

Appearances:

For Plaintiff: Adv AL Williamson

Instructed by: Werthschröder Inc

For Respondent: Adv N. Riley

Instructed by: FJ Cohen Attorneys

- [1] See LAWSA Volume 15(2) Second Edition Volume par 301; *Beretta v Beretta* 1924 TPD 60 (explained in *Levenstein v Levenstein* 1955 3 SA 615 (SR)); *Roberts v Forsyth* 1948 3 SA 926 (N).
- [2] *Beretta v Beretta* supra (explained in *Levenstein v Levenstein* supra); *Roberts v Forsyth* supra.
- [3] *Mackay v Naylor* 1917 TPD 533 538 (obiter per Mason J). *Earle v Driman* supra; *Fluxman v Brittain* 1941 AD 273; *Van Preen v Preen's Properties (Pty) Ltd* 1948 1 SA 335 (T) 339 (does not apply to compensatio); *Rae v Rohrs* 1954 2 SA 235 (N); *Credit Corporation of SA Ltd v Roy* 1966 1 SA 12 (D).
- [4] *Rae v Rohrs* supra; *Credit Corporation of SA Ltd v Roy* supra.
- [5] See for example *Communicare and Others v Khan and Another* 2013 (4) SA 482 (SCA) at para 31; *Kwazulu-Natal Joint Liaison Committee v MEC for Education, Kwazulu-Natal and Others* 2013 (4) SA 262 (CC) per Nkabinde J; *Strydom v Engen Petroleum Ltd* 2013 (2) SA 187 (SCA); *National Credit Regulator v Opperman & Others* 2013 (2) SA 1 (CC) per Cameron JA (dissenting); *Hubbard v Cool Ideas* 1186 CC 2013 (5) SA 112 (SCA) at para 14; *CA Focus CC v Village Freezer t/a Ashmel Spar* 2013 (6) SA 549 (SCA); *Cape Town Municipality v SA Pension Fund* 2014 (2) SA 365 (SCA); *Mansingh v General Council of the Bar and Others* 2014 (2) SA 26 (CC).
- [6] 2012 (4) SA 593 (SCA)
- [7]
- [2015] ZASCA 111
- [8] Referring to *KPMG Chartered Accountants (SA) v Securefin Ltd & another*, 2009 (4) SA 399 (SCA) para 39 and *Endumeni* (supra) at para 18

- [9] When an inference is drawn from circumstantial evidence in a civil case, the rule that the inference sought to be drawn must be consistent with all the proved facts, is applicable. The conclusion need not be the only reasonable one: it is sufficient if it is the more natural or plausible conclusion from amongst several conceivable ones. See *Govan v Skidmore* 1952 1 SA 732 (N) 734; *Ex parte Holden* 1954 4 SA 128 (N); *Merchand v Butler's Furniture Factory* 1963 1 SA 885 (N); *Ocean Accident & Guarantee Corp Ltd v Koch* 1963 4 SA 147 (A) 159; *SAR & H v Dhlamini* 1967 2 SA 203 (D); *Smit v Arthur* 1976 3 SA 378 (A) 386; *AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 2 SA 603 (A); *Maritime & General Insurance Co v Sky Unit Engineering (Pty) Ltd* 1989 1 SA 867 (T); *S v Van As* 1991 2 SACR 74 (W).
- [10] *Natal Joint Municipal Pension Fund v Endumeni Municipality* supra
- [11] Exhibit 'G'
- [12] Exhibit 'H'
- [13] 1980 (1) SA 481 (A) at 495A-B
- [14] 2010] ZANCHC 55
- [15] Case 674/2010, full court judgment of the Gauteng Local Division, Johannesburg
- [16] 2013 JDR 1075 (GNP) at par. 22
- [17] 2011 (3) SA 511 (SCA) at paras [19] to [29]
- [18] at para
- [28] p 523 C
- [19] at para
- [28] p 523 E
- [20] This is when the defendant ceased to make payments to the plaintiff.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPJHC/2018/568.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/forsyth-v-heydenrych-unknown-topic-agpjhc-2018--6a3ea5103b1caa9129808bbc>

Prepared on 11 October 2026 · Esheria