

SOUTH AFRICA / JUDGMENT

Williams v Tsakos (34460/2019)

[2024] ZAGPJHC 771 (19 August 2024)

[2024] ZAGPJHC 771**COURT**

South Gauteng High Court, Johannesburg

BEFORE

C Todd

CASE / FILE NUMBER

34460/2019

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Source record**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, JOHANNESBURG****CASE****NO: 34460/2019****1.****REPORTABLE:****2.****OF INTEREST TO OTHER
JUDGES:****3.****REVISED:****In****the matter between:****GWENDOLINE
DOROTHY WILLIAMS
Plaintiff
and
ANDRE
TSAKOS
First
Defendant**

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Order: Paragraph [90] of
this judgment.

JUDGMENT

TODD, AJ:

- [1] The Plaintiff is 76 years old. She lives in a retirement village. The Defendant is her youngest brother.
- [2] During February 2012 the Plaintiff loaned an amount of R1,100,000 to the Defendant. This was an amount that the Plaintiff had accumulated over time through the sale of a house, cashing in policies that she had held with her former husband and some related investments. At the time, she held her accumulated investments with Allan Gray and hoped that they would provide her with a pension.
- [3] The Defendant, her brother, is an entrepreneur. At the relevant time he conducted a micro-lending business through a close corporation, Wonderslip CC, of which he was the sole member. He has held various other business interests at different times.
- [4] In December 2011 the Defendant had entered into a new business venture with a friend. This was a waterproofing business. In January 2012 his friend and business partner in that venture was killed in a motor cycle accident.
- [5] At that stage the Defendant was, according to him, overcommitted in the micro-lending business and he needed to raise money quickly to save the waterproofing business following the death of his business partner.
- [6] The Defendant planned to raise funds through a bond on his own house, but this was going to take some time. He was aware of his sister's investment savings. As a result, he approached her for a loan. In his words, he made her an offer that she couldn't refuse, with a good interest rate.
- [7] According to the Plaintiff the Defendant begged her to lend him the money. He knew that she had an amount invested towards her pension, but he promised that he would pay it back at an interest rate of prime plus 3%. He made several phone calls to her to try to persuade her to lend him the money.
- [8] At the time both the Plaintiff and her sister, Ms Kinnear, were employed in the Defendant's micro lending business. The Plaintiff held her brother in high regard. As a result, although she had the money safely invested with Allan Gray, in the end she was persuaded to take the risk associated with a loan to her brother instead, at the favourable interest rate offered by him, in order to enable him to advance his business interests.

- [9] The Defendant disputes that he begged his sister for the loan, but it is clear on his own evidence that he was facing a liquidity crisis and urgently needed money to save the waterproofing business that he had just embarked upon. It is also clear that it was he who approached his sister for the loan and who set its terms.
- [10] The Plaintiff paid the money to the Defendant, into his personal bank account, by way of two payments made on 14 and 20 February
2012. Initially she advanced the loan purely on trust, without any written record or agreement recording its terms. After she had paid the money over, however, and although she had “extreme trust” in her brother, she decided that she did want documentary evidence of the loan and she asked the Defendant to provide her with a document reflecting its terms.
- [11] The Defendant did not comply with that request. As a result, the Plaintiff approached an attorney and had a loan agreement drawn up. When she handed the Defendant the document, she testified, he was furious and tore it up. He said he would draw up his own document instead, which he then did.
- [12] On the Defendant’s version the loan agreement drawn up by the Plaintiff’s attorney was given to him by the Plaintiff’s son, his nephew, and not by the Plaintiff herself. Nothing turns on this. It is, however, appropriate for me to say at this point that where there are differences in the versions of the Plaintiff and Defendant on the facts I have no hesitation in preferring the version of the Plaintiff.
- [13] The Plaintiff gave evidence clearly, consistently, coherently and made a good impression as a witness. She made concessions fairly when appropriate, and her evidence remained consistent throughout. The Defendant, by contrast, gave a bad impression as a witness. Although much of his evidence was consistent with that of the Plaintiff, when it came to points that he perceived might not be in his favour the Defendant was evasive and in certain respects gave evidence that was implausible or plainly untrue. I will return to certain of these instances where relevant in due course.
- [14] Returning to the sequence of events, the Defendant testified that he read through the document that had been prepared by the Plaintiff’s attorney recording the terms of the loan, and that he was unhappy with one particular provision in it, which entitled the Plaintiff to require repayment of the capital sum on 30 days’ notice. The Defendant said he thought this was unfair because he had by then, as intended, utilised the proceeds of the loan to inject money back into his businesses. This meant that he did not have liquidity available to repay the loan on 30 days’ notice. In his words, “I wasn’t going to put myself in a position where she could just wake up one morning and say look, you know, here is your 30-day notice”.
- [15] Whether or not this was the only reason for his decision, it is clear that the Defendant did not accept the document presented to him by his sister. Indeed I accept the evidence of the Plaintiff that the Defendant tore it up when it was presented to him. On the Defendant’s own evidence he refused to use the document at all. He did not propose to amend it by adjusting

the repayment terms to deal with the only concern that he says that he had with it. Instead, according to the Defendant, he used the internet to search for an example of an acknowledgement of debt, and he then personally drew up the terms which he insisted should govern

the loan.

- [16] It is, then, common cause that the Defendant drew up the terms of the acknowledgement of debt that was subsequently signed by the parties on 25 April 2012. This was more than two months after the Plaintiff had advanced the money to him. A copy of that acknowledgment of debt, together with its annexure, was attached to the particulars of claim.
- [17] In that document the Defendant acknowledged himself to be indebted to the Plaintiff in the capital sum of R1,100,000 as at 14 February
2012. The document recorded that the capital sum would bear interest at “prime plus 3% per annum”. The Defendant was obliged to “pay the interest accrued upon on a monthly basis at the request of the [Plaintiff] from time to time”. All payments made would be appropriated firstly towards interest and lastly in reduction of the capital sum.
- [18] The document did not require the repayment of the capital sum by any specified date. Instead, and importantly for the Defendant in light of his evidence that he needed the capital for a minimum period of investment in his businesses, the Plaintiff was not entitled to claim repayment of the capital sum in full during the first two years of the loan, that is until 14 February 2014. After that she was entitled to claim repayment of the full capital sum, but absent demand, the agreement made no provision for a date on which the capital sum was repayable.
- [19] Although the loan was made to him personally, and he had invested it in one or more of the businesses conducted by him, the Defendant instructed his other sister, Ms Kinnear, who served as his bookkeeper in the micro-lending business, to make the regular interest payments due in terms of the agreement with the Plaintiff. The instruction was that these payments should be made from a bank account held by Wonderslip CC, the vehicle for the Defendant’s micro-lending business.
- [20] In his plea, the Defendant denied that the loan was advanced at his request or for his benefit, and pleaded that the intention of the parties was that the loan was for the benefit of the microlending business, conducted through Wonderslip CC. He pleaded that the money was used by the micro lending business, that Wonderslip CC had accepted the benefit of the loan, and that the acknowledgement of debt constituted a stipulation alteri.
- [21] This pleading was entirely inconsistent with the Defendant’s own evidence at the trial. The Defendant’s evidence was that he needed money most urgently for his new waterproofing venture, and he confirmed that the loan was advanced to him personally by the Plaintiff, at his request, and on his terms.

- [22] What is also clear from the evidence, however, is that on the Defendant's specific instructions all repayments made to the Plaintiff against the loan were made from the close corporation through which the Defendant conducted his micro-lending business.
- [23] Had the Defendant persisted with his pleaded case, the question might have arisen whether he could, in the circumstances, have relied on the separate legal personality of Wonderslip CC to avoid liability. The Defendant's own evidence about how he managed his business affairs, instructing that his personal debts be paid by Wonderslip CC, and moving money between different entities through which he conducted business at different times (in his words "I shuffled it around") might well have produced a result similar to that in *Airport Cold Storage (Pty) Ltd v Ebrahim & others*[1]. In that case the court concluded[2] that "although the defendants attempted to obtain the advantages of the separate identity of the corporation, they operated the business of [the close corporation] as if it were their own and without due regard for, or compliance with, the statutory and bookkeeping requirements associated with the conduct of the corporation's business. When it suited them, they chose to ignore the separate juristic identity of the corporation. In these circumstances, the defendants cannot now choose to take refuge behind the corporate veil ... to evade liability for its debts."
- [24] Since, however, on the evidence in the present matter, including the Defendant's own evidence, the loan was made to him personally and repayments made by the close corporation of which he was the sole member were made on his behalf in reduction of the interest on the loan, no question of "piercing the veil" arises here.
- [25] The Defendant testified that he did not personally maintain a record of any kind of the interest accumulated, the repayments made, and the outstanding balance of the loan from time to time.
- [26] The only evidence available concerning the interest accrued, repayments made, and the outstanding balance of the loan from time to time was the evidence of the Plaintiff. That information is contained in a schedule prepared by the Plaintiff that was attached to her particulars of claim.
- [27] The Plaintiff testified that she had maintained the schedule on an ongoing basis since inception of the loan. The schedule reflects the interest rate applicable from time to time, repayments made, the interest accrued, and the balance outstanding on the loan.
- [28] The Plaintiff testified that she had prepared that schedule and maintained it on an ongoing basis according to instructions given to her by the Defendant. Those instructions included the formulae on which she should calculate interest, which the Defendant showed her how to do. That is the basis on which she maintained the schedule and kept a record of the capital and interest accruing on the loan, repayments and the outstanding balance on an ongoing basis.

- [29] The Defendant, for his part, testified that the actual calculation “was not rocket science” and that it merely required the calculation of interest in arrears. The Plaintiff, he testified, who had worked with loans and interest rates on a daily basis for a number of years in the micro-lending business, “had been doing this for years”. He disputed that he had showed her how to calculate the interest, saying this was “common knowledge at the time”.
- [30] The Defendant further stated that he was not involved in preparing the schedule or in giving any instructions in that regard to the Plaintiff. The Plaintiff, he said, would simply liaise with his bookkeeper, their sister Ms Kinnear. The Defendant confirmed, however, that Ms Kinnear made all repayments and managed the loan on his behalf. From time to time, she would say to him that payments were up to date, and would provide him with the schedule and other information of that kind.
- [31] Under cross-examination the Plaintiff re-iterated that it was the Defendant who had showed her how to calculate interest. She testified that the schedule was sent to the Defendant on various occasions and that he had not at any stage objected to it or indicated that the interest and repayments were incorrectly calculated. On a few occasions she had emailed the updated schedule directly to the Defendant, but otherwise had provided it to their sister Ms Kinnear as and when she asked for it. The Plaintiff presented a copy of the updated schedule in this way every few months.
- [32] According to the Plaintiff, since the Defendant had accepted the schedules over a number of years, she understood him to have agreed to the method she was applying in calculating the interest. If her calculations had not been correct, the Plaintiff testified, the Defendant would certainly have said something at the time. He did not do so.
- [33] The Defendant confirmed that he was provided with a schedule from time to time by Ms Kinnear. In his evidence he stated, however, that Ms Kinnear had prepared another schedule that was different to the one presented by the Plaintiff. When asked whether he had performed an analysis of the interest accrued and the payments made, the Defendant stated that he had not, but he referred to the different schedule purportedly prepared by Ms Kinnear. He stated that this was similar to the one presented by the Plaintiff but that it differed in certain respects. The only specific difference he could recall, however, was that Ms Kinnear’s schedule reflected additional repayments not included on the Plaintiff’s schedule. The Defendant was, however, unable to elaborate further on this assertion and did not produce any schedule nor substantiate this averment in any respect.
- [34] I do not believe this part of the Defendant’s evidence and consider it a deliberate fabrication by the Defendant in an attempt to cast doubt on the evidence of the Plaintiff.
- [35] By contrast, I accept the Plaintiff’s evidence, which is that the schedule attached to the particulars of claim was updated regularly and provided from time to time to the Defendant, and that the Defendant at no time put in issue the manner in which the debt was reflected in the schedule and the interest calculated in the schedule.

- [36] I do not find it credible that the Defendant, an entrepreneur involved in multiple business interests, including a micro-lending business for many years, having personally borrowed money from his sister and having drafted and signed an acknowledgment of debt reflecting the terms on which he was prepared to repay the loan, would not have raised an objection if he had been presented with an inaccurate record of the loan. This is particularly so after he had specifically rejected the terms of the agreement initially presented to him by the Plaintiff, which had been drawn up by her attorneys, and had insisted on asserting his own terms for the acknowledgement of debt.
- [37] In my view the evidence clearly establishes that the schedule put up by the Plaintiff with the particulars of claim had been regularly shared, from time to time and as at the relevant date, with the Defendant and with Ms Kinnear, and that it fairly and accurately reflects the terms that had been agreed between the parties.
- [38] Insofar as the schedule reflects interest accruing monthly and, to the extent not repaid, added to the capital sum, I return to this issue later.
- [39] It is also clear on the Defendant's own version that Ms Kinnear at all times acted on his direct instructions, and as his agent, and that insofar as she had access to and assisted in the administration of payments and checked that the payments were accurately reflected on the schedule and that the schedule accurately reflected the balance due from time to time under the loan, she did so on behalf of the Defendant.
- [40] The Defendant was invited to point out anything incorrect on the schedule and stated that he could not do so. The initial repayment reflected in the schedule was an amount of R20,000 made on 1 March 2012, and repayments were made from time to time over a continuous period of more than six years until the last payment was made in September 2018.
- [41] During 2017 and 2018, consistent with the Defendant's evidence regarding his deteriorating financial position and the poor state of the micro-lending business, the amounts of the repayments gradually reduced. The last payment made, on 25 September 2018, was an amount of R1,000.
- [42] The Defendant testified that by January 2016, when he made an offer of compromise to the Plaintiff, he had paid some R1 million in interest payments. He then offered the Plaintiff the debtor's book of the micro-lending business in settlement of the outstanding capital on the loan. At that stage, according to him, the original capital amount, in the sum of R1,100,000, was still outstanding. This is slightly higher than the amount that was outstanding at the time according to the Plaintiff's schedule, but it is consistent with the Plaintiff's evidence that the schedule reflected interest calculated on an agreed basis.

[43] In relation to the Defendant's current business interests, the Plaintiff gave evidence that he now owns a vape business known as Vape Guru. In a clear example of his evasiveness as a witness, when he was asked about this in cross examination the Defendant stated first that he only worked for the company. Asked directly whether he had any interest or shareholding in the company, he stated that he did not. After being pressed with a series of further questions the Defendant admitted that he was indeed a trustee of a trust which holds the shares in the company, and that his daughters were beneficiaries of that trust.

[44] At the conclusion of his evidence, and following a question from the court, the Defendant made the following statement:

"I just want to say that I am not disputing that I loaned the money in my personal capacity and that I signed the Acknowledgement of Debt. I'm not disputing it. All I am saying is that [the Plaintiff] had a few opportunities over the last, since 2012, to actually get her money back and opted not to take the money.

There were offers of debtors books. My circumstances changed to the point where I had numerous, millions of millions of rands of creditors after me. We ran up millions of rands in the waterproofing company. I just wasn't in the position to just go to the bank and make a withdrawal and pay her her money.

If I was, I would have and just been done with, but the circumstances weren't like that, so I tried to in good faith give her the debtors book and an opportunity for her and [Ms Kinnear] to collect this debtors book and at least clear this debt, but she didn't want it."

[45] Mr Booysen, who appeared for the Defendant, raised various grounds on which the Defendant resists the Plaintiff's claim.

[46] First, he submitted that the loan agreement between the parties was void ab initio because the Plaintiff was not registered as a credit provider under the provisions of the National Credit Act, 2005.

[47] Second, he submitted that the claim had prescribed.

[48] Third, he submitted that the Plaintiff had failed to prove the quantum of her claim and its calculation, and that for that reason the action should be dismissed.

[49] Finally, Mr Booysen submitted that the Defendant can avoid the obligations assumed by him under the acknowledgment of debt in favour of the Plaintiff on grounds that the parties had agreed that Wonderslip CC would take over the Defendant's obligations.

- [50] Dealing with the last submission first, and although the Defendant had pleaded something along these lines, there was no support for it whatsoever on the Defendant's own evidence. I have referred earlier to the kind of inquiry that might have been necessary if the Defendant had persisted, in his evidence, in contending that the debt to his sister was due and payable by Wonderslip CC and not by him personally, but on the evidence that question simply does not arise.
- [51] In support of his submission that the provisions of the National Credit Act applied to the loan and that the terms of the acknowledgement of debt were unenforceable because the Plaintiff was not registered as a credit provider under the provisions of that Act, Mr Booysen referred to *Fourie v Geyer*[3]. He submitted that the acknowledgement of debt required the Defendant to pay punitive costs and substantial interest and this pointed to the agreement being subject to the provisions of the National Credit Act because its terms were greatly to the Plaintiff's benefit and advantage and were "clearly concluded at arm's length".
- [52] In my view there is no doubt that the loan agreement between the parties was one that falls within the ambit of the exclusion in section 4(2)(b)(iii) of the National Credit Act. It also falls within the ambit of section 4(2)(b)(iv).
- [53] The parties are siblings. The transaction was initiated by the Defendant, who needed the money and who set the terms on which he would borrow it from his sister. He made her, as he put it, "an offer that she couldn't refuse". The Defendant knew that the money was held by his sister as an investment towards her retirement. It was advanced initially purely on trust between siblings without any documentation. When his sister asked to document the terms of the loan and had an attorney draw an agreement to that effect, the Defendant rejected it outright, and prepared his own document on his own terms.
- [54] The terms on which the Defendant insisted for the loan were vague and open ended, prescribing no repayment date and imposing only a prohibition on claiming payment of the full capital sum during the first two years of the loan.
- [55] That the transaction was not at arms length is reinforced by the informal manner in which the Defendant treated repayments, relying entirely on the Plaintiff and his other sister, who served also as his bookkeeper in his micro-lending business, to maintain a record of what interest had accrued and what payments had been made under the loan.
- [56] Various interactions regarding the loan and its repayment, including the Defendant's proposal on its possible compromise, were discussed between the Defendant and his nephew, the Plaintiff's son. This, too, indicates that the loan was treated as an incident of the familial relationship between the parties. The loan was a product of the parties' family relationship, with Defendant going to some lengths to persuade his sister to part with her retirement savings to assist his business enterprise, and offering a good interest rate to persuade her to take the risk that this entailed.

- [57] The Plaintiff was at the time dependant on the income she derived from employment in the Defendant's micro-lending business. The Defendant was dependant on the support he received from both of his sisters in that business, and, when the shoe pinched in relation his new waterproofing business venture, depended on his sister, the Plaintiff, to entrust him with her retirement savings.
- [58] It was the Plaintiff's familial trust in the Defendant as her brother which resulted in her agreeing to advance the loan to him. The Plaintiff was employed in the Defendant's micro-lending business at the time of advancing the loan. That business was clearly conducted as a family business, both sisters being employed by their brother, and the Plaintiff having sought to persuade the Defendant to employ her son as well to assist him, which duly occurred albeit unsuccessfully. All of these factors point to a degree of mutual dependence between members of the family in all of their interactions. The loan was manifestly an incident of that family interdependence.
- [59] It is also clear from the evidence that it was the Defendant who set the terms of the acknowledgment of debt, which he drafted personally after he had rejected terms presented to him by the Plaintiff. His conduct in doing so demonstrated that he was in control of the terms on which the loan was offered, and not the Plaintiff. It is hardly open to him in those circumstances to suggest that it contained onerous or punitive provisions. The Defendant was clearly in a dominant position in relation to the transaction, was advanced the loan by his sister without any documentation, and when asked to record its terms rejected those proposed by the Plaintiff and imposed his own terms on the relationship. That is hardly a transaction which the Defendant can contend was concluded at arm's length.
- [60] In summary, in my view, the parties were co-dependent or in any event not independent. In concluding the loan neither party sought to obtain the utmost possible advantage out of the transaction. The transaction was conceived within the mutual support and interdependence of siblings. It fell within the exclusions in both section 4(2)(b)(iii) and 4(2)(b)(iv) of the National Credit Act.
- [89] As regards costs, these should in my view follow the result. The scale of costs was included in the agreed acknowledgment of debt prepared by the Defendant.
- [90] In the circumstances I make the following order:
1. The Defendant is ordered to pay the Plaintiff the sum of R1,080,029.41 together with interest at the prescribed legal rate calculated from 24 October 2019 until date of final payment.
 2. The Defendant is ordered to pay the Plaintiff's costs on the attorney and own client scale, including the costs consequent on the application for absolution from the instance.

C TODD

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

Date of Hearing: 29 April 2024, 20 June 2024 Date of Judgment: 19 August 2024 APPEARANCES

Counsel for the Plaintiff: Adv CB Garvey Instructed by: Otto Krause Inc. Attorneys Counsel for the

Defendant: Adv R Booysen Instructed by: De Kooker Attorneys

[1] 2008

(2) SA 303 (WCC)

[2] at paragraph [78]

[3] 2020

(6) SA (NWM)

[4] 1916 WLD 133

[5] 1981

(2) SA 1 (C) at pages 5-7

[6] 1988

(1) SA 290 (A)

[7] at 298H-J

[8] Euroblitz 21 (Pty) Ltd and another v Secena Aircraft Investments CC [2015] ZA SCA 21 at paragraph [11], although the reference there to Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Limited (in liquidation)

[1997] ZASCA 94; 1998

(1) SA 811 (SCA) appears to be incorrect

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