REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 13710/2012

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

28 October 2016

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DATE SIGNATURE

In the matter between

SEEVNARAYAN PRANCIP **PLAINTIFF**

And

RAMJATHAN GOVESH **DEFENDANT**

JUDGMENT

VICTOR J:

[1] The plaintiff claims payment of the sum of R4 million in respect of a loan which he advanced to the defendant. He also claims interest at the rate of 11% per annum calculated monthly in arrears from 20 February 2011. The defendant alleges that the transaction was not a loan but a simulated transaction to obtain the South African Reserve Bank's authorisation to send money out of the country.

The loan

[2] On 7 March 2011 and at Durban the plaintiff and defendant concluded a written agreement of loan. It was recorded that the defendant needed a loan. The defendant accepted the loan on the terms and conditions set out in the written document and agreed that the amount of R4 million would be paid back into a bank account nominated by the plaintiff one year after the effective date, being 21 February 2012. The defendant was obliged to pay interest at the agreed rate which was reflected in the loan agreement and interest would accrue on the sum of R4 million until such time as the loan was repaid.

[3] The agreed rate meant prime rate plus 2%, see clause 1.11.1. The prime rate was defined as the publically quoted basic interest rate of interest compounded monthly in arrears and calculated on a 365 day per annum at a rate published by the Standard Bank of South Africa as being its prime overdraft rate as set out by any representative of that bank.

[4] The defendant expressly renounced the benefits of exceptio non numeratae pecuniae and non-causa debiti, revision of accounts error in calculus and he confirmed that he understood the meaning of the exceptions and the effect of their renunciation, see clause 5. The payment date meant a calendar year from the effective date and the defendant would be entitled to repay the loan on any date prior to 12 months from the effective date. A breach by the defendant of any terms or conditions of the loan would constitute an event of default, see clause 8.1 and no amendment or consensual calculation of the loan agreement or any provision or term thereof or any agreement or document issued or executed would be valid unless such was recorded in a written document signed by both parties.

[5] The plaintiff complied with his obligations and on 22 February 2011 paid the amount of R4 million into the defendant's bank account. One year later being 21 February 2012 the plaintiff pleaded that the defendant breached the agreement.

[6] In the particulars of claim there was reference to a demand in terms of the National Credit Act. All matters pertaining to the National Credit Act were finally abandoned as well as the unjust enrichment claim which was pleaded as an alternative in the event that the loan was not enforceable in terms of the National Credit Act. By argument stage it was evident that the defendant would not pursue any contravention of the National Credit Act.

[7] The defendant admitted his signature to the loan agreement. He also stated that he did not intend to conclude a loan agreement or incur any obligations or acquire any rights in respect of the purported loan agreement. He pleaded that it was not intended to be a genuine loan agreement between the plaintiff and the defendant but was a simulated transaction to facilitate the South African Reserve Bank clearance for the transfer of monies overseas. He pleaded that the funds sent to the Montpellier Rugby Club in France were on behalf of the company that the plaintiff and defendant were previously directors of, being One World Communications Company (Pty) Ltd (One World Communications). He pleaded further that the plaintiff did not have a tax clearance certificate and therefore would not be permitted to remit funds overseas.

[8] The defendant claimed that on 22 February 2011 the amount of R4 million was transferred from Espro (Pty) Ltd to the plaintiff's bank account and was then transferred into his bank account. He forwarded this amount of R4 million from his bank account to pay for the obligations which had been incurred to the Montpellier Rugby Club in France.

Background

[9] There is a significant history to the relationship between the plaintiff and defendant which is relevant to assessing whether the loan was a simulated transaction. In 2009 the plaintiff's father instructed an IT company in India to design a computer app in the form of a communication system. The plaintiff and defendant through One World Communications would distribute this communication app within South Africa. The app involved cell phone communication at very low cost. The intention was to distribute this product in South Africa then in France.

[10] The communication app failed. It was the defendant's duty to see to the proper design and functioning of the communication app since he had the necessary IT skills and knowledge. A lot of money was spent by the plaintiff's father who paid through one of the companies to get the product to work but it failed. In order to gain this market in France, the plaintiff and defendant through One World Communications undertook a sponsorship of the Montpellier Rugby Club which was in need of financial assistance. They believed that through this club and all its fans, members and University students the communication app would be a major success. However, the app ultimately failed. It was quite clear that the plaintiff's father who was the real financier through the various family trusts and companies became concerned about the sponsorship because the communication app could not operate and he suggested very strongly to the plaintiff and defendant that the sponsorship should not be

entertained as the app would not be ready in time for the launch of the sponsorship programme. However, the plaintiff and defendant went ahead with the sponsorship project. The plaintiff's father was also concerned that three months of sponsorship at €100 000.00 per month commencing from January 2011 would simply not be financially feasible having regard to the major difficulties getting the communication app to work.

[11] Be that as it may, in January 2011 the plaintiff and defendant requested the plaintiff's father to come all the way to France to try and promote the idea of this sponsorship but the plaintiff's father was clearly against the project. During the course of trying to launch the company in France contact had been made with Ernest and Young in France. The plaintiff's father already unhappy with the project was further upset with the input from Ernest and Young and therefore on 15 January 2011 a meeting was held with Ernest and Young in Durban in order to facilitate the funding of the launch in France. The upshot of that further meeting was that Ms Beukes of Ernst and Young was ultimately called in to advise. She suggested that because the plaintiff and defendant were in a hurry to get the money to France, because they had committed themselves to the sponsorship, that they each obtain the permission of the South African Reserve Bank to send the money abroad. During the course of those negotiations the plaintiff and defendant were advised to set up trusts in Mauritius in order to make the operation completely separate from

the South African operation of One World Communications. Those trusts were duly set up.

[12] Matters were delayed and the date for paying over the sponsorship was close therefore there was increasing urgency to get the money to France. Ms Beukes advised that the easiest way to get the money to France was for the plaintiff and defendant to each use their Reserve Bank allowance of R4 million per annum and send that to France. She was not told of the fact initially that the defendant did not have the money, but eventually it was clear to her that the defendant would have to loan the money from the plaintiff so as to get the money to France and get the project off the ground.

[13] The defendant's case is that the entire loan transaction was simulated to ensure the speedy transfer to funds to France.

Simulated Transaction

[14] It is necessary to analyse very carefully this alleged simulated transaction. The law on simulated transactions has been dealt with in *Roshcon (Pty) Ltd v Anchor Auto Builders CC & others* 2014 (4) SA 319 (SCA) and the *Commissioner South African Revenue Services v Bosch & Another* 2015 (2) SA 174. The dictum in *Roshcon* is that each case must be a based on a fact sensitive analysis. Shongwe JA referred in his judgment to the fact that for a Court to declare a transaction a simulation it does not have to look at any particular

legislation but has to look at the facts of each particular case.

[15] Innes JA stated in *Zandberg v Van Zyl 1910 AD 302* that the test which must be applied when considering an agreement which may or may not be said to be a simulation is: 'The inquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down. Perezius (*Ad. Cod., 4.22.2)* remarks that these simulations may be detected by considering the facts leading up to the contract, and by taking account of any unusual provision embodied in it.'

[16] In *CSIRS v NWK* 2011 (2) SA 67 (SCA) para 55 Lewis JA defined the test as follows: 'In my view the test to determine simulation cannot simply be whether there is an intention to give effect to a contract in accordance with its terms. Invariably where parties' structure a transaction to achieve an objective other than the one ostensibly achieved they will intend to give effect to the transaction on the terms agreed. The test should thus go further, and require an examination of the commercial sense of the transaction: of its real substance and purpose. If the purpose of the transaction is only to achieve an object that allows the evasion of tax, or of a peremptory law, then it will be regarded as simulated. And the mere fact that parties do perform in terms of the contract does not show that it is not simulated: the charade of performance is generally meant to give credence to their simulation.'

[17] Reference was also made by the parties to the case of *Dadoo Ltd and others v Krugersdorp Municipal Council* 1920 AD 530 at 548 where Innes J reasoned that: 'Parties may generally arrange their

transactions so as to remain outside its provisions. Such a procedure is in the nature of things perfectly legitimate. There is nothing in the authorities, as I understand them to forbid it, nor can rendered illegitimate by the mere fact that the parties intend to avoid the operation of law and selected a course of convenience in its result as another which would have brought them within it. An attempted evasion, however, may proceed along other lines. The transaction contemplated may in truth be within the provisions of the statute that the parties may call it a name or cloak it in a guise calculated to escape these provisions. Such a transaction would be *in fraudem legis* and the Court would strip off its form and disclose its real nature.'

[18] In *Roschcon* Wallis JA concurred with the judgment but elaborated further on the test referred to in *NWK* (supra). He states as follows at paragraph 34: 'The problem dealt with in NWK was the contention that irrespective of the unreality of most of the elements of the arrangement under scrutiny provided the parties intent to take all the steps provided for in the contractual documents, in other words, to jump through the contractual hoops as a matter of form, the Court could not find that the transaction was simulated.'

[19] Wallis JA also referred to NWK where Lewis JA dealing with substance over form of the transaction stated as follows: 'If the purpose of the transaction is only to achieve an object that allows the evasion of tax, or of a peremptory law, then it will be regarded as simulated. And the mere fact that parties do perform in terms of the contract does not show that it is not simulated:

the charade of performance is generally meant to give credence to their simulation.'

[20] Wallis JA held found that the position remains that the Court examines the transaction as a whole including all surrounding circumstances, all unusual features of the transaction and the manner in which the parties intend to implement it before determining in any particular case whether a transaction is simulated.

[21] In this case therefore, it is necessary that the matter be approached in a fact sensitive manner. The evidence presented by the plaintiff was that of the plaintiff himself and his father. The defendant testified and did not call any additional witnesses. It was clear to me that the defendant in cross-examination had great difficulty identifying the real agreement that was disguised by the contract of loan. The defendant on several occasions testified that the loan agreement was not between the parties reflected on the face of the contract and that he was to be a surety. He testified to this after the plaintiff and his father had completed their testimony.

[22] The defendant in cross-examination stated that he intended to agree to the terms of the contract in his capacity as a director of One World Communications but not in his personal capacity. The defendant accepted that the only issue was that of identity of the parties to the contract and the contract had to be amended to reflect

the true agreement but no rectification was sought. In cross-examination he was adamant that One World Communications should be substituted for his name as the borrower of Espro Capital (Pty) Ltd and One World Communications should be substituted as a debtor.

[23] This trial was preceded by an opposed application which was ultimately referred to trial. The defendant's case was clear in the preceding opposed application that he was a conduit for the money that had to be sent to the Montpellier Rugby Club, that the South African Reserve Bank allowed his money to go through in order to accommodate the transfer of funds from the plaintiff's father and the plaintiff himself because the plaintiff's record with the Revenue Services had certain difficulties.

[24] A further witness was called on behalf of the plaintiff, Ms Chanel Beukes, a senior tax manager at Ernest and Young Advisory Services. The defendant made it very clear in cross-examination that Ms Beukes was not in collusion with the simulated transaction and that she really knew nothing about it. The defendant claimed that on 24 May 2012 she requested a copy of a loan between the defendant and One World Communications. However, it was clear both to the plaintiff and the defendant that Ms Beukes only knew about a loan agreement that was involved

between the plaintiff and the defendant and not between the defendant and One World Communications.

[25] Neither the plaintiff nor the defence called Mr Padyachee who drafted the loan agreement. A further factor is that up until the time that the relationship between the plaintiff and the defendant soured there was no suggestion that this loan agreement was a simulated transaction. The defendant believed that the project in France would generate a lot of revenue to the extent of R500 000.00 a month profit and that he could easily repay the sum of R4 million in the time available that is that one year agreement.

[26] The defendant criticised the evidence of the plaintiff on several grounds, namely, that the attorney, Mr Padyachee, who drafted the agreement was not called. However, this particular criticism also applies to the defendant. It was for the defendant to provide sufficient and persuasive evidence to demonstrate that the loan agreement was a simulated transaction. So therefore, the inference that I am to draw is not against the plaintiff for not calling Mr Padyachee, but against the defendant since he pleaded that the loan agreement was a simulated transaction. It is unlikely that an attorney would have drafted a loan agreement with the amount of detail that I have referred to for the purposes of a simulated transaction and to merely make the defendant a conduit for the transfer of monies to the Montpellier Club.

[27] I am also mindful of the undisputed fact that the plaintiff's father had several financial interests abroad and that from time to time used his overseas investments, all legal, to pay their liabilities abroad. His funds seemed to remain in those overseas countries. It was both the evidence of the plaintiff and the plaintiff's father that if indeed the defendant was not to be involved in the financing of this project, the plaintiff and the plaintiff's father could easily have sent the money to the Montpellier Rugby Club from one of their overseas companies. In fact, the evidence seems to suggest that both the plaintiff's father and the various family members still had the necessary Reserve Bank allowances for that year and they could have easily sent the money to France without using the defendant as a conduit.

[28] The defendant's conduct, has to be assessed in the circumstances. He signed the loan agreement. He had time to peruse the loan agreement for a few days before he signed it. He had contact with Ms Beukes and nowhere did he say to her that he was not prepared to sign the loan agreement because it was not a genuine loan and there were many other opportunities for him to raise the fact that he was not liable to the plaintiff for this money. By the time the defendant testified he had a multiplicity of versions.

[29] On behalf of the defendant, the plaintiff's evidence was criticised, in particular the omission in the annual financial statements

of reference to the R4 million loan. In this regard it is clear and unequivocal that the money initially came from the plaintiff's own trust fund. The plaintiff loaned an amount of R8 million from the Trust in respect of which he was a beneficiary. That money was then paid to the plaintiff and he advanced the R4 million to the defendant. It is undisputed that the that the annual financial statement for the trust for the year ended February 2011 reflected loans receivable from the defendant as being R4 million and therefore the plaintiff was criticised as to why he, the plaintiff, was claiming the money and not the PST Trust where the loan to the defendant was reflected. The submission on behalf of the defendant was that the loan in the annual financial statement should have been that the Trust advanced to the plaintiff himself an amount of R8 million and the minute should have recorded that from that R8 million he loaned the defendant R4 million. This submission was not conclusive or indicative that the loan of the money to the defendant was a simulated transaction.

[30] The plaintiff was invited to bring his own return to the Receiver to demonstrate that he had reflected the loan to the defendant. The documents were never forthcoming. However, the analysis that I have to do is a fact sensitive one and it seems to me that I cannot lose sight of the fact that there is a written loan agreement. If the liability was to be only that of the plaintiff then it is clear to me that there were sufficient avenues for him to get the

amount of R4 million to France without the need of using the defendant as a conduit.

[31] The evidence is clear that round about the time of this loan the relationship between the plaintiff's father and the defendant was very strained. A lot of money had been put into this communication app to no avail. It was clear therefore the plaintiff's father had washed his hands of this project and that he thought it a complete waste of money. There were also many occasions in which the defendant could have raised the question of the loan but did not do so. He did not do so in his discussions with Ms Beukes and he certainly did not do so at a very heated meeting which took place in Durban when the Montpellier project and the App had failed. At that meeting nowhere does he demand clarification of the fact that it was not a loan and that he was a conduit. At that very same meeting in Durban the plaintiff's father made both the plaintiff and the defendant forfeit their shareholding in One World Communications and the defendant happily agreed to that and did not raise the question of the loan even at stage. It was only much later.

[32] Therefore, the starting point is that I have to look at the true nature of the transaction. I also have to look at the financial circumstances regarding the transaction. Nowhere do I find any commercial reason or any unusual feature that the plaintiff would have used the defendant as a conduit. I have to examine the

transaction as a whole, see NWK supra, and to look at any unusual features of the transaction and the manner in which the parties intended to implement them before deciding whether this loan was a simulated transaction.

[33] A difficulty for the defendant was that he suddenly produced an unsigned suretyship agreement after the plaintiff and his father had testified. In this unsigned suretyship agreement he stated that he intended to sign as surety for proportionate share for the loan from Espro Capital to One World Communications of which he was a shareholder and director. This added further confusion as to exactly what the defendant's case was.

[34] The suretyship agreement was raised by the defendant at a very late stage of the trial after the plaintiff and his father had given evidence. The import of this suretyship agreement was that the defendant would then be a surety and not a debtor or receiver of the loan. It is a document consisting of some 8/9 pages and it certainly was not signed, but the defendant alleges that it was generated at the time and that this was corroborative of his submission that the loan was advanced to One World Communications and not to him. It therefore made it very difficult to ascertain what the true intention or the simulated transaction was.

[35] It is very difficult to ascertain from the defendant's evidence that One World Communications and Espro would be parties to a contract. Nothing of this is to be found in the trusts that were set up in Mauritius and in the documentation presented to Ms Beukes of Ernest and Young. It was only when the defendant was finally sidelined after the complete collapse of the various projects that he then asserted that the loan was to One World Communications. This is where the evidence of Mr Kovasian Padyachee was critical and the defendant, in my view, was the party who should have called Mr Padyachee because by this time the only credence that could be given to the defendant's evidence was that Mr Padyachee was party to this simulated transaction and generated a false loan agreement for the parties. It would seem to me that the defendant's evidence that Espro was a party to the contract was something that was tailored to suit the various documents utilised during the trial.

[36] The defendant conducted himself in a manner and testified in a manner which was contradictory to his version in the opposed application, in his plea and the number of written statements that were inconsistent with his version. The defendant was silent and acquiesced until the demand for repayment was made. In *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A), Miller JA stated the following at page 10 E - H: 'But in general where according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct.

Such party's silence and inaction, unless satisfactorily explained may be taken to constituting an admission by him of the truth of the assertion or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute.
Reference was also made to *Tattersall and Another v Nedcor Bank Ltd 1995 (3) SA 222 (A)*, Nestadt JA at 231.

[37] In my view, the various letters written by Ms Beukes that the plaintiff and defendant individually would be applying for exchange control approval in respect of the R4 million per calendar year permitted for private individuals was undisputed, and furthermore there was silence and acquiescence on the part of the defendant. When a copy of the loan agreement was requested repeatedly by Ms Beukes, starting 14 February 2011 again the defendant acquiesced and did not raise the question of the loan being a simulation but was quite happy to sign the loan agreement.

[38] On 2 March 2011 it is clear from the evidence that Mr Padyachee sent an email to the plaintiff and the defendant attaching the loan agreement and informing them that they were drafting notes for attention. Again, the defendant acquiesced and did not demand an explanation from Mr Padyachee, certainly in any email exchange as to why he was now required to sign a loan when there was no such loan intended.

[39] Again, the defendant's acquiescence and silence can be ascertained from an email dated 25 April 2011 when Ms Edu sent an email to the defendant, this is from Mauritius, in which she said:

> 'The business plan of One World Holdings, (that is the holding company in Mauritius), mentions a shareholders loan of South African R12 million but the trusts each only hold $100 at that stage. Please confirm when the money will be invested in the trusts which will in turn loan this money to OWC Holdings. Please also confirm the source of these funds.'

[40] On the 27th, that is two days later, of April 2011 the plaintiff replied to the email that was copied to the defendant in which he said:

> 'The R12 million you referred to is the total amount we intend to invest in the company. Both Kavesh (defendant) and I had invested a total of R8 million thus far.'

[41] It is important that the defendant did not correct the facts in the letter. If the plaintiff was fabricating his reference to words 'we intend investing' should have been corrected by the defendant. The letter regarding the R12 million is also illustrative of the plaintiff's understanding that he and the defendant were investing money and

that because they were business partners and that he was happy to lend the money to the defendant.

[42] On 24 May 2011, Beukes sent an email that was copied to the defendant in which she said:

> 'We also need to agree on the treatment of the R4 million that went straight from Kavesh's account, (that is the defendant's account) to France, on behalf of his trust.'

[43] Again nowhere does the defendant question Those facts and it is only at the end of May 2011 when it was clear that the project would not get off the ground that suddenly there is a flurry where he then instructs Mr Padyachee to write a letter to Beukes about the signed loan agreement between himself and One World and saying that an amendment is required to record the extent of the loan. Again, there were silence from the defendant and Mr Padyachee is not called.

[44] The plaintiff referred to the various probabilities. It is quite clear that the plaintiff's father came to a stage where he would not advance anymore money. The plaintiff and defendant doggedly went ahead with the project and to me it was quite clear that the defendant would have to borrow money if he wished to continue. I find that it

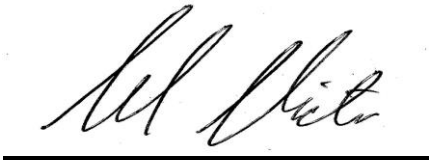
was clear that the plaintiff, being his business partner and friend at that stage, was quite happy to lend him the money.

[45] I therefore find that the facts in this case are inconsistent with a simulated loan. They are more consistent and it is more probable that both the plaintiff and defendant and especially the defendant thought that the project in France would be hugely successful, even to the extent that the defendant was prepared to register a trust in Mauritius so that the project could be completely offshore. He was convinced that he would be able to repay the loan in a very short time and therefore was happy to sign a loan agreement in terms of which he would have to repay the money within a year. There are further aspects of the defendant's evidence which I found unsatisfactory. As his cross-examination proceeded and progressed he tailored his evidence to be consistent with documentation adverse to his version which was put to him and in particular the loan accounts. I find that the defendant was an unsatisfactory witness whose testimony became increasingly false as the case proceeded. His silence and inaction is significant in undermining his version. In preparing for trial he would have been advised of the importance of the suretyship agreement.

The order that I would make is therefore the following:

1. The defendant is ordered to pay to the plaintiff the sum of R4 million.

2. Interest at the rate of 11% per annum compounded monthly in arrears from 20 February 2011 until date of payment.
3. The defendant is ordered to pay the costs of suit.



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JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG