



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

30/1/2017.

Case Number: 43355/2015

- (1) REPORTABLE: ~~YES~~ / NO  
(2) OF INTEREST TO OTHER JUDGES: YES/NO  
(3) REVISED ✓

30 January 2017  
DATE

SIGNATURE

ANDRE EUGENE MAEPI

PLAINTIFF

AND

ESSOU ABRAHAMS

DEFENDANT

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JUDGMENT

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MOLEFE J

[1] The plaintiff issued summons against the defendant for payment of R1 300 000. 00 plus interest and costs based on a written loan agreement dated 19 February 2012, with a conditional alternative claim based on unjust enrichment for payment of R700 000. 00 plus interest and costs. The contractual claim is based on a loan agreement which determines that the capital loan amount of R700 000. 00 is payable over four (4) months with interest at the rate of 84%.

[2] The defendant in his plea denied payment by the plaintiff and additionally pleaded legal defences in regard to the main claim, with specific reference to the National Credit Act, Act 34 of 2005 ("the NCA").

[3] The issues for determination in respect of the main claim are:

3.1 whether the parties concluded a written loan agreement which purports to be an acknowledgment of receipt of the capital amount;

3.2 whether the plaintiff paid the R700 000. 00 to the defendant and if the loan is repayable by the defendant;

3.3 whether the transaction is regulated by the NCA and if so, was the plaintiff registered as a credit provider in terms of the NCA and if not, the effect of the plaintiff's failure to register as such.

[4] In regard to the conditional alternative claim of unjust enrichment the issues to be determined are:

4.1 whether the loan agreement was illegal due to the non-registration of the plaintiff as a credit provider in terms of the NCA;

4.2 whether payment of R700 000. 00 was made by the plaintiff to the defendant and was the plaintiff impoverished and the defendant enriched as a result of the payment.

#### **Summary of oral evidence presented**

[5] The plaintiff testified himself and called one witness Mr Jeremy Waters ("Waters"). The plaintiff submitted as documentary evidence, the written loan

agreement<sup>1</sup> and a photograph depicting Waters sitting at a table in the defendant's home with a vast amount of cash in front of him<sup>2</sup>. The defendant did not object to the admission of the loan agreement and/or the photograph as evidence.

[6] *Mr Andre Eugene Maepi*, the plaintiff, testified that he was introduced to the defendant by Waters on 12 February 2012 and the defendant requested a loan of R700 000. 00 from the plaintiff. Various discussions took place between them on 13, 14 and 15 February 2012 and the discussions/negotiations culminated in the initial oral agreement on 17 February 2012 when the plaintiff handed a cash amount of R700 000. 00 to the defendant at the defendant's funeral parlour. The cash amount was given to the defendant in the presence of Waters but it was decided that the money would be counted at the defendant's house as there was no private area at the funeral parlour in which to count the money.

[7] The defendant and Waters went to the defendant's home to count the money without the plaintiff as plaintiff was in a hurry to go to his wife who was about to give birth. Plaintiff later that same day went to defendant's home where he found that the defendant and Waters had finished counting the money. Photographs of the defendant and Waters with the money were taken with Waters' cellphone and the defendant was satisfied that the amount of the money was correct.

[8] Plaintiff testified that the loan agreement could not be signed on 17 February 2012 as it could not be printed as the defendant's printer was broken. Two days later on 19 February 2012, plaintiff went to the defendant's home with Waters and the loan agreement was signed by plaintiff, defendant and Waters as a witness. Plaintiff was satisfied that the defendant would repay him the loan as defendant had

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<sup>1</sup> Pleadings bundle, page 13 Annexure "A1"

<sup>2</sup> Pleadings bundle, page 14 Annexure "A2"

informed him that he was awaiting payment from the Municipality for the projects he was doing.

[9] Under cross-examination, the plaintiff conceded that he did not register as a credit provider as he was ignorant of the NCA. Plaintiff could not provide an explanation as to why the loan agreement had been endorsed as a copy of the original on 12 December 2014 nor could he explain where the original agreement was.

[10] *Mr Phillip Jeremy Waters*, in his testimony, corroborated the plaintiff's version that the plaintiff gave R700 000. 00 cash to the defendant on Friday 17 February 2012 at the defendant's funeral parlour. He also confirmed that the photograph was taken with his cellular phone at the defendant's home after the money had been counted by him and the defendant. Waters testified that he introduced the defendant, his neighbour to the plaintiff as the defendant needed a loan for an agricultural project.

[11] Under cross-examination, Waters testified that he introduced the defendant to the plaintiff for a loan as he was under the impression that he was in partnership with the defendant. He admitted that later there was animosity between him and the defendant which led to him suing the defendant for money owed to him.

[12] *Mr Essou Abrahams*, the defendant, testified himself and called one witness Mr Gerald Ferris. The defendant denied payment of R700 000. 00 by the plaintiff. He testified that he signed the loan agreement during or about February 2012, at his funeral parlour, on the bonnet of the plaintiff's vehicle. Defendant's version is that when the agreement was presented to him, it had already been signed by the plaintiff and one witness, Waters. It was then agreed that the second witness would

only sign beneath defendant's signature once he received the funds from the plaintiff. Defendant further testified that he required the R700 000. 00 to provide security in terms of a road construction tender which was to commence in March 2012. Due to plaintiff's failure to provide the funds as agreed, he was unable to commence with the project, and the project was as a result extended to September 2012.

[13] The defendant testified that he did not know anything about the photograph and that he was not present when it was taken. He further denied that the plaintiff was ever at his house except on the one occasion when he came to threaten defendant's wife and children, for reasons unknown to him. He admitted that Waters is his neighbour and that Waters introduced him to the plaintiff when he needed the loan. However, since March 2012, there has been animosity between Waters and him and the reasons that caused the animosity were unknown to him.

[14] Although the defendant in his examination-in-chief testified that he knew nothing about the photograph, he testified under cross-examination that the photograph was taken at his home, on a date unknown to him and that it depicted Waters with a large amount of cash as on that unknown date, Waters was busy attending to the defendant's payroll for his employees.

[15] *Mr Gerald Ferris*, defendant's witness testified that during or about February 2012, he was requested by Waters to sign an agreement as a witness in terms of which Waters and defendant would borrow money. He was later informed by Waters that it was no longer necessary for him to sign the agreement as the funds had already been received. He later received a photograph from Waters' cellphone depicting Waters with a large amount of money received. Ferris corroborated the

version of Waters to the effect that the photograph was taken using his cellphone and was sent to Ferris after the R700 000. 00 had been paid to the defendant. Ferris confirmed that after he received the photograph, it was clear that it was no longer necessary for him to sign the loan agreement as a witness as the defendant had already received the money.

[16] Although the defendant's counsel never objected to the admission of the photograph as evidence, nor was the authenticity of the photograph in dispute or a subject of any cross-examination on behalf of the defendant, for the first time in his heads of argument defendant's counsel submitted that the evidentiary weight of the photograph that was taken with a cellphone must be weighed in light of the *Electronic Communications and Transactions Act 25 of 2002* and specifically section 15 which reads as follows:

*"Admissibility and evidential weight of data messages*

*15(1) In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message in evidence –*

- a) on the mere grounds that it is constituted by a data message; or*
- b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.*
- (2) Information in the form of a data message must be given due evidential weight.*
- (3) In assessing the evidential weight of a data message, regard must be had to-*
  - (a) the reliability of the manner in which the data message was generated, stored, or communicated;*
  - (b) the reliability of the manner in which the integrity of the data message was maintained;*
  - (c) the manner in which its originator was identified; and*
  - (d) any other relevant factor."*

Counsel argued that the original instrument (Waters' cellular phone) cannot be established and no date can be attached to the photograph to support the plaintiff's version.

[17] I do not agree with the submissions made by the defendant's counsel. A data message means data generated, sent, received or stored by electronic means and includes — (a) voice, where the voice is used in an automated transaction; and (b) a stored record. In my view the photograph is not a data message to the extent that it was forwarded to another person, who had opportunity to tamper with the photograph. Evidence was led that it was printed from the original device it was taken on, being the cellular telephone of Mr Jeremy Waters. The defendant also in his version admitted that the photograph was taken from his house although he denied that the cash depicted was the R700 000. 00 paid to him by the plaintiff. Furthermore, the failure of the defendant to cross-examine the plaintiff and/or Waters about the authenticity of the photograph has the effect that this evidence may not be called into question. (See **R v Balitane 1956 (3) SA 634 (E)**).

[18] Undoubtedly, the evidence of the plaintiff and defendant show factual disputes and irreconcilable versions. The technique generally adopted by the courts in resolving factual disputes when dealing with two irreconcilable versions is set out in **SWF Group Limited and Another v Martell ET CIE and Others**<sup>3</sup> wherein the following relevant applicable principles are stated:

*"To come to a conclusion on the disputed issues a court must make findings on:*

*18.1 the credibility of the various factual witnesses which depends on a court's impression about the veracity of the witnesses;*

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<sup>3</sup> 2003 (1) SA 11 SCA at paragraph (5)

**18.2 their reliability; and**

**18.3 the probabilities.**

**18.4 As to the credibility of a particular witness, a number of factors must be taken into consideration:**

**i) the witness's conduct and demeanour in the witness box;**

**ii) his bias, latent and blatant;**

**iii) internal contradictions in his evidence;**

**iv) external contradictions with what was pleaded or put on his behalf, or with established facts or with his own extracurial statements or actions;**

**v) the probability or improbability of particular aspects of his versions;**

**vi) the caliber and cogency of his performance compared to that of other witnesses testifying about the same incident or event.**

**18.5 A witness' reliability will depend in addition to the aforesaid factors mentioned above and on:**

**i) the opportunities he had to experience and observe the event in question; and**

**ii) the quality, integrity and independence of his recall of the event.**

**18.6 Having regard to the probabilities, this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues.**

**18.7 In light of its assessment of the factors in 18.4 and 18.6 above, a court should then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it.**



*18.8 When a court's credibility findings compel it in one direction and its evaluation of the general probabilities compels it in another direction, the more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail".*

[19] The test propounded by Wessels JA in **National Employers' Mutual General Insurance Association v Gany**<sup>4</sup> is to the effect that "*where there are two stories mutually destructive, before the onus is discharged, the Court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rests is true and the other false*".

[20] In a civil case where the *onus* rest on the plaintiff as is in the present case, and where there are mutually destructive stories, the plaintiff can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not, the court will weigh up and test the plaintiff's allegations against the general probabilities (See **National Employers' General Insurance v Jagers**<sup>5</sup>).

[21] The plaintiff *in casu* appeared to be honest and reliable and presented a clear and solid case with very minor and immaterial contradictions. The plaintiff's evidence was corroborated by the evidence of Mr Waters in every material aspect. I find both the plaintiff and his witness to be reliable.

[22] The defendant's version on the other hand, is in my view flawed and unreliable. The defendant was a poor witness and adjusted his version of events during his evidence when he was confronted with impossibilities and improbabilities.

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<sup>4</sup> 1931 AD 187 at 199

<sup>5</sup> 1984 (4) All SA 622 (E)

In regard to the photograph, the defendant at first did not know anything about it but later he changed his version that it was taken during February/March 2012 when Waters was doing his payroll. It is difficult for me to understand how the defendant, an experienced businessman, would sign a loan agreement acknowledging receipt of a sum of R700 000. 00 despite having not received the money from the plaintiff. What is also strange is the defendant's version that the plaintiff came to his home and threatened his family but he could not explain why the plaintiff, who in his version still had to give him the loan, would threaten his family. I find the defendant's version to be highly improbable and his version actually corroborating the plaintiff's version that he gave him the R700 000. 00 and that the defendant refused to pay back the money.

[23] The defendant's own witness Ferris, did not assist the defendant by corroborating his version but in fact, Ferris corroborated the evidence of the plaintiff and Waters to the effect that the photograph was taken after payment of R700 000. 00 was received by the defendant.

[24] I am therefore satisfied that the plaintiff has discharged the *onus* of proving that the parties concluded the written loan agreement after the plaintiff had made a payment of R700 000. 00 to the defendant and that the loan is repayable by the defendant.

**[25] Applicability of the National Credit Act**

25.1 In terms of section 40 of the NCA, a person must apply to be registered as a credit provider if the total amount of debt owed to that credit provider under all outstanding credit agreements, other than incidental credit

agreements, exceeds the R500 000 threshold prescribed in terms of section 42 (1);

25.2 Section 40(3) of the NCA provides that a person who is required in terms of section 40(1) to register as a credit provider, but who is not so registered, must not offer, make available or extend credit, enter into a credit agreement or agree to do any of those things;

25.3 In terms of section 40(4) of the NCA, a credit agreement entered into by a credit provider who is required to be registered but who is not so registered is an unlawful agreement and void to the extent provided for in section 89. In terms of section 89(2)(d), a credit agreement is unlawful if at the time of the agreement was made, the credit provider was unregistered and the Act required the credit provider to be registered. In terms of section 89(5)(a) if a credit agreement is unlawful in terms of section 89, it is void from the date the agreement was entered into.

[26] It therefore follows that when an unregistered credit provider who is required to be registered, lends money to a consumer, he or she will have no contractual cause of action and will be obliged to sue the consumer under the law of unjust enrichment, by means of the *condictio ob turpem vel iniustam causa*, to recover the money<sup>6</sup>.

[27] Plaintiff's counsel<sup>7</sup> submitted that it was not necessary for the plaintiff to register as a credit provider and that the main claim is accordingly in order and

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<sup>6</sup> Van Heerden v Nolte 2014 (4) SA 584 (GP)

<sup>7</sup> Advocate J.A.H. May

enforceable with due regard to the NCA and in this regard relied on **Friend v Sendal 2015 (1) SA 395 (GP)**.

The full bench<sup>8</sup> in **Friend supra** held that section 40(1)(b) of the NCA had to be seen as having been directed at those people who were in the credit market and/or industry or at those who intended to participate in the credit market and/or industry and not for a credit provider involved in a single transaction, as *in casu*.

[28] The defendant's counsel<sup>9</sup> disagreed with plaintiff's submissions and referred the court to the matter of **Van Heerden v Nolte 2014 (4) SA 584 (GP)** wherein the court stated as follows:

*"[14] In any event, the ratio decidendi in Friend is inconsistent with the approach taken by the Constitutional Court in National Credit Regulator v Opperman and Others 2013 (2) BCLR 170 (CC) handed down in December 2012, three months after the Full Court handed down its judgment in Friend. The basic facts in Opperman are not dissimilar to those in the present case. Opperman had lent his friend a total amount of R7 million under three separate credit agreements. The Constitutional Court found that he had been obliged to register as a credit provider despite the facts that he was not in the business of providing credit, was unaware of the requirements to register as a credit provider and had no intention of violating the NCA. It held further that Opperman was required to register as a credit provider because the "total principal debt exceeded the R500 000 threshold prescribed in terms of section 42(1) of the NCA".*

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<sup>8</sup> Legodi J, Fabricius J & Kubushi J

<sup>9</sup> Mr M.C. Scheepers

[29] The conclusion that I come to is that a full bench judgment may not enjoy precedence over a Constitutional Court by virtue of the *stare decisis* principle as the Constitutional Court is the highest authority of law in South Africa. In *casu*, the total principal debt exceeded the prescribed threshold of R500 000. 00 and the plaintiff was not in the business of providing credit and therefore make the NCA applicable. The plaintiff, as an unregistered credit provider consequently has no cause of action and the loan agreement is *ipso facto* void. In the result, the plaintiff was indeed entitled to register as a credit provider in terms of the NCA. The plaintiff is however entitled to sue under the law of unjust enrichment in the alternative claim.

### **Unjust Enrichment Claim**

[30] The plaintiff is entitled to the alternative claim for enrichment as the agreement entered into between the parties is unlawful and accordingly void. Although a general enrichment action has not yet been accepted in our law, there are nevertheless certain general requirements for any action based on enrichment<sup>10</sup>:

30.1 the defendant must be enriched;

30.2 the plaintiff must be impoverished;

30.3 the defendant's enrichment must be at the plaintiff's expense; and

30.4 the defendant's enrichment must be unjustified.

In other words, the enrichment must be without legal cause or *sine causa*.

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<sup>10</sup> The Law of South Africa, vol 9, second edition at par 209

[31] The common cause and crisp issues *in casu* are the following: the plaintiff has paid to the defendant an amount of R700 000; the defendant was unjustifiably enriched and the plaintiff was accordingly impoverished.

[32] I do not agree with the submissions made by counsel for the defendant that it is also incumbent on the plaintiff to illustrate why the *par delictum* rule should not find application to the plaintiff's unjust enrichment claim. Counsel in this regard relies on what the Constitutional Court stated in **Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport and Others 2015 (10) BCLR 1158 (CC)**:

*"In order to be successful, ordinarily the party who claims on the basis of unjust enrichment must be free of turpitude and show that he or she has not acted dishonourably.*

*If the credit provider is not free of turpitude, the par delictum rule stipulates that the law should not come to her aid".*

[33] I have noted that no evidence has been presented to the court of any turpitude on the part of the plaintiff and/or plaintiff's witness Waters. There can therefore be no doubt that the plaintiff is clear of turpitude and in my view, this argument is with no merits and should fail.

[34] In the circumstances, I find that the plaintiff has successfully discharged the *onus* expected of him of proving on a balance of probabilities that he paid R700 000.00 to defendant as a loan and that loan is repayable by the defendant.

[35] I therefore make the following order against the defendant:

1. *Payment of the amount of R700 000.00;*

2. *Interest a temporae morae at the rate of 15,5% per annum from 17 February 2012 until 31 July 2014, both days included; and at the rate of 9% per annum from 1 August 2014 until date of payment, both days included;*

3. *Costs of suit including the costs of the summary judgment.*

  
D S MOLEFE  
JUDGE OF THE HIGH COURT

**APPEARANCES:**

<b>Counsel on behalf of Plaintiff</b>	<b>:</b>	<b>Adv. J.A.H May</b>
<b>Instructed by</b>	<b>:</b>	<b>Lampen Attorneys</b>
<b>Counsel on behalf of Defendant</b>	<b>:</b>	<b>Mr. M.C Scheepers</b>
<b>Instructed by</b>	<b>:</b>	<b>Scheepers Aucamp Attorneys</b>
<b>Date Heard</b>	<b>:</b>	<b>19, 20 and 28 October 2016</b>
<b>Date Delivered</b>	<b>:</b>	<b>30 January 2017</b>