IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

Case No: 28602/2024

DELETE WHICHEVER IS NOT APPLICABLE

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

25 October 2024

DATE SIGNATURE

In the application between:

PILLAY DEEVIA **APPLICANT**

and

WALTER GROBLER **RESPONDENT**

JUDGMENT

NHARMURAVATE AJ

INTRODUCTION

[1] This is an opposed application brought by the Ms Deevia Pillay the Applicant wherein she seeks a money judgement to be granted in the following terms:

"1. An order is to be granted ordering the respondent make payment to the applicant in the amount of R 6 744 375. 00

2. That the respondent be ordered to pay the applicant interest in respect of the sum mentioned above, 88 tempura more calculated from the first day of April 2015 to date of final payment.

3. Cost on scale as between attorney and Own client

[2] This application is opposed by Walter Grobler the Respondent based of the argument that the Applicant should have sued the company not the Respondent personally and financially the investment did not yield any financial benefit for the investors.

SHORT SYNOPSIS

[3] The Applicant is a single mother who was previously employed by ABSA bank for 16 years before retrenchment in 2015. The Applicant and Respondent are both family members through the Respondent's wife who is the cousin to the Applicant. She was approached by the Respondent who requested that she loan and advance him capital in the form of hard cash from her retrenchment package and portion of her pension fund that had been paid out.

[4] The Respondent informed her that this would benefit both because she would receive a substantial interest which was calculated at 50%. The Applicant was excited about the proposition and subsequent entered into a written agreement on the 1st of April 2015 termed as the Money Investment Agreement *(the agreement*) with the Respondent.

[5] In terms of this agreement the applicant would be the investor wherein she would invest the amount of R400 000.00. In turn the Respondent would invest the amount to exotic breeding with no restriction of funds. The Applicant was to receive 50% interest on the investment amount annually payable after one year from the effective date. Additionally, the Applicant would be paid back a year

from the investment date. After one year from the effective date the investor would have the option to invest that amount and gain the interest with the entrepreneur if the investor chooses to reinvest the 50% interest will be payable on the invested amount. If the investor chooses to reinvest a new agreement will be signed between the investor and the entrepreneur.

[6] After signing the agreement, the Applicant duly complied with the agreement and advanced to the Respondent the amount of R400,000 as required. Thereafter, the Respondent failed to pay the Applicant in line with the agreement. The Applicant pleaded several times with the Respondent as a family member to come to her assistance as she was struggling financially. Around 2020 the Applicant requested to meet with the Respondent so that he can sign the acknowledgement of debt which the Respondent refused to do but made a promise that he will indeed pay the money together with interest in terms of their agreement.

[7] Sometime thereafter, the Respondent made two payments on the 11th of September 2020 and 2021 January both these payments were made using the reference loan repayment. Thereafter the Applicant did not receive any further payments from the Respondent. She thereafter instructed her legal representatives to demand her money back. The Respondent answered through his legal representatives and alleged that the Applicant's claim had been extinguished by prescription as she had not instituted an action within three years for the repayment of her money.

[8] This response prompted an argument between legal representatives wherein the Applicant argued that the matter had not prescribed as the Respondent had made two payments respectively on the 9th of September 2020 and on the 21st of January 2021 such payments interrupted prescription.

[9] This is then the basis that is used by the Applicant to seek a repayment of R 6 834 375.00 minus the R 90,000 which was paid by the Respondent. The Applicant justified this amount in line with the agreement made between the

parties that is she would have received her first payment in April 2016 at R600 000.00. The second amount would have been received in April 2017 at R900,000. The third amount would have been received in April 2018 at R1 350 100.00. The 4th amount at R2 025 000.00 would have been received in April 2019.In April 2020 amount of R3 037 500.00 The 6th amount would have been received in April 2021 in the amount of R4 556 250.00. The last payment should have been received in April 2022 in the amount of R6 834 375.00.

[10] This application is opposed by the Respondent based on various reasons which shall be expanded upon herein under briefly.

LAW TO FACTS

Prescription

[11] The Respondent raised a point of law that the Applicant's claim has prescribed simply because the Applicant's claim is based on a written agreement concluded on the 1st of April 2015. The Respondent argued that he was only served with this application on the 1st of June 2022. The Respondent highlighted section 11(d) of the Prescription Act 68 of 1969 in that the Applicant's claim prescribed on the 1st of April 2019 thereby extinguishing the claim that the Applicant may have against the Respondent.

[12] The Applicant opposed this point *in limine* based on the fact that the Respondent made two payments which amounted to an acknowledgment of debt thereby interrupting prescription both of these payments were made respectively on the 9th of September 2020 for an amount of R50,000.00 and an amount of R40,000.00 on the 21st of January 2021.The Applicant relied on the SCA judgement of Investec Bank Limited v Erf 436 Elandspoort (Pty) Ltd[1] where the court held that periodic payments towards the debt interrupt prescription.

[1] (1) SA 28 (SCA)(16 September 2020)

[13] The Respondent contended that the two payments were made *ex gratia* that is simply because he was feeling sorry for the Applicant as a family member. These did not amount to an acknowledgement of debt or paying towards the debt owed.

[14] Section 14(1) of the Prescription Act 68 of 1969 state as follows that :

"(1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.

(2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt from the date upon which the debt again becomes due.'

[15] In my view the two payments made towards the Applicant were not made *ex gratia.* The two payments were made in different years 2020 and 2021 and on both occasions the Respondent references these payments as "*loan repayment*". The Respondent treated both payments as loan repayments. Additionally, both these repayments came about as a result of the Applicant pushing the Respondent. The two payments were not made voluntarily considering the conversations (WhatsApp messages) between the two parties. The two repayments were made with the intention of satisfying his debt with the Applicant otherwise the reference would have mentioned otherwise.

[16] In the SCA matter of ***Natal Joint Municipality Fund v Endumeni Municipality***[2] the court highlighted the importance of reading words as they are within the context provided. It was held that interpretation is the process of attributing meaning to the words used in a document and having regard to the context provided by reading the particular provision or provisions in light of the document as a whole and the circumstances attended upon its existence whatever the nature of the document, consideration must be given to the language used in light of the ordinary rules of grammar[3].

[2] 2012 (4) SA 593 (SCA) para 18
[3] Supra

[17] The conduct of making payment towards the Applicant on two different occasions using the same reference being "*loan repayment*" in my view constitutes an acknowledgement of debt towards the Applicant.

[18] In the ***Cape Town Municipality v Allie NO***[4] decision where the court had to determine whether the Cape Town Municipality had acknowledged liability and if it had interrupted prescription in terms of section 14 of the Act. The court held that the test is an objective test. The inquiry should be what did the debtor's conduct convey outwardly? *"..the concept of a tacit acknowledgment of liability is irreconcilable with the debtor being permitted to negate or nullify the impression which his outward conduct conveyed, by claiming ex post facto to have had a subjective intent which is at odds with his outward conduct . .*

[19] In my view the reference used "*loan repayment"* validates that the Respondent had knowledge alternatively acknowledges that between the two parties exists a loan which he must pay back. Secondly, this signifies the intention of the Respondent to repay the loan. The argument that the Applicants matter prescribed as early as April 2018 would be correct but for the two repayments which revived the Applicants claim[5]. When the application was served on the Respondent it was done timeously so calculating from the first repayment on the 21st of September 2020.

[20] Therefore in my view the Applicant's claim has not been extinguished by prescription from the first date of repayment the Applicant had three years to institute proceedings against the Respondent which she did[6].

The Debt Owed

[21] The Applicant Counsel Mr Lazarus argued that the Applicant was entitled to the amount sought as per the notice of motion of R 6 744 375.00. Mr Lazarus for the

[4] Investec v Erf 436
[5] Kaknis v Absa Bank Limited and Another
[6] 14 (2) *prescription shall commence to run afresh from the day on which the interruption takes place*

Applicant argued that in line with the agreement signed between the parties the 50% interest was applicable and the *in duplum* rule was not applicable as the money was loaned and advanced for investment purposes.

[22] The Respondent Counsel Mr Erasmus in opposition argued that in terms of clause 4 of the agreement the Applicant was to receive 50% interest on the amount invested which was payable on the 1st of April 2016. Additionally, that it was a tacit term of the agreement that interest was subject to the business turning a profit after expenses. Similarly, the repayment of the capital invested was subject to the liquidity of the business and the ability of the business to pay back the capital. The interest of 50% was subject to the invested amount being reinvested by the Applicant which did not take place herein. Further, the 50% interest would have been applicable if there was a new agreement signed between the parties as per the money investment letter agreement. Therefore, the *in duplum* rule was applicable under the circumstances.

[23] In *Wilkens NO v Voges* Justice of Appeal Nienaber said[7]:-

"*A tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if both parties thought about a matter which is pertinent but did not bother to declare their assent. It is imputed if they would have assented E about such a matter if only they had thought about it - which they did not do because they overlooked a present fact or failed to anticipate a future one. Being unspoken, a tacit term is invariably a matter of inference. It is an inference as to what both parties must or would have had in mind. The inference must be a necessary one: after all, if several conceivable terms are equally plausible, none of them can be said to be axiomatic. The inference can be drawn from F the express terms and from admissible evidence of surrounding circumstances. The onus to prove the material from which the inference is to be drawn rests on the party seeking to rely on the tacit term. The practical test for determining what the parties would necessarily have agreed on the issue in dispute is the celebrated bystander test. Since one may assume that the parties to a commercial contract are intent on concluding a contract which functions efficiently, a term G will readily be imported into a contract if it is necessary to ensure its business efficacy; conversely, it is unlikely that the parties would have been unanimous on*

[7] 1994 (3) 130 (A) at 136 H-J

both the need for and the content of a term, not expressed, when such a term is not necessary to render the contract fully functional."

[24] The court above also considered the test applicable to the tacit or implied terms of the agreement in the following manner that :"The *"bystander" test is a practical way to determine what the parties would have agreed on. It asks: what would the parties have said if a bystander had asked them what would happen in a certain case during the contract negotiations? If both parties would have said, "Of course, so-and-so; we didn't bother to say that, it's too obvious", then that outcome is considered to have been intended by the parties and a term to that effect is implied in the contract. In other words, the parties' common intention must have been such that a reference to the hypothetical situation would have prompted them to quickly and unanimously assert the tacit term to govern it[8]."*

[25] In terms of clause 4[9] of the agreement the Applicant's money was due on the 15th of April 2016. This was not honoured by the Respondent. Tritely the Respondent must prove that the tacit terms argued would have been applicable at the time the parties entered into the money investment agreement. In applying the bystander test, this court is not convinced that had the Applicant been told before entering into the agreement that the loan she advanced as capital to the Respondent was subject the Respondent making a profit otherwise same would not be repaid. The Applicant was a single mother who had just been retrenched and was financially distressed. In my view, had she been told that repayment was subject to the Respondent making a profit she would have not entered this contract alternatively the Respondent failed to convince this court as such. This was not the party's common intention when they entered into this agreement. Clause 4 needs no interpretation the parties intention was that the Applicant will be repaid.

[8] Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another 2005 (6) SA 1 (SCA) at [50] – [51], and City of Cape Town (CMC Administration) v Bourbon-Leftley and Another NNO 2006 (3) SA 488 (SCA) at[19] – [21].

[9]Invest amount to be paid back in 1 year from effective date "

[26] In my view when applying the bystander test to the question of the 50% interest dependable on a profit being made by the Respondent, perhaps the Applicant would have agreed to that at the inception of the agreement had a bystander posed such a question then. That she would not be eligible to the 50% interest being paid towards her repayment of the capital amount loaned if a profit was not made. However, the Respondent has not demonstrated that there was no profit made by him. The Respondent has not attached any of his financial to show that he did not make any profit let alone attach audited statement or financials of the company invested into to convince this court as such. The Respondent cannot impute profit as a tacit term of the agreement when it favors him.

[27] My view is further fortified by the fact that the Respondent attested that animals were sold, this court draws an inference that all animals were sold. This court was not informed when and how much was made from the sale proceeds and what happened to those proceeds. Further, why were these proceeds not used to pay the Applicant? Did the Respondent get share in that? How much was his share? Why did he not consider paying the Applicant let alone explaining the difficulties he was having at the time. This information has been deliberately left out of the Respondents papers.

[28] In my view the Respondent wants to rely on the tacit terms of the agreement opportunistically simply because he argues that repayment of the capital amount was not guaranteed. The Respondent did not demonstrate that the Applicant would have entered into agreement despite a profit not being made and despite there being no guarantee to repay the loan amount invested. The argument that there were no guarantees when dealing with animals as they could become sick, or die is made very late as it is not the Respondent's case that the Applicant was informed on this. The Respondent always had this knowledge why not make it part of the agreement as it was crucial if not key to the agreement.

[29] The Respondent has not tabled before this court that he is unable to repay the Applicant, nor has he attached any proof that financially he is struggling to pay the Applicant. He simply mentions the reasons that he deregistered from the close corporation without even attaching any proof which proves this allegation.

The Respondent argument in short is "*I am not going to pay you because I did not make profit".*

[30] Additionally, the Respondent's answering affidavit has been drafted poorly in that it does not deal with the allegations contained in the Applicant's founding affidavit. The Respondent's answering affidavit to the Applicant's founding affidavit fails to admit or deny, or confess and avoid, allegations in the applicant's affidavit. The court under such circumstances will, accept the Applicant's allegations as being correct. It is not clear why the Respondent drafted his papers in that manner the argument raised in this regard was the rule does not prescribe the form of how the answer must the drafted which is far from the truth.

[31] In my view, the Respondent is liable to pay the Applicant the capital amount R 400 000.00 (minus the repayments) inclusive of the 50% interest which would have applied on the 1 of April 2016.

[32] The question of payments sought based on the 50% interest by the Applicant from the April 2017 up to and including April 2022 is flawed in that Clause 5 of the agreement has a condition which stipulated a follows that :
"5. After 1 year from effective date, investor will have the option to either re-invest invest amount, or to re-invest invest amount + interest with entrepreneur. If the investor chooses to re-invest, 50% interest will be payable on the invest amount. If the investor chooses to re-invest, a new agreement will be signed between the investor and entrepreneur."

[33] The Applicant had an option to reinvest the amount or reinvest the invested amount inclusive of the interest. However, money was not re-invested and there are no allegations made by the Applicant that she has an intention to do so in her founding papers[10]. Further ,there was no new agreement signed regard being

[10] Pillay v Krishna and Another 1946 AD 946 ". He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is a fact that is denied and that the denial is absolute." . . . The onus is on the person who alleges something and not on his opponent who merely denies it.'

had to clause 5 of the agreement. The 50% interest was only applicable upon the new agreement being signed by the parties which did not take place.

[34] Therefore the 50% interest in this regard is not applicable. There is no basis in law to award the amount as set out in the Applicants founding papers dating from April 2019 up to and including April 2022.

Compliance with the NCA

[35] The Respondent argued vaguely that the loan agreement was in contravention of the National Credit Act 34 OF 2005 without specifically pointing to the provisions which the Applicant did not comply with. There was no clear response if at all on this point from the Applicant nor was this covered on the papers filed appropriately by both parties to assist this court in this regard.

[36] However, my view is that the contract was signed between the parties in April 2015. The agreement took place before the 11th of May 2016 which was the date when the amendment to the provisions of section 42(1)[11] took place. When the agreement was signed the Applicant could loan the Respondent an amount less than R500 000.00 without being registered as a credit provider with the National Credit Regulator. It is common cause that the applicant loaned the Respondent an amount of R400,000.00. This amount was less than the threshold provided by the National Credit Act under Section 42(1) at the time. Therefore, when the agreement was signed in April 2015 registration as a credit provider by the Applicant was not a requirement.

[37] The amendment only took place on the 11th of May 2016 which reduced the threshold to 0.%. Accordingly the amendment took effect after the agreement was signed by the parties. Therefore the Applicant is entitled to recover the capital amount inclusive of interest. The loan agreement between the two parties remains valid.

[11] The National Credit Act 34 of 2005

Misjoinder of the Respondent

[38] The Respondent does not deny that the Applicant loaned him an amount of R400 000.00, but he argues that the Applicant should have sued the company. This point was dealt with in passing it was not even raised as a point *in limine* in the Respondent's answer. Whereas a point of law needs to be clearly raised and outlined as it amounts to an objection raised before the commencement of the main argument, this allows the Applicant to properly address it to allow fairness in the proceedings simply because a point in *limine* can lead to a dismissal of the matter without the need to hear the main matter.

[39] In my view, this argument is flawed simply because the agreement was not between the Applicant and the company. The agreement was drafted by the Respondent without informing anyone in the alleged company nor did he consult investors or other company members or directors before signing or even drafting the agreement. The agreement was hastily drafted by him without involving anyone. This was clearly a private agreement between the two parties.

[40] The agreement signed was between the Applicant and the Respondent names not the company. The Respondent is the only person that the Applicant met, consulted and reached an agreement within even the money was given to him. There was no company resolution permitting this agreement or pertaining to the decision to loan money from the Applicant it was solely the decision of the Respondent.

[41] It would have been peculiar for the Applicant under such circumstances to thereafter go after the company for the repayment of the amount loaned without having the agreement with the company. She was not even advised as such by the Respondent let alone this factor forming part of the agreement that if ever a dispute arises in relation to the repayment of the invested amount or any other amount hereto that the Applicant must sue the company.

[42] The second argument raised in this regard is that the Applicant is not the only investor who lost out on this the business deal several other investors also lost out financially without being repaid. This argument is not relevant at this stage. Astonishingly it does not appear anywhere in the Respondents' that he held a meeting with the Applicant to inform her of the business instability and further proposing to amend the agreement. The Respondent knew in the middle of 2015 that the business was not going well. This is bizarre because the invested amount was received from the Applicant around that time bearing in mind that the agreement was signed in April 2015.

[43] In my view,the Respondent already had knowledge of the business difficulties when he sought the loan from the Applicant which explains the hastiness of him drafting the agreement. The business of dealing with exotic animals was already seemingly in trouble when he received the funds, but this may have been concealed from the Applicant. The Respondent had a duty to at least table the difficulties they were having business wise to the Applicant as the investor which he did not do early or soon thereafter.

[44] The Respondent is liable to repay the loan advanced by the Applicant not the company as argued.

CONCLUSION

[45] I therefore find that the Respondent is liable to pay the Applicant's capital loan balance remaining plus interest at 50 % computed as follows: the capital loan amounting of R 400 000.00 subtract the amount of R 90 000.00. This then leaves a balance brought forward of R310 000.00 plus interest at 50% which would have been paid in 2016 at R200 000.00 which gives a total owed to the Applicant at R510 000.00.

[46] The Applicant in its papers sought costs on Attorney and client scale. However, there was no arguments made or advanced in that regard nor was this covered

in the Applicants heads or otherwise. This court was also not addressed on the scale. Therefore, normal costs shall be awarded by this court and costs will follow the result.

[47] I therefore make the following order :

1. The Respondent is ordered to pay the Applicant the amount of R510 000.00 with interest calculated from the date of the letter of demand being the 2nd of March 2022 .

2. The Respondent shall pay the costs of this application on a party and party scale.

NHARMURAVATE, AJ
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

For the Applicant : Mr J Lazarus
Instructed by. : Shapiro and Ledwaba Attorneys

For the Respondent : Adv N Erasmus
Instructed by. : Van Der Cloete Inc

Date of Hearing : 11 September 2024
Date of Judgment: 25 October 2024