



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 44111/2020

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ **NO**
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~ **NO**
(3) REVISED: YES

15/02/21
DATE

[Signature]
SIGNATURE

In the matter between:

J.J.G NEL

IVY JEWEL 3 (PTY) LTD

IVY JEWEL 4 (PTY) LTD

LABONTE 1 (PTY) LTD

LABONTE 2 (PTY) LTD

SILKBLAZE 3 (PTY) LTD

SILKBLAZE 4 (PTY) LTD

RUSTYROSE 52 (PTY) LTD

First Plaintiff

Second Plaintiff

Third Plaintiff

Fourth Plaintiff

Fifth Plaintiff

Sixth Plaintiff

Seventh Plaintiff

Eighth Plaintiff

and

P.J.J CILLIERS

Defendant

JUDGMENT

BAQWA J:

INTRODUCTION

1. This is an action in which the plaintiffs seek an order for specific performance and for a money judgment against defendant. The plaintiffs seek an order in terms of which defendant must effect certain developments on specified erven on the Legend Golf and Safari Resort ("the Legend") and to pay levies, rates and taxes in respect thereof.

Further the plaintiffs seek judgment for the payment of the sum of R23 million with interest, alternatively the payment of R5 million with interest together with costs suit.

2. The first plaintiff is Jacobus J.G Nel ("Nel") a businessman of the farm Baviaanskloof 290 in the district of Potgietersrus, Limpopo Province whilst the second to the eighth plaintiffs are companies which were incorporated by the first plaintiff and which individually own an erf each on the Legend.
3. The defendant is Petrus J.J Cellier a businessman of Entabeni Private Game Reserve, Haakdoring Road, Sterkrivier, district Potgietersrus, Limpopo Province.

BACKGROUND

4. During 2006 the defendant was in the process of developing an upmarket golf estate, the Legend. First plaintiff and defendant were business acquaintances and they had discussions during which first plaintiff expressed his interest to invest in the development.
5. It was agreed between first plaintiff and defendant that the latter would sell shares in the Legend to first plaintiff for the sum of R8 million. It was also part of that agreement that first plaintiff would acquire (7) seven erven in the development for which he (first plaintiff) undertook to arrange financing. The investment amounts were paid to the development company and subscription for shares in it.
6. It is common cause that upon acquisition of the shares in Legend, first plaintiff had them transferred to the Koos Nel Trust. The property investment was made by acquiring the properties in the seven companies each of which obtained a bank loan from ABSA Bank for the purchase price of each erf and for which first plaintiff stood as surety.
7. During November 2007 defendant recruited new investors from Kuwait. Subsequent to this development first plaintiff opted to withdraw from the investment he had made in Legend. The reason for opting out was that defendant had brought the Kuwaitis in as business partners: first plaintiff was unwilling to partner with new entrants on account of their race and creed. As he put it in his e-mail, he said "...ek trek nie in juk saam met 'n mohamedaan nie..."

8. Defendant tried to persuade first plaintiff not to withdraw from the partnership which they were in the process of establishing. After a while, in February 2008 defendant agreed to buy his interest for 2,5% of what defendant estimated the development would be worth after another 3 years.
9. First Plaintiff drafted the document which contained the new agreement and which for purposes of these proceedings has been referred to as "D1". He recorded therein that the "payments" to him were to be in terms of "...*belasting vriendelik*..." transactions. Put simply, this meant the repurchase of his shares would have resulted in a profit of R23 million for him, subject to capital gains tax of 40% as (an individual) and 28% (if in a company).
10. In the circumstances, paragraph 2 of "D1" ought not to be taken literally to mean that the R30 million was to be paid in cash to first plaintiff personally three years later. The reference to the future "*transaksie*" which "...*sal...wees*" was an indicator of the manner in which the "payment" was to be made and was still to be agreed to make it "*belasting vriendelike*".
11. First plaintiff and defendant began negotiations concerning the payment of R30 million which would be made to first plaintiff in a manner that would avoid a huge tax liability. Notably, the development had by then not yet generated significant profits though the parties remained optimistic. At that point, first plaintiff accepted that a downright payment of R30 million would not be feasible.
12. In the evidence "D2" is translated as follows:

"whereas the parties had concluded an agreement about 18 February 2008 [that is now

D1]...”

“In terms thereof an amount of R30 million was repayable [terug betaalbaar] within a three-year period and whereas the parties have renegotiated the agreement [heronderhandel]. Therefore, the parties now agree as follows:

- (1) *The amount of 6 million as payable immediately [which is already been paid];*
- (2) *Cellier, that is the defendant, undertakes to pay a further R6 million in cash in three equal annual instalments. The first instalment shall be paid on the first business day of May 2012 and the same for the subsequent years. The aforementioned annual payments will bear compounded interest which shall be calculated monthly at the prime lending rate of ABSA Bank plus 3.5 percent from March 2011.”*

13. Three years later in June 2011, the parties agreed that instead of the 30 Million, there will now be the R6 million which had already been paid and another R6 million which must be paid in three annual instalments and which will bear interest. This is “D2”.

THE LAW

14. The relevant provisions of the *National Credit Act* 34 of 2005 (“the NCA”) are as follows:

14.1 Section 8(4):

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

- (a) ...
- (b) ...
- (c) ...

(e) ...

(d) ...

(e) ...

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

(i) *the agreement; or*

(ii) *the amount that has been deferred."*

14.2 Section 40 (4):

"A credit agreement entered into by a credit provider who is required to be registered in terms of subsection (1) but who is not so registered is unlawful."

14.3 Section 89 (5):

"If a credit agreement is unlawful in terms of this section, despite any other legislation or any provision of an agreement to the contrary, a court must make a just and equitable order including, but not limited to an order that-

(a) *the credit agreement is void as from the date the agreement was entered into."*

14.4 Section 90 (2)

"A provision of a credit agreement is unlawful if-

(a) *its general purpose or effect is to-*

(i) *defeat the purposes or policies of this Act;*

(ii) *..."*

EVIDENCE

15. The only evidence tendered in this trial was first plaintiff's evidence. He confirmed the facts which are common cause, namely, that he and defendant had entered into a share purchase agreement in Legend and that they had subsequently concluded agreements which have now been identified as "D1" and "D2".
16. Initially first plaintiff was adamant that "D1" had been drawn up by defendant but later conceded under cross-examination that he had made an error when he said so. "D1", so he admitted, had been drawn up by first plaintiff himself. He confirmed that he purchased 2.5 million percent shares in Legend for an amount of R5 million and that in clause 2 of that agreement five erven in the development would be given as security for payment of the amount of R5 million as well as an amount of R2 million in respect of a company known as Verylasminute which is not the subject of the present case.
17. A huge amount of detail was elicited from first plaintiff in his evidence in chief and under cross examination about the tax implications of the agreements which first plaintiff and defendant entered into but I do not propose to dwell on those in this judgment for reasons which will become clear below.
18. First plaintiff confirms that after his attempted withdrawal from the share purchase agreement in Legend, that led to the conclusion of a written agreement on 18 February 2008 which was a one-pager document, referred to as "D1". This is the agreement in which it was stated that the transactions should be *"belasting"*

vriendelik” which was intended to mean that profit should be shown as a capital gain rather than income and that such capital gain would be in a company rather than in a trust. First plaintiff conceded that for this reason “D1” was inchoate.

19. First plaintiff testified that on 20 June 2011 the parties entered into a further agreement, “D2”. The purpose of “D2” was to structure the manner in which defendant would pay the R30 million agreed upon in “D1”. In “D2” the cash portion payable was reduced to R12 million, R6 million of which had already been paid. The remaining balance of R6 million would be payable over the next three years in three annual instalments subject to interest at prime (ABSA Bank) plus 3.5% per annum. This in essence is the money which the plaintiffs seek judgment against the defendant, namely the cash amount in paragraph 2 of “D2”, alternatively, in the event that “D2” is found to be unenforceable, the balance of R23 million arising from paragraph 2 in “D1”.
20. Before discussing the merits of the plaintiffs’ claim I need to briefly discuss two issues arising from an amendment of the defendant’s plea and the other arising from the plaintiff’s evidence-in-chief and from submissions by plaintiffs’ counsel.

FIRST PLAINTIFF NOT A PARTY

21. The defendant submits that the plaintiffs have failed to demonstrate that first plaintiff had acted in his personal capacity when concluding “D1” and “D2”.
22. They submit that first plaintiff’s own evidence confirms that at all times he had been acting as a trustee of Koos Nel Trust and that in “D1” and “D2” first plaintiff was dealing with trust assets, namely, the Legend shares and the shares in the

seven companies which were all registered in the name of Koos Nel Trust.

23. First plaintiff was cross-examined at length regarding his relationship with the Koos Nel Trust and it was repeatedly suggested to him that he could not, at will, and without reference to the other trustees deal with trust assets as if they were his own personal property. Whilst seemingly conceding that what was put to him was the correct legal position he doggedly refused to accept that the trust assets no longer belonged to him and that he no longer had the right to deal with trust assets on his own. In first plaintiff's refusal to accept his lack of capacity to deal with trust assets he did not dispute that in 2001 he had transferred the assets in all his businesses and companies to the Koos Nel Trust.
24. According to first plaintiff, he regards the trust as his "alter ego" and states that he did not need permission of other trustees for each and every decision regarding the trust assets. As far as he was concerned, all the bank accounts in the whole group are his own "...Koos Nel Group are my accounts it is my Group..."
25. In his own words, acquiring the Legend shares in Koos Nel Trust was his "footwork ... to minimise tax responsibilities and I wanted the capital growth in this development which was promising at that stage to rather occur in my trust..."
26. Defendant's defence which surfaced later in his case that he never concluded an agreement with first plaintiff in his capacity but in his capacity as trustee of Koos Nel Trust is inconsistent with an affidavit he had filed in opposition to an application for summary judgment. In that affidavit he admits under oath that

“D1” and “D2” were concluded between first plaintiff and himself. No mention was made at all of the Koos Nel Trust.

27. It also seems apparent from a perusal of both “D1” and “D2” that the description of the parties refers to them in their personal capacities. It is common cause that “D1” was drafted by first plaintiff and endorsed by defendant and that “D2” was drafted by defendant.
28. In the circumstances it does not seem that much credence can be placed on defendant’s defence that he concluded agreements with the Koos Nel Trust and not with first plaintiff.
29. The plaintiffs submit that even if it were to be accepted that first plaintiff acted in his capacity as a trustee of the Koos Nel Trust without defendant knowing that first plaintiff acted for an undisclosed principal (“the Koos Nel Trust”), it would not make any difference to first plaintiff’s *locus standi* to claim specific performance from defendant.
30. In **Botha v Gijose t/a Paragon Fisheries [2007] SCA 73** (RSA) the Court had to determine whether a person acting as an agent for an undisclosed principal was entitled to sue in his own name. The Court *a quo* sitting in an appeal from the Magistrates’ Court found that the agent of an undisclosed principal had no *locus standi* to sue. The Supreme Court of Appeal overturned the decision of the Court *a quo* and said:

[8] *It would appear that the doctrine of the undisclosed principal was not fully understood. The rights of the agent as against the third party are succinctly*

summarised by Joubert, LAWSA 2ed paras 228 and 231 as follows:

Par 228: 'In a standard situation of representation the representative acquires no rights and incurs no liabilities from the contract concluded by him or her on behalf of his or her principal. The rights and obligations come into being between the principal and the third person. In an undisclosed principal situation, the intermediary and the third person create vincula iuris between themselves by the contract concluded in their own names, but also so it is said, alternative vincula iuris between the undisclosed principal and the third person.'

Par 231: 'The contract is concluded between the third person and the intermediary acting in his or her own name. The third person is in terms of the contract liable to the intermediary. He or she cannot avoid liability to the intermediary on the ground that he or she is liable to the undisclosed principal, unless and until the undisclosed principal elects to hold him or her liable.'...

'I am therefore of the view that both on principle and on the authorities it is not proper for an agent to sue as representing his principal by suing in his own (that is the agent's own) name, where the claim being enforced is that of the principal and the principal is the true plaintiff. This does not, of course, apply where the agent has the right to sue in his own name, as is the case where he has contracted on behalf of an undisclosed principal and sues on the relevant contract.'

The appellant throughout the negotiations and conclusion of the agreement acted in his personal capacity. No mention was made of the close corporation. It seems clear that what happened, (as so often does with lay persons), is that the appellant did not see the close corporation as a separate legal entity and considered that he and the close corporation were one and that he was entitled personally to sell the business..."

31. Evidently from the above judgment, an intermediary does have *locus standi* to sue in his own name until the undisclosed principal elects to hold the third party liable, which was not the case in the present case.

32. In the result, the objective facts do not support the defence which the defendant raises regarding the first plaintiff's *locus standi*. On the defendant's own evidence, the Koos Nel Trust was a mere adjectus in the relationship between first plaintiff and defendant. See **ABSA Brokers (Pty) Ltd v Stolz and Others [2002] 4 ALL SA 476 (NC)**.

SETTLEMENT AGREEMENT

33. The plaintiffs submit in their closing argument that "D2" was intended by the parties to be a "...settlement of their disputes and that clauses 2,3 and 4 of "D2" do not fall foul of the provisions of Section 8 of the NCA. They seek support for this proposition in the matter of **Ratlou v MAM Financial Services SA (Pty) Ltd 2019 (5) SA 117 (SCA)**.
34. This submission by the plaintiffs is being raised irregularly in that heads of argument are not pleadings and a party may not raise a potential defence in that manner.
35. Further, during the evidence-in-chief plaintiffs' Counsel tried to introduce the settlement issue through a leading question which attracted an objection. In response, plaintiffs' Counsel stated that "settlement" was not the correct characterisation of "D2" and disavowed any reference to the Ratlou decision.
36. Another reason why the "settlement" argument is not sustainable is that it was never pleaded as part of the plaintiffs' case.

37. The most baffling aspect of the submission that "D2" ought to be interpreted as a settlement is that plaintiff had until the latter stages of this case conceded that clauses 2,3 and 4 of "D2" fall within the ambit of clause 8(4) of the NCA.
38. Besides the provisions of Section 8 it is not in dispute that none of the plaintiffs were registered as credit providers in terms of the Act. This renders "D2" unlawful in terms of Section 89 (2)(d) and nullifies any argument to the contrary.

ENFORCEABILITY OF PLAINTIFFS' CLAIMS

39. First's plaintiff evidence was that "D2" was substituted by "D1" and this resulted in a new set of obligations for the parties.
40. It is correct that the plaintiffs' claim is premised on "D1" or alternatively on "D2". The viability of the claim becomes questionable from the very onset, when one considers that "D1" had been renegotiated by the parties and substituted. The payment of R30 million by defendant at the end of February 2011 had been reduced in "D2" to R12 million. "D1" cannot be resuscitated in any form in the absence of an agreement between the parties to that effect. Plaintiffs' attempt to revive "D1" by restating its terms in their particulars of claim cannot bring it back into existence.
41. As stated above, clauses 2,3 and 4 of "D2" constitute a "credit agreement as defined in Section 8(4)(f) of the Act and it is common cause that none of the plaintiffs were registered as credit providers in terms of the Act.

42. The only conclusion that can be reached in the circumstances is that “D2” is unlawful in terms of Section 89 (2)(d).
43. Considering first plaintiff’s evidence and the overarching intention of what the parties sought to achieve in the original agreement and in the subsequent “D1” and “D2”, I am not persuaded, as was argued, that clauses 2,3 and 4 of “D2” are severable from the rest which would leave the whole of “D2” unlawful.
44. The applicability of the Act generally and Section 40 in particular to the agreements between first plaintiff and defendant is emphasised by the Supreme Court of Appeal in the matter of **Du Bruyn N.O and Others v Karsten 2019 (1) SA 403 SCA** where the following was said:

“[21] Section 40(1) was amended by Act 19 of 2014 to delete any reference to 100 credit agreements. It now reads as follows:

‘A person must apply to be registered as a credit provider if the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of s 42 (1).’

Therefore the amount of credit provided is now the sole determining factor to ascertain whether a credit provider is obliged to register.”

45. The Court went on further to state the following:

“[27] *While it may be reasonable, and indeed eminently sensible, to interpret s 40 as being inapplicable to once-off transactions where the role players are not participants in the credit market, it is difficult to reconcile this interpretation with*

the language of the provision, its context and purpose. The legislature has set thresholds that trigger the obligation to register where a single transaction is in excess of the prescribed amount. To conclude that this does not apply to once-off transactions or to those who are not regular participants in the credit market, is, however attractive and sensible it may sound, not being true to the text and the context of the statute. As stated in Potgieter, to find otherwise would be to substitute what is justifiably seen as regulatory overreach with judicial overreach.[15] Lamenting the dismal drafting of the NCA, the Constitutional Court suggested that we accept the words of the provision of the statute, acknowledge the drafting error and leave it to parliament to correct.

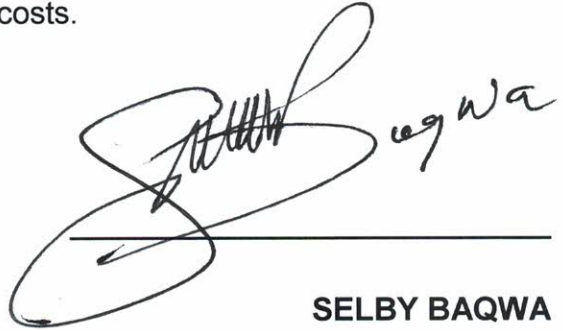
[28] In summary the only conclusion to be drawn is that the requirement to register as a credit provider is applicable to all credit agreements once the prescribed threshold is reached, irrespective of whether the credit provider is involved in the credit industry and irrespective of whether the credit agreement is a once-off transaction. That it is an imperfect solution is readily accepted, but it is for the legislature to remedy, rather than for the courts to attempt to accommodate deficient drafting by attributing a meaning to s 40(1)(b) that is not justified by the wording of the statute."

46. None of the parties have claimed that "D2" be declared void or invalid nor have they claimed restitution.
47. In the circumstances the finding and conclusion I come to is that "D2" is unlawful and unenforceable.

ORDER

48. In the result, I make the following order:

48.1 The plaintiffs' claims are dismissed with costs.



SELBY BAQWA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Matter Heard On	:	5 October 2020 to 16 October 2021
Judgment Reserved On	:	15 October 2021
Judgment Delivered On	:	<u>15</u> February 2021

APPEARANCES:

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	:	Adv. JHA Saunders
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Counsel for the Defendant	:	Adv. JD Maritz [SC]
Attorneys for the Defendant	:	Savage, Jooste and Adams Inc.