

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 6096/2008

In the matter between:-

QUINCE PROPERTY FINANCE (PTY) LTD Plaintiff
Formally known as **ZS RATIONAL FINANCE (PTY) LTD**

and

<u>HONEY & PARTNERS INC</u>	1 st Defendant
<u>E F SAFFY</u>	2 nd Defendant
<u>R J BRITZ</u>	3 rd Defendant
<u>J J VAN ZYL 1ST DEFENDANT</u>	4 th Defendant
<u>N J NAUDE</u>	5 th Defendant
<u>J M BURGER</u>	6 th Defendant
<u>N J G DREYER</u>	7 th Defendant
<u>C J POTGIETER</u>	8 th Defendant
<u>H L BUCHNER</u>	9 th Defendant
<u>J DU TOIT</u>	10 th Defendant
<u>G DE BEER</u>	11 th Defendant
<u>N H BARNASSCHONE</u>	12 th Defendant
<u>D J J DE VILLIERS</u>	13 th Defendant
<u>S J LE ROUX</u>	14 th Defendant
<u>J J FEUTH</u>	15 th Defendant
<u>L B SAFFY</u>	16 th Defendant
<u>H E VAN DER WALT</u>	17 th Defendant
<u>A PRINSLOO</u>	18 th Defendant
<u>G S GOODES</u>	19 th Defendant

HEARD ON: 19, 20, 21, 22 JANUARY 2010

JUDGMENT: EBRAHIM, J

DELIVERED ON: 18 MARCH 2010

[1] This trial is concerned with the interpretation, validity and terms of an agreement entered into between the plaintiff and the defendants in terms of which the plaintiff claims payment of an agreed amount of R744 883,02 from the defendants.

[2] The plaintiff's claim is based on a standard form written finance agreement ("the finance agreement") concluded between the plaintiff, a close corporation known as Joroy 0002 CC ("Joroy") and the defendants Honey and Partners ("Honey"). Honey has defended the plaintiff's claim and in defence relies on an agreement ("the master agreement") concluded between Honey and the plaintiff.

[3] 3.1 The context in which the agreement between the plaintiff and the defendants (Honey) was concluded is

the following: The plaintiff, a limited liability company, was initially known as Dynarc Bridge Finance (Pty) Ltd. It thereafter changed its name by special resolution to ZS Rational Finance (Pty) Ltd and then to Quince Property Finance (Pty) Ltd, the name in which it sues the defendants. It is a company which conducts business as a money lender and has its principal place of business in Tyger Valley in the Western Cape. The first defendant is a company with limited liability conducting business as legal practitioners in terms of section 23 of the Attorneys Act, 53 of 1979 at its principal place of business in Bloemfontein. The remaining defendants are all directors of the first defendant.

- 3.2 During 2004 the first defendant was approached by the plaintiff with a view to obtaining legal assistance in regard to a new business venture which plaintiff intended embarking upon. The new venture was concerned with the granting of bridging finance in the context of property transactions. The first defendant was required by the plaintiff to formulate the necessary

contracts required to conduct the business of the granting of finance. It was envisaged that the plaintiff would negotiate agreements with the estate agents whereby the estate agency would appoint the first defendant as conveyancing attorney in the knowledge that the latter had an agreement with the plaintiff whereby financing for the payment of certain matters connected with the property transaction would be readily available subject to the condition that the registration of the transfer of the property sold by the estate agency would be dealt with timeously and effectively. This business venture required that there be a contract to regulate the relationship between the plaintiff and the borrower of the finance as well as the conveyancing attorney and for this purpose a standard finance agreement was drawn up by Deon Rossouw ("Rossouw") an attorney employed as a professional assistant at the time by the first defendant (Honey). The standard finance agreement was printed and embodied in book-form called "Die Kontrakboek". It was intended that a number of attorneys firms would be involved with the plaintiff in the business venture.

Honey was appointed as the attorney to draft the preliminary agreements in connection with the business venture, hence the standard format agreement contained in “Die Kontrakboek”. It was also agreed between the plaintiff and the first defendant that an agreement regulating the relationship between the plaintiff and the conveyancing attorney appointed by the plaintiff to attend to the registration of transfer of the property transaction in respect of which plaintiff had loaned monies was necessary. For this purpose an agreement termed “the master agreement” was formulated by Rossouw. At the trial Rossouw’s evidence that the master agreement was intended to be a blueprint to regulate the plaintiff’s relationship with every conveyancing attorney appointed to deal with the registration of the transfer of property transactions in respect of which the plaintiff had loaned money, was not contested.

- [4] 4.1 On 24 August 2004 Honey and the plaintiff (Dynarc Bridge Finance (Pty) Ltd) signed an agreement (“the master agreement”). I set out hereunder the salient

portions of the agreement. The preamble to this agreement provides as follows:

“WHEREAS the Attorney has received instructions to proceed with the registration of transfers of properties in terms of Deeds of Sale.

AND WHEREAS as the funds for the payment of the transfer duty, transfer and bond costs and any other costs, related to the transfer, have been included in a bond to be registered in favour of a Financial institution.

AND WHEREAS the purchasers wish to utilise the funds of DYNARC BRIDGE FINANCE to pay transfer duty and rates & taxes.”

Clause 1 provides as follows:

“1. THE ATTORNEY’S OBLIGATION

The Attorney undertakes unto and in favour of DYNARC BRIDGE FINANCE that:

- (i) The maximum capital sum will only be utilised for the purpose of obtaining a Transfer Duty Receipt and/or Rates and Taxes Certificate, as the case may be, and for no other purpose whatsoever,

unless agreed thereto in writing between DYNARC BRIDGE FINANCE and the attorney.

- (ii) The maximum capital sum shall be deposited into the Attorneys Trust Account.
- (iii) The Attorney will furnish a certified copy of the Transfer Duty Receipt reflecting the payment of the transfer duty to the South African Revenue Services on demand to DYNARC BRIDGE FINANCE.
- (iv) Registration of the Transaction will not exceed 30 days from commencement date of loan, failing which additional fees of R2,50 plus VAT per R1000,00 per day will be payable by the purchaser.
- (v) Whenever a purchaser or a seller, whatever the case may be, is desirous to obtain finance for the payment of transfer duty and/or rates and/or taxes, the Attorney, where possible, will recommend that the purchaser or seller, whatever the case may be, use DYNARC BRIDGE FINANCE as financier.
- (vi) The Attorney will attend to the duly completion of the financing agreement entered into between DYNARC BRIDGE FINANCE, the Attorney and the purchaser or seller, as the case may be.”

Clause 3:

3. THE ATTORNEY'S UNDERTAKINGS

The Attorney hereby irrevocably undertakes to:

- (i) Use DYNARC BRIDGE FINANCE where possible as financier in a conveyancing transaction where the Attorney is the Conveyancer and where a purchaser or seller requires finance with regards to the payment of transfer duty and/or rates and/or taxes and to use no other financier for the currency of this agreement.
- (ii) Make payment to DYNARC BRIDGE FINANCE of the financed amount within a period of 72 hours from the date of registration of transfer of the property.
- (iii) Make payment to DYNARC BRIDGE FINANCE of the administration fee of 3% (minimum of R300) and finance charges calculated at 2,3% on the amount advanced for a 30-day period within a period of 72 hours from the date of registration of transfer of the property.
- (iv) In the event of cancellation of the transaction and where the loan amount is still in the possession of the attorney, to pay DYNARC BRIDGE FINANCE any balance of the capital amount advanced and also the administration fee within a period of 72 hours after cancellation. DYNARC BRIDGE

FINANCE shall be entitled to recover from the Attorney all amounts due including the administration fee and finance charges. If the Attorney does not hold sufficient funds to pay the capital amount and administration fee, the Attorney undertakes to take all reasonable steps to recover the outstanding monies from the Purchaser and upon recovery to make payment thereof to DYNARC BRIDGE FINANCE. If the attorney has already made payment to the Receiver of Revenue and/or relevant local authority, he undertakes to take all reasonable steps within a reasonable time to recover the money paid and shall immediately upon recovery of any money, make payment to DYNARCH BRIDGE FINANCE of the money recovered. He does not however warrant this payment of this amount but warrants that he will assist DYNARC in all necessary litigation steps to recover the money from the party concerned.

- (v) In the event of death and/or insolvency of the borrower, the attorney shall be under no obligation to make payment to DYNARC BRIDGE FINANCE but shall immediately advise DYNARC BRIDGE FINANCE of the occurrence of death and/or insolvency of the Borrower and furnish DYNARC

BRIDGE FINANCE with documentary proof thereof. The attorney shall furthermore liaise with the executor and/or curator, as the case may be, and take all reasonable steps in order to recover the monies owing to DYNARC BRIDGE FINANCE but does not warrant the repayment of the amount.

(vi) Pay DYNARC BRIDGE FINANCE on demand all the amounts due including the Administration fee and finance charges in the event of the transaction be delayed, for whatever reason for a period of more than 90 days. This clause is subject to the provisions of clauses (iv) and (v) above.

(vii) Make use of the following bank account, which belongs to DYNARC BRIDGE FINANCE:

Bank name: STANDARD BANK LIMITED

Branch no: 055 534

Account holder: DYNARC BRIDGE FINANCE
(PTY) LTD

Account number: 041 274 458"

Clause 4:

"4. DYNARC BRIDGE FINANCE undertakes to:

(i) Negotiate agreements with estate agencies whereby such estate agency will appoint the Attorney as conveyancer, knowing that the Attorney has an agreement with DYNARC

BRIDGE FINANCE whereby financing for the payment of transfer duty and/or rates and/or taxes is readily available, subject to certain conditions and therefor that the registration of the transfer of a property sold by the estate agency will be dealt with timeously and effectively.”

Clause 5:

“5. DURATION

This agreement commences on the date that the last party to this agreement to have signed this agreement has in fact done so and shall continue to be binding on the parties for a period of five years from date of commencement.”

Clause 7:

“7. RESPONSIBILITY

- (i) Furthermore the warranties given by the Attorney in this agreement and furthermore the conditions of this agreement, the Attorneys accepts that he is responsible for payment of all amounts due to DYNARC BRIDGE FINANCE by the borrower.
- (ii) DYNARC BRIDGE FINANCE will cede its claim, against the borrower, to the Attorney, after payment thereof by the Attorney to recover the amount paid to DYNARC BRIDGE FINANCE in terms of this agreement.”

It was common cause at the trial that the master agreement had been signed by plaintiff's representative, Mario Nel ("Nel") and by the second defendant ("E. F. Saffy").

4.2 On 29 June 2006 an addendum to the master agreement was formulated and agreed upon by Rossouw and Nel (acting on behalf of ZS Rational Finance (Pty) Ltd).

"WHEREAS the Attorney entered into an agreement with Dynarc Bridge Finance (Pty) Ltd which company has since changed its name to ZS Rational Finance (Pty) Ltd or with ZS Rational Finance (Pty) Ltd on 25 day of August 2004 (hereinafter referred to as the 'Master Agreement');

AND WHEREAS in terms of clause 5 of the Master Agreement the duration of the Agreement was for a specified period of time;

AND WHEREAS ZS RATIONAL FINANCE and the ATTORNEY wishes to renew the Master Agreement and/or amend clause 5 of the Master Agreement.

NOW THEREFORE ZS RATIONAL FINANCE and the ATTORNEY agree as follows:

1. REVIVAL OF MASTER AGREEMENT, ADDENDUM

- 1.1 In the event where the Master Agreement has lapsed, ZS RATIONAL FINANCE and the ATTORNEY hereby agrees to enter into a new Agreement on exactly the same terms and conditions as the Master Agreement, subject to any changes, if any, as stipulated in this agreement.
- 1.2 ZS RATIONAL FINANCE and the ATTORNEY agree that in the event where the Master Agreement has lapsed and further transactions had occurred between ZS RATIONAL FINANCE and clients of the ATTORNEY, ZS RATIONAL FINANCE and the ATTORNEY confirms that such transactions was done on exactly the same terms and conditions as the Master Agreement.
- 1.3 In the event where the Master Agreement is still binding between ZS RATIONAL FINANCE and the ATTORNEY, then and in that event this agreement shall be an addendum to the Master Agreement.

2. DURATION

- 2.1 Clause 5 of the Master Agreement is amended insofar as the agreement between ZS RATIONAL FINANCE and the ATTORNEY shall endure indefinitely, subject thereto that either party can cancel the agreement with 30 (thirty) days prior

notice delivered to the domicilium address of the other party.

2.2 In the event of notice of cancellation, the cancellation shall only be effective upon date where any amounts owing to ZS RATIONAL FINANCE which was lend through the ATTORNEY, have been paid in full.”

It is apparent that the principal change in the addendum refers to the duration of the master agreement; where the original master agreement was limited to a period of five years the addendum made the effective period of unlimited duration, that is the master agreement, was to endure indefinitely. It was also agreed that in the future the master agreement would regulate relationships between the plaintiff and the conveyancing attorney in respect of all bridging finance, namely in respect of all kinds of loans made by the plaintiff to the borrower.

[5] 5.1 On 23 March 2006 at Bloemfontein the plaintiff, represented by Nel, concluded a finance agreement with Joroy CC (“Joroy”) as borrower and Honey

represented by Rossouw, as conveyancing attorney in respect of a property described as Plot 8995, Forrestdale, Kimberley, owned by Joroy and sold by it to a company called Bothma Diamonds Incorporated (translated in Afrikaans Bothma Diamante BK) on 9 March 2006. In terms of the agreement which is to be found at pp. 34 and 35 of the documents bundle "A", the plaintiff loaned to Joroy an amount of R300 000,00. The loan was described in the agreement as an "Advance on Profit". The preamble to the agreement reads as follows:

- "1. AND WHEREAS it is recorded that:
- 1.1 The Borrower is the Purchaser, Seller or Mortgagee, as the case may be, of the relevant property(s) described in this agreement and as referred to below and which terms apply *mutuatis mutandis* in whatever context to this agreement in the singular or the plural;
 - 1.2 This short term 'bridging finance' agreement is entered into to facilitate the transfer of the property to the Borrower(s) jointly and/or severally or to facilitate an advance or a bond registration or an advance on the profit of a sale and signature of this document signifies

that all parties to this agreement have read and understood it's terms conditions and reached consensus; and

1.3 That variation of the terms and conditions of this agreement are not valid and binding on any party unless reduced to writing and signed by the parties.

1.4 The reference to Conveyancing Attorney means each Attorney in that firm jointly and/or severally.”

Under terms and conditions the following is agreed between the parties:

“WHEREAS THE BORROWER AND THE CONVEYANCING ATTORNEY WARRANT THAT:-

1. THE CONVEYANCING ATTORNEY WARRANTING HIS AUTHORITY UNDERTAKES THE FOLLOWING OBLIGATIONS:

The Conveyancing Attorney undertakes unto and in favour of ZSRATIONAL FINANCE that:

I) The maximum capital sum will only be utilised for the purpose of the Transfer Duty and/or Rates and Taxes, and/or advance on profit of sale and/or advance on proceeds of bond registration as the case may be, and for no other purpose whatsoever.

- II) The maximum capital sum from the Bond Grantor shall be deposited directly into the Attorneys Trust Account and no other.
- III) The Attorney will furnish a certified copy of the Transfer Duty receipt of the South African Revenue Services on demand, to ZS RATIONAL FINANCE.

2. THE CONVEYANCING ATTORNEY'S WARRANTIES

The CONVEYANCING ATTORNEY unequivocally warrants to ZS RATIONAL FINANCE that:

- I) An Agreement of Sale for the property (as referred to in A above) or a loan agreement between the Mortgagee and bank has been concluded and signed and all suspensive conditions in relation thereto have been fulfilled or waived.
- II) All material facts relating to the transaction are true and correct in every material aspect.
- III) That he is unaware of any impediment to this agreement.
- IV) That his implied duties both under contract and in terms of the Attorneys' Act and any other applicable statutory authority or common law hereto apply.

3. THE ATTORNEY'S UNDERTAKINGS

The Conveyancing Attorney hereby irrevocably undertakes to:

- I) Pay ZS RATIONAL FINANCE the full and complete sum of the sum borrowed plus the interest described therein as at section C above within a period of 72 hours from the date of registration of transfer of the property or registration of the bond, as the case may be, as described above.
 - II) Pay ZS RATIONAL FINANCE the application fee and service charges as set out above within a period of 72 hours from the date of registration of transfer of the property as described above.
 - III) In the event of cancellation of the transaction or the borrower becoming deceased, to pay ZS RATIONAL FINANCE within 72 hours of demand by ZS RATIONAL FINANCE the full amount advanced as described in B above.
 - IV) Pay ZS RATIONAL FINANCE on demand all the amounts due including finance charges and fees in the event of the transaction being delayed, for whatever reason for a period of more than 90 days.
4. DEFAULT: In the unlikely event of the Borrower(s) and/or their Conveyancer defaulting in the payment of any of the

above stated amount the Borrowers and/or Conveyancers waive their common law rights and/or statutory rights to invoke the *in duplum* rule and said rule shall not apply; and, the Borrower(s) and/or Conveyancers agree to pay the total amount advanced, application fee, service fee, finance charges, pay collection commission at the prescribed rate, interest on the total cumulative outstanding sums (capital + interest + fees) from date of default date to date of judgment at the morator interest rate; and, costs of any legal suite on an attorney and client High Court scale.”

5.2 In respect of this agreement, the following matters were common cause, namely

1. that the property concerned was not registered in the name of Bothma Diamante.
2. that the reason for this was that Bothma Diamante was unable to obtain bond finance from a registered commercial financial institution to purchase the property.
3. The transaction was not formally cancelled by Joroy who elected to cut its losses by pursuing

other possible avenues to obtain a purchaser for the property.

4. The transaction was delayed meaning it had not been registered for a period of more than 90 days from the date of the signing of the finance agreement.
5. Joroy defaulted in repaying the loan of R300 000,00 to the plaintiff. The plaintiff was accordingly entitled to invoke the remedy provided by clause 4 of the finance agreement.

[6] After making an unsuccessful demand for repayment of the loan to Joroy plus all fees and charges due to it in terms of the finance agreement, the plaintiff instituted action in this court against the defendants jointly and severally during September 2008. It must be mentioned that this was done after the plaintiff had sought the assistance of the defendants in pursuing Joroy for repayment of the amount of the loan.

[7] 7.1 The plaintiff has based its claim for payment of the agreed amount exclusively on clause 3(iv) of the finance agreement. It has not formulated an alternative

claim against Honey in terms of one of the other clauses in the finance agreement or in terms of the master agreement. For the reader's convenience I reiterate the provisions of clause 3(iv):

"The conveyancing attorney hereby irrevocably undertakes to pay ZS RATIONAL FINANCE on demand all the amounts due, including finance charges and fees in the event of the transaction being delayed for whatever reason for a period of more than 90 days."

7.2 The plaintiff sought, by agreement, at the inception of proceedings, to amend its particulars of claim to extend the ambit of its cause of action against the defendants by including clause 4 of the finance agreement which I remind the reader provides as follows:

"DEFAULT: In the unlikely event of the Borrower(s) and/or their Conveyancer defaulting in the payment of any of the above stated amount the Borrowers and/or Conveyancers waive their common law rights and/or statutory rights to invoke the *in duplum* rule and said rule shall not apply; and, the Borrower(s) and/or Conveyancers agree to pay the total amount advanced,

application fee, service fee, finance charges, pay collection commission at the prescribed rate, interest on the total cumulative outstanding sums (capital + interest + fees) from date of default date to date of judgment at the morator interest rate; and, costs of any legal suite on an attorney and client High Court scale.”

[8] 8.1 The formulation of the plaintiff’s claim is accordingly done on a very narrow basis and limit its chance of success in this action to the “all or nothing” approach it has adopted in the pleadings. In addition Mr. Joubert, counsel for the plaintiff, was constrained to concede in closing argument that the evidence of the plaintiff’s only witness, Willem le Roux, had not assisted the plaintiff in throwing any light upon any of the issues in this case.

8.2 Honey has pleaded that on a proper construction of the master agreement and the finance agreement, it is not liable to the plaintiff alternatively it alleges that the finance agreement should be rectified and as a further alternative that the finance agreement is void as a result of a common or unilateral mistake.

8.3 It was agreed between counsel that in respect of the first issue, that is that of proper construction of the master agreement and the finance agreement, the plaintiff carried the onus and had the duty to begin because of the additional overall burden that it bears in civil proceedings, whilst the defendants would bear the burden of proof in respect of the special defences raised in their pleadings.

See: **PILLAY v KRISHNA AND ANOTHER** 1946 AD 946 at 952 – 953 and **SOUTH CAPE CORPORATION (PTY) LTD v ENGINEERING MANAGEMENT SERVICES (PTY) LTD** 1977 (3) SA 534 (A) at 548.

[9] The only evidence relative to the issues in this case was presented by two defence witnesses, Deon Rossouw and Mario Nel. In this regard this is a peculiar case in that the only evidence which tends to throw light on the intention of the parties on contracting with each other in respect of both the master agreement and the finance agreement, has been presented by the defendant.

- 9.1 Mario Nel represented the plaintiff and Rossouw represented the defendant in the conclusion of the two agreements. The uncontested evidence of both these witnesses was that Honey would not “staan pa” for any monies loaned by the plaintiff to a borrower/client of Honey.
- 9.2 Deon Rossouw, is an attorney of the High Court of South Africa and at present a director of the first defendant (Honey). In 2004, in his capacity as a professional assistant attorney of the firm, he drafted the original master agreement and the finance agreement. He also represented Honey during negotiations with the plaintiff (Mario Nel) when the master agreement was negotiated, discussed and concluded. He said after these discussions it was agreed that the master agreement would be amended to incorporate a further agreement which had been reached between the parties. In response to a question in cross-examination by Mr. Joubert as to what he meant by the word “amend” he responded as follows:

“U edele, die meestersooreenkoms is die ooreenkoms wat die verhouding tussen die partye reël.

Tussen Dynarc en die prokureurs. In die sluiting van daardie ooreenkoms, daar is ‘n boekkontrak wat ‘n standaard finansieringsooreenkoms is, dit is ‘n standaardformaat en as daar in daardie ooreenkoms byvoorbeeld klousules of terme is wat nie, want in daardie kontrak gee ‘n prokureur ook sekere ondernemings. As hy nie tevrede is met daardie ondernemings nie, word dit gewysig op die meestersooreenkoms of word dit in die meestersooreenkoms gestipuleer. Die meestersooreenkoms sal dan gesluit word sonder dat daar nog enige finansieringsooreenkoms waartoe ‘n prokureur ‘n party is, gesluit is. Maar dit was definitief die bedoeling tussen onself en Dynarc dat as ons die finansieringsooreenkoms dan teken, dat daardie ondernemings wat in daardie ooreenkoms gegee word, is onderhewig aan die ondernemings in die hoofooreenkoms.”

As I understood his evidence, it amounted to the following: that it was agreed between the parties orally that any clause in the finance agreement which sought to saddle the defendants with liability for repayment of the loan made by the plaintiff to the borrower/Honey’s client, would be superseded by the master agreement

which they agreed was to be amended to reflect that any reference to the defendant's liability to the plaintiff in respect of monies loaned by the plaintiff to the borrower/Honey's client, was to be regulated by clause 3 of the master agreement so that in effect the only agreement between the plaintiff and the defendants regulating their relationship, would be the master agreement and not clause 3 of the finance agreement to which Honey was a party. The amendment was agreed upon orally between Nel and Rossouw but not recorded specifically in writing so that there was no specific written amended master agreement in this respect. The master agreement would magically be transformed in accordance with the orally agreed amendment and would exist as the one and only agreement regulating the relationship between the plaintiff and the defendant in respect of monies loaned for any kind of transaction by the plaintiff to the borrower/Honey's client. (See exhibit A4 and 5.)

Rossouw testified that it was not possible to strike out the offending clauses seeking to impute liability for

amounts advanced by the plaintiff to its borrowers,
because

“We are not now going to change each and every finance book format application in writing, it was not necessary we had the agreement, our master agreement.”

This evidence appears at p. 146 of the transcript at line 12 – 15.

In answer to a question put by his counsel, Mr. Green, as to what the amended attorney agreement meant to him, he answered as follows:

“As stated there was an original agreement which included all the warranties from the attorney and that original agreement was sent in a template format to Dynarc and they then printed it on their stationary and presented it to attorneys whenever they entered or wanted a relationship with an attorney. So I amended the template, the original agreement in line with our conversation and negotiation with Mr Mario Nel and then obviously in order to get it on Dynarc stationary I then sent him the amended agreement for Honey attorneys to be printed and to be signed by the parties.”

No doubt Mr. Joubert considered the evidence to be a little bit confusing. He was pressed on the question of what the amended agreement actually meant to him. His evidence in this regard at p. 148 of the transcript at line 18 was the following:

“No it was stated to me that the finance agreement that Honey attorneys signs has got certain warranties and undertakings by the attorney that will apply to that attorney and I do not agree with it, although it has got those warranties and undertakings in the standard wording and in the standard format, it was never the intention that that applies to Honey attorneys.”

He was then asked at p. 149 of the record by Mr. Joubert under cross-examination at line 5:

“Are you aware that its terms contained undertakings in terms of which the attorney as defined in the contract, in your case, in the case of the document at page 34 of the bundle would hold your firm of attorneys, would be liable in terms of that contract, forget for a moment about the master agreement and other intent, that you concede? ---Yes.”

He also agreed that he was aware that when he signed that contract on behalf of Honey and Partners it contained a liability clause. When asked pertinently why he did not take the trouble of simply drawing a line through clause 3 before appending his signature to the finance agreement, he answered:

“M'lady, it is not necessary to draw a line through that clause because I have got another document that regulates that clause. We have got a signed agreement.”

He was then asked to show pertinently where the master agreement regulates the specific transaction that involves bridging finance being granted to Joroy and his answer was:

“It is necessary then at this point in time to explain how the master agreement has come about.”

He was then asked by Mr. Joubert to make a concession that the bridging finance transaction in respect of which the plaintiff loaned R300 000,00 to Joroy with Honey and Partners as a co-signee is not

referred to in the master agreement and he conceded that and then proceeded further with his evidence at line 14 on p. 150 of the transcript:

“When the business started up and when they, when Dynarc ventured into this type of business the original idea was that they will only be financing certain types of property transactions being rates and taxes and... transfer duty. Now the nature of such a transaction there must be a deed of sale, the borrower will always be a purchaser because, well it can also be a seller in the instance of rates and taxes but that is where the business idea originated from and at that point in time when this master agreement was drafted that was the type of financing that they would entertain.”

In response to the court's enquiry as to whether it would have been a hardship to cross out clause 3 in the finance agreement which imputed liability to Honey, and on which basis the plaintiff charges the defendants with liability in this case, he replied in the negative adding:

“But we have referred numerous clients on this bridging finance agreement, loans been granted and repaid etc, on which we never crossed it out because that was the understanding in the agreement, ... and the intention of the parties.”

That evidence is to be found on p. 147 of the typed transcript of the proceedings.

He conceded that the finance agreement containing clause 3 was drafted by him and that he was aware that in accordance with the undertakings as drafted, his firm of attorneys would be held liable in the event, generally speaking, of non-payment by the borrower and that armed with such knowledge he had signed the agreement on behalf of his firm. When asked pertinently by Mr. Joubert to point out a reference in the master agreement to the transaction between the plaintiff and Joroy to which Honey was a co-signatory he evaded giving a direct answer that there was none but ultimately was forced to make that concession as well as the further concession that the master agreement only referred to loans granted by the

plaintiff for the payment of rates and taxes and transfer duty. He was forced to make the concession also that the master agreement provided for no other form of transaction. To the proposition that in the event of a loan required for anything other than rates and taxes and transfer duty such as advance on profits, a separate written agreement regulating such transaction was required, he answered:

“On the interpretation of this master agreement, correct.”

On my understanding of Rossouw’s evidence as a whole, the amended master agreement and the business of the amendment embrace a scenario which could be likened to that found in the fairytale “The Emperor’s New Clothes” – the amendment had been agreed to and it was there, but nobody could see it, except the parties who had agreed to it that is Rossouw and Nel.

- 9.3 Nel’s evidence dovetailed with that of Rossouw in all material aspects. At the time of the conclusion of the

master agreement and finance agreement, he was a director of the plaintiff. He referred to the original master agreement as being part of the plaintiffs insurance policy, the term he used was “staan pa”. He testified that the second defendant, as the most senior member and director of Honey, was adamant that he was not going to let his company, that is the first defendant (Honey), “staan pa” for money borrowed by the clients of Honey from the plaintiff. Nel also testified that his company (at the time Dynarc Bridge Finance (Pty) Ltd) had developed a relationship of trust with Honey and accordingly he agreed to the amendment of the original master agreement in the terms testified to by Rossouw because in effect the master agreement was the agreement which outlined the relationship between Dynarc and Honey in respect of all the transactions for bridging finance granted by Dynarc. He also agreed with Rossouw that it was not possible to change the finance agreement format in the “kontrakboek” because the heavy financial costs involved made such a course of action prohibitive. Each and every conveyancing attorney involved as a

co-signee to loan transactions financed by the plaintiff (Dynarc) would have to be furnished with a “kontrakboek”; that is why, he testified, the master policy, as he put it, was the document which “we used to outline the wording of the finance agreement”. This, he said, made it unnecessary to delete clause 3 of the finance agreement. He confirmed his signature on the addendum to the master agreement and said that the reference therein to “all bridging finance” included advances on profits.

- [10] 10.1 Honey has denied liability to the plaintiff on three main grounds, firstly it has pleaded that on a proper construction of both the master agreement and the finance agreement its relationship with the plaintiff was regulated by the master agreement and not the finance agreement. Accordingly it alleges that it was not liable to pay to the plaintiff the amount of the R300 000,00 loan to Joroy in the event of the said transaction being delayed for a period of more than 90 days. In terms of the master agreement, Honey alleges that it was obliged only to assist the plaintiff in all necessary

litigation steps to recover the amount of R300 000,00 plus interest and administration costs. Secondly, as a first alternative to this defence and only if the proper construction defence is not upheld, Honey has pleaded that the finance agreement does not correctly record the agreement between plaintiff, Joroy and first defendant in that the continuing common intention of the parties was that Honey's obligations to the plaintiff in respect of the loan of R300 000,00 to Joroy were to be limited to the terms set out in clause 3 of the master agreement and calls for the rectification of clause 3 of the finance agreement. Thirdly, as a second alternative defence and only if the proper construction and rectification defences are not upheld, Honey has pleaded that the finance agreement was concluded on the common assumption of the plaintiff and the first defendant that Honey's obligations to the plaintiff in terms of the finance agreement was the same as those set out in clause 3 of the master agreement and as there is a material difference between the first defendant's obligations as set out in the finance agreement and in the master agreement, it never

intended to bind itself in terms of the obligations set out in clause 3 of the finance agreement and that accordingly the finance agreement is void as a result of the common mistake between the parties, alternatively the first defendant's unilateral mistake when entering into the finance agreement with the plaintiff.

10.2 In its replication the plaintiff admits the conclusion of the master agreement but alleges that it does not apply and is irrelevant to the issue of the first defendant's liability to the plaintiff for the amount loaned to Joroy for three reasons namely,

10.2.1 The finance agreement replaced the master agreement.

10.2.2 The finance agreement deals with the specific transaction which forms the subject matter of the dispute between plaintiff and first defendant, namely the loan to Joroy where as the master agreement governs the general relationship between the parties; and

10.2.3 On a proper construction of the master agreement clause 3 of the provisions relating to the undertakings given by Honey apply only to cases where the transaction has been cancelled and the loan amount is still in the first defendant's possession, which is not the case in the present action.

[11] 11.1 I propose to deal *seriatim* with each of the defences raised by the first defendant.

1. **THE PROPER CONSTRUCTION DEFENCE**

The question to be answered in respect of this defence is whether it was the finance agreement which regulated the relationship between the parties in respect of the loan to Joroy in which case the defendants would be liable to the plaintiff as contended for by the plaintiff or whether clause 3 of the finance agreement was replaced by corresponding provisions in the master agreement in which case the defendants would not be liable to plaintiff as contended for by the first defendant (Honey). The answer lies in

the interpretation of the language contained in the two agreements concerned in order to ascertain the common intention of the parties and the true meaning and interpretation of the contracts. I have embarked on this exercise bearing in mind some seminal judicial decisions on the topic as well as the more recent remarks of Harms DP concerning the role of evidence in matters of interpretation in **KPMG CHARTERED ACCOUNTANTS v SECUREFIN LTD AND ANOTHER** 2009 (2) ALL SA 523 (SCA) at 533 par. 39 b where he said the following:

“First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (*Johnson v Leal* 1980 (3) SA 927 (A) at 943B [also reported at [1980] 2 All SA 366 (A) – Ed]). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed)

Phipson on Evidence (16ed 2005) paragraphs 33–64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (*Johnson and Johnson (Pty) Ltd v Kimberly-Clark Corp* [1985] ZASCA 132 (at www.saflii.org.za), 1985 Burrell Patent Cases 126 (A)). Fourth, to the extent that evidence may be admissible to contextualise the document (since ‘context is everything’) to establish its factual matrix or purpose or for purposes of identification, ‘one must use it as conservatively as possible’ (*Delmas Milling Co Ltd v du Plessis* 1955 (3) SA 447 (A) at 455B–C [also reported at [1955] 4 All SA 140 (A) – Ed]).’

Dealing specifically with the parol evidence rule in **JOHNSTON v LEAL** 1980 (3) SA 927 (A) at 943 B Corbett JA spelt out the rule as follows:

“...it is clear to me that the aim and effect of this rule is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract... To sum up, therefore, the integration rule prevents a party from altering, by the production of extrinsic evidence, the recorded terms of an integrated contract in order to rely upon the contract as altered.”

Closely connected to this parol evidence/integration rule is the rule that no evidence may be given to alter the clear and unambiguous meaning of a contract. See **RAND RIETFontein Estates Ltd v Cohn** 1937 AD 317.

- 11.2 The most favoured technique of interpretation consistently applied by our courts remains the application of the “Golden Rule” of interpretation in order to determine the plain ordinary and popular meaning of the language of the contract in the context of the contract as a whole. Joubert JA summarised the approach as follows in **Coopers & Lybrand and Others v Bryant** 1995 (3) SA 761 (A) at 767 E – 768 E:

“According to the 'golden rule' of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument... The mode of construction should never be to interpret the

particular word or phrase in isolation (*in vacuo*) by itself... A The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

- (1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract...;
- (2) to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted...;
- (3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions.”

In **RICHTER v BLOEMFONTEIN TOWN COUNCIL**

1922 AD 57 at 70 Innes CJ dealing with the question of the admissibility of evidence of background circumstances and extrinsic evidence of surrounding circumstances with reference particularly to when they

may be employed as a rule/technique to interpreting a contract stated at pp. 69 – 70:

“Every document should, of course, be read in the light of the circumstances existing at the time, and evidence may rightly be given of every material fact which will place the Court as near as may be in the situation of the parties to the instrument (see judgment of PARKE, B., in *Shore v Wilson*, 9 Cl. & Fin. 556). Where extrinsic evidence is tendered to identify the persons or things referred to - in other words, where it is merely a question of applying the document - the matter is comparatively simple. But where it is sought to interpret the language used by reference to surrounding circumstances, then the enquiry becomes often very intricate. Not because of any doubt as to the test, but because of the difficulty of applying it. The rule itself is clear; apart from cases where words or expressions are used in a technical or special sense, extrinsic evidence is only admissible to explain the construction of a document where words occur which are ambiguous either in themselves or as read with their context. And I agree with the learned JUDGE-PRESIDENT that the evidence admitted must relate to the ambiguity. For it is only allowed in order to explain the meaning of language which, as it stands, is capable of more than one meaning. The object is to ascertain the intention of the parties, not in the abstract, but as embodied in the language of the

instrument. The narrow line upon which enquiries of this nature often proceed, and the important consequences which may be involved in the application of the rigid rule as to ambiguity are well illustrated...”

The learned Judge then goes on to illustrate the rule with reference to two foreign judgments.

- 11.3 The classical analysis of the rule excluding evidence of surrounding circumstances as an aid to interpretation is to be found in the dictum of Schreiner JA in **DELMAS MILLING CO LTD v DU PLESSIS** 1955 (3) SA 447 (A) at 454 – 455:

“There appear to be three broad classes of evidence that are usable in different kinds of cases. Where although there is difficulty, perhaps serious difficulty, in interpretation but it can nevertheless be cleared up by linguistic treatment this must be done. The only permissible additional evidence in such cases is of an identificatory nature; such evidence is really not used for interpretation but only to apply the contract to the facts. Such application may, of course, be itself the cause of the difficulty, giving rise to what is sometimes called a latent ambiguity. If the difficulty cannot be cleared up with sufficient certainty by

studying the language, recourse may be had to 'surrounding circumstances' i.e. matters that were probably present to the minds of the parties when they contracted (but not actual negotiations and similar statements). It is commonly said that the Court is entitled to be informed of all such circumstances in all cases (cf. H Richter's case *supra* at page 69; *Garlick v Smartt and Another* , 1928 AD 82 at p. 87; *Cairns (Pty.) Ltd v Playdon & Co. Ltd.*, *supra* at p. 125). But this does not mean that if sufficient certainty as to the meaning can be gathered from the language alone it is nevertheless permissible to reach a different result by drawing inferences from the surrounding circumstances. Whether there is sufficient certainty in the language of even very badly drafted contracts to make it unnecessary and therefore wrong to draw inferences from the surrounding circumstances is a matter of individual judicial opinion on each case. Cases of this class, though they are generally spoken of as cases of ambiguity, might conveniently be given some such name as 'cases of uncertainty' to distinguish them from the third class of case where even the use of surrounding circumstances does not provide 'sufficient certainty'. These are cases of ambiguity in the narrow sense, where after the surrounding circumstances have been considered there is still no substantial balance in favour of one meaning rather than another. The usual examples of such true ambiguity come from testamentary documents, but examples

are conceivable in the case of contract. In these cases, which will naturally be much rarer than those of uncertainty, recourse may be had to what passed between the parties on the subject of the contract. One must use outside evidence as conservatively as possible but one must use it if it is necessary to reach what seems to be a sufficient degree of certainty as to the right meaning.”

11.4 The difficulty inherent in distinguishing between admissible background circumstances and inadmissible surrounding circumstances was recognised by Harms JA in **SECUREFIN**, *supra*, where at 533 e he stated:

“The time has arrived for us to accept that there is no merit in trying to distinguish between ‘background circumstances’ and ‘surrounding circumstances’. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms ‘context’ or ‘factual matrix’ ought to suffice. (See *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) at paragraphs 22 and 23 [also reported at [2002] 4 All SA 331 (SCA) – Ed] and *Masstores (Pty) Ltd v Murray and Roberts (Pty) Ltd and another* 2008 (6) SA 654

(SCA) at paragraph 7 [also reported at [2009] 1 All SA 146 (SCA) – Ed].)”

Our courts have also frequently quoted, approved and followed the statement of Wessels JA regarding notions of fairness and equity in the interpretation of a contract in **SCOTTISH UNION & NATIONAL INSURANCE CO LTD v NATIVE RECRUITING CORPORATION LTD** 1934 AD 458 at 465:

“We have no right, because we may think that the contract is a hard bargain, to lean towards a construction more reasonable to the insured than the contract constituted by the words of the document.”

Clearly the learned Judge was dealing with a contract of insurance in the matter.

In **SOUTH AFRICAN FORESTRY CO LTD v YORK TIMBERS LTD** 2005 (3) SA 323 (SCA) at 340 par. [32] Brand JA opined:

“... In the interpretation process, the notions of fairness and good faith that underlie the law of contract again have a role to play. While a court is not entitled to superimpose on the clearly expressed intention of the parties its notion of fairness, the position is different when a contract is ambiguous. In such a case, the principle that all contracts are governed by good faith is applied and the intention of the parties is determined on the basis that they negotiated with one another in good faith.”

[12] Neither counsel addressed me in closing argument pertinently on what to me is the pivotal issue in this case, namely the proper construction of the two agreements. I am unable therefore in considering what interpretation to place on those agreements to have regard to any oral submissions by counsel because none were made. Be that as it may, I do not think that had any such arguments been advanced, that any debate would have arisen that applying the golden rule of interpretation to the language of the relevant clauses in the two agreements (clause 3), that they are mutually and unambiguously exclusive where each seeks to impute liability to the first defendant (Honey). In terms of clause 3(iv) of the master agreement, the first defendant's

obligations to the plaintiff are limited to assisting, in the event of cancellation of the transaction, by taking

“all reasonable steps to recover the outstanding monies from the purchaser and upon recovery to make payment to Dynarc Bridge Finance. If the attorney has already made payment to the Receiver of Revenue... he does not however warrant this payment... but warrants that he will assist... in all necessary litigation steps”.

On the plain and ordinary meaning of the language used in clause 3(v) of the master agreement, it is clear that in the event of the death or insolvency of the borrower, the defendant's obligation to the plaintiff is also limited to assisting with recovery of the loan by liaising with the executor of the deceased or insolvent estate. To that end, the first defendant shall repay on demand to the plaintiff the amount of the loan should the transaction have been delayed for whatever reason for a period of more than 90 days. (The underlining is mine). What is clear from the language used in clause 3 of the master agreement, is that the first defendant's liability for repayment of the loan amount to the plaintiff

is non-existent, on my reading, interpretation and construction of the master agreement, its only obligation to the plaintiff being to assist in a legal capacity to recover the amount loaned to the borrower in the event of cancellation of the conveyancing transaction on the latter's death or insolvency. It is also noteworthy that the agreement refers throughout to the purchaser clearly because the agreement is framed in a context that the amount loaned would be in respect of payment of transfer duty, rates and taxes to the Receiver of Revenue. The unambiguous language used in clause 3 of the finance agreement, on the other hand, imputes unequivocal responsibility for repayment of the amount of the loan to Joroy plus finance charges and fees, which I have accepted means administrative costs in the context of the facts of this case, to the first defendant in the event of cancellation of the conveyancing transaction, or the death of the borrower, within 72 hours of such event or in the event of the transaction being delayed for whatever reason for a period of more than 90 days. (Underlining is my own.)

[13] It is apparent from the ordinary meaning of the words used to define the ambit of the master agreement in its preamble and from the plain ordinary meaning of the words used in its substantive clauses that the agreement is concerned only with the provision by the plaintiff of funds for payment of transfer duty, rates and taxes and for no other purpose unless the plaintiff and first defendant agree to the variation in writing. The finance agreement, on the other hand, stipulates the loan of R300 000,00 to Joroy is an advance on profits to be repaid out of the proceeds of the sale and thus capable of being utilised by the borrower (Joroy) for whatever purpose he deems appropriate. Having regard to these two diametrically opposed versions of the first defendant's obligations to the plaintiff in regard to the loan to Joroy, it can hardly be argued by the first defendant, in my view, that in regard to the plaintiff's loan to Joroy and employing the ordinary grammatical meaning of the language used in clause 3 of each of the two agreements, that is the master and the finance agreements, that each of these agreements does not qualify in its own right, based on its own content, as a model of clarity, the material clauses in each of them being clear, unambiguous and consonant with

the balance of the contract which, each in its own respect, pertinently allocates various responsibilities to the remaining party/parties to the contract. I must add though that in comparing and analysing each of these agreements, with reference particularly to the first defendant's liability to the plaintiff, that I have found that the finance agreement has the merit of greater precision.

[14] I deal now with the evidence of context, background and surrounding circumstances (the factual matrix) as an aid to the interpretation of the two agreements. In doing so I am guided by the dictum in SECUREFIN, *supra*, that the limitation and restriction of ambiguity is no longer a necessary pre-requisite for the use of evidence of surrounding circumstances in interpreting documents. The only evidence to which I can have regard in fathoming the common intention of the parties, is that of Rossouw and Nel, provided off course that, on the probabilities, their evidence passes muster and is accepted by this court as being indicative of an intention for the first defendant not to be liable to the plaintiff for the amount loaned to Joroy as contended for by these witnesses. Regrettably though for

the defendants, I am unable to find in their favour, that, on the probabilities, either of these witnesses were credible witnesses and that the interpretation relied upon by the defendants is justified by the underlying text. Given that the intention of the two contracting witnesses must, first and foremost, be gathered from the ordinary grammatical meaning of the language used in the two agreements and not from what either of them may have had in mind at the time of contracting (**VAN PLETSEN v HENNING** 1913 AD 82 at 99), the additional contribution made in ascertaining that intention by reference to the background and surrounding circumstances, that is what transpired between these two witnesses, their negotiations and their conduct, does not, in my judgment, reflect that the master agreement had been amended as testified to by each of them, because their evidence in this regard is unconvincing and improbable. Rossouw is a commercial attorney on his own admission. He drafted both agreements and signed the finance agreement. He did not attempt to deny that he fully understood the grammatical construction and import, and more importantly, the grammatical independence of the language used in clause 3, the clause concerned with the

subject matter of the dispute, in the two agreements. He did not deny that he was fully acquainted with the terms of both agreements and despite the second defendant's objections to assuming liability for repayment of the loan to Joroy in the event of the latter defaulting with payment for whatever reason, he nevertheless signed the finance agreement without deleting clause 3 and clause 4 thereof. His explanation that an oral antecedent agreement between himself and Nel amending clause 3 of the master agreement so as to limit the obligations of the first defendant to plaintiff, to that of taking legal action for recovery of the amount of the loan to Joroy, made the deletion of clause 3 of the finance agreement unnecessary and that, this course of action, if embarked upon, would have been prohibitively expensive for the plaintiff, is at odds with the uncontested objective fact that it would only have been necessary to delete clause 3 of the finance agreement in respect of the Joroy application and that would not have involved the plaintiff in any expense at all. I reject out of hand the testimony of both Rossouw and Nel on this crucial aspect, as being so highly improbable that it is incapable of any credence whatsoever. In doing so I take into account that Nel at the time was, on his own

evidence as well as that of Rossouw's, a director of the plaintiff possessed of inordinate innovative ideas and skills and who described himself with pride on the witness stand as an entrepreneur, always on the lookout to explore new business opportunities and ventures. That is hardly the type of businessman who would ignore the forcefulness and indiscriminate weight of a clause in a contract which he signs on behalf of his company, imputing liability to his co-signee's company (Honey) with an intention to limit the protection accorded to his company (the plaintiff) in the sense conveyed by the ordinary, plain and popular meaning of the language of clause 3 of the finance agreement in the context of that agreement as a whole.

In light of the view I have taken of the testimony of these witnesses, in the critical respects mentioned, I find that I am unable to accept their further testimony that the addendum to the master agreement signed on 27 June 2006, had application to the finance agreement signed by the plaintiff on 23 March 2006, because it referred to all bridging finance which included advance on profits. I am fortified in this conclusion by the fact that the addendum was signed long

after the finance agreement and it was never the defendant's case that the parties intended the provisions of the addendum in this material respect to operate retrospectively as regards the finance agreement. Whilst it is true that Mr. Green in argument submitted that clause 1(i) of the master agreement requiring the plaintiff to agree in writing that a loan can be made for a purpose other than rates and taxes or transfer duty does not require the conclusion of a further agreement in respect of a loan for purposes other than rates and taxes or transfer duty, I reject the further contention advanced by him that the requirement that the plaintiff agree in writing to a variation of the master agreement would be met if the plaintiff were to write a letter authorising such a transaction or if the plaintiff, advised of the purpose of the loan, then produced a written quotation in respect thereof. Whilst there was evidence provided by Rossouw that a quotation was given in respect of the loan requested to Joroy and that loan was in respect of an advance of profits, there is no evidence from the defendants that the provision of that quotation satisfied the requirement in clause 1(i) of the master agreement that the plaintiff agree in writing. So that

argument advanced by Mr. Green is pure speculation on his part and I intend saying no more than that about it.

In passing I comment that the evidence as outlined by the defendants in respect of its defence of a proper construction, must stand out for its extraordinary ability to tantalise the legal mind and whilst not harbouring any doubts as to the correctness of the conclusion I have reached in regard to that defence, the evidence remains perplexing and elusive to the questioning legal mind.

[15] My findings are accordingly that on a proper construction of the master agreement and the finance agreement:

1. The master agreement and the finance agreement are two separate, divisible, distinct and severable agreements, each serving a specific purpose, the one unrelated to the other: the master agreement was concluded in order to regulate the relationship between the plaintiff and Honey in respect of the conveyancing transactions for which the plaintiff had loaned funds for the payment of rates and taxes and transfer duty. It related mainly to the plaintiff's loan to a purchaser in

respect of a property transaction. The finance agreement was concluded in order to regulate the relationship between the plaintiff, Joroy and the first defendant (Honey) in respect of the conveyancing transaction relating to the sale of Joroy's property and for which plaintiff had loaned funds to Joroy as an advance on profit.

2. Each of the master agreement and finance agreement records that the document embodying the agreement is the entire agreement and may not be varied except in writing and on signature by the parties. No written variation of either the master agreement or the finance agreement was recorded and signed by the parties.
3. The master agreement accords a protection to the defendants in that it limits their obligation to the plaintiff to the furnishing of legal assistance in the recovery of the loan for rates and taxes and transfer duty, whilst the finance agreement makes the defendants liable for the repayment of the loan to Joroy in the event of the transaction being cancelled or delayed.

4. The plaintiff's acceptance of Joroy's application embodied in the finance agreement does not constitute the plaintiff's agreement in writing to a variation as required by the master agreement, nor is it the plaintiff's consent to the alleged amendment of the master agreement such as to qualify as an execution of the master agreement. This is impossible in the context of the timeframe in which the master agreement, the finance agreement and the amended agreement as well as the addendum to the master agreement were all entered into on the common cause evidence given by both Rossouw and Nel.

5. The evidence, as contextualised, of the conclusion of the master agreement and the finance agreement does not advance the interpretation contended for and relied on by the defendants. There is no factual basis for a finding that the master agreement regulated the relationship between the parties and that the defendants are not liable to the plaintiff for payment of the agreed amount of R744 883,02. On the contrary

the relationship was very much subject to clause 3(iv) and clause 4 of the finance agreement.

I conclude therefore that the common continuing intention of the parties when entering into the master agreement and the finance agreement, as distilled from a comparative analysis of the two agreements, was that the defendants would attract liability to the plaintiff in the event of non-payment of the loan to Joroy.

THE DEFENCE OF RECTIFICATION

[16] It is trite that rectification may be granted where the common continuing intention of parties to a written contract, is incorrectly recorded as a result of a common mistake of both parties on proof by the party claiming it of such facts as would entitle him to the remedy. This is so even when the contract correctly reflects the language the parties intended to record, but where the words used incorrectly reflected the parties' prior actual agreement or continuing common intention which the parties' seeking rectification intends to entrench by the leading of extrinsic evidence. See **TESVEN CC AND ANOTHER v SOUTH AFRICAN BANK OF**

ATHENS 2000 (1) SA 268 (SCA) at 274 par. [16]. There is ample authority for the recognition that the onus placed on the parties seeking rectification (in this case the defendants) is a heavy one and not easily discharged. See **BARDOPOULOS AND MACRIDES v MILTIADOUS** 1947 (4) SA 860 (W) at 863 – 864:

“A party seeking to obtain rectification must show the facts entitling him to obtain that relief 'in the clearest and most satisfactory manner'... and as is pointed out in *Taylor v Cape Importers* (1938 CPD 362 at p. 368), where the common intention is to be shown not by any writing but by verbal evidence, the Courts may have great difficulty in determining whether there was a mistake in the written contract. These cases do not, I consider, require more than a balance of probability in favour of the party seeking rectification but indicate that such a claim is in fact difficult to prove.”

In **BUSHBY v GUARDIAN ASSURANCE CO** 1915 WLD 65 at p. 71 quoted with approval in the **BARDOPOULOS**-case by Clayden J the principle was neatly stated thus:

“In order to obtain the rectification of a written instrument, the plaintiff must show in the clearest and most satisfactory manner... that there was a prior contract entered into between the parties, with which the instrument to be rectified fails to agree; that such failure was due, not only to the plaintiff's mistake, but also to mistake on the part of the other party to the contract; and further that the mistake was reasonable and was not the result of carelessness or negligence on the part of the plaintiff... the plaintiff must also prove that the prior contract continued up to the date of the instrument sought to be rectified. As a rule this, no doubt, is so, but where the prior contract is itself in writing it seems to me that its continuance must be presumed until the contrary is shown.”

(In this case the onus was on the plaintiff because it was the party seeking rectification.)

The factual issues relating to the conclusion of the oral amended agreement were fully canvassed in evidence by Mr. Green on behalf of the defendants and evolved to perfection under cross-examination of Rossouw and Nel by Mr. Joubert. On the basis of this evidence Mr. Green contends that in the particular circumstances of the present

matter, where the terms of the antecedent oral amended agreement between Rossouw and Nel had been intentionally (for that was the evidence) omitted from the written master agreement as being unnecessary, this court ought to find that the terms thereof were at variance with clause 3 of the finance agreement as a result of a common mistake between the parties that the first defendant's obligation to plaintiff as set out in clause 3 of the finance agreement were the same as those set out in the antecedent amended master agreement and allow clause 3 of the finance agreement to be rectified in accordance with the continuing common intention of the parties as deduced from their prior oral agreement. Such a remedy is however not open to the defendants because of the negative credibility findings I have made in regard to the testimony of both Rossouw and Nel specifically with reference to the improbabilities of the version advanced by each of them concerning the alleged oral amended agreement. In light of those improbabilities I reject the contention of a common assumption and/or a common mistake as being devoid of any rational belief. I come to the conclusion therefore that the defendants have failed to prove an antecedent contract with which clause 3 of

the finance agreement is at variance or in conflict. Such proof is indispensable to a successful plea of rectification. No factual basis has been shown by the defendants to exist for a finding by this court that they are entitled as of right to the rectification of the finance agreement and the defence must therefore fail. In coming to this conclusion I have borne in mind the case of **FIRST RAND BANK OF SOUTHERN AFRICA LTD v PRETORIUS AND ANOTHER** 2002 (1) ALL SA 275 (C) relied on by the defendants. The case is distinguishable from the facts of this matter in that there the court was dealing with a completely acceptable and tangible document which clearly comprised further terms not contained in the original agreement and not the *viva voce* evidence of the existence of an antecedent verbal agreement in respect of which unfavourable credibility findings had been made.

THE DEFENCE OF COMMON AND UNILATERAL MISTAKE

[17] By parity of reasoning, the defendants' plea that the finance agreement falls to be declared a nullity on the ground of

common mistake cannot be sustained and is summarily dismissed for lack of an evidentiary basis therefor.

[18] 18.1 The defendants' reliance on the defence of unilateral mistake is also misconceived and fatally flawed because the erroneous belief complained of is not supported by any evidence that such an error existed at the time of contracting. This is due to this court's unequivocal rejection of the testimony of Rossouw and Nel on the all important and material aspect of how the master agreement, the finance agreement, the amended agreement and the addendum to the master agreement were negotiated, discussed and concluded. But even if I were to assume in the defendants' favour, without finally deciding, that there was room for finding, on an analysis of the testimony of these two witnesses, that Rossouw laboured under the erroneous belief that his actual intention of excluding defendants from liability to the plaintiff for repayment of the Joroy loan conformed to the expressed common intention of the parties, such a unilateral mistake, does not allow him to

repudiate his apparent assent to the finance agreement except in very narrow circumstances. See **GEORGE v FAIRMEAD (PTY) LTD** 1958 (2) SA 465 A at 471 and **NATIONAL AND OVERSEAS DISTRIBUTORS CORPORATION (PTY) LTD v POTATO BOARD** 1958 (2) SA 473 A at 479. The effect of these decisions is that for a unilateral mistake to vitiate a contract, the error complained of must be a *iustus error*. The test is a subjective one and there is very limited scope for the defence in the absence of misrepresentation by the other party, or at the very least, knowledge that the assent to the contract was being made under some misapprehension or misconception. None of these prerequisites have been shown on a balance of probabilities to have been present and to have influenced the defendants' decision to enter into the finance agreement subject to the acceptance of liability to the plaintiff in terms of clause 3 thereof.

18.2 Nowhere in Rossouw's evidence does he raise the defence of *iustus error* (reasonable error). I deal with

the concept nevertheless to show the futility of the defence. Rossouw is not a layman and when he put his signature to the finance agreement, it is inconceivable that he did not realise what he was called upon to signify by his assent to that document, that is that he was agreeing its terms and binding his firm to an obligation to repay the debt of another (the loan to Joroy). Nowhere in the evidence is it apparent that he did so because he was led to believe otherwise by Nel. It is axiomatic that in these circumstances Rossouw could not help but appreciate the risk he was assuming by appending his signature to the finance agreement so that, if indeed an error was made, it was one which was not reasonably made in the circumstances. All of this however does not assist the defendants one jot because it was never Rossouw's testimony that he had erred unilaterally in signing the finance agreement, specifically with reference to clause 3(iv) and clause 4 of the attorney's undertakings in the finance agreement. The idea of Rossouw and Nel signing the finance agreement because of a common mistake and/or a unilateral mistake seems to me, given

the uncontested evidence of these witnesses, to be a somewhat large demand on one's credulity. I find that the defendants have therefore failed to discharge the onus they carry on a balance of probabilities in respect of both these defences.

[19] Another bone of contention between the parties, not pleaded, but one which evolved through the cross-examination of the witnesses, was the question of whether or not there had been a repudiation and cancellation of the Joroy transaction. During cross-examination of Rossouw, Mr. Joubert, suggested that the transaction had not been cancelled in an attempt to take the facts of the matter outside of the provisions of clause 3(iv) of the master agreement to which Mr. Green immediately objected, arguing that it had been cancelled.

[20] Repudiation occurs when the act or conduct of a party to a contract evinces an intention to no longer be bound by the contract and indicates by word or conduct a deliberate and unequivocal intention that all or some of its obligations

arising from the contract will not be performed. (See

DATACOLOR INTERNATIONAL (PTY) LTD v

INTAMARKET (PTY) LTD 2001 (2) SA 284 (SCA) at 294 H

– I.) It is agreed by both parties that Bothma Diamonds (Bothma Diamante) repudiated the property transaction by frustrating the fulfilment of the suspensive condition. Joroy accepted Bothma Diamante's conduct in this regard and by doing so elected to find another purchaser thereby accepting the repudiation which, in turn, had the effect of bringing the contract to an end, that is of cancelling the contract. The contract, in any event, became void *ab initio* on non-fulfilment of the suspensive condition.

[21] In my view, the contract between Joroy and Bothma Diamante was terminated in this manner. Mr. Joubert, however, was adamant that the contract had not been cancelled because notice of cancellation had not been conveyed to Bothma Diamante and in an attempt not to restrict the plaintiff's claim in the event of it succeeding in this action, applied for the amendment of its particulars of claim to reflect that the transaction in question was not cancelled.

The amendment, if granted, would have had the effect of not limiting the amount of the plaintiff's claim only to the capital loaned to Joroy (par. B: Details of the Finance Agreement). The application by Mr. Joubert was directed at amending clause 3(III) of the finance agreement. The application was vigorously opposed by Mr. Green. I disallowed the application on the basis of the remarks of Nienaber JA and Conradie AJA in **CIBA-GEIGY (PTY) LTD v LUSHOF FARMS (PTY) LTD EN 'N ANDER** 2002 (2) SA 447 (SCA) at 426 par. [30] – [34]. At par. [34] the learned Judges quoted, with approval, and applied, the following dictum in **TRANS-DRAKENSBERG BANK LTD (UNDER JUDICIAL MANAGEMENT) v COMBINED ENGINEERING (PTY) LTD AND ANOTHER** 1967 (3) SA 632 (D) at 641 A – B:

“Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show *prima facie* that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on the record an issue for which he has no supporting evidence, where evidence is required, or, save perhaps in exceptional

circumstances, introduce an amendment which would make the pleading excipiable...”

The learned Judges went on to quote, with approval, the judgment of De Villiers JP in **KROGMAN v VAN REENEN**

1926 OPD 191 at 195:

“He must show, for instance, that the matter involved in the amendment is of sufficient importance to justify him in putting the court and the other party to the manifold inconveniences of a postponement.”

In my judgment nothing turned on the proposed amendment because the plaintiff had pinned its mast to the specific sale of clause 3(iv) and clause 4 of the finance agreement and the parties had agreed the amount of the claim at R744 883,02. So no useful purpose, from the plaintiff's point of view, would have been served by allowing Mr. Joubert to persist in the bringing of his application to further amend the particulars of claim in the manner sought.

[22] I find that on the evidence presented, the plaintiff has discharged the onus it carries of showing on a balance of probabilities that Honey is liable to it in the agreed amount of R744 883, 02. In the result there will be judgment for the plaintiff against the defendants jointly and severally, the one paying the other to be absolved, in the sum of R744 883, 02 together with costs on the attorney and client scale.

S. EBRAHIM, J

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Instructed by:
Symington & De Kok
BLOEMFONTEIN

On behalf of defendants: Adv. I.P. Green
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