

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

APPEAL CASE NO: HCA36/2023

COURT A QUO CASE NO: LP/PLK/RC-347/2019

(1) REPORTABLE: NO
(2) OF INTEREST TO THE JUDGES: NO
(3) REVISED. [REDACTED] 30 July 2024

In the matter between:

JAMES THEMA

Appellant

and

THABO TIMMY MATHONSI

Respondent

JUDGEMENT

GAISA AJ

INTRODUCTION

[1] This is an appeal against the judgment of Regional Magistrate Ngobeni of the Polokwane Regional Court, which granted an order of absolution from the instance at the close of the Appellant's (Plaintiff's) case.

[2] The appeal raises important questions about the proper application of the test for absolution from the instance, the interpretation of contractual documents in the context of alleged agency relationships, and the interaction between common law principles and statutory frameworks such as the National Credit Act.

FACTUAL BACKGROUND

[3] The Appellant, Mr James Thema, instituted action against the Respondent, Mr Thabo Timmy Mathonsi, for payment of R250,000.00 plus interest. This amount was alleged to be the outstanding balance on a loan of R450,000.00 that the Appellant claims to have advanced to the Respondent on 27 October 2015.

[4] The Respondent denied liability, raising various defences, including that he was acting as an agent for a close corporation called Mhlonhlori Business Enterprises and that the Appellant was not entitled to charge interest as he was not a registered credit provider.

[5] At the close of the Appellant's case, the Respondent applied for absolution from the instance. The court *a quo* granted the application, finding that the Appellant had failed to make out a prima facie case.

LEGAL FRAMEWORK

[6] Powers of the Appeal Court

6.1. As an appeal court, we are empowered to consider both questions of law and fact. However, we must be mindful of the principle articulated in **R v Dhlumayo**¹ that an appeal court should be slow to interfere with the findings of fact made by a trial court. This principle is based on the recognition that the trial court has the advantage of seeing and hearing witnesses and observing their demeanour.

¹ 1948 (2) SA 677 (A)

6.2. Nevertheless, where the court of first instance has misdirected itself on the facts or the law, or where the evidence cannot reasonably support the decision or is wrong, the appeal court not only has the right but also the duty to intervene. This was emphasised in **Santam Bpk v Biddulph**.²

[7] **Test for Absolution from the Instance**

7.1. The test for absolution from the instance at the close of the plaintiff's case is well established. In **Claude Neon Lights (SA) Ltd v Daniel**,³ the court stated:

"When absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff."

7.2. This test was reaffirmed in **Gordon Lloyd Page & Associates v Rivera & Another**,⁴ where the court explained that:

² 2004 (5) SA 586 (SCA) at paras [5], [6], [8], [9], [18].

³ 1976 (4) SA 403 (A) at 409G-H

"This implies that a plaintiff has to make out a prima facie case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence, no court could find for the plaintiff."

7.3. The bar for avoiding absolution is set relatively low in the plaintiff's favour. As emphasised in **Van Zyl N.O obo A.M v MEC for Health**,⁵ the question at this stage is *"what might a reasonable court do"* instead of *"what ought a reasonable court to do"* at the close of the defendant's case.

7.4. In **Van Zyl N.O obo A.M v MEC for Health**⁶ the court articulated that the threshold for avoiding absolution from the instance is relatively low in favour of the plaintiff.

7.5. That court said:

"The authorities on this point go back more than a century, and they are clear... "(W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to

⁴ 2001 (1) SA 88 (SCA) at para [2]

⁵ [2023] 1 All SA 501 (WCC)

⁶ [2023] 1 All SA 501 (WCC)

*be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff."*⁷

- 7.6. **Van Zyl N.O** *supra* also found that *"the enquiry here is only whether a prima facie case has been set up by the plaintiff, the bar for the avoidance of absolution is set fairly low in that party's favour."* This is reinforced when it is noted that the relevant question is *"what might a reasonable court do"* at the close of the plaintiff's case, as opposed to *"what ought a reasonable court to do"* at the close of the defendant's case'⁸

[8] **Principles of Agency Law**

- 8.1. The principles of agency law are relevant to the Respondent's defence that he was acting as an agent for Mhlonhlori Business Enterprises. For an agency relationship to exist, there must be:

- 8.1.1. an agreement between the principal and the agent;

⁷ Van Zyl N.O *supra* at para [9]

⁸ Van Zyl N.O *supra* at paras [10] and [11]

8.1.2. authority given by the principal to the agent to act on the principal's behalf;

8.1.3. the agent's intention to act on behalf of the principal.

8.2. As established in **Noordkaap Lewendehawe Ko-operasie Bpk v Schreuder**,⁹ the onus of proving the existence of an agency relationship rests on the party alleging it. Furthermore, the mere mention of a third party in a contract does not automatically create an agency relationship or absolve the signatory from personal liability. The court must consider all the surrounding circumstances to determine whether an agency relationship exists.¹⁰

[9] **The National Credit Act**

9.1. The National Credit Act 34 of 2005 (NCA) requires credit providers to register if they enter into a specified number of credit agreements or if the principal debt owed exceeds a prescribed threshold.

9.2. Section 40(1) of the NCA, as amended, requires registration for any person or entity that is the credit provider under at least 100 credit

⁹ 1974 (3) SA 102 (A)

¹⁰ Noordkaap *supra* 110

agreements, other than incidental credit agreements, or if the total principal debt owed under all outstanding credit agreements exceeds the threshold prescribed in terms of section 42(1).

9.3. The threshold amount was reduced to nil (R0) effective 11 May 2016. However, this amendment only applies to credit agreements entered after that date.

9.4. It is important to note that, as held in **Opperman v Boonzaaier**,¹¹ non-compliance with the NCA's registration requirements does not automatically render a credit agreement void. The court must consider the circumstances of each case to determine the appropriate remedy.

[10] **Issues for Determination**

The main issues for determination in this appeal are:

10.1. whether the court *a quo* erred in granting absolution from the instance;

¹¹ 2013 (5) SA 1 (CC) at paras [1], [9] and [18]

- 10.2. whether the Appellant established a *prima facie* case;
- 10.3. whether the court *a quo* misdirected itself regarding the agency argument;
- 10.4. whether the court *a quo* erred in its approach to the credit provider issue.

ANALYSIS

[11] The Prima Facie Case

11.1. From my review of the record, it is evident that the Appellant led the following evidence:

11.2. He testified that on 27 October 2015, the Respondent signed an acknowledgement of debt in his favour for R450,000.00 plus interest at 15.5% per annum, payable by 31 October 2015. This acknowledgement of debt was attached to the particulars of claim.

11.3. He testified that he paid the R450,000.00 to the Respondent in cash.

- 11.4. When the Respondent failed to pay by 31 October 2015, they verbally agreed in January 2017 that the Respondent would make monthly payments of R50,000.00 until the debt was settled.
- 11.5. Between January and December 2017, the Respondent only paid R73,000.00. They then agreed this amount would be allocated to interest.
- 11.6. In December 2017, they signed a revised agreement reducing the capital amount to R400,000.00 to be paid in monthly instalments of R50,000.00 from January 2018.
- 11.7. The Respondent made further payments totalling R150,000.00 between February and August 2018.
- 11.8. The Respondent has since failed to pay the remaining balance of R250,000.00.
- 11.9. If accepted, this evidence relates to all the elements of the Appellant's claim. It establishes the existence of a contract (the acknowledgement of debt), its material terms (the loan amount, interest rate, and repayment terms), and its breach (failure to repay the full amount).

11.10. The court *a quo* appears to have been swayed by two main factors in granting absolution:

11.10.1. the possibility that the Respondent was acting as an agent for Mhlonhlori Business Enterprises; and

11.10.2. the Appellant's admission that he was not a registered credit provider.

11.11. With respect, the court *a quo* erred in its approach to both these issues.

[12] **The Agency Argument**

12.1. Regarding the agency argument, the court was required to consider the evidence in the light most favourable to the Appellant at the absolution stage. The Appellant testified that he dealt with and lent money to the Respondent personally. He explained that while the Respondent mentioned Mhlonhlori, the Respondent told him to "leave Sibongile out since when he wanted money, it was the Defendant who was going to pay".

- 12.2. The Respondent signed the acknowledgement of debt in his personal capacity. Based on this evidence, a court could or might find that the contract was personally between the Appellant and Respondent.
- 12.3. The fact that some references to Mhlonhlori were made in later documents does not negate the possibility of personal liability. At most, it raises a triable issue to be resolved after hearing all the evidence. It was premature for the court *a quo* to conclude at this stage that the Appellant had contracted with Mhlonhlori rather than the Respondent.
- 12.4. Furthermore, as established in **Noordkaap Lewendehawe Ko-operasie** *supra*, the Respondent is responsible for proving the existence of an agency relationship. At the absolution stage, the Respondent had not yet presented evidence to discharge this onus. The court erred in drawing inferences favourable to the Respondent without hearing his evidence.

[13] **The Credit Provider Issue**

13.1. Regarding the credit provider issue, the court erred in two respects.

First, it is not clear that the National Credit Act applied to this transaction, which appears to have been a once-off loan rather than the Appellant's regular business. Second, even if the Act did apply, non-compliance would not automatically invalidate the entire agreement. At most, it might affect the Appellant's ability to charge interest.

13.2. The court *a quo* should have considered the principles established in **Opperman v Boonzaaier** *supra*, which require a nuanced approach to the consequences of non-compliance with the NCA. The appropriate remedy, if any, should be determined after hearing all the evidence and considering the case's specific circumstances.

13.3. More fundamentally, the court's role at the absolution stage is not to make final determinations on such legal issues. The question is whether there is evidence upon which a court might find for the plaintiff. Here, such evidence existed in the form of the signed acknowledgement of debt and testimony about subsequent agreements and payments.

CONCLUSION

[14] I am mindful that absolution from the instance should be granted sparingly. It deprives the plaintiff of the right to have all the evidence heard and tested. As noted in **Van Zyl** *supra*, it is particularly problematic where the defence relates to matters peculiarly within the defendant's knowledge.

[15] In this case, the Respondent's version of events and explanations for the various documents has not yet been heard. It would be in the interests of justice for the trial to continue and all evidence to be presented before a final determination is made.

[16] For these reasons, I find that the court *a quo* erred in granting absolution from the instance. There was sufficient evidence upon which a court, applying its mind reasonably, could or might find for the Appellant. The defences raised by the Respondent are matters to be determined after hearing all the evidence.

[17] This judgment reminds us that absolution from the instance is an extraordinary remedy that should be granted sparingly, particularly where critical aspects of the defence fall within the defendant's peculiar knowledge.

[18] It also reinforces the principle that procedural rules should be interpreted and applied in a manner that promotes, rather than frustrates, the attainment of substantive justice.

ORDER

[19] In the result, the following order is made:

19.1. The appeal is upheld.

19.2. The order of absolution from the instance is set aside.

19.3. The matter is remitted to the Regional Court for the trial to continue.

19.4. Costs of the appeal are to be costs in the cause.



GAISA AJ

**ACTING JUDGE OF THE HIGH COURT
POLOKWANE; LIMPOPO DIVISION**

I concur



NAUDE-ODENDAAL J
JUDGE OF THE HIGH COURT
POLOKWANE: LIMPOPO DIVISION

APPEARANCES

FOR THE APPELLANT	: MR GSC MOHLABI
INSTRUCTED BY	: GSM MOHLABI INC. ATTORNEYS
FOR THE RESPONDENT	: ADV MOYA
INSTRUCTED BY	: MPHELA MOTIMELE ATTORNEYS
DATE OF HEARING	: 10 MAY 2024
DATE OF JUDGEMENT	: 30 JULY 2024