



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

- (1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES:

SIGNATURE

DATE: 4 MARCH 2025

CASE NO: 2023-093414

In the matter between:-

LASERTEK PAYMENT SOLUTIONS (PTY) LIMITED

Applicant

and

ELECTRONIC CONNECT (PTY) LIMITED

Respondent

Neutral citation: *Lasertek (Pty) Ltd v Electronic Connect (Pty) Ltd* (093414/2023)

[2023] ZAGPJHC (4 March 2025)

Coram: Allen AJ

Heard: 24 February 2025

Delivered: This judgment was handed down electronically by circulation to the parties or their legal representatives by email, by uploading to the electronic file of this matter on Caselines, and by publication of the judgment to the South African

Legal Information Institute. The date for hand-down is deemed to be 14:00 on 4 March 2025.

Summary: National Credit Act 34 of 2005 – s 4(1) loan agreement between parties not dealing at arm's length and related - under what circumstances is a credit provider obliged to register – where the credit agreement exceeds the threshold set out in s 42(1) - irrespective of whether it is a single transaction - irrespective of whether the credit provider is a regular participant in the credit industry.

ORDER

1. The application is dismissed with costs.
 2. The agreement attached to the founding affidavit (March agreement) as well as those clauses in the September agreement insofar as they refer to the March agreement are declared to be unlawful and void due to non-compliance with s 40(1) of the National Credit Act (Act 34 of 2005).
-

JUDGMENT

ALLEN AJ

INTRODUCTION

[1] This is an opposed application for payment of the amount of R3 922 383.83 in terms of a written loan agreement. The parties are limited liability companies and concluded a second agreement. The primary issue is whether there was a novation or variation of the first agreement between the parties. The secondary issue is the computation of interest and the impact of the *in duplum* rule.

BACKGROUND

[2] On 1 March 2021, the parties entered into a written loan agreement (the March agreement) for a loan facility to respondent in a total amount of R4 025 000.00. Payments were made by applicant “directly” to one “FSS”(FSS). Interest on any amount loaned will accrue at a rate of 5% per month, calculated daily, from the date of each payment in terms of clause 3 of the agreement.

[3] The amount was repaid on 22 December 2021. On 21 December 2021, according to applicant, the outstanding amount of the loan was R5 970 732.67 (capital and interest). On 16 May 2023 applicant made demand for payment of the outstanding balance in the amount of R 3 319 357.00. On 31 August 2023 the amount outstanding was R3 922 383.83.

[4] The agreement¹ reads under the heading “Repayment Date” to mean “a date to be determined by mutual consent, but no later than 31 July 2021”.

[5] On 15 September 2021 the parties concluded a second agreement (September agreement). It is respondent’s case that the September agreement, *inter alia*, varied and/or novated the repayment terms contained in the March agreement and disputes its liability towards applicant. This agreement does not form part of applicant’s case. Applicant’s reliance is on the March agreement only.

[6] It is respondent’s case that no interest could have accrued on the loan amount as the repayment date had been varied and/or novated in terms of the September agreement and no set date for repayment had been agreed. Further, interest would only begin to accrue once the respondent had been placed *in mora* and the applicant never did so.

[7] It is further respondent’s case that the amount claimed exceeds the maximum

¹ Clause 1, definitions

amount of interest that can accrue in terms of the *in duplum* rule.

[8] The parties have different views of the “repayment date”. Applicant’s view is that the repayment date was latest 31 July 2021. Respondent’s view is that, by latest 31 July 2021 a date should be determined. The intention of the parties at the time of contracting does not appear from the papers.

[9] The September agreement confirms that the amount of R4 025 000.00 “has already been deployed plus interest due, calculated at an interest rate that is still to be agreed by the parties”². It is my understanding that interest is due on this amount, but the interest rate was still to be agreed. Again, the intention of the parties in regard hereto is not clear *ex facie* the papers. The capital was repaid after conclusion of this agreement.

[10] No reference was made in the papers regarding the National Credit Act, Act 34 of 2005 (NCA) as to its applicability, or not.

DISCUSSION

[11] At the hearing of the matter a legal question arose which was not canvassed in the papers before me. I enquired whether applicant was registered with the National Credit Regulator at the time of the March agreement and, if not registered, whether it could legally lend money to the respondent. Applicant’s response was that I cannot raise it since it is not in the papers. Applicant could not answer and undertook to take instructions. The matter stood down until after tea the same day for this purpose.

[12] Applicant responded that his client is in Dubai and unable to make contact. I stood the matter down to 24 February 2024 for applicant to take instructions and file a supplementary affidavit latest 21 February 2024. My directive was not in writing and is

² Clause 9.4.2

now questioned to the extent that an affidavit will only be filed if applicant has taken instructions.

[13] No supplementary affidavit was filed to address the issue. Applicant filed supplementary heads on 21 February 2024. The heads are conspicuously silent regarding applicant's registration. Respondent did not file supplementary heads.

[14] At this hearing I again raised the issue. Applicant avoided to answer and relied on the supplementary heads only. I have no alternative as to make a negative inference regarding applicant's registration with the NCR.

[15] The supplementary heads, paragraph 7, state the authorities quoted are dispositive that I could raise the issue and applicant's registration as credit provider is not in issue on the pleadings. In addition, I ought not consider or same to feature in my determination.

[16] The heads, under the heading "APPLICABILITY OF THE NCA" states the *Du Bruyn* case³ is not applicable and "this matter concerns a large loan between juristic persons (and a juristic consumer in particular)"⁴.

[17] The heads then dealt with the invalidity of a credit agreement owing to the non-registration of a credit provider as considered in the *Slip Knot*⁵ case.

Mero Motu raising of Legal Compliance

[18] I raised the question due to the fact that the March agreement is a "memorandum of loan agreement for R 4 025 000".

³ *Du Bruyn NO V Karsten* **2019 (1) SA 403 (SCA)**

⁴ Paragraph 11.2 of the supplementary heads.

⁵ *Paulsen v Slip Knot Inv 777 (Pty) Ltd* **2014(4) SA 253 (SCA)**, *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* **(CCT 61/14) [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) (24 March 2015)**

[19] “Perhaps the best place to start is to consider the question whether a Court of law is entitled to *mero motu* raise a question of law even if not specifically raised in either of the parties’ papers. The general rule is that a Court of law should not decide issues irrelevant to the outcome of a case”. This was held in the matter of *Morobane v Commission for Conciliation Mediation and Arbitration and Others*⁶ at para 6.

[20] In *Minister of Justice and Correctional Services v Walus*⁷ President Maya, writing for the majority had this to say:

“[23] ...However, where a point of law is apparent on the papers (even where it has been expressly abandoned) but the common approach of the parties proceeds on a wrong perception of the law...the court is not only entitled, but it is also obliged, mero motu, to raise the point of law and require the parties to deal with it. Otherwise it would be bound to make a decision that is premised on an incorrect application of the law, despite the accepted facts, merely because a party failed to raise the legal point, as a result of an error of law on his part. That would infringe the principle of legality”.
(Emphasis added)

[21] In *Absa Bank Ltd v Lowting and Others*⁸ the events of what transpired in court were strikingly similar to the instant matter. It is stated:

“[14] As stated, the court called upon the advocates to furnish further heads of argument on the issue of the applicability or otherwise of the National Credit Act. Such heads were not forthcoming due to a miscommunication but were provided promptly when the issue was followed up by the court. In both sets of heads of argument the conclusion was reached that the National Credit Act does not apply to the facts of this matter. The question arises whether these submissions are accurate.

[19] The question arises whether this admission of a legal issue is correct or can bind a court. The National Credit Act places a duty on a court hearing a matter to give effect to its provisions thereof and its objectives as set out in sections 2 and 3, particularly subsections 3(c), (d), (e), (g), (h) and (i). An erroneous legal admission

⁶ *Morobane v Commission for Conciliation Mediation and Arbitration and Others* (JR26/18) [2019] ZALCJHB 342 (19 November 2019)

⁷ *Minister of Justice and Correctional Services v Walus* [2017] 4 All SA 1 (SCA).

⁸ *Absa Bank Ltd v Lowting and Others* (39029/2011) [2013] ZAGPPHC 265 (19 August 2013)

cannot absolve a court from its duty. A credit provider cannot sidestep the provisions. Section 90 of the National Credit Act, inter alia, stipulates that any clause in a credit agreement, the purpose of which is to defeat the policies or purposes of the act, or to deceive the consumer or to subject the consumer to fraudulent conduct, is unlawful. The importance of the objectives of the National Credit Act was emphasised by Levenberg AJ in the matter of *SA Taxi Securitisation (Pty) Ltd v Mbatha* and two similar cases **2011 (1) SA 310** (GSJ) at paragraph [30] etseq.

[40] In this regard, due regard should be had to the fact that the National Credit Act does find application in respect of juristic persons and that such application is merely limited by Chapter 1 Part B section 4 of the National Credit Act. Sections 92 and 93 find application regardless of whether the consumer is a juristic person. It is only when the provisions of section 4(1)(a) or 4(1)(b) find application, as in the present case, that the National Credit Act finds no application.

[46] Furthermore, an aspect which has not received judicial scrutiny is whether section 4(1) of the National Credit Act is constitutional.

[47] Neither has the constitutionality of section 4(2)(c) been tested by the courts.

[51] The circumstances of this case demonstrate that the specific goals of the National Credit Act are not achieved when sureties, in the position of the defendants set out below, are not protected by its provisions. In the opinion of the court, this issue should enjoy judicial scrutiny.

[55]However, the court makes these observations as it deems to defeat the objects of the National Credit Act when sureties and co-principal debtors, who are natural persons, have no protection when a bank enters into a large agreement with a juristic entity which is a mere shell (as in this case). In such circumstances, where the sureties and co-principal debtors, more often than not are natural persons, the banks may see a loophole to advance exorbitant amounts of credit to juristic entities such as close corporations and have the members sign suretyship and co-principal debtor agreements in the full knowledge that they will not be able to repay the credit granted. The court takes judicial notice of the fact that close corporations are

often the vehicle utilised to conduct business by individuals with small businesses and limited means. This is an issue which should clearly be investigated further by courts".
(Emphasis added)

[22] I am dutybound and have a function to police legal compliance.

[23] Section 9 and 36 of the Constitution of the Republic of SA, 1996 is set out below:

"9 Equality-

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair".

"36 Limitation of rights-

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.

- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights”.

[24] Section 39(2) of the Constitution reads as follows: “When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport or objects of the Bill of Rights”.

[25] The preamble of the NCA reads as follows: “To promote a fair and non-discriminatory marketplace for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information; to promote black economic empowerment and ownership within the consumer credit industry; to prohibit certain unfair credit and credit-marketing practices; to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting; to provide for debt re-organisation in cases of over-indebtedness; to regulate credit information; to provide for registration of credit bureaux, credit providers and debt counselling services; to establish national norms and standards relating to consumer credit; to promote a consistent enforcement framework relating to consumer credit; to establish the National Credit Regulator and the National Consumer Tribunal; to repeal the Usury Act, 1968, and the Credit Agreements Act, 1980; and to provide for related incidental matters”.

[26] The purpose of the NCA is set out in section 3.

“3. Purpose of Act

The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by-

- (a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;
- (b) ensuring consistent treatment of different credit products and different credit providers;
- (c) promoting responsibility in the credit market by-
 - (i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and

- (ii) discouraging reckless credit granting by credit providers and contractual default by consumers;
- (d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
- (e) addressing and correcting imbalances in negotiating power between consumers and credit providers by-
 - (i) providing consumers with education about credit and consumer rights;
 - (ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; and
 - (iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;
- (f) improving consumer credit information and reporting and regulation of credit bureaux;
- (g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;
- (h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and
- (i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements”.

The March Agreement

[27] In the *Slip Knot* case the constitutional court reversed the *in duplum* rule and further stated:

“[37] In section 4(1)(a)(i), the Legislature exempts credit agreements in respect of which the consumer is a large juristic person (like Winskor). This evinces a conscious legislative choice not to protect this type of consumer under the Act. It is to this category of consumers that Slip Knot provided credit. Since none of them enjoyed protection under the provisions of the Act, there is little, if any, reason why Slip Knot and similarly placed credit providers should register in terms of the NCA”.

[28] Applicant cannot be said to be a “similarly placed credit provider” and respondent to be “a large juristic person (like Winskor)” as it does not appear from the papers. The *in duplum* rule is also in dispute in the instant matter.

[29] I have analyzed this agreement extensively. Applicant is a payment solution⁹ company as per its name and no evidence appears from the papers other than the description.

[30] The agreement, clause 2.2, states that payments by applicant are to be made directly to one FSS to receive payment in terms of an MOA between respondent and FSS. FSS is a third party, not a party to the agreement and only identified as such. The MOA is not annexed to the agreement or disclosed. It is questionable why FSS is not identified or described in the agreement. Why the secrecy?

[31] In terms of the statement¹⁰ the amounts of R 3 000 000.00 and R 1 025 000.00 were advanced.

[32] The agreement is a loan secured by a “security document” not annexed or disclosed in the papers¹¹. No further details were disclosed and “the current R9.5m reconciliation project being delivered by Lasertek and Electronic Connect will serve as security”¹². Respondent warrants its obligations are legal, valid, binding and enforceable and “the security document, if and when entered into, will create valid, legally binding and enforceable security for the obligations expressed to be secured by it”¹³.

⁹ The definition of payment solutions as per Law Insider is : “**Payment Solutions** means (i) the development, implementation and maintenance of, and/or providing Business Users and Business Clients with access to and/or use of, a technology platform that facilitates payment for services provided in and/or by Taxis and (ii) the leasing, renting, distribution, sale and/or resale to Business Clients of equipment, software, solutions and/or services for the making, acceptance and/or processing of credit card, debit card and/or other non-cash payment transactions in and/or for Taxis and/or the services provided therein or thereby, and including, for the avoidance of doubt, the provision of payment gateway and payment terminal solutions.

¹⁰ Annexure “FA 4” to the founding affidavit

¹¹ Clause 6

¹² Clause 6, second sentence

¹³ Clause 7

[33] In the same agreement the third-party rights¹⁴ of a person (FSS) who is not a party were expressly excluded in terms of the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this agreement. This Act is a UK Act. Clause 16 states that the law of South Africa is applicable.

[34] To summarize: It is not in dispute that the parties contracted by means of a loan agreement. Applicant hereafter paid the money to FSS, the third party. The agreement is silent as to whether the money was paid on behalf of respondent. Payment was effected in this manner in terms of a separate agreement between FSS and respondent. Respondent gives security in terms of a security document. The reconciliation project of both parties will serve as security. Respondent repaid the capital amount to applicant¹⁵.

[35] It is not disclosed on what basis respondent repaid the amount whilst FSS received the money, put differently, was it respondent's own money or money received from FSS. Is respondent not the middle-man, agent or fronting for FSS and in effect not contracting for its own benefit to probably circumvent the NCA? Should the agreement not be interpreted as a form of surety agreement disguised as a loan agreement? Respondent did not receive the benefit and a security document was to secure payment, in this instance, by FSS. The consumer in this instance appears to be rather FSS, a non-contracting party, and not respondent. It cannot be said the agreement did not create rights for FSS. Clause 10 expressly excluded those rights, albeit in terms of a UK Act.

[36] This construction is distinguishable from the *Slip Knot* case and therefore the parties, in my view, do not fall into the same category as *Slip Knot*.

The September Agreement

[37] It is applicant's case the September agreement regulates the parties'

¹⁴ Clause 15

¹⁵ Paragraph 17 of the answering affidavit

commercial relationship¹⁶, the two agreements plainly deal with different subject matter¹⁷ and the latter does not seek or purport to novate the March agreement¹⁸.

[38] The recital is lengthy and needs some scrutiny:

(a) It refers to a previous MOA between respondent and one "Paytek" for a managed service solution to the "Postbank"¹⁹, was amended three times to record the key terms of a first joint project (reconciliation project)²⁰. This reconciliation project is the R9.5m security in the March agreement²¹. The "previous MOA" is not disclosed, albeit that FSS appears not to be a party hereto based on the names disclosed.

(b) Next is a cession agreement amongst applicant, respondent and Paytek whereby Paytek ceded all its rights and obligations to applicant and respondent²². The cession agreement is not disclosed and the parties in the instant case obtained certain rights and obligations for a joint reconciliation project (the security for the March loan).

(c) The further refinements required following various advancements and delays relative to the opportunity which have changed the cashflow profile of the deal²³. Put differently, the deduction I make is the cashflow of the deal changed as a result of various advancements and delays of the opportunity.

(d) The respondent raised a dispute with applicant resolved through the amended terms of this agreement and which consolidated and superseded the MOA referred to hereinbefore. My deduction is this September agreement consolidated and superseded the MOA between respondent and Paytek, but the MOA was followed by a cession agreement among plaintiff, respondent and Paytek and which deals with the reconciliation project as security in the March agreement.

[39] The contentious clauses are: (a) Clause 9.4.1 which reads as follows: "Lasertek has provided a loan facility to Electronic Connect to secure the initial 10% down payment on the FSS switch, being R4 025 000.00, to support the transaction." In my view this amount

¹⁶ Paragraph 7 of the replying affidavit

¹⁷ Paragraph 8 of the replying affidavit

¹⁸ Paragraph 9 of the replying affidavit

¹⁹ Clause 2.1

²⁰ Clause 2.2

²¹ Clause 6

²² Clause 2.5

²³ Clause 2.6

refers to the same amount in the March agreement paid to FSS which is secured by the reconciliation project of applicant and respondent obtained by means of a cession agreement.

(b) Clause 9.4.2: “.....this clause will only be applicable to mitigate the risk of non-repayment of any loan funding that is provided by Lasertek to EC to fund the transaction beyond the R4 025 000.00 10% deposit that has already been deployed plus interest due calculated at interest rate that is still to be agreed by the parties.” This clause deals with mitigation of the risk of non-repayment of the loan.

(c) Clause 9.4.5: “Apart from repayment of the loan per 9.4.1 which is to be repaid as soon as practically possible, operational profit share relative to this project will only commence once the financial commitments to FSS to conclude the session(sic) of the FSS agreements to electronic connect have been met”. In my view operational profit share between applicant and respondent (of the reconciliation project) will commence once the financial commitments to conclude the cession of the FSS agreements to respondent have been met. It appears to me that the cession agreement is a disguise for a buy and sell agreement whereby applicant, Paytek and FSS are also involved. The down payment hereof was advanced by applicant and secured by a joint project with operational profit sharing by applicant and respondent.

[40] I find it questionable that the parties are doing business at arm's length.

[41] Respondent did not raise any defences in relation to the NCA or applicant's registration with the NCR.

[42] In *Hicklin v Secretary of Inland Revenue*²⁴, the court articulated that:

“... ‘dealing at arm's length’ is a useful and often easily determinable premise from which to start the inquiry. It connotes that each party should be independent and seek the utmost possible advantage out of the transaction. In an arm's length agreement, the rights and obligations created are more likely to be regarded as normal than abnormal. When considering the normality of the rights or obligations so created due regard has to be paid to the surrounding circumstances. What may be normal in one

²⁴ *Hicklin v Secretary of Inland Revenue* 1980 (1) SA 481 A at 495A-D.

case, may be abnormal in another because of different circumstances. The determination of normality or abnormality is a factual one.

Given these facts, in my view, the parties were not dealing at arm's length, as provided for in s 4(2)(b)(iii). The AOD gave expression to that. There was no evidence that the appellant sought to obtain the utmost advantage from the transaction. The agreement lacked the character of a credit agreement.

[26] In terms of s 4(2)(b)(iv) of the NCA, where parties are not independent of one another and where they do not strive to obtain the utmost advantage from the transaction, the transaction is not at arm's length. In my view, the evidence shows that the first respondent was dependant on Messrs Rippon and Chadha and ultimately on the appellant”.

[43] In the case of *Natal Joint Municipal Pension Fund v Endumeni Municipality*²⁵, at para 18, where the following was said:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used...” (Emphasis added)

²⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* **2012 (4) SA 593 (SCA)**

[44] In *Phoenix Salt Industries (Pty) Ltd v The Lubavitch Foundation of Southern Africa*²⁶, par 24, the Supreme Court of Appeal recently put it thus:

“Natal Joint Municipal Pension Fund v Endumeni Municipality pronounced that ‘proper interpretation of a contract requires the whole contract to be read, and grammatical meaning to be attached to the words used in consideration of the surrounding circumstances only known to the parties.’ This is the law prevailing on interpretation of contracts, agreements and even legislations”. (Emphasis added)

[45] In the case of *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*²⁷ at paras 25, 26 & 51, where the following was said:

“[25] ...It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As *Endumeni* emphasised, citing well-known cases, ‘[t]he inevitable point of departure is the language of the provision itself’.

[26] ... *Endumeni* is not a charter for judicial constructs premised upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed. Nor does *Endumeni* licence judicial interpretation that imports meanings into a contract so as to make it a better contract, or one that is ethically preferable.

[51] ...interpretation begins with the text and its structure. They have gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.” (Emphasis added)

²⁶ *Phoenix Salt Industries (Pty) Ltd v The Lubavitch Foundation of Southern Africa* (330/2023) [2024] ZASCA 107 (03 July 2024)

²⁷ *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA)

[46] In the case of *Kubyana v Standard Bank of South Africa Ltd*²⁸ the Constitutional Court cautioned at para 18:

“...legislation must be understood holistically and, it goes without saying, interpreted within the relevant framework of constitutional rights and norms. However, that does not mean that ordinary meaning and clear language may be discarded, **for interpretation is not divination** and courts must respect the separation of powers when construing Acts of Parliament’. (Emphasis added)

[47] Mhlantla AJ pointed out in *Kubyana* at para 18 fn 23, that “In *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) Kentridge AJ, at paras 17-8, stated:

‘I am well aware of the fallacy of supposing that general language must have a single ‘objective’ meaning. Nor is it easy to avoid the influence of one’s personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.

We must heed Lord Wilberforce’s reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to ‘values’ the result is not interpretation but divination.

While these remarks referred to constitutional interpretation, they apply even more forcefully in relation to statutory interpretation generally. See also *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 23-4 and 26”. (Emphasis added)

[48] The cautionary remarks of Cameron J in *National Credit Regulator v Opperman*²⁹ at paras 99, 100 & 105, are apposite in this regard:

²⁸ *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC)

²⁹ *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC)

[99] ... it has to be assumed that the legislature's enacted text includes only words that matter...

[100] ... if the language used by the lawgiver is ignored in favour of other pursuits, the result is not interpretation but divination.

[105]There is then no particular constitutional imperative to squeeze a meaning from the provision. Rather, we must accept the words of the provision for what they say, even at the cost of accepting that the provision is ineffectual. It is better, in my view, to acknowledge the drafting error, and to leave parliament to correct it.
(Emphasis added)

[49] In *Minister of Police v Molokwane*³⁰ the SCA explained in para 16 what had been held in *African Christian Democratic Party v Electoral Commission and Others* 2006 (3) SA 305 (CC) at para 25, as follows:

"There it was held that the adoption of the purposive approach in our law has rendered obsolete all the previous attempts to determine whether a statutory provision is directory or peremptory on the basis of the wording and subject of the text of the provision. The question was thus 'whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose'. A narrowly textual and legalistic approach is to be avoided".

[50] In the same case the SCA pointed out in para 13 and 14 what had been observed in *Ex Parte Mothuloe (Law Society, Transvaal, Intervening)*³¹ at 1132F, namely, that there was a "...trend in interpretation away from the strict legalistic to the substantive, and endorsed that had been said in *Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 433H-434A about the categorisation of statutory requirements as 'peremptory' or 'directory':

'...They are well-known, concise, and convenient labels to use for the purpose of differentiating between the two categories. But the earlier clear-cut distinction between them (the former requiring exact compliance and the latter merely substantial compliance) now seems to have become somewhat blurred. Care must therefore be

³⁰ *Minister of Police v Molokwane* (730/2021) [2022] ZASCA 111 (15 July 2022)

³¹ *Ex Parte Mothuloe (Law Society, Transvaal, Intervening)* 1996 (4) SA 1131 (T)

exercised not to infer merely from the use of such labels what degree of compliance is necessary and what the consequences are of non or defective compliance. These must ultimately depend upon the proper construction of the statutory provision in question, or, in other words, upon the intention of the lawgiver as ascertained from the language, scope, and purpose of the enactment as a whole and the statutory requirement in particular...”.

Analysis of applicability of the NCA

[51] I have considered the relevant sections of the NCA. Emphasis was added to sections for ease of reference.

[52] The National Credit Act, 34 of 2005 (NCA), in *CHAPTER 3, CONSUMER CREDIT INDUSTRY REGULATION, Part A, Registration requirements, criteria and Procedures* reads as follows in Section 40 under the heading “Registration of credit providers”:

“40. (1) A person must apply to be registered as a credit provider if-

- (a) that person, alone or in conjunction with any associated person, is the credit provider under at least 100 credit agreements, other than incidental credit 45 agreements; or
- (b) 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 section 42(1).

(2) In determining whether a person is required to register as a credit provider-

- (a) the provisions of subsection (1) apply to the total number and aggregate principal debt of credit agreements in respect of which that person, or associated person, is the credit provider;
- (b) each associated person that is a credit provider in its own name and falls within the requirements of subsection (1) must apply for registration in its own name;
- (c) a credit provider that conducts business in its own name at or from more than one location or premises is required to register only once with respect to all of such locations or premises; and
- (d) “associated person”—

- (i) with respect to a credit provider who is a natural person, includes the 15 credit provider's spouse or business partners; and
- (ii) with respect to a credit provider that is a juristic person, includes-
 - (aa) any person that directly or indirectly has a controlling interest in the credit provider, or is directly or indirectly controlled by the credit provider;
 - (bb) any person that has a direct or indirect controlling interest in, or is directly or indirectly controlled by, a person contemplated in clause (aa); or
 - (cc) any credit provider that is a joint venture partner of a person contemplated in this subparagraph.

(3) A person who is required in terms of subsection (1) to be registered as a credit provider, but who is not so registered, must not offer, make available or extend credit, enter into a credit agreement or agree to do any of those things.

(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 an unlawful agreement and void to the extent provided for in section 89".

[53] Person is defined in section 2(6) of the act and include juristic persons.

[54] The word "must" means necessary or very important in the present or future for a person or associated person to apply for registration as a credit provider³². "If" means in the event that, in this matter, the total outstanding debt owed to the credit provider under the credit agreement exceeds the threshold in section 42(1).

³² "Must" in the Cambridge Dictionary means: "used to show that it is necessary or very important that something happens in the present or future:"
<https://dictionary.cambridge.org/dictionary/english/must#:~:text=used%20to%20show%20that%20it%20is%20necessary%20or%20very%20important%20that%20something%20happens%20in%20the%20present%20or%20future%3A>

[55] A Credit provider is defined in section 1 of the NCA³³.

[56] A credit agreement³⁴ means an agreement that meets all the criteria set out in section 8³⁵. In this matter section 8(1)(a) to (d) may all find application.

[57] 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)".

[58] "Threshold" means the prescribed threshold in terms of Section 42(1) of the NCA is presently R0.00 which threshold was announced on 11 May 2016³⁶ and took effect on 11 November 2016³⁷ described by Minister Davies as "the final Determination of Threshold for Credit Provider Registration". This means that anyone (all credit providers) who provides credit from this date must therefore register as a credit provider with the National Credit Regulator (NCR). The loan agreement was concluded March 2021, after this date.

[59] Applicant's case is that the agreement is a large loan between juristic persons and a juristic consumer in particular. Section 4 of the NCA reads as follows:

"4. Application of Act

(1) Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except-

(a) a credit agreement in terms of which the consumer is-

³³ "credit provider", in respect of a credit agreement to which this Act applies, means- (a) the party who supplies goods or services under a discount transaction, incidental credit agreement or instalment agreement; (b) the party who advances money or credit under a pawn transaction; (c) the party who extends credit under a credit facility; (d) the mortgagee under a mortgage agreement; (e) the lender under a secured loan; (f) the lessor under a lease; (g) the party to whom an assurance or promise is made under a credit guarantee; (h) the party who advances money or credit to another under any other credit agreement; or (i) any other person who acquires the rights of a credit provider under a credit agreement after it has been entered into

³⁴ "credit agreement" means an agreement that meets all the criteria set out in section 8

³⁵ 8. (1) Subject to subsection (2), an agreement constitutes a credit agreement for the purposes of this Act if it is- (a) a credit facility, as described in subsection (3); (b) a credit transaction, as described in subsection (4); (c) a credit guarantee, as described in subsection (5); or (d) any combination of the above.

³⁶ Government Gazette 39981

³⁷ Threshold takes effect six months after publication in terms of section 42(2) of the NCA

- (i) a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7 (1);
 - (ii) ...
 - (iii)
 - (b) a large agreement, as described in section 9 (4), in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below the threshold value determined by the Minister in terms of section 7 (1);
 - (c) ...
 - (d) ...
- (2) For greater certainty in applying subsection (1)-
- (a) the asset value or annual turnover of a juristic person at the time a credit agreement is made, is the value stated as such by that juristic person at the time it applies for or enters into that agreement;
 - (b) in any of the following arrangements, the parties are not dealing at arm's length:
 - (i) a shareholder loan or other credit agreement between a juristic person, as consumer, and a person who has a controlling interest in that juristic person, as credit provider;
 - (ii) a loan to a shareholder or other credit agreement between a juristic person, as credit provider, and a person who has a controlling interest in that juristic person, as consumer;
 - (iii) ...
 - (iv) any other arrangement-
 - (aa) in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction; or
 - (bb) that is of a type that has been held in law to be between parties who are not dealing at arm's length;
 - (c) this Act applies to a credit guarantee only to the extent that this Act applies to a credit facility or credit transaction in respect of which the credit guarantee is granted; and
 - (d) a juristic person is related to another juristic person if-

- (i) one of them has direct or indirect control over the whole or part of the business of the other; or
- (ii) a person has direct or indirect control over both of them".

[60] Section 9(4) reads as follows:

"A credit agreement is a large agreement if it is-

- (a) a mortgage agreement; or
- (b) any other credit transaction except a pawn transaction or a credit guarantee, and the principal debt under that transaction or guarantee falls at or above the higher of the thresholds established in terms of section 7 (1) (b)".

[61] The respondent is a juristic person, but it cannot be said it is the consumer in the agreement for the reasons stated hereinbefore. The real consumer may well be FSS. No asset value or annual turnover is stated or disclosed to ascertain if the transaction is above the threshold. Should it be disclosed for respondent or FSS? From the March agreement it cannot be said FSS is a juristic person.

[62] The amount in the March agreement makes it a large agreement. This amount has been settled prior to the launching of the application and before me is a claim for interest only which is in dispute.

[63] The second part of this section in the Act³⁸ reads the consumer is a juristic person with asset value/turnover below the threshold. In this instance the same analysis is applicable regarding the juristic person and asset value/turnover below the threshold which was not stated or disclosed for respondent or FSS read in the context of the whole commercial relationship.

[64] Did the parties do business at arm's length? I compared the construction of the March agreement, especially clause 6 the second sentence³⁹, and what is disclosed in the September agreement namely the cession agreement and the parties thereto,

³⁸ Section 4(1)(b)

³⁹ "The current R9.5m reconciliation project being delivered by Lasertek and Electronic Connect will serve as security".

joint reconciliation project and the parties thereto, the MOA's and also the involvement of FSS which received the money, cashflow and the dispute.

[65] In the instant matter the juristic persons are related as there is a cession agreement (other credit agreement) whereby applicant has a controlling interest over the business, or part thereof, of the respondent by the applicant as the credit provider. Put differently, the parties are not independent and cannot be said to obtain the utmost possible advantage out of the transaction.

[66] I measure this against the purpose and relevant sections of the Act⁴⁰. I am not convinced.

[67] The NCA in CHAPTER 5, CONSUMER CREDIT AGREEMENTS, Part A, *Unlawful agreements and provisions* under the heading "Unlawful credit agreements" Section 89 reads as follows:

- "(1)
- (2) Subject to subsections (3) and (4), a credit agreement is unlawful if-
 - (a)
 - (b)
 - (c)
 - (d) at the time the agreement was made, the credit provider was unregistered and this Act requires that credit provider to be registered; or
 - (e)
- (3)
- (4) Subsection (2)(d) does not apply to a credit provider if-
 - (a) at the time the credit agreement was made, or within 30 days after that time, the credit provider had applied for registration in terms of section 40, and was awaiting a determination of that application; or
 - (b) at the time the credit agreement was made, the credit provider held a valid clearance certificate issued by the National Credit Regulator in terms of section 42(3)(b).

⁴⁰ Sections 4(2)(b)(i), (ii), (iv)(aa), (bb), 4(2)(c), 4(2)(d)(i),(ii), 90 and 91(a)

- (5) If a credit agreement is unlawful in terms of this section, despite any provision of common law, any other legislation or any provision of an agreement to the contrary, a court must order that-
- (a) the credit agreement is void as from the date the agreement was entered into;
 - (b) the credit provider must refund to the consumer any money paid by the consumer under that agreement to the credit provider, with interest calculated-
 - (i) at the rate set out in that agreement; and
 - (ii) for the period from the date on which the consumer paid the money to the credit provider, until the date the money is refunded to the consumer; and
 - (c) all the purported rights of the credit provider under that credit agreement to recover any money paid or goods delivered to, or on behalf of, the consumer in terms of that agreement are either-
 - (i) cancelled, unless the court concludes that doing so in the circumstances would unjustly enrich the consumer; or
 - (ii) forfeit to the State, if the court concludes that cancelling those rights in the circumstances would unjustly enrich the consumer".

[68] In *Blacher v Josephson*⁴¹ two questions were considered with regards to a loan advanced by the respondent. The first question was whether the respondent was registered as a credit provider in terms of the NCA at the time of the conclusion of the loan agreement. The second question was whether the respondent had conducted a credit assessment, prior thereto. The loans constituted credit agreements in terms of the NCA, and as such, registration as a credit provider with the National Credit Regulator at the time the loan was concluded was necessary in addition to the assessment of the credit worthiness of the borrower. The credit provider was not registered and on this basis alone the agreements were unlawful.

[69] In Para 80 it is stated:

"The threshold requirement was subsequently removed by way of legislative amendment on 11 May 2016, from which time in the case of non-commercial loans

⁴¹ *Blacher v Josephson* (A15/22) [2023] ZAWCHC 27; 2023(3) SA 555 (WCC) (14 February 2023)

between natural persons, save for certain exceptions, registration is required for all credit providers, even those extending credit on a once-off basis⁴². (Emphasis added)

[70] In para 89 it is stated:

“In *Opperman*⁴³ the Constitutional Court set out what the important aims and purposes of the NCA are viz. to promote and advance the social and economic welfare of South Africans in order to achieve a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers. As was said in *Cool Ideas*⁴⁴ in relation to the HCMPA, these are important and laudable aims”.

[71] In para 90:

“The requirement that credit providers must be registered allows for their control and regulation, especially in relation to their financial probity and integrity, thereby avoiding the unscrupulous exploitation of credit consumers by so-called fly-by night operators and loan sharks. In the event that this award is enforced the appellant would end up paying the respondent an amount, in total of R 4 621 500, on a capital advance of R 2.5 million, which by my rough (and possibly inaccurate reckoning), equates to an 84% return on investment”. (Emphasis added)

[72] In the *Du Bruyn* case the SCA had to consider whether the parties were dealing at arm's length and held as follows: “[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 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”. (Emphasis added)

⁴² Emphasis refer to Karsten case supra

⁴³ Supra

⁴⁴ *Hubbard v Cool Ideas* **1186 CC 2013 (5) SA 112 (SCA)**

[73] In the matter before me the amount of R 3 922 383.83 is claimed which is the interest on the loan only, the capital was settled within nine months. Further interest is claimed on this interest amount at the rate of 5% per month from 1 September 2023 to date of final payment. This equates to a 97% return on investment over about two and a half years plus further interest to be added. R5 970 732.67 was the total amount the day before the capital was settled, less the capital equates to R 1 945 732.67 interest earned. To my calculations it means an interest rate of about 64,5% p.a. for the 9 months. Unscrupulous exploitation comes to mind which, even only on a once off basis, finds application to the purpose of the NCA.

[74] My analysis of the triad of text, context and purpose of the March agreement are amplified in the recital of the September agreement which in my view is a well constructed plan with layers to circumvent the applicability and purpose of the NCA. The purpose of the NCA is defeated which I grappled with.

[75] I am not convinced with applicant's argument that "all credit providers must register" as stated in the *Blacher* and *Du Bruyn* cases to be interpreted as applicable to natural persons only. I say so having considered the facts of the respective cases and the reasoning. "All credit providers" cannot be understood to include natural persons only and exclude juristic persons. "All" was not defined either and therefore I have to accept its ordinary meaning. The Cambridge Dictionary defines "all" as "every one (of), or the complete amount or number (of), or the whole (of)"⁴⁵

[76] If applicant as a credit provider does not have to register then disclosure, transparency, accountability, fair trade, etc. is not applicable either which the NCA is to police. The exemption of a credit agreement from the applicability of the Act and defenses raised will depend on the facts of each case. From what is before me, I come to the conclusion that the parties are not dealing at arm's length and the loan agreement cannot be said to be exempted from the NCA. Registration would have

⁴⁵ **every one (of), or the complete amount or number (of), or the whole (of)**

[https://dictionary.cambridge.org/dictionary/english/all#:~:text=every%20one%20\(of\)%2C%20or%20the%20complete%20amount%20or%20number%20\(of\)%2C%20or%20the%20whole%20\(of\)%3A](https://dictionary.cambridge.org/dictionary/english/all#:~:text=every%20one%20(of)%2C%20or%20the%20complete%20amount%20or%20number%20(of)%2C%20or%20the%20whole%20(of)%3A)

resulted in protection for either respondent or FSS (or both) as discussed in the *Blacher, Opperman, Cool Ideas and Du Bruyn* cases.

[77] Applicant is therefore included by definition in “all credit providers” to register with the NCR and must register prior to contracting.

[78] In the case of *Nedbank Ltd and Others v The National Credit Regulator and Another*⁴⁶ the SCA held:

“[1] The objects are set out in s 3 and are directed at providing protection for the consumer and addressing imbalances that exist between consumers and credit providers.

[2] The NCA must be interpreted in a manner that gives effect to these objects. Appropriate foreign and international law may be considered in construing the NCA. Unfortunately, the NCA cannot be described as the ‘best drafted Act of Parliament which was ever passed,’ nor can the draftsman be said to have been blessed with the ‘draftsmanship of a Chalmers’. Numerous drafting errors, untidy expressions and inconsistencies make its interpretation a particularly trying exercise. Indeed, these appeals demonstrate the numerous disputes that have arisen around the construction of the NCA. The interpretation of the NCA calls for a careful balancing of the competing interests sought to be protected, and not for a consideration of only the interests of either the consumer or the credit provider”. The instant case dealt specifically with interest and the in duplum rule.

CONCLUSION

[79] A disclosure of all the facts is a *sine qua non* to the consideration of whether or not to grant the relief sought. In the absence of any evidence to the contrary it is accepted applicant was not registered with the National Credit Regulator at the time the loan agreement was entered into between the parties, even though the court requested same. Section 40 (read with section 89) finds application for non-compliance which renders the March agreement and those clauses in the September

⁴⁶ *Nedbank Ltd and Others v The National Credit Regulator and Another* (662/2009, 500/2010) [2011] ZASCA 35; 2011 (3) SA 581 (SCA); [2011] 4 All SA 131 (SCA) (28 March 2011)

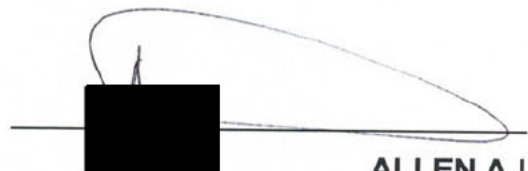
agreement insofar as it refers to the March agreement unlawful and the application fatally defective for the relief sought.

[80] Premised on the abovementioned I deem it not necessary to consider the issues in dispute and factual disputes raised in the papers. Applicant's argument that the loan is a large loan between juristic persons and juristic consumer in particular, that the Act is not applicable and by implication registration as well, must fail with costs to follow the result.

ORDER

[81] In the result I make the following order:

1. The application is dismissed with costs.
2. The agreement attached to the founding affidavit (March agreement) as well as those clauses in the September agreement insofar as it refers to the March agreement are declared to be unlawful and void due to non-compliance with s 40(1) of the National Credit Act (Act 34 of 2005).



**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

APPEARANCES:

For the Applicant:	Adv M Cooke Instructed by Werksmans Sandton
For the Respondent:	Adv K Naidoo Instructed by L Mbangi Inc Sandton