IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

NOT REPORTABLE

Case no: **A108/2024**

Court *a quo* case no: **4643/2023**

In the matter between:

LEBATA KHOTSO — Appellant

and

MOTSHEDI NATHANE — Respondent

Citation:	*L Khotso v M Nathane* (A108/2024) [2025]
Coram:	JP DAFFUE and NS DANISO JJ and JJ BUYS AJ
Heard:	29 APRIL 2025
Delivered:	15 MAY 2025

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 16H30 on 15 MAY 2025.

Summary: The court *a quo* granted summary judgment relying on relaxation of *par delictum rule* — the plaintiff, being the money lender, was not a registered credit provider in terms of section 40 of the National Credit Act 34 of 2005 (the NCA) – held on appeal by the unsuccessful defendant that section 164(1) read with section 89(5) of the NCA were applicable – no case made out for summary judgment – appeal granted.

ORDER

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1. The appeal is upheld.
2. The order of the court a quo is set aside and replaced with the following:
a. the application for summary judgment is dismissed;
b. leave is granted to the defendant to defend the action;
c. the plaintiff shall pay the costs of the summary judgment application on a party and party scale, inclusive of the costs of opposition thereof, counsel's fees to be taxed on scale C.
3. The respondent shall pay the appellant's costs of the appeal, counsel's fees to be taxed on scale C.

JUDGMENT

Daffue J (Daniso J and Buys AJ concurring):

Introduction

[1] The appellant appeals against the judgment of a single judge of this division in terms whereof summary judgment was granted for payment of the sum of R1 600 000 plus interest *a tempore morae* and costs of suit against the appellant, cited as defendant in the court *a quo*.

[2] The issue on appeal is whether the plaintiff, cited as respondent in this appeal, should have been successful in the summary judgment proceedings insofar as he relied on unjustified enrichment, having acknowledged that the loan agreement entered into between him as lender and the appellant as borrower was void for non-compliance with the National Credit Act 34 of 2005 (the NCA). This court will also consider whether the application could be considered at all, bearing in mind the claims that may be adjudicated as set out in rule 32(1) of the Uniform Rules of Court.

The parties

[3] The appellant in the appeal and defendant in the court *a quo* is Mr Lebata Khotso, a major male person residing in Welkom. Although Adv N Snellenburg SC drafted the heads of argument, adv SJ Reinders appeared before us on behalf of the appellant on instructions of A Podbielski Inc, c/o Honey and Partners Inc, Bloemfontein.

[4] The respondent in the appeal and the plaintiff in the court *a quo* is Mr Motshedi Nathane, a major male business person residing in Roodepoort, Gauteng. He did not file a notice to oppose the appeal and consequently, there was no appearance on his behalf before us. I shall hereinafter refer to the parties as on appeal to avoid confusion.

The pleaded facts.

[5] The following averments appear from the particulars of claim:

a. the respondent lent R3 000 000 to the appellant in accordance with a written loan agreement dated 3 May 2021 in terms whereof they agreed that interest in the total amount of R3 000 000 would be payable;

b. the total amount, that is the capital of R3 000 000 and interest of R3 000 000, would be payable in 24 equal monthly payments of R250 000 from June 2021;

c. the respondent complied with his obligations and paid R3 000 000 to the appellant;

d. the appellant made several payments from September 2021 to July 2022 in the total amount of R1 400 000;

e. the respondent was not a registered credit provider, but alleged that at the time of entering into the agreement he in particular was unaware of the illegal nature of the agreement of which he only became aware in June 2023;

f. the appellant has been enriched at the expense of the respondent in the amount of R1 600 000 which he failed to pay to the respondent.

[6] The following averments are contained in the plea:

a. in the event of an unlawful credit agreement, the court must in terms of s 89(5) of the NCA make a just and equitable order, including but not limited to an order that the credit agreement is void as from the date thereof;

b. the appellant was not liable to make further payments to the respondent in light of the unlawful agreement;

c. it is denied that the respondent was unaware of the illegal nature of the agreement at the time of entering into it;

d. the respondent failed to make the necessary allegations to sustain a cause of action based on unjustified enrichment;

e. the agreement contravened the provisions of s 105(1) of the NCA insofar as the interest rate levied contravened the maximum rate that might be charged and furthermore, part of the payments made included interest at a rate in contravention of the maximum rate;

f. an acquaintance of the respondent instructed him to deduct the amount of R1 600 000 allegedly owed by the appellant to him in partial settlement of the respondent's debt owed to that acquaintance in the amount of R7 million.

[7] In the respondent's affidavit in order to verify the cause of action, he made the following allegations:

a. the appellant was unjustly enriched at his expense as he had received an amount of R3 000 000, but failed to repay this amount;

b. at the time of entering into the agreement the parties were unaware that it was invalid and since the respondent has become aware of the invalidity, he abandoned any claim in respect of interest;

c. the appellant bore the onus to prove that he had not been unjustifiably enriched.

[8] In the answering affidavit the appellant made the following allegations:

a. in relying on s 89(5) of the NCA, the court has to make a just and equitable order which may include that the contract is void, that the respondent's action should be dismissed and/or that the respondent should be entitled to restitution, *ie* payment of the balance of the capital that had not been repaid;

b. the determination to be made by the court must be based on the justice and facts of the individual case, public policy considerations and a balancing of these factors against each other;

c. the summary judgment application was an abuse of process;

d. the loan agreement must be declared void, which may justify a dismissal of the respondent's action, and/or an order that the respondent is not entitled to any performance, *ie* payment of the balance under the agreement;

e. the respondent has not properly and fully pleaded a cause of action for recovery of the R1 600 000 on the basis of unjustified enrichment;

f. the only just and equitable order to be granted in terms of s 89(5) would be that the contract is void and the respondent not entitled to repayment of the loan or repayment of the outstanding balance;

g. the payments already made to the respondent included interest at a rate contravening the maximum rate that might have been charged;

h. the appellant has not been enriched at the expense of the respondent who was not impoverished in the amount of R1 600 000;

i. consequently, the application for summary judgment should be dismissed, leave be granted to him to defend the action, that the respondent should pay the costs of the application on a scale as between attorney and client and furthermore, that the action be stayed until payment of the appellant's taxed costs.

The judgment of the court a quo

[9] The court *a quo* dealt with the principles applicable to summary judgment procedure as well as s 89(5) of the NCA and the *par delictum* rule. It did not agree with Mr Snellensburg's submission that the court could only make an order based on unjustified enrichment after hearing evidence during a trial. According to the court *a quo*, it was undisputed that the balance of the loan in the amount of R1 600 000 had been received by the appellant. Consequently, the court was in a proper position to decide which order was just and equitable.

[10] The court *a quo* dealt with Mr Snellenburg's submission pertaining to the excessive interest charged and stated the following:[1]

'If [it] was to be taken as a determining factor in holding that the Plaintiff is not entitled to restitution, it will effectively mean that the Plaintiff is penalised in not receiving the outstanding balance of the capital loan amount, although interest does not even form part of the present claim.'

[11] In concluding as it did, the court *a quo* erred. It was not for the appellant to provide any particulars in respect of interest allegedly forming part of the payments made as set out in paragraph 40 in the judgment. It is apparent from the loan agreement that the full amount of R6 000 000 would be paid in 24 equal instalments of R250 000 in respect of the capital and interest. Obviously, this meant that the amount paid over to the respondent included illegal interest. The court *a quo* relied on

[1] Record p 45: judgment para 39.

the relaxation of the *par delictum* rule explained nearly a century ago in *Jajbhay v Cassim*,[2] a judgment followed in numerous judgments ever since. In the exercise of its discretion the court *a quo* granted summary judgment based on the simple justice between man and man principle and the relaxation of the *par delictum* rule.

An evaluation of the appellant's submissions

[12] Rule 32(1) sets out the type of claims that may be adjudicated in summary judgment procedure. These claims are:

'(a) on a liquid document;

(b) for a liquidated amount in money;

(c) for delivery of specified movable property; or

(d) for ejectment;

together with any claim for interest and costs.'

[13] In his heads of argument Mr Snellenburg strenuously submitted that the application for summary judgment should not have been entertained by reason of s 164(1) read with s 89(5) of the NCA. Section 164(1) reads as follows:

'Nothing in this Act renders void a credit agreement or a provision of a credit agreement that, in terms of this Act, is prohibited or may be declared unlawful unless a court declares that agreement or provision to be unlawful.' (emphasis added)

Section 89(5) reads as follows:

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

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

[14] The respondent did not identify the enrichment action relied upon, although this in itself is not a requirement. It could only be the *condictio ob turpem vel iniustam causam*. The requirements for the enrichment action applicable *in casu* are the following:

a. ownership must have passed with the transfer, or on the facts of this case, money has been paid over to the other party;

b. the transfer (or payment) must have taken place in terms of an unlawful agreement; and

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[2] 1939 AD 537 at 544 & 545, 549-557 and 558.

c. the plaintiff must tender the return of what they have received.[3]

Bearing in mind the general principles pertaining to enrichment, the plaintiff should have alleged that he was impoverished and the defendant enriched as a result.

[15] The Constitutional Court in *Opperman*[4] continued as follows:

'In order to be successful, ordinarily the party who claims on the basis of unjust enrichment must be free of turpitude and show that he or she has not acted dishonourably. This is the *par delictum* rule. The underlying principle is that the law should discourage and deter illegality; it should not render assistance to those who defy it.'

[16] It was submitted on behalf of the appellant that the respondent had to verify his cause of action under oath, but failed to do so bearing in mind that the cause of action verified must be in respect of a complete cause of action. The respondent failed, as submitted, to plead the *facta probanda* which identified the issues upon which he would seek to rely and on which evidence would be led in intelligible and lucid form allowing for the defendant to plead thereto. In fact, so it was argued, the respondent never qualified for summary judgment as a result of an incomplete pleaded cause of action.

[17] The appellant submitted that the respondent did not seek an order in terms of s 89(5) read with s 164 of the NCA. The respondent did not allege that because the loan agreement was unlawful as he was not registered as a credit provider in terms of s 40(1) and (2) of the NCA, he was entitled to the relief contained in s 164(1) read with s 89(5) and consequently, that a just and equitable order should be made. When the scheme of the NCA is considered, parties trying to circumvent the provisions thereof may be prevented from claiming what is allegedly due to them, even on the basis of unjustified enrichment. It is clear that the respondent did not seek an order to declare the loan agreement void. It was for the court to make such a declaration based on the *facta probanda* and verifying of the cause of action under oath presented to it. Only once such order is made, the further provisions of s 89(5) are activated and become relevant.

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[3] See *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) para 15. It is recorded that the court in *Opperman* declared s 89(5) as it read at the time unconstitutional whereafter the legislature amended the section to read as it now reads and quoted above.

[4] *Ibid* para 16.

[18] Even if the respondent were to seek an order of unlawfulness, he would not be entitled to summary judgment, bearing in mind rule 32(1) quoted above. In *Nature's Choice (Pty) Ltd v Ballendene*[5] summary judgment was granted for payment of the capital of R800 000 lent and advanced by an unregistered lender. The facts are not similar to the facts *in casu* as no mention is made of any interest charged or claimed. The court incorrectly referred to s 189(5) of the NCA. There is no such a section. However, the court never considered s 164(1) or the rationale for the statutory provision contained therein. The same applies to the court *a quo in casu*. I do not know whether Mr Snellenburg drew the court *a quo*'s attention to s 164(1) and argued same, but it is apparent from the judgment that this statutory provision was ignored. If the court *a quo*'s judgment is analysed properly, it failed to recognise that s 89(5) is only activated once a declaration of unlawfulness is made in terms of s 164(1).

[19] I am satisfied that the court *a quo* could not consider the matter based on so-called simple justice between man and man and the just and equitable principle. It should not have endeavoured to consider a relaxation of the *par delictum* rule during the summary judgment proceedings. This should have been left for the trial court to adjudicate eventually. I am in respectful agreement with the judgment of Boruchowitz J in *Leech and Others v ABSA Bank Ltd.*[6] The respondent's turpitude and other factors will be relevant and to be considered by the trial court after discovery and cross-examination of the parties and the respondent in particular. It is not necessary to speculate what may happen in such a case, but the intentional contravention of the NCA may well be an aspect to be fully canvassed during cross-examination. The underlying principle pertaining to the *par delictum* rule as discussed in *Opperman supra*[7] is that the law should discourage and deter illegality and should not render assistance to those who defy it. In my view, if the court *a quo*'s judgment is allowed to stand, a wrong message would be sent out, *ie* that unregistered credit providers who contravene the NCA may eventually find themselves in a better position than a person who abides by the law and complies with all registration requirements.

[20] In the circumstances I am satisfied that it was not correct to make a mere mathematical calculation by subtracting the R1 400 000 paid by the appellant from the

[5] (2020/1935) [2021] ZAGPJHC 756 (22 July 2021).
[6] [1997] 3 All SA 308 at 314, 315 & 316 e.
[7] *Loc cit* at para 17 and further; see also *Afrisure CC and Another v Watson NO and Another* 2009 (2) SA 127 (SCA) at para 39 and further.

R3 000 000 capital lent to him to arrive at the sum of R1 600 000. When the appellant made the payments, they were intended to provide for capital and excessive interest and were in fact accepted on that basis. There can be no doubt about that. The effect hereof is that the respondent received an undisclosed amount of interest unlawfully. The respondent should have tendered the interest unlawfully agreed upon and received in order to have complied with the third requirement of the particular enrichment action. He did not plead compliance with such requirement. I am satisfied that the appellant's disclosed defence was not only *bona fide,* but also good in law. The court *a quo* erred in not coming to the same conclusion and if it did, it was bound to refuse summary judgment. I am satisfied that it could not be found that the respondent had an unanswerable case.

[21] The appellant's counsel submitted in the heads of argument that summary judgment should have been refused with punitive costs on the attorney and client scale and that the action be stayed pending payment of the taxed costs. When I requested Mr Reinders' response in this regard during oral argument, he immediately conceded that at best for the appellant, party and party costs should be awarded in respect of the summary judgment application and that no order should be made pertaining to the stay of the action as provided for in rule 32(9)(a). His concession was properly made and there is no reason to dwell further on this topic. An appropriate order will be made.

Conclusion

[22] The successful appellant is entitled to the costs of the appeal. The respondent should not have embarked upon summary judgment proceedings. I considered whether it would not be fair to order the costs of those proceedings to be costs in the main action, but based on the findings herein, I am satisfied that the respondent shall pay those costs.

Order

[23] The following order is made:

1. The appeal is upheld.
2. The order of the court *a quo* is set aside and replaced with the following:

a. the application for summary judgment is dismissed;

b. leave is granted to the defendant to defend the action;

c. the plaintiff shall pay the costs of the summary judgment application on a party and party scale, inclusive of the costs of opposition thereof, counsel's fees to be taxed on scale C.

3. The respondent shall pay the appellant's costs of the appeal, counsel's fees to be taxed on scale C.

[redacted]

JP DAFFUE J

I concur

[redacted]

NS DANISO J

I concur

[redacted]

JJ BUYS AJ

Appearances

For appellant:	Adv SJ Reinders (the heads having been drawn by Adv N Snellenburg SC)
Instructed by:	A Podbielski Inc c/o Honey & Partners Inc Bloemfontein
For the respondent:	No Appearance