

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2024-064772

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES /NO
05/09/25	05 September 2025
DATE	SIGNATURE

In the matter between:

ANGELINE POOLE N.O.

First Applicant

JANETTA EVELYN CARR N.O.

Second Applicant

And

AARON STANGER N.O.

Respondent

Heard: 01 September 2025

Delivered: This Judgment was handed down electronically by circulation to the parties' legal representatives by email and by uploading to Court-Online and

ORDER

1. The Application is dismissed.
2. The costs of the application are to be paid by the Applicants on the attorney and client scale. These costs are to include the costs of counsel as taxed or agreed, on Scale C, as follows :
 - 2.1 Where both counsel have been engaged in and/or attended to work together, only the costs of the senior shall be paid by the Applicants;
 - 2.2 Where the junior has attended to work without the senior (such as, but not limited to, consultations, drafting and research), her costs shall be paid by the Applicants;
 - 2.3 Where the senior has attended to work without the junior his costs shall be paid by the Applicants;
 - 2.4 Where the senior has instructed the junior on work he required her to do to assist him, and the junior has reported back to the senior on such work done, the costs of both counsel for the time spent in these interactions shall be paid by the Applicants;
 - 2.5 In summary of 2.1 to 2.4 all costs of the senior shall be paid by the Applicants, all costs of the junior for work done alone without the senior shall also be paid by the Applicants, the costs of time spent in the senior instructing the junior on work he required her to do to assist him and the junior reporting back to the senior on such work done shall also be paid

by the Applicants. The remaining costs of the junior when working with the senior (for example, but not limited to, both counsel attending consultations, both counsel preparing for court together, both counsel attending court for the hearing) shall not be paid by the Applicants.

- 2.6 This restriction on costs of counsel is not be understood as disallowing the costs of any counsel as between counsel and their own instructing attorney. No displeasure with, or sanction of, either counsel is intended by this Order.

JUDGMENT

C VON LUDWIG AJ

Procedural Issues

- [1] Respondent sought condonation for the late filing of his Answering Affidavit. I expressed my reservations about his reasons for the lateness, but granted condonation. Applicants had delivered a Replying Affidavit and submitted a Supplementary Affidavit, the application is ready and ripe for hearing and there appears to be no prejudice to either party in proceeding with a full set of papers.
- [2] Applicants then sought leave to file a Supplementary Affidavit attaching an email which, it was submitted, added to the context of the existence of the Loan Agreement which is the basis of the Applicants' case.
- [3] Respondent opposed admission thereof on the basis that a case must be made out in the Founding Affidavit, and that "context" is relevant when dealing with

the terms of an agreement, but not in determining the existence of an agreement.

- [4] Mr Kaplan for Respondent proposed dealing with the application as a whole from which it would become evident what to do with the Supplementary Affidavit. I accepted this approach and the application proceeded.

Parties and Relief Sought

- [5] The Applicants are joint liquidators of Nyakaza Property Developers (Pty) Ltd (in liquidation) ("Nyakaza") which was liquidated on 25 May 2022. There is a Petition pending to the Supreme Court of Appeal for the setting aside of the liquidation.
- [6] The Respondent is the Executor of the Estate Late A D V Liebman ("Liebman") who died in May 2023.
- [7] Applicants seek to recover R6 072 769.04 and interest thereon at the ABSA overdraft interest rate, from Respondent in respect of funds lent and advanced to Liebman between 06 and 11 September 2019.
- [8] They contend there is no dispute of fact, hence Motion Proceedings.
- [9] Respondent contends, *inter alia*, that there is no loan agreement.

Background

- [10] Nyakaza was registered on 04 August 2005.
- [11] Liebman was a director from 04 October 2005 until 15 July 2019 when he was removed.
- [12] It does not appear from the Founding Affidavit that Liebman was a shareholder.

- [13] Liebman's son and daughter played roles in the company, and there is other litigation. A somewhat confusing background is sketched in the Founding Affidavit, with some information being of assistance and some not.
- [14] On 28 August 2019 Nyakaza passed a Resolution which mandated Liebman "and Jacqueline" (his daughter) to have access and signing powers "*to the ABSA Bank account*" and have "*authority to sign and transact along with existing signatory CHRISTIANA BICCARD.*"
- [15] It further provided that "*all transactions shall require any two joint signatures on the ABSA bank account*".
- [16] On 05 September 2019 another Resolution was passed in terms of which Nyakaza agreed to loan to Liebman R7 000 000.00 to be repayable within 12 months, which would attract interest at the ABSA prime overdraft rate, and that the signatories of the company's bank accounts were authorised to make such payments as and when such funds become available.
- [17] In the Founding Affidavit Applicants set out a schedule of 6 payments which were made by Nyakaza to Liebman's bank account from 06 to 11 September 2019.
- [18] Applicants submit that the Resolutions and the payments constitute an agreement of loan between Nyakaza and Liebman, and postulate the dates for repayment as being 12 months from payment of each instalment.
- [19] These sums were not repaid by Liebman to Nyakaza, hence the application.

- [20] In correspondence Respondent contended that the claim has prescribed. Applicants address this in the Founding Affidavit, but in answering the Respondent persists with this contention.
- [21] In the Answering Affidavit Respondent also disputes the Applicants' authority to prosecute this claim.
- [22] The Answering Affidavit deals almost "*en passant*" with the actual merits of the claim and Respondent's defence, but does aver that there was no agreement of loan and Applicants have not made out a case for one.

Analysis

- [23] The Founding Affidavit, despite seeming to set out a history, and some tables with summaries, is in fact very unstructured and patchy. This submission by Mr Kaplan for Respondent goes to the root of the matter. "*Applicants want us to cast about on the papers generally to look for a cause of action. Has the Founding Affidavit made out a case?*"
- [24] Mr Fernandes for the Applicants contended that the basic essentials for a loan agreement were fulfilled, namely that :
1. The August resolution mandated Liebman and "Jacqueline" to be signatories of Nyakaza's ABSA bank account, and required that all transactions must have 2 signatories;
 2. The September resolution authorised Nyakaza to lend to Liebman R7 million, to be repayable over 12 months with specific interest;
 3. Funds were paid by Nyakaza into Liebman's personal account.

- [25] The struggle I have had to set out the logical and legal steps of the alleged loan agreement for this Judgment highlights exactly where the flaws in the Applicants' case lie.
- [26] Respondent reminded that the very basis of the Applicants' claim is an agreement/contract. For a contract to exist there are three basic requirements. For the very basic principles of contract Mr Kaplan referred to LAWSA (First Re-issue, vol 5 part 1):
- a) the contractants must agree on the consequences they wish to create;
 - b) they must intend to bind themselves legally
 - c) they must be aware of their agreement.
- [27] The Applicants seem to contend that because Liebman and his daughter were authorised signatories, and there always had to be 2 signatories, either Liebenberg or Jacqueline would always be one of them. From that they conclude that either Liebman and/or his daughter would have been signatories for the payment of the 6 sums which constitute the alleged loan. From that they conclude that Liebman and/or his daughter would, before signing, presumably understand and accept the cause for each payment. Receiving the payments into his bank account seems to be contended to be the concluding step of the loan process.
- [28] This is nothing more than a chain of probabilities.
- [29] There is absolutely nothing on any of the papers to support the contention that Liebman knew of the contents of either of the Resolutions (himself directly or via his daughter), actually signed for any of the payments, if he did sign for any

of the payments had any knowledge or agreement that they were being paid "as a loan", or in receiving the payments into his account did so "as a loan".

[30] Even if Liebman was aware of the contents of the Resolutions there is nothing to show that he agreed with them. We do not know if he signed for the payments to himself. Receipt of payments into his account takes these submissions no further. There is simply nothing to illustrate that Liebman had any intention to bind himself legally. The consequences which Nyakaza wished to create are evident from the Resolutions and the payments, but there is nothing to support any contention that the other party, Liebman, was in fact a party to these intentions or agreed with these consequences.

[31] On a strict application of the law that an applicant must make out its case in its Founding Affidavit, the case fails right here.

[32] It then becomes evident why Mr Kaplan contended that what to do about the Supplementary Affidavit would become clear in dealing with the matter as a whole. However, even if I accepted the introduction of new matter in the Replying Affidavit, and even if the Supplementary Affidavit were admitted into evidence, and I accepted Applicants' submission that the case law permits me to consider the context of the conclusion of the agreement (which I do not) I remain of the view that no cause of action can be found on the Applicant's papers as a whole.

[33] The additional flaws in the Applicants' case support this conclusion:

1. Liebman was not a director at the time the Resolutions were passed. He played no role in voting for these resolutions. He may have known, by virtue of perhaps being asked to sign things, that he had been appointed

as a signatory per the first resolution, but we have no evidence that he did know, or even that he did sign anything, let alone the transactions in question;

2. There is nothing whatsoever to say that he knew anything about the existence or content of the second resolution.
3. Liebman was one of three signatories and only 2 were required for transactions. There is nothing before the Court to say that Liebman was in fact a signatory to any of the transactions pursuant to which payment was made to his account.
4. Even if Liebman had been a signatory to any of the payments into his account there is nothing before the Court to say what the underlying documentation for such signatures may have been and it cannot be assumed that the second resolution was the document on which he based any of his signatures.
5. If Liebman was not a signatory to any of the payments, and Jacqueline was a signatory, there is nothing before the Court to say that just because she was his daughter she told him of the payments or the resolution.
6. Applicant placed importance on the admission by the Respondent (Liebman's attorney while he lived and now his executor) that the Resolutions are "valid". The inference is drawn that Respondent knew of them and of their content, supporting the allegation that they, together with the payments, constituted the alleged loan agreement.

7. Even if Liebman was aware of all of the above, the inference that a proper loan agreement was concluded between him and Nyakaza simply because he knew of the contents of the Resolutions is not logic or law.
8. Receiving the money/payments into his account does not mean that Liebman concluded a loan agreement. There could conceivably be a number of reasons for payments by the company to Liebman.
9. At best, on the bald allegations of the Founding Affidavit, Liebman authorised the payments to his account as they are set out in paragraph 40 or saw them coming in and was aware of them. There is nothing to say what the reason for these payments was in his perception and/or that there was any agreement as to any repayment, as per the resolution or otherwise. Indeed the fact that he did not make any repayments after expiry of the contended 12 month repayment terms, although he had not yet passed away, militates against any such payments being, in his mind, due.
10. Even if case law permits me to consider the context of the situation when examining the existence of an agreement (I am of the view that it does not and that the "context" cases pertain to the terms of an agreement) there are so many contextual aspects to be considered when dealing with an issue which involved family members, other litigation, a plethora of correspondence, and obviously complex dynamics, that the "contextual" aspects could lead to very different conclusions from that which the Applicants want me to reach.

11. Importantly, all of the above are suppositions, possibilities, and at best may be contended to be probabilities. None of this constitutes factual evidence to make out a cause of action.

[34] This is an Application, as opposed to an Action which is the usual way of prosecuting a money claim, and Applicants contend there is no dispute of fact. From the above it is clear that there is the most basic and obvious dispute of fact about the very existence of the loan agreement which founds Applicants' claim.

The Law and the Cases

[35] A thorough Judgment is important for various reasons. However it serves no purpose to include a summary of relevant cases when the issues pertaining to process and the law are simple. The litigants may accept that I have, in coming to my conclusions, considered all the cases to which I was referred.

Conclusion

[36] I find that the Applicants have not made out a case for the agreement of loan as alleged.

[37] It is also clear that there is a basic, core material dispute of fact.

[38] Whether the Applicants fail for lack of a cause of action, or for coming on Motion when they ought to have come by way of Action and for not even attempting to explain why they contend there is no dispute of fact, fail they must.

[39] In these circumstances costs must follow the result. What sort of costs is the question. The Founding Affidavit is self-evidently poor in its failure to disclose a cause of action, emphasised by introduction of new matter in the Reply and the

attempt to file a Supplementary. Many annexures, some irrelevant, compound the ills.

[40] Respondent is not without blame. 3 of the 9 pages of the Answering Affidavit deal with condonation (sought for a poor reason) and the remainder of the Affidavit is far from crisp and succinct, but the fact remains that it is for Applicant to make out a case and Respondent has been brought unnecessarily to Court and must recover the costs thereof.

[41] I am of the view that punitive costs against the Applicants are justified.

[42] However, no submissions were made to me as to why Applicants engaged 2 counsel, and having regard to the nature of the matter I do not understand the need for it and do not intend to allow costs for this save as expressly set out in my Order.

[43] I thus make the following Order :

Order

1. The Application is dismissed.
2. The costs of the application are to be paid by the Applicants on the attorney and client scale. These costs are to include the costs of counsel as taxed or agreed, on Scale C, as follows :
 - 2.1 Where both counsel have been engaged in and/or attended to work together, only the costs of the senior shall be paid by the Applicants;
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- 2.6 This restriction on costs of counsel is not be understood as disallowing the costs of any counsel as between counsel and their own instructing attorney. No displeasure with, or sanction of, either counsel is intended by this Order.



C VON LUDWIG AJ

ACTING JUDGE
GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Appearances:

For the Applicant:	Adv P Fernandez Instructed by NLA Legal Inc
For the Respondent:	Adv J Kaplan Adv E Dreyer Instructed by Stanger and Associates

Date of hearing: 01 September 2025

Date of judgment: 05 September 2025