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

CASE NO: 2019-28951

(1) REPORTABLE: NO

(2) OF INTEREST TO THE JUDGES: NO

(3) REVISED: NO

DATE: 11/11/2025

SIGNATURE:

In the matter between:-

ABSA BANK LIMITED

Plaintiff

and

FRANS LODEWYK MUNNIK BASSON

First Defendant

THE BASSON FAMILY PROPERTY GROUP (PTY) LTD

Second Defendant

JUDGMENT

Mfenyana J

- [1] This is an application for absolution at the instance of the defendants after the close of the plaintiff's case. The plaintiff sued out a summons against the defendants, claiming various amounts and an order declaring specially executable, certain properties belonging to the second defendant, pledged as security for the first respondent's debts. In the alternative, the plaintiff seeks an order declaring the loan agreement and the credit card facility agreement void and the first defendant has been unduly enriched at the expense of the plaintiff. The claims arise from written agreements concluded between the parties in 2011 and 2012, essentially extending a loan and a credit facility to the defendants. The plaintiff claims that it fulfilled all its obligations in terms of the agreement and paid the funds to the first respondent.
- [2] Both respondents have defended the action, citing various reasons, key to which is that the loan agreement was subject to certain conditions, none of which were fulfilled by the plaintiff.
- [3] When the trial commenced, the plaintiff called four witnesses: Mr Wessel Frederick Claassens (Mr Claassens), Mr Neville van Vuuren (Mr van Vuuren), Ms Raafiqah Mahomed (Ms Mahomed) and Ms Amanda Jane Bekker (Ms

Bekker) to testify. The plaintiff thereafter closed its case.

[4] Mr Claassens testified that he was the banker responsible for the first defendant's portfolio with the plaintiff. During cross-examination, the issue turned on whether the condition that required the First National Bank bond to be settled and cancelled had been fulfilled. Mr Sullivan, counsel for the defendants, challenged Mr Classens, stating that ABSA did not settle the FNB bond, and highlighted that Mr Classens could not provide any document proving otherwise. Mr Oliveira, for the plaintiff, confirmed that no such documents had been submitted. Mr Claassens, however, testified that the bond would not have registered if the obligation with FNB had not been cancelled.

[5] Mr van Vuuren testified that he was employed as a banker with ABSA Wealth. He explained the process involved when migrating clients to Wealth. He stated that the bank increases the limit, restructures the account and consults the client if more information is required. He testified that he met with the first defendant to discuss a request to increase facilities. He stated that although he understood that the first defendant would be able to afford the increased credit, he still had the responsibility to confirm this. He denied that the granting of the loan by ABSA rendered the first defendant over-indebted, and stated that, in those circumstances, he would not expect the first respondent to apply

for an additional loan.

[6] During cross-examination, Mr van Vuuren conceded that he was not involved in the process leading to the agreements and did not play a part in it. He confirmed that it was a decision taken by ABSA to migrate the first defendant to ABSA Wealth; however, discussions were held with both Mr Claassens and the first defendant. When it was put to him by Mr Sullivan that there was no application and thus the first defendant would testify that he did not apply for the credit granted to him, Mr van Vuuren stated that there would not be an application form, as the first respondent was referred to him by Mr Claassens. He further testified that before a submission is sent to Credit, the banker, in this case, Mr Claassens would obtain information from the client. When it was put to Mr van Vuuren that the submission for credit assessment was not completed by the first defendant, he stated that the increase in the amount comes from him, as the document is populated at the client's request. He vehemently refuted the suggestion that the first defendant did not apply for the facility, stating that the instruction was from the first defendant or the second defendant.

[7] The plaintiff's third witness, Ms Mahomed, a regional manager employed by ABSA, testified about the process involved in credit applications and assessments. She stated that for the loan in the present matter, there must

have been an assessment done. She added that once approved, an application is valid for 6 months.

[8] Ms Bekker testified that she was employed by ABSA from 2013 to 2025, responsible for debt recovery in the defendant's case. She testified that in her capacity as a recovery specialist, she met with the first defendant multiple times, and he assured them that he had various sources to settle the debt. Ms Bekker submitted financial records and certificates proving the debt, which the defendants did not contest. She is the manager who signed the certificates of balance. She, however, confirmed she had no involvement in granting the original loan or credit card.

[9] At the close of the plaintiff's case, the defendant applied for absolution, contending that the plaintiff had failed to prove that the conditions were met and consequently no agreement existed.

[10] The test for absolution from the instance was formulated in *Claude Neon Lights SA Ltd v Daniel*¹ as follows:

“ . . . when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind

¹ 1976 (4) SA 403 (A).

reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (Gascoyne v Paul and Hunter, 1917 T.P.D. 170 at p. 173; Ruto Flour Mills (Pty.) Ltd. v Adelson (2), 1958 (4) SA 307(T)).”²

[11] ‘This implies that a plaintiff has to make out a *prima facie* case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff’ (Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) 37G-38A; Schmidt Bewysreg 4th ed 91-92). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one...’

[12] The question is whether, at the close of the plaintiff’s case, there was such evidence ... assuming it were true, upon which a reasonable court might, not should, give judgment against the defendant. In other words, “whether a court, if no further evidence was led, after reasonable application of its mind, might find in favour of the plaintiff”³.

[13] It follows from the above that the court, in such an application, does not concern itself with the defendant’s plea, but rather with whether the plaintiff has discharged its onus of showing the existence of a *prima facie* case.

² At 409G – H.

³ *De Klerk v ABSA Ltd and Others* 2003 (4) SA 315 (SCA).

[14] The Court has a discretion to grant or refuse absolution and, in the exercise of this discretion, the Court would normally not have regard to the credibility of witnesses unless there was a serious issue regarding the credibility of such witnesses to the extent that the Court was unable to place any reliance upon them and the Court may also have regard to the possibility that the plaintiff's case may be strengthened by evidence emerging during the defendant's case⁴.

[15] In *Ruto Flour Mills (Pty) Limited v Adolfson*⁵, the court stated as follows with reference to *Gascoine v Paul* and Hunter⁶:

“At the close of the case for the plaintiff therefore the question which arises for the consideration of the Court is, is there evidence upon which a reasonable man might find for the plaintiff. ... If the defendant does not call any evidence but closes his case immediately the question for the Court would then be: is there such evidence upon which the Court ought to give judgment in favour of the plaintiff. If the evidence is not only not convincing but actually found by the trial Court to be an utter fabrication (see: *Cats v Bloomfield* [1914 TPD 397](#); *Theron v Bear* 1918 CPO 443, *Hutchinson v Fourie* [1930 TPD 740](#)) or if the pure fact is that it is too vague and contradictory to serve as proof for the question in issue, then it would be evidence upon which a reasonable man would not find and the Court would be perfectly justified in granting absolution from the instance at the close of the case for the plaintiff.”

[16] In applying for absolution, Mr Sullivan stated on behalf of the defendants that the evidence presented by the plaintiff is insufficient for a ruling to be made

⁴ *Fedgas (Pty) Ltd v Rack-Rite Bop (Pty) Ltd* [1997 3 All SA 68](#) (B).

⁵ 1958 (4) SA SALR 307 (TPD).

⁶ *Gascoine v Paul and Hunter* - Transvaal Provincial Division Law Reports 1917, 170 at 173.

against the defendant. He submitted that there is no evidence upon which a court, acting reasonably, might find for the plaintiff. He further submitted that there is no prospect that the plaintiff's claim might succeed. There is thus no need for the defendants to go through the trouble and expense of mounting a defence against the plaintiff's claim, and the defendants should be absolved, he added. For this proposition, he relied on the well-known case of *Claude Neon Lights*⁷.

[17] He further relied on *Gordon Lloyd*⁸ that the court is required to find that there is evidence relating to all the elements of the claim, and that at this stage of the enquiry, the court is concerned with what its judgment might be if the evidence were believed and not whether it believes the evidence. Thus, credibility is not a concern for the court at this stage. Mr Sullivan further submitted that a critical look at the particulars of claim indicates that the first cause of action is in respect of the loan account agreement, but makes no mention of the specific condition that the First National Bank bond account 6[...] should be closed and the bond cancelled.

[18] He further contended that the plaintiff had neither provided evidence nor

⁷ *Claude Neon Lights (SA) Ltd v Daniel* 1976(4) SA 403 (A).

⁸ *Gordon Lloyd Page & Associates v Rivera and Another* (384/98) [2000] ZASCA 33; 2001 (1) SA 88 (SCA); [2000] 4 All SA 241 (A) (31 August 2000)

proven that the condition was fulfilled, nor demonstrated their own compliance with the condition. He stated that only after doing so should the plaintiff be required to prove the defendants' breach. He also noted that Mr Claassens admitted that, if the condition was not met, the loan amount should not have been disbursed, and that proof of compliance would be a guarantee issued by ABSA to FNB. Under these circumstances, the plaintiff cannot succeed with its claim against the defendants.

[19] According to Mr Sullivan, the payment and cancellation of the FNB bond was a condition precedent, and therefore, the plaintiff cannot enforce any rights arising from the agreement until that condition has been satisfied. He referenced various decisions of the SCA, indicating that the non-fulfilment of suspensive conditions affects the agreement, emphasising that the burden of proving the fulfilment of these conditions rests on the plaintiff. He noted that Mr Claassens's evidence was that the condition should have been met.

[20] Additionally, he noted that the terms of the credit facility were not included in the pleadings. He further argued that of the plaintiff's witnesses, only Mr Claassens provided testimony relevant to the credit card and loan agreement, as the other three witnesses were not involved at the relevant time and did not address these issues. The defendants argued that since the conditions of the agreements were not fulfilled, no credit agreement came into existence and,

therefore, there is nothing to enforce.

[21] On the issue of the first defendant's marriage, Mr Sullivan submitted that the plaintiff has failed to prove that the first defendant is married out of community of property.

[22] On these grounds, Mr Sullivan submitted that absolution should be granted with costs.

[23] In response, Mr De Oliveira characterised the defendants' application for absolution as a storm in a teacup. He argued that the court should determine whether the plaintiff has made out a *prima facie* case, and 'in case of doubt as to what a reasonable court might do, the court should lean on the side of allowing the case to proceed'. He added that "the plaintiff should not lightly be deprived of his remedy without the evidence of the defendant being heard. A defendant who might be afraid to go into the witness box should not be permitted to shelter behind the procedure of absolution from the instance."⁹ If certain facts in issue are within the knowledge of the defendant, the court should refuse absolution - if the burden of proof was on the defendant in proving some of the issues.

⁹ *Supreme Service Station (1969)(Pty) v Fox and Goodridge (Pty) Ltd* 1971 (4) SA 90 (RA) at 93.

[24] He argued that Mr Sullivan incorrectly takes for granted that clause 3.1. of the loan agreement is a condition precedent or a resolutive condition, which it is not. He stated that the court would have to interpret whether this is a condition (precedent or resolutive) or just a term. In the replication, the plaintiff denied that the conditions amount to conditions precedent. With reference to *Firststrand Bank Limited v Nel*¹⁰ and *Vega Holdings*¹¹ Mr De Oliveira submitted that the interpretation of the condition must be determined from the proper interpretation of the language used by the parties. Do they suspend the operation of all or some of the terms of the contract until the occurrence of an uncertain future event, or are they just terms of the agreement? He further submitted that in ordinary parlance, terms are loosely referred to as conditions, but they are not. True suspensive conditions render the operation of the entire contract dependent upon an uncertain event, he said, and there is no magic in the use of the term 'condition'.

[25] Citing Wallis JA in *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Ltd*¹², Mr De Oliveira argued that reliance on the subsequent conduct of the parties where there is ambiguity in a contract could be taken into account in preferring one interpretation over the other. The conduct of the parties in implementing the contract in this matter is that funds

¹⁰ 2022 JDR 2393 (GJ).

¹¹ *Firststrand Bank Limited v Vega Holdings Proprietary Limited* 2021 JDR 2673 (GJ).

¹² (759/11) [2012] ZASCA 126 (21 September 2012).

were disbursed, a deed of suretyship was executed by the second respondent, two properties of the second respondent were mortgaged to the plaintiff, and the first defendant paid the instalments for 6 years. Therefore, it is probable that the first respondent wants to shelter behind the process to avoid giving evidence.

[26] He submitted that the courts will adopt an interpretation which gives business efficacy to the contract rather than destroying the contract, particularly where the parties have conducted themselves in a manner which suggests that they hold the contract as valid. Where a contract is unconditional on the face of it, the onus is on the party who alleges such a condition to prove it. Where there is doubt, the court should lean in favour of keeping the contract alive. With reference to *Vega Holdings*, a judgment of this Division which was upheld by the Full Court, where Keightley J held that if on the face of it the provision is enforceable, it is a term, but if it depends on an uncertain future event, it is a condition precedent in the strict sense. Mr De Oliveira argued that it was not put to the plaintiff's witnesses that the first defendant would raise that there was a condition precedent, consequent to which the contract did not take effect. The closing of the undefined FNB account that must be closed appears to be within the control of the first defendant.

[27] It was further argued on behalf of the plaintiff that the terms of the loan agreement and the credit card are what they are. There is no dispute about them. It is also common cause that the credit card facility was made available to the first respondent. It is also common cause that the first respondent accepted the credit card facility and expended the funds.

[28] The plaintiff argued that the importance of Mr van Vuuren's evidence is that, in November 2023, the first defendant applied for a further loan and, in doing so, acquiesced and affirmed the existence of the 2012 loan, and the first defendant was the controlling mind of this process. It also relates to the issue of s15(4) of the Matrimonial Property Act, which states that if the non-consenting spouse ratifies the contract within a reasonable time, the contract becomes valid and enforceable, with retrospective effect. The onus is on the first defendant to prove that the contract was not entered into in the ordinary course of business.¹³

[29] Regarding the dispute about the NCA, the burden of proof that an agreement is reckless, results in over-indebtedness, and should be set aside, rests with the consumer. The plaintiff submitted that the application should be dismissed with costs, and that the determination of the scale of costs should be reserved

¹³ *Strydom v Engen Petroleum Ltd* 2013 (2) SA 187 (SCA).

until it is finally decided whether the agreement was conditional.

[30] In reply, Mr Sullivan submitted that the test requires this court to consider the evidence and not arguments on interpretation. He stated the evidence is that the condition must be fulfilled by ABSA and not the first defendant, before the funds could be paid. He stated that this amounts to a suspensive condition. I must immediately state that Clause 3.1.3.3 makes no mention of when and by whom it should be met. He stated that this accords with the wording of the agreement(subject to), which renders it a suspensive condition. Mr Sullivan further submitted that the court should only consider itself with the particulars of claim, which states that all suspensive conditions were met. He argued that Vega Holdings is distinguishable on the facts

[31] It seems to me that the determination of whether or not the plaintiff has made out a case sufficient for this court to require the defendants to respond thereto lies in whether there is sufficient evidence presented by the plaintiff upon which this court, acting reasonably, might find in their favour. The question is not whether the plaintiff has proven their entire case, but whether they have established a *prima facie* case. Having regard to the surrounding circumstances in light of *Endumeni*¹⁴ and *Comwezi*¹⁵, there can be no doubt

¹⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012).

¹⁵ *Ibid*, note 12.

that both the plaintiff and the defendants implemented the contract in a manner which suggests that they both considered the contract to be in existence, and more importantly, that they considered themselves bound by the terms thereof and acted in accordance with that belief. That, in my view, should dispose of any suggestion that the agreement did not come into existence. Both parties kept their respective sides of the bargain. The defendants have failed to meet the requirements for absolution.

[31] In the result, I make the following order:

- a. The application for absolution from the instance is dismissed.
- b. The defendants shall pay the costs of the application, the scale of which costs shall be determined in the final hearing of the matter.

S MFENYANA
Judge of the High Court
Johannesburg

Appearances

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Date of hearing : 16 April 2025

Date of judgment : 11 November 2025