

**REPUBLIC OF SOUTH AFRICA**



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

Case Number: 2024-129977

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: NO

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DATE

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SIGNATURE

In the matter between:

**CAROLINE CROWTHER**

Applicant

and

**NAMASIVAN CHETTY**

Respondent

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**JUDGMENT**

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*This judgment is handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date and time for hand down is deemed to be 26 February 2026.*

**DE OLIVEIRA, AJ**

- [1] The applicant seeks repayment from the respondent of monies loaned and advanced to him by the applicant in and during 2018 and 2019, save that the applicant relies on an Acknowledgement of Debt concluded between the parties on 16 February 2021 wherein the respondent acknowledged himself to be liable to the applicant in respect of such loans ("AoD").
- [2] It is common cause that the applicant is not registered as a credit provider in terms of section 40(1) of the National Credit Act 34 of 2005 ("NCA").
- [3] In terms of section 89(2)(d) of the NCA, if at the time an agreement is made and the credit provider is unregistered and the NCA requires that credit provider to be registered, such agreement is unlawful and, in terms of section 89(5) of the NCA, a court must make a just and equitable order including but not limited to an order that the credit agreement is void as from the date the agreement was entered into.
- [4] The antecedent question, however, is whether the NCA applies to the AoD at all. In terms of section 4(1) of the NCA, the NCA applies to all agreements (save for those referred to in the section) "...*between parties dealing at arm's length*..." It follows that where, for example, a person loans money to another, but that such persons are not dealing at arm's length, the NCA does not apply to the loan.
- [5] The issue for determination is accordingly whether, in concluding the AoD, the parties were dealing at arm's length as contemplated in section 4(2)(b)(iv) of the National Credit Act 34 of 2005 ("NCA").

### *The Relevant Factual Background*

- [6] According to the applicant, during 2018 and 2019 she lent money to the respondent, who was her accountant at the time and a friend. The applicant states that the loans were not arm's length transactions as the parties were friends. The applicant further states that she does not loan money in the ordinary course of business and that she does not loan money to the general public.<sup>1</sup>
- [7] In *Du Bruyn NO and Others v Karsten*,<sup>2</sup> the Supreme Court of Appeal pertinently held that it was irrelevant that a transaction in question may have been a once-off transaction where the role players are not participants in the credit market. Where a loan exceeds the statutory threshold, the lender is simply required to be registered in terms of the NCA.
- [8] In terms of the AoD, the respondent acknowledged himself to be indebted to the applicant in the sum of approximately R2 million; interest would be charged on outstanding amounts at 8% per annum; the debt would be due and payable on six months' written notice; should the debt not be paid six months after demand is made, the full amount would become due and payable; and in the event of the applicant requiring to take action in terms of the AoD, she would be entitled to costs on an attorney and client scale.
- [9] The applicant made demand for repayment in terms of the AoD in and during March 2024. When, despite the passage of six months, the respondent failed to pay the applicant in terms of the AoD, the applicant demanded repayment of the

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<sup>1</sup> I digress to mention that, whilst these allegations foreshadow certain knowledge on the part of the applicant that a defence in regard to the NCA would be raised by the respondent, and whilst these allegations are the sum total of the applicant's case (in the founding affidavit) in regard to the question of whether the parties were dealing at arm's length when the AoD was concluded, there is no evidence to suggest that the defence was raised prior to the institution of proceedings.

<sup>2</sup> 2019 (1) SA 403 (SCA).

amounts owing in terms thereof. Since the date of demand in March 2024, the respondent has paid the applicant the sum of R239 500.00 in reduction of his indebtedness owed to the applicant.

[10] It transpired that, in March 2021, on the request of the respondent, the applicant credited the amounts outstanding by the respondent with certain invoices issued by an accounting consultancy and advisory service in respect of work done by such business for the applicant and her various businesses. Whilst at first the parties agreed that such invoices would be set-off against amounts owing by the respondent to the applicant, the applicant subsequently chose of her own accord to reverse such set-offs on the basis that the debtor and creditor in regard thereto are not the applicant and respondent, respectively, in their personal capacities.

[11] As a consequence of the respondent's failure to repay his indebtedness to the applicant in terms of the AoD, the applicant seeks payment of the outstanding amount in terms thereof together with interest thereon at the rate of 8% per annum from 1 November 2024 to date of final payment, as well as costs on an attorney and client scale.

[12] According to the respondent, the AoD is an unlawful credit agreement as envisaged in section 89(2)(d) of the NCA in that it is a credit agreement in terms of section 8(4)(f) thereof.

[13] The respondent contends that the parties were dealing at arm's length in that, *inter alia*, (i) the applicant strived to achieve the utmost advantage from the transaction, (ii) the parties are not in a familial relationship and (iii) the parties are not independent of one another.

[14] The import of these contentions is to be found in section 4(2)(b)(iii) and (iv) of the NCA, which provides, *inter alia*, that parties are *not* dealing at arm's length when the contracting parties are natural persons in a familial relationship, where they are co-dependant on one another or one is dependent upon the other; or when, in any other arrangement, the parties do not necessarily strive to obtain the utmost possible advantage out of the transaction.

[15] In support of the respondent's contention that the parties were dealing at arm's length, he points out that:

- (a) the AoD is a formally drafted document;
- (b) the AoD provides for compound interest to be levied from the date of the loans themselves, that is from 2018 and 2019;
- (c) the AoD provides for judgment to be granted against the respondent; and
- (d) the AoD provides for costs on an attorney and client scale.

[16] The respondent further states that, at the time that the loans were advanced by the applicant to the respondent, the applicant knew that the respondent intended to use the funds for his other business ventures and agreed that he could repay same, with interest, after he sold his shares in a sports betting business. Whilst it is not important for purposes of this judgment (in the light of the conclusion to which I come), the respondent alleges that the parties, in and during October or November 2023, orally agreed that repayment of the full balance owing in terms of the AoD would only become due and payable after the respondent sold the site of his gambling business, or as the respondent further contended, that the

parties concluded a *pactum de non petendo* in terms of which the applicant would not enforce her rights under the AoD until after the aforementioned sale.

[17] It bears mentioning that, in her replying affidavit, the applicant sought to counter the respondent's case, and to expand upon her allegations pertaining to whether the parties were dealing at arm's length, by indicating that the parties appeared to be good friends who would regularly discuss their personal affairs in addition to business affairs. She annexed lengthy transcripts of the parties' WhatsApp exchanges to her replying affidavit.

[18] Notwithstanding the aforementioned set-off issue, as well as the issue pertaining to the *pactum de non petendo*, the respondent's core contention is that, at all material times, the parties were dealing at arm's length with one another despite the fact that they may have been friends at the time, and that the applicant sought to obtain the utmost advantage out of AoD, being the issue to which I now turn.

### *Analysis*

[19] In support of the applicant's case, Ms. Stevenson, who appeared before me on behalf of the applicant, referred me to the following findings in *Petzer v Dixon*:<sup>3</sup>

*"In my view, the parties were not independent of each other. The appellant sought the respondent's assistance for financial support to fund her share of the capital. The respondent was a silent partner and needed the help and expertise of the appellant to start and operate the franchise business. From the evidence led at the court a quo, it cannot be said that the parties strove to gain the maximum possible benefit for themselves out of the transaction. To the contrary, the parties assisted each other as*

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<sup>3</sup> 2023 JDR 0891 (WCC) at paragraph [26].

*acquaintances. Even after the expiration of five years since the loan was concluded, the respondent only claimed what was agreed upon. She only charged the appellant the interest she paid to the bank. She did not charge the appellant penalties on the arrears. She loaned the appellant R117 000, and the latter paid her R70 000 leaving a balance of R47 000 due and payable. She claimed this amount in her summons at the court a quo and nothing more.”*

[20] The facts of the present matter (those that are not in dispute) appear to me to be distinguishable, however. In the first instance, whilst in *Petzer* the creditor charged only a rate of interest upon which she herself was liable to repay her bank (from where she obtained the money to loan to the debtor), in the present case the applicant – despite making a passing reference, unsupported by any evidence, to some similar intention on her part – did not charge interest in terms of the AoD for this purpose.

[21] Ms Stevenson also relied on the judgment of the Supreme Court of Appeal in *Allied Steelrode (Proprietary) Limited v Dreyer and another*,<sup>4</sup> where it was held that a certain loan transaction and acknowledgment of debt were *not* concluded at arm’s length, except that there also the matter is distinguishable because, for example, no interest was claimed from the debtor.

[22] Ms Stevenson otherwise sought to rely on allegations in the replying affidavit that are directly at odds with the respondent’s allegations as set out in the answering affidavit (which is an issue to which I will return in a moment).

[23] For his part, Mr Booysen, who appeared before me on behalf of the respondent, highlighted the respondent’s insistence that the parties were dealing at arm’s

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<sup>4</sup> 2023 JDR 4927 (SCA).

length when concluding the AoD. He pointed out, for example, that according to the respondent the loans were advanced to him for commercial purposes and that it was understood, at all material times, that the respondent intended to utilise the loans for his business ventures and that he would repay them, *with* interest, in due course. In view of the fact that this allegation accords with the retrospective interest bearing component of the AoD, I cannot find that the respondent's version in this regard is so far-fetched, palpably untrue or implausible that it can be rejected on the papers.

[24] The same is true of the applicable interest rate in terms of the AoD, being 8%. Whilst the applicant states that such a rate is significantly lower than the norm, corroborating, so she says, her allegation that the parties were not dealing at arm's length, this does not detract from the fact that she sought repayment of the monies advanced with interest at a rate approaching the prevailing prime interest rate.

[25] On the issue of the set-off, which of course affects the quantum of the applicant's claim, it appears from an email exchange during November 2021 that the parties did indeed agree that monies owed to the applicant by the respondent would be reduced in the manner set out in paragraph [10] above, but as already stated, further disputes of fact have arisen in regard to this issue as well.

[26] I am mindful of the trite principles of our law pertaining to motion proceedings where disputes of fact arise or where they were, or should reasonably have been foreseen by an applicant.

[27] An applicant who presses for a decision on the papers in the face of a factual dispute by necessary implication consents to the matter being decided on the basis of the rule in *Plascon-Evans*. The reason for this is not because the onus is on the applicant but because the applicant is *dominus litis* and must be taken to know that a court cannot decide factual disputes on probabilities or on onus in opposed motion proceedings.<sup>5</sup>

[28] It is settled law that, if a party has knowledge of a material and *bona fide* dispute of fact, or should reasonably foresee its occurrence, and nevertheless proceeds on motion, that party will usually find the application dismissed.<sup>6</sup>

[29] An application for the hearing of oral evidence must, as a rule, be made in *limine* and not once it becomes clear that the applicant is failing to convince the court on the papers or on appeal. The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail.<sup>7</sup>

[30] Notwithstanding the aforesaid, there is no evidence to suggest that the defence pertaining to the NCA was raised or foreshadowed prior to the institution of proceedings, and for her part the applicant, in reply, put up (*prima facie*) cogent evidence to rebut the respondent's allegations. This is not a matter where, in the exercise of my discretion, the application should simply be dismissed. It seems

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<sup>5</sup> See for example *Absa Bank Ltd v Collier* 2015 (4) SA 364 (WCC) and the authority referred to in footnote 42 therein.

<sup>6</sup> See for example *Lombaard v Droprop CC And Others* 2010 (5) SA 1 (SCA) at [31].

<sup>7</sup> *Law Society, Northern Provinces v Mogami and Others* 2010 (1) SA 186 (SCA) at [23].

to me that this matter should appropriately be determined by way of the hearing of oral evidence.

[31] I asked both Ms Stevenson and Mr Booyesen whether, if I adopt the view that the matter ought to be referred, one or more issues should be referred for the hearing of oral evidence or whether the matter in its entirety should be referred to trial – they both agreed on the latter.

*Order*

[32] In the circumstances, I make the following order:

- (a) The applicant's claim is referred to trial.
- (b) The notice of motion shall stand as a simple summons.
- (c) The notice of intention to oppose shall stand as a notice of intention to defend.
- (d) The applicant shall deliver its declaration within 20 days of the grant of this order.
- (e) Thereafter the rules relating to actions shall apply.
- (f) The costs of the application are reserved for determination by the trial court.

A handwritten signature in black ink, appearing to be 'De Oliveira', is written over a solid black rectangular redaction box. The signature is fluid and cursive.

**DE OLIVEIRA AJ**  
**ACTING JUDGE OF THE HIGH COURT**  
**JOHANNESBURG**

Counsel for the Applicant:

R Stevenson

Instructed by:

Terina Singh Attorneys

Counsel for the Respondent:

M Booyesen

Instructed by:

Kaveer Guinness Attorneys

Date of hearing:

23 February 2026

Date of Judgment reserved:

23 February 2026

Date of Judgment delivered:

26 February 2026

