



**THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

In the matter between

Case No: 1162/2015

JOHANN DE BRUYN

PLAINTIFF

And

DERICK DU TOIT

DEFENDANT

Coram: ROGERS J

Heard: 26 FEBRUARY 2015

Delivered: 27 FEBRUARY 2015

JUDGMENT

ROGERS J:

[1] This is an application for summary judgment. The plaintiff alleges in his particulars of claim that on 22 May 2007 he lent the defendant R80 000 and that on 6 August 2007 he lent him a further R200 000. Interest was by agreement payable at a rate of 50% per six months (ie 100% per annum). The defendant, so the plaintiff alleges, repaid the first loan by way of a payment of R40 000 on 22 February 2008 and a further payment of R80 000 on 28 March 2008. (These repayments are less than the capital plus interest at the full rate allegedly agreed.) The plaintiff's claim is for repayment of the second loan together with interest thereon.

[2] The plaintiff alleges in his particulars of claim that on 17 July 2008 the defendant signed a written agreement acknowledging the liability and recording the payments made to date. A copy of that written agreement is annexed to the particulars of claim. (The written document actually describes the arrangement as an investment by the plaintiff with the defendant.)

[3] The plaintiff alleges, further, that on 9 December 2014 he made written demand for repayment of the sum of R200 000 plus interest within 30 days. There was no response. On 13 January 2015 the plaintiff dispatched to the defendant by registered mail a notification in terms of s 129 of the National Credit Act 34 of 2005. Payment having not been forthcoming, the plaintiff issued summons on 27 January 2015. (Since the track-and-trace report indicates that the first notification to the defendant from the relevant post office took place on 20 January 2015, the summons seems to have been issued prematurely, ie 10 business days had not elapsed.)

[4] When the defendant entered appearance to defend, the plaintiff applied for summary judgment. The defendant has filed an opposing affidavit in which two main points are raised, namely (a) that the interest stipulation violates the National Credit Act and that the agreement as a whole is void and contrary to public policy; (b) that the claim has prescribed. Mr van der Meer appeared for the plaintiff and Mr Basson for the defendant.

[5] I think prescription is a sufficient basis for disposing of the application for summary judgment. The plaintiff alleges in his particulars of claim that the loan was

repayable 'on demand'. The written agreement, which was in effect an acknowledgment of debt, did not specify a date for repayment and did not contain any provision for the giving of written notice before making a claim.

[6] Mr van der Meer referred me to *Stockdale & Another v Stockdale* 2004 (1 SA 68 (C)). He submitted, with reference to this case, that the defendant's failure to contest that the loan was only repayable 'on demand' was fatal to the defence of prescription. I disagree. *Stockdale* and earlier cases dealing with amounts payable 'on demand' do not lay down a rule that such a debt becomes due for purposes of prescription only after demand has been made. On the contrary, and in keeping with the principle that a creditor cannot delay the commencement of prescription by failing to take a step within his power, it has been held on a number of occasions that a loan repayable on demand is immediately due for purposes of prescription. It is only where the giving of notice is a condition precedent for a claim, and thus a necessary ingredient of the creditor's cause of action, that the running of prescription is deferred until the giving of notice. See Loubser *Extinctive Prescription* 1996 at 53-63, where the authorities are reviewed. The learned author concludes his discussion thus (at 63):

'On account of the policy consideration that a creditor should not be able to rely on his own failure to demand performance from the debtor in order to delay the running of prescription the courts will require clear indication that the parties intended demand to be a condition precedent for the debt to become due, in which case prescription will only begin to run from the date of demand.'

[7] The decision in *Stockdale* appears to me to support this general approach. That was an appeal from a judgment in the magistrate's court following a trial. It so happens that the relevant acknowledgments of debt contained express provisions to the effect that the capital and interest was payable within 30 days from the date of notice. The question was whether prescription began to run 30 days after the execution of the acknowledgments, on the basis that the creditor could have given the written notice forthwith. Traverso AJP affirmed the general policy consideration that a creditor should not be able to rely on his own inaction to delay the running of prescription (para 12). She also accepted, as a 'general rule of law', that in all obligations in which a time for payment has not been agreed the debt is due

forthwith, adding the rider that this might be qualified 'in the light of the particular circumstances of the case' (para 15). She said that it was necessary to ascertain the intention of the parties (para 13). There was evidence that satisfied her that there was no immediate expectation or obligation placed upon the defendant in respect of the loan. Although no condition was linked to the making of demand, it was nevertheless 'abundantly clear' that the parties never contemplated that notice to repay could be given within 30 days of the date of the acknowledgments. The parties had concluded the loan agreements based on a certain set of circumstances. For as long as those circumstances prevailed, it was understood that notice would not be given (para 17).

[8] The general principles discussed in *Stockdale* were applied by Davis J in the unreported case of *Praesidium Capital Management (Pty) Ltd v Kay-Davidson* [2010] ZAWCHC 531. That was also an application for summary judgment in which the defendant raised prescription among other defences. The defendant was sued as a surety on acknowledgments of debt signed by the principal debtor for monies advanced. The acknowledgments specified no date for repayment. Davis J referred with approval to the following statement by Selekowitz J in *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 501 (C) at 546I-547B (a passage not inconsistent with the subsequent judgment on appeal reported at 1998 (1) SA 811 (SCA)):

'A loan without agreement as to time for repayment is in common law repayable on demand. Although by no means linguistically clear, the phrase "payable on demand" is used in this context in our law to mean that no specific demand for repayment is necessary and the debt is repayable as soon as it is incurred. When suing for repayment, there is no need to allege a demand and such a demand is not part of the plaintiff's cause of action.'

Davis J said that this approach had been followed in *Stockdale*. On this basis he refused summary judgment.

[9] It is not necessary, in the present case, to decide precisely what evidence can be taken into account in determining whether notice or demand is a condition precedent for a cause of action and whether such evidence is limited to that which is on ordinary principles admissible in the interpretation of contracts. We are

concerned here with an application for summary judgment. On the information currently available to the court, it is not possible to say that the contract should be interpreted as making demand a condition precedent for the recovery of the money. As I have said, the general statement that the loans were repayable on demand does not have this effect nor is there any express provision in the subsequent written acknowledgment for the giving of notice. On the face of it, the written acknowledgment was signed because the defendant had not yet repaid the money which the plaintiff already expected to have been repaid, nearly a year having elapsed from the time the second loan was advanced. One knows that the first loan was repaid within less than a year of the advance. There is nothing in the document or in the other facts pleaded in the particulars of claim to suggest that the plaintiff could not at any time have insisted on repayment.

[10] If the defendant is able to establish at trial that prescription began to run by not later than 17 July 2008 (when the historic indebtedness on the second loan was acknowledged), the defence of prescription would succeed unless the plaintiff were to allege and prove some act of interruption prior to the service of summons in January 2015. I am satisfied, therefore, that on this score the defendant has raised a bona fide defence.

[11] In view of this conclusion, I deal more briefly with the defence based on the alleged unlawful stipulation of interest and resultant alleged invalidity of the agreement. Mr van der Meer conceded that his client could not lawfully claim interest at the contractual rate allegedly agreed, same being in violation of the National Credit Act. He submitted that even if this were to result in the contract as a whole being declared invalid, something he conceded was one potential outcome having regard to s 90(4)(b), his client would have a right to recover the capital by way of an enrichment action. The purported deprivation of this right by way of s 90(4) read with s 89(5)(c) has been declared unconstitutional (*National Credit Regulator v Opperman & Others* 2013 (2) SA 1 (CC)). He submitted that I should thus grant summary judgment at least for the capital of R200 000.

[12] There are at least two obstacles in the way of Mr van der Meer's submission. The first, procedural in nature, is that the plaintiff has not pleaded an alternative claim based on enrichment.

[13] The second, which is substantive, is that a common law enrichment action in circumstances such as the present case does not allow recovery of money as of right. Van der Westhuizen J, writing for the majority in *Opperman*, pointed out that recovery in such circumstances is ordinarily barred by the par delictum rule but that this has been ameliorated by recognising a discretionary power to permit recovery in accordance with considerations of fairness (paras 15-17 and authorities there mentioned). The common law in this regard was not found to be contrary to the Constitution. Indeed, the objection to s 89(5)(c) was that it extinguished a right to claim restitution based on unjustified enrichment without leaving any discretion to a court to consider a just and equitable order under the circumstances (para 88). It would be entirely inappropriate, at the stage of summary judgment, to assume that an unpleaded enrichment action for recovery would succeed. The court would need to be informed of the circumstances in which the loans were made, the relationship between the parties, whether the loans formed part of a larger scheme of business and the like. Furthermore, if the second loan agreement were found to be invalid as a whole, the same would presumably apply to the first loan agreement, so that the defendant might have a counterclaim to recover at least the purported interest he paid on the first loan (cf *Parow Motorhandelaars (Pty) Ltd v Parker* [2014] ZAWCHC 122 para 18).

[14] Summary judgment is thus refused with costs and the defendant is granted leave to defend the action.

ROGERS J

APPEARANCES

For Plaintiff:

Mr S van der Meer

Van der Meer Attorneys

4 Durbanville Avenue Service Road

Corner Durbanville Avenue & De Villiers
Drive

Valmary Park

Durbanville

For Defendant:

Mr M Basson

Instructed by:

De Waal Inc

20 Briffant Street

Chantecler, Eversdal

c/o Heyns & Partners

3rd Floor, 6 on Pepper

Pepper Street

Cape Town

For Respondent:

YYY

Instructed by:

Xxx

Cape Town

