

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



Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 5406/2021

In the matter between: -

JAN VAN DER WALT

Applicant

and

CHARL TERBLANCHE

Respondent

CORAM: N. M. MBHELE, AJP

HEARD ON: 12 MAY 2022

DELIVERED ON: 14 JULY 2022

[1] This is an application for payment of R520 000.00 and R100 000 arising from a loan agreement concluded on 26 March 2019 between the applicant and the respondent. The applicant advanced an amount of R520 000.00 to the respondent after the latter undertook to return the money with interest of R100 000 within 3 days.

[2] The terms of the agreement were captured in a WhatsApp communication sent by the respondent as follows:

“Jan ek wil net verduidelik ook ek moet 8 units se waarborge lewer voor ek die eerste trekking kan kry. Ek het al 11 verkoop en kan 8 se waarborge lewer maar 2 van die verkopers moet nog elk 20% deposito neersit voor ek die eerste trekking kry. Ek het alles gebou met my eie fondse maar het nou die trekking van 963000 nodig. Ek kort net R520000 om die depositos te waarborg voor ek die groot trekking kry. Ek sal die trekking binne 3 dae kry as ek die finale deposito's kan waarborg en ek sal dadelik vir jou R620 000 terugbetaal. Ek sal dit verskriklik waardeer.”

- [3] On 30 June 2021 the applicant sent the following Whatsapp message to the respondent demanding payment of the amount owing.

“Goeiemôre Charl

Dit was nou onderneming in 2019.

Ons is nou meer as 2 jaar later.

Jy moet asb my geld betaal.

My rekeningnommer is

JG vd Walt

Standard Bank

Westgate branch

Rekeningnommer 401401456.”

- [4] The respondent's defence is that the repayment of the debt was subject to a suspensive condition that he was first to receive a drawing from the bondholder in the amount of R9 630 000.00 which would enable him to pay off the debt. His contention is that the bondholder only paid an amount of R7 537 813.00 making it impossible for him to repay the applicant. In an email sent by the respondent to the applicant's friend the respondent said the following in relation to the loan:

“Met my lening by Jan is jy heeltemal reg en ek hoop om dit dringend reg te stel, ek is baie jammer dat die fondse nog nie terugbetaal is nie en sal dit opmaak met Jan. Die Covid k*k het my bestaan opgef*k en ek kon dit nooit voorsien nie, alles was 'n probleem van munisipale goedkeurings tot ontheffings van verbande. Maar ek besef my verantwoordelikheid en sal dit met Jan uitsorteer.”

- [5] The issue to be determined is whether the loan agreement was subject to a suspensive condition as alleged by the respondent. Should it be found that the loan was subject to a condition, the next step is to determine whether such condition was fulfilled which would render the contract enforceable. In **Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office Limited**¹ Brand JA remarked as follows:

“[10] The way in which the appellant introduced the debate in its particulars of claim, raised the concept of suspensive conditions. As explained by Botha J in *Design and Planning Service v Kruger* 1974 (1) SA 689 (T) at 695C-E, a suspensive condition of a contract, properly so called, suspends the operation of all or some of the obligations flowing from that contract, pending the occurrence or non-occurrence of a specific uncertain future event. If the condition is fulfilled, the obligations under the contract become enforceable. If the condition is not fulfilled, the agreement becomes unenforceable (see also eg *Jurgens Eiendomsagente v Share* 1990 (4) SA 664 (A) at 674E-J; De Wet & Van Wyk *Kontraktereg & Handelsreg* 5 ed Vol 1 at 146-154; RH Christie *The Law of Contract* 6 ed (2011) at 137 and 145).”

- [6] It is well established in our law that he who asserts must prove.² The onus to prove the existence of a suspensive condition rests on the respondent. In **Pillay v Krishna**³ the following was said about the party who alleges the existence of a condition in a contract.

“A Full Bench of the Natal Provincial Division gave a decision on the point, in *Merton v Harris*, in 1912 (33, N.L.R. 474). At p. 478 LAURENCE, A.J.P., said: “The burden of proof, however, is clearly on the person who affirms the existence of such a condition, and the real question in the present case is whether the defendant has satisfactorily proved that such a condition was made and accepted by the plaintiff.”

- [7] The existence of a suspensive condition as alleged by the respondent must be clearly discernible from the wording of the contract. It is settled law that in interpreting contracts, the intention of the parties must be sought in the words they used. It is apparent from the wording of the message sent by the respondent that he required

¹ *Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office Limited* 2013 1 All SA 266 (SCA); 2013 2 SA 133 (SCA) par 10.

² *Pillay v Krishna and Another* 1946 AD 946 at 952

³ 1946 AD 946 at 960

R520 000.00 to guarantee the deposits which would allow him access to drawings in the amount of R9 630 000.00 within 3 days. He would repay the applicant within 3 days from the date on which the applicant advanced the capital amount. It does not say that the payment is dependent on him receiving the full amount of R9 630 000.00. When one attaches simple and literal rule interpretation to the contract it is clear that there was no suspensive condition established.

[8] The undisputed evidence is that the R520 000.00 that the respondent received from the applicant enabled him to guarantee the deposits and as a consequence thereof he received a drawing of R7 396 636.00. The defence raised by the respondent is not supported by available evidence, it is farfetched and untenable. It falls to be rejected. The application must succeed. As regards to costs, there is no reason to depart from the general rule that costs must follow the result. The nature of the matter and circumstances surrounding it warrant a punitive costs order.

[28] I, therefore make the following order:

1. The respondent is ordered to pay the applicant the sum of R520 000.00;
2. The respondent is ordered to pay interest from 29 March 2019 a *tempore morae* to date of full payment;
3. The respondent is ordered to pay the applicant an amount of R100 000.00;
4. Respondent shall pay costs of this application on the attorney and client scale.

N.M. MBHELE, AJP

Appearances:

For the Applicant:

Adv. H. van der Vyver

Instructed by Hill McHardy & Herbst Inc.
Bloemfontein

For the 1st Respondent:

Adv. A. P. Berry
Instructed by FJ Senekal Inc.
Bloemfontein