

REPUBLIC OF SOUTH AFRICA



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

CASE NO: A5015/2019

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

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DATE

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SIGNATURE

In the matter between:

GERHARD

CHRISTOPHER

HEYDENRYCH

APPELLANT

AND

HOWARD

BRUCE

MORTIMER

FORSYTH

RESPONDENT

JUDGMENT

THE COURT:

INTRODUCTION

[1] The core issue that arises for determination in this appeal is the question whether the credit agreement concluded between the appellant and the respondent (“the agreement”) was one at arm’s length, and hence subject to the National Credit Act 34 of 2005 (“the NCA”). More particularly, whether the respondent had to be registered as a credit provider in terms of section 41 of the NCA.

[2] The parties are both natural persons. It is trite that the requirement to register as a credit provider is applicable to all credit agreements once the prescribed threshold is reached, irrespective of whether the credit provider is involved in the credit industry and irrespective of whether the credit agreement is a once-off transaction.¹ It is common cause that the respondent did not apply to be registered as a credit provider.

[3] The court *a quo* agreed with the respondent that the agreement was not one at arm’s length and hence not subject to the NCA. The appellant seeks to overturn this finding; leave to appeal having been granted by the court *a quo*.

CONDONATION

[4] The appellant seeks condonation for his non-compliance with Rule 49(6)(a) and (b) of the Uniform Rules of Court, that is, the failure to prosecute the appeal timeously. Leave to appeal was granted on the 25 March 2019. The appellant filed his application for a hearing date and the filing of the record on 19 August 2019, which was 24 days after the due date.

[5] In *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others*,² the Constitutional Court held that in determining whether condonation may

¹ *Du Bruyn NO and Others v Karsten* 2019 (1) SA 403 (SCA) at [28].

² 2010 (2) SA 181 (CC).

be granted, lateness is not the only consideration. The test for condonation is whether it is in the interests of justice to grant condonation. Factors relevant to a condonation enquiry include, but are not limited to, the extent and the cause of delay; the prejudice to other litigants; the reasonableness of the explanation for the delay; the importance of the issues to be decided in the intended appeal; and the prospects of success. None of these factors is however decisive: the enquiry is one of weighing each against the others and determining what the interests of justice dictate.³ In *United Plant Hire v Hills*,⁴ the court held that a reasonable prospect of success on the appeal is not a *sine qua non* for condonation. It is sufficient if the appeal is *prima facie* arguable.⁵

[6] The appellant demonstrated good cause for his non-compliance with the Rules. The delay was occasioned by his failure to find the court file timeously having made various attempts to find it. Thereafter he had difficulties in getting the transcripts. The delay is also of a relatively short duration and there is no prejudice to any party including the respondent.

[7] Consequently, we are inclined to grant the appellant condonation for the delay in prosecuting the appeal.

THE FACTS

[8] The respondent and the appellant have known each other for a period of 35 years. The appellant and the respondent were brothers-in-law; the respondent was married to the appellant's elder sister for 33 years.

³ *Bernert v Absa Bank Ltd* 2011 (3) SA 92 (CC) at [14].

⁴ 1976(1) SA 717 (A) at 720 E-G.

⁵ *Van der Merwe v Steenkamp* 1925 OPD 179.

[9] In 2007, the appellant acquired a business, a property holding entity named West Dunes Property 232 (Pty) Limited (“West Dunes”) which owned an immovable property. This business entailed the renovation of the immovable property and then renting out rooms to university students for profit. Appellant sought investors for this venture and the respondent agreed to invest by buying a percentage of the shares in West Dunes, hoping for a dividend return on his investment.

[10] In May 2008, appellant acquired a further immovable property, Blue Moonlight. He again sought investors in order to fund both the purchase and renovation of the property in question. The respondent again agreed to invest and purchased 25 shares at R44 000 a share at a total cost of R1 100 000.00.

[11] West Dunes also sought to acquire shares in Blue Moonlight, but did not have the funds to buy any shares, nor could it raise such funds from a financial institution.

[12] The appellant was aware that the respondent had recently obtained an access facility from Standard Bank of South Africa (“Standard Bank”) through a mortgage facility over his home. The respondent’s home was not registered in his name, but was registered in the name of his property holding company, Ceefax Property (Pty) Limited (“Ceefax”). The bond was also in the name of Ceefax. During the trial, the appellant contended that he did not know that the respondent's home was registered in the name of Ceefax, and had he known, he would not have entered into the agreement because he did not want to borrow money from Ceefax.

[13] The appellant, on behalf of West Dunes, approached the respondent for a possible loan to West Dunes. The respondent agreed to loan such funds to West Dunes at an interest rate of prime minus 1.7%. That is the same interest rate the

respondent was paying on the mortgage bond over the property. The respondent would acquire such funds through Ceefax's access facility with Standard Bank.

[14] Not long thereafter the appellant asked the respondent to lend him R660 000.00 to pay for the 15 shares he (the appellant) had subscribed for in Blue Moonlight at a cost of R44 000.00 per share. The respondent agreed to assist the appellant and to lend him the money. The parties accordingly signed the agreement in respect of such a loan on 12 October 2008, just over a month after a similar agreement in respect of the West Dunes loan was entered into on 10 September 2008. In terms of the agreement the respondent lent the appellant an amount of R660 000.00, again at the same rate that the respondent was paying on the access facility on the bond over his home i.e. prime minus 1.7%.

[15] Pursuant to the above, the respondent paid R660 000.00 from Ceefax's mortgage bond facility directly to the appellant. The appellant made regular payments into the Ceefax bond account until 31 July 2017. Thereafter he made no further payments. Ten years later the loan was still outstanding. As a result, the respondent, as plaintiff *a quo*, instituted action against the appellant, as defendant *a quo*, for repayment of monies lent and advanced by the respondent to the appellant pursuant to the agreement between the parties.

SECTION 4 OF THE NCA

[16] In terms of section 40(1)(b) of the NCA, subject to certain exceptions, a person must register as a credit provider if the total of the loan amounts lent out by that person to individuals (and small juristic persons) exceeds the prescribed threshold⁶.

⁶ At the time of the conclusion of the agreement the prescribed threshold was R500 000,00. See Government Gazette 28893 of 1 June 2006.

The exceptions are listed in section 4 of the NCA. Section 4(1) provides that the NCA applies to every credit agreement between parties dealing at arm's length, meaning that if the parties were not dealing at arm's length, then this would constitute an exception to the rule that all credit providers need to register as such.

[17] The appellant submits that the agreement was an agreement concluded at arm's length and that the respondent ought to have complied with section 40(1)(b) of the NCA and be registered as a credit provider.

[18] Section 4(2)(b) (iii) and (iv) of the NCA provides that in any of the following arrangements, the parties are not dealing at arm's length:

“(iii) A credit agreement between natural persons, who are on a familial relationship and-

(aa) are co- dependent on each other; or

(bb) one is dependent on the other; and

(iv) any other agreement-

(aa) in which each party is not independent of the other and consequently does not necessarily strive to obtain the outmost possible advantage out of the transaction; or

(bb) that is of a type that has been held in law to be between parties who are not dealing are not dealing at arm's length;”

[19] Section 4(2)(b)(iv) consists of two parts, section 4(2)(b)(iv(aa) and (bb). Although the NCA does not define “dealing at arm's length”, it is apparent that the

Legislature intended that credit agreements between natural persons who are (a) in a familial relationship, and who are co- dependent on each other or where the one is dependent upon the other, and (b) any agreement where each party is not independent of the other and does not strive to obtain the utmost advantage out of the transaction, are not within arm's length and thus not susceptible to the provisions of the NCA. In this regard the dictum in *Hicklin v Secretary for Inland Revenue*,⁷ is instructive. Trollip JA stated:

“For ‘dealing at arm's length’ is a useful and often easily determinable premise from which to start the inquiry. It connotes that each party is independent of the other and, in so dealing, will strive to get the utmost possible advantage out of the transaction for himself. Indeed, in the Afrikaans text the corresponding phrase is “die uiterste voorwaardes beding”.

[20] As far as the term “familial relationship” is concerned, there is also no definition found in the NCA. This being so, it is useful to have regard to other legislation containing similar provisions. Section 2(1) of the Companies Act⁸ provides:

“(1) For all purposes of this Act— (a) an individual is related to another individual if they—

(i) are married, or live together in a relationship similar to marriage; or

(ii) are separated by no more than two degrees of natural or adopted consanguinity of affinity.”

⁷ 1980 (1) SA 481 (A) at 495A-B.

⁸ Act 71 of 2008.

[21] Section 1 of the Income Tax Act⁹ is also of assistance. It contains a definition of "connected persons", which means:

“(a) In relation to a natural person—

- (i) Any relative; and*
- (ii) Any trust (other than a portfolio of a collective investment scheme in securities or a portfolio of a collective investment scheme in property) of which such natural person or such relative is a beneficiary.*

[22] A "relative" is defined in the Income Tax Act as:

“In relation to any person, means the spouse of that person or anybody related to that person or that person's spouse within the third degree of consanguinity, or any spouse of anybody so related, and for the purpose of determining the relationship between any child referred to in the definition of 'child' in this section and any other person, that child shall be deemed to be related to the adoptive parent of that child within the first degree of consanguinity.”

[23] Taking into consideration the above definitions, and applying a common sense approach to the meaning of the word “familial relationships”, there is no reason to exclude brothers-in-law. The appellant and the respondent were clearly in a familial relationship. That being said, two questions arose: One, were they co-dependent on each other; or was one dependent on the other, and two, did the parties strive to obtain the utmost advantage out of the transaction?

⁹ Act 58 of 1962.

[24] The terms "dependent" and "co-dependent", as used in section 4(2)(b)(iii) of the NCA, are similarly not defined in the NCA. The meaning of the word "dependent" is, however, variously defined as: Relying on or requiring the aid or support of another;¹⁰ Relying on someone or something else for aid, support, etc.;¹¹ Requiring someone or something for financial support;¹² and, needing somebody/something in order to survive or be successful.¹³ In this vein, loans between related parties or loans between parties where the one has some influence or measure of control over the other are not loans between independent parties.

[25] In *Dayan v Dayan*,¹⁴ a judgment of the Full Court of this Division, the court was, *inter alia*, concerned with the question whether the agreement between the appellant and respondent was one at arm's length and hence subject to the provisions of the NCA. At paragraph [9] of its judgment, the court approvingly referred to *Hicklin*¹⁵, and held as follows:

"In addition the agreement was entered into by half-brothers who had a close relationship and who concluded a number of transactions over the period. The transactions included loans, transfer of immovable property, an employment contract and a number of payments of salary. These two persons were related as contemplated by the Section. When they concluded the loan agreement in question they were not dealing at arm's length. The parties were not independent of each other and were not striving to gain utmost advantage for themselves out of the transaction."

¹⁰ Thefreedictionary.com

¹¹ Dictionary.com.

¹² Lexico.com

¹³ oxfordlearnersdictionary.com

¹⁴ [2011] JOL 27225 GSJ.

¹⁵ *Supra*

[26] In the matter of *Fourie v Geyer*,¹⁶ the plaintiff claimed that the relationship was not at arm's length due to the 18 year relationship between the parties. The court rejected this argument due to the commercial nature of the agreement and the salient features thereof. The court held that it was evident that the parties were striving to gain the best possible advantage. In *Claasen t/a Mostly Media v Delport t/a AD Industrial Chemicals*,¹⁷ reliance was placed on the NCA because the parties were friends, mixed socially and did business together. The plaintiff contended that the defendant was dependent on him for financial assistance and that the relationship thus was not at arm's length. The court held that the parties were independent of each other and that the agreement was concluded at arm's length. The court however placed great reliance on the terms of the agreement which imposed interest and penalties on the arrears. In *Cloete v Van den Heever NO*,¹⁸ however, the court held that an agreement between close acquaintances, at an interest rate charged to the credit provider by his bank, was not at arm's length.

[27] Although decided cases are a useful tool, it is well established that every case should be decided on its own facts. In the present matter the parties are brothers-in-law. They have known each other for 35 years. They spent many Christmas', Easters, birthdays and family gatherings together. They were also extremely close on an emotional level. The respondent was the first person the appellant turned to on the day the appellant's son tragically committed suicide. Moreover, the respondent invested in three of the appellant's business ventures because he saw that as support for his brother-in-law.

¹⁶ (MKP27/2018) [2019] ZANWHC (22 August 2019)

¹⁷ (1612312008) [2009] ZAWCHC 84 (4 June 2009)

¹⁸ 2013 JDR 1075 (GNP)

[28] At the trial the respondent testified that he and appellant were in a familial relationship and that the appellant was dependent on the respondent in many respects. He also testified that the original agreement was concluded on terms which in no way benefitted him, meaning that he did not strive to obtain the utmost possible advantage out of the transaction. The appellant would repay the same amount plus interest that the respondent would have paid the mortgagee (i.e. Standard Bank) on the amount withdrawn from the bond. The appellant was not concerned that Ceefax appeared to be the bond holder. His sister had instructed him in writing on 03 October 2008, to make the monthly payments in respect of the West Dunes loan into the Ceefax bond account at the Standard Bank, to which he did not object. The appellant also chose not to obtain finance from any arm's length finance institution due to his impending divorce. He approached the respondent who loaned him an amount of R660 000,00 which money he would not have lent to anybody other than a very familiar family member.

[29] The respondent bore the onus to prove his case. The evidence demonstrated, at least, on a balance of probabilities, that the appellant and the respondent were not independent of each other, and did not strive to obtain the utmost possible advantage out of the transaction. The court *a quo* correctly concluded that the loan agreement between the parties was not one at arm's length. The transaction therefore falls within the ambit of the provisions of section 4 (2)(b)(iii) of the NCA.

[30] As a result the following order is made:

1. The appeal is dismissed with costs.
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WEINER J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

I agree.

WINDELL J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

I agree.

NEMAVHIDI AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

APPEARANCES

Counsel for the appellant: Adv. N.J. Riley

Instructed by: Mendelson Attorneys Inc.

Counsel for the respondent: Adv. A. Williamson

Instructed by: Wayne Venter Attorneys

Date of hearing: 26 January 2022

Date of judgment: 31 May 2022

