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

CASE NO: 2022/026464

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES

DATE
SIGNATURE

In the matter between:

PREVANCE CAPITAL (PTY) LTD (reg no 2005/002277/07)	Applicant
and	
TGA PRODUCTIONS (reg no 2014/041188/07)	First Respondent
ALF, JESSIE	Second Respondent

JUDGMENT

MOORCROFT AJ:

Summary

National Credit Act, 34 of 2005 – sections 4(1)(b)– Act not applicable to transaction concerning a large agreement with a juristic person - section 40 – registration of credit provider not required

Interest rates – usury – common law – no maximum rate – oppression, extortion or something akin to fraud - each case to be determined on its own facts

Maximum interest rate under National Credit Act – compared to interest rates when Act does not apply

Order

[1] In this matter I make the following order:

1. *The second respondent is permitted to represent the first respondent in these proceedings;*
2. *Judgment is granted against the first and second respondents jointly and severally, the one paying the other to be absolved, for:*
   - *2.1. Payment of R5,858,487.70 (five million, eight hundred and fifty eight thousand four hundred and eighty seven Rand and seventy cents;*
   - *2.2. Interest on the aforesaid amount at the rate of 2% per month, compounded monthly on the last day of the month, from 30 September 2022 to date of final payment;*
   - *2.3. Costs of the application on the scale as between attorney and own client.*

[2] The reasons for the order follow below.

The second respondent's application for leave to appear on the behalf of the first

respondent

[3] The second respondent is the sole director and the shareholder of the first respondent. She is cited in the application as a surety and co-principal debtor who also gave a guarantee to the applicant for the debt of the first respondent to the applicant. She is a businesswoman and she represented the first respondent in contracting with the applicant.

She explained that she could not afford legal representation and did not qualify for legal aid because her income and assets were above the threshold for assistance.

[4] It was held in *Yates Investments (Pty) Ltd v Commissioner for Inland Revenue*[1] that a company must be represented by counsel in court proceedings. The Appeal Court did not however address the question of a judicial discretion to allow a company to be represented by a director of the company under appropriate circumstances.

[5] This question was considered by the Supreme Court of Appeal in *Manong v Minister of Public Works*.[2] Ponnan JA referred to the following *dictum* by Lord Denning MR:[3]

> *"It is well settled that every court of justice has the power of regulating its own proceedings; and, in doing so, to say whom it will hear as an advocate or representative of a party before it. As Parke J said in Collier v Hicks ((1831) 2 B & Ad 663 at 672, 109 ER 1290 at 1293): "No person has a right to act as an advocate without the leave of the Court, which must of necessity have the power of regulating its own proceedings in all cases when they are not already regulated by ancient usage".*

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1 *Yates Investments (Pty) Ltd v Commissioner for Inland Revenue* 1956 (1) SA 364 (A).

2 *Manong v Minister of Public Works* [2009] ZASCA 110 para 8. See also *Mittal Steel South Africa Ltd t/a Vereeniging Steel v Pipechem CC* 2008 (1) SA 640 (C) para 51, *Ex Parte California Spice & Marinade (Pty) Ltd and others in re Bankorp v California Spice & Marinade (Pty) Ltd and others* [1997] 4 All SA 317 (W) para 13, and *Arbuthnot Leasing International Ltd v Havelet Leasing Ltd and others* [1991] 1 All ER 591 (Ch) 595.

3 *Engineers' and Managers' Association v Advisory, Conciliation and Arbitration Service and another* (No 1) [1979] 3 All ER 223 (CA) 225.

[6] In South Africa the power of the High Court to regulate its own process is governed by section 173 of the Constitution, 1996.

[7] In deciding to allow the applicant to represent the company that was his *alter ego*, Ponnan JA said in *Manong*:

> *"[9] The main reasons for relaxing the rule are, I suppose, obvious enough: a person in the position of the controlling mind of a small corporate entity can be expected to have as much knowledge of the company's business and financial affairs as an individual would have of his own. It thus seems somewhat unrealistic and illogical to allow a private person a right of audience in a superior court as a party to proceedings, but deny it to him when he is the governing mind of a small company which is in reality no more than his business alter ego. In those circumstances the principle that a company is a separate entity would suffer no erosion if he were to be granted that right. There may also be the cost of litigation which the director of a small company, as well acquainted with the facts as would be the case if a party to the dispute personally, might wish to avoid. Such companies are far removed from the images of gigantic industrial corporations which references to company law may conjure up."*

[8] It is appropriate in this matter to permit the second respondent to appear also on behalf of the first respondent.

Analysis of the loan agreement

[9] On 25 February 2019 the applicant and the first respondent represented by the second respondent entered into a written loan agreement in terms of which the applicant lent an amount of R3,800,000[4] to the first respondent. The loan was to be secured by a deed of suretyship or a guarantee agreement by the second respondent as well as a covering mortgage bond in favour of the applicant over property in

[4] Clause 1.1.9.

Bryanston, Sandton. The loan was to be paid into the bank account of the deceased estate of the late TG Alf.

[10] The applicant provides property bridging finance to businesses. The purpose of the loan was not stated in the document but it is common cause that the loan was a business loan required by the first respondent.

[11] The agreement provided for interest at a rate[5] of 3.25% per month compounded monthly in arrears and payable on the last day of each month. The applicant however unilaterally reduced the interest rate to 2% per month. This change benefitted the respondents and was not objected to even though it was not reduced to writing and signed by the parties.

[12] The agreement called for the entire loan including interest be repaid by 31 October 2019.[6] In the event of a breach the full outstanding amount would become payable immediately.[7] The agreement contained an *"entire agreement"* and *"no variation except in writing and signed by the parties"* clause,[8] and it also provided for attorney and client costs[9] in the event of litigation.

The guarantee and suretyship

[13] On 31 January 2019 the second respondent provided the applicant with an unconditional and irrevocable written guarantee in terms of which the second respondent guaranteed payment of any amount due to the applicant by the first

5 Clause 1.1.7.
6 Clause 1.1.4 and 3.2.3.
7 Clause 4.2.
8 Clause 10.4.
9 Clause 4.3.

respondent, and to pay attorney and client cost in any legal proceedings to enforce the applicant's claim.

On the same day the second respondent bound herself as surety and co-principal debtor for the debts of the first respondent to the applicant..

Analysis of the debits and credits, and the *in duplum* rule

[14] The debits and credits appear on a statement annexed to the founding affidavit. From the statement which is not in dispute the interest was initially just above 3% per month and it later reduced to 2% per month. What is in dispute is the entitlement of the applicant to charge interest at these rates.

Between 1 March 2019 and 25 February 2022 a total of R3,440,025 was paid. The first of these payments was made on 1 March 2019 and to the sixth and last on 25 February 2022. The outstanding balance was R5,858,487.70 on 31 August 2022.

[15] The statement also shows that the unpaid interest never exceeded the unpaid capital. The double (*duplum*) was not reached and interest continued to accumulate. This brings me to the *in duplum* rule.

[16] Sitting in the Constitutional Court Madlanga J discussed the *in duplum* rule in *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd*.[10] The rule originated in Roman law and was recognised in South Africa as long ago as 1830.

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[10] *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) paras 42 to 45. See also *LTA Construction Bpk v Administrateur, Transvaal* 1992 (1) SA 473 (A) and *Bellingan v Clive Ferreira & Associates CC and Others* 1998 (4) SA 382 (W).

[17] The rule provides that interest stops running when equal to the unpaid capital. The rule is not[11] suspended *pendente lite* (while litigation is pending)[12] but if the accumulation of interest had ended because the double had been reached, interest begins to run again from the date that the judgment debt is due and payable.[13]

[18] The respondents argued that the *in duplum* rule applied to the transaction, which is correct in principle but because the double was never reached the rule did not serve to limit the accumulation of interest.

The answering affidavits

[19] The second respondent filed an answering affidavit dated 3 October 2022 and alleged that the argument of the applicant is "*incomplete*" and that the application should not be enrolled. The second respondent also filed a draft settlement agreement that was discussed between the parties but never entered into.

The second respondent argued that a verbal or implied agreement was entered into in terms of which the loan was restructured. It is common cause between the parties however that there were settlement discussions but no written agreement amending the terms of the first agreement was signed.

[20] In March 2023 the second respondent filed an affidavit on behalf of both respondents in which she sought to "*withdraw*" the first answering affidavit. She now

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11 The position was different before judgment in the *Paulsen* case. See *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in Liquidation)* 1998 (1) SA 811 (SCA), [1998] 1 All SA 413 (SCA)

12 *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) paras 45 to 95.

13 *Ibid* para 96.

raised two issues, namely the *in duplum* rule and a reference to the applicant's tax returns in respect of which no further averments were made.

[21] The applicant's application to compel the respondents to file a practice note and heads of argument was on the court roll on 12 April 2023. The second respondent appeared in person and sought leave to seek legal representation. De Vos AJ granted an order in terms of which the respondents were granted leave to seek legal representation and directed them to file *"whatever legal documents may be necessary"* by 25 May 2023.

[22] The respondents did not appoint attorneys and the second respondent filed a further opposing affidavit on behalf of both respondents in support of an argument that the applicant is not registered as a credit provider under the National Credit Act, 34 of 2005, and that as a consequence the loan agreement and the suretyship are not enforceable.

[23] The respondent did not file heads of argument and a practice note, and the applicant sought and obtained leave to enrol the matter without these documents.

[24] The second respondent also lodged complaints against the applicant's attorney with the Legal Practice Council and against the applicant with the National Credit Regulator but these were dismissed.

Registration as credit provider and the applicability of the National Credit Act

[25] It is common cause on the papers that the applicant is not registered as a credit

provider but as will be shown below registration is not required as the National Credit Act is not applicable.

[26] The first respondent is a juristic person as defined in section 1 of the National Credit Act. The loan agreement is a large agreement as defined in section 4(1)(b) and 9(4) of the National Credit Act.[14] The National Credit Act is not applicable to the loan agreement.

[27] Because the Act does not apply to the loan agreement it also does not apply do the guarantee or the suretyship.[15] The applicant therefore need not be registered as a credit provider in terms of section 40 of the Act.[16]

Usury

[28] The respondents did not expressly rely on usury but they did so implicitly. Because they were not represented it is prudent to deal with the question of usury in some detail.

[29] There is no prescribed maximum rate of interest[17] at common law. In *Dyason v Ruthven*[18] Watermeyer J said that:

> *"…if any stipulation of interest be attacked as liable to reduction, on the ground*

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14 A large agreement is an agreement concerning a principal debt of R250,000 or more: General Notice 713 in *Government Gazette* 28893 of 1 June 2006 and Scholtz & others *Guide to the National Credit Act* para 4.5.

15 Section 4(2)(c) of the National Credit Act. See also *FirstRand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another* 2009 (3) SA 384 (T) paras 18 to 21.

16 *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) para 39.

17 *Dyason v Ruthven* (1857-1860) 3 Searle 282 at 305.

18 *Ibid* 312.

of usury or extortion, this can only be done by offering proof of the usury and extortion in the particular case."

[30] More recently Cachalia JA said in *De Vasconcelos v Business Partners Ltd*:[19]

"[12] There is no statutory limitation on the amount of interest that may be charged for repayment of the loan at issue in this appeal. So, the mere fixing of a high amount of interest for repayment of a loan between contracting parties is not unlawful. The appellants understand this and therefore rely, as I have mentioned, on the common law rule against usurious contracts. Its effect is to render an agreement or transaction usurious and invalid if shown to be tainted by oppression, or extortion or something akin to fraud. The appellants, upon whom the onus lies, must establish the facts in this regard, as it would for any public policy challenge to the terms of a contract. There is no suggestion that the rule is inimical to any constitutional principle or value."

[31] It is informative to refer to the prevailing interest rates in circumstances where the National Credit Act is applicable:[20]

31.1 The maximum interest rate for mortgage agreements is 20.25% per year;

31.2 The maximum interest rate is 22.25% per year for credit facilities and 35.25% per year for the development of a small business;

31.3 The maximum interest rate for short term credit transactions is 5% per month for a first loan and thereafter 3% per month on subsequent loans

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19 *De Vasconcelos v Business Partners Ltd* 2019 JDR 0993 (SCA) para 12. See also *Reuter v Yates 1904* TS 855 at 858 and *Slip Knot Investments 777 (Pty) Ltd v Project Law Prop (Pty) Ltd* 2011 JDR 0339 (GSJ) para 11.

20 Scholtz & others *Guide to the National Credit Act* para 10.6.3.

in the same calendar year. A rate of 5% per month equals 60% per year.

31.4 The maximum rate for other credit agreements is 25.25% per year and for incidental credit agreements it is 2% per month.

[32] The interest rate agreed upon in the loan agreement is in line with what is prescribed and commonly used in commerce, even when the National Credit Act is applicable. It is not a usurious rate.

No evidence was presented to substantiate a finding of oppression, extortion or something akin to fraud, and no such averment was made.

Application for postponement

[33] As indicated above the second respondent appeared for herself and for the first respondent. When the matter was argued on 2 October 2023 the second respondent felt faint on what was a hot day in court and when she was addressing argument in reply it was obvious that she was not feeling well. I stood the matter down to Wednesday, 4 October 2023.

[34] When argument resumed on the 4th the second respondent applied from the bar for a postponement on the ground that she now intended to appoint an attorney on a *pro bono* basis. She handed up a letter addressed to an attorney with whom she had spoken and indicated that she needed expert advice on the interpretation of sections of the National Credit Act.

[35] As I have indicated the National Credit Act is not applicable. The second respondent first sought a postponement to seek legal representation in April 2023 when the application to compel delivery of heads of argument and a practice note was on the roll, and she neither filed heads of argument nor did she appoint attorneys.

[36] The application for a postponement was dismissed.

Conclusion

[37] I therefore make the order as set out above.

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J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **5 OCTOBER 2023**.

COUNSEL FOR APPLICANT:	E MANN
INSTRUCTED BY:	SWARTZ WEIL VAN DER MERWE GREENBERG INC
COUNSEL FOR RESPONDENTS:	SECOND RESPONDENT IN PERSON
INSTRUCTED BY:	-

DATE OF THE HEARING:	2 & 4 OCTOBER 2023
DATE OF JUDGMENT:	5 OCTOBER 2023