Reportable

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

Case: 13335/2009

In the matter between:

RODEL FINANCIAL SERVICE (PTY) LTD	Applicant
vs	
YOGANANDA DHANAPAL NAIDOO	First Respondent
NIRVANA NAIDOO	Second Respondent

J U D G M E N T

SEEGOBIN J

INTRODUCTION

[1] In its amended notice of motion the applicant, Rodel Financial Services (Proprietary) Limited, seeks an order against the first and second respondents ("the respondents") in the following terms:

> '1. That judgment is granted in favour of the applicant against the respondents, jointly, for payment of the sum of R1 162 988, 28, together with discounting fees thereon at the rate of 0.125% per day on the sum of R500 000.00 from 22 June 2009 to date.

1a Alternatively that judgment be granted in favour of the applicant against the respondents jointly for payment of the sum of R500 000,00 plus interest thereon for the period and at the rates set forth in annexure "A" hereto.' [1]

[2] First, it should be noted that in view of the fact that the respondents have repaid R50 000.00 towards their indebtedness, any order granted against them would be in respect of R450 000.00 and not R500 000.00 as reflected in the orders above, and secondly, the rates of interest set out in annexure "A" are the rates which are permissible in terms of the National Credit Act 34 of 2005 (the NCA) if it is found that the acknowledgement of debt (AOD) in question is subject to the NCA.

[3] The case made out by the applicant in its founding papers can briefly be summarized as follows:

3.1 On 15 June 2006, the applicant advanced the sum of R300 000.00 to the respondents;

3.2 On 5 July 2006, the applicant advanced the sum of R200 000.00 to the respondents;

3.3 These amounts were advanced pursuant to a written discounting agreement ('the discount agreement') in terms of which the applicant had purchased certain amounts payable to the

1 Amended Notice of Motion, pages 74-76 of the indexed papers

respondents at a discounted fee;

3.4 The respondents did not comply with their repayment obligations in terms of the discounting agreement; and

3.5 On 28 February 2007, both respondents, acting personally signed an AOD in terms whereof they, *inter alia*:

3.5.1 acknowledged that they were truly and lawfully indebted to the applicant in the sum of R300 000.00 and R200 000.00 respectively;

3.5.2 acknowledged themselves to be truly and lawfully indebted to the applicant for discount fees calculated at 4% of the capital sums for the first thirty (30) days from the date the capital sums were advanced and thereafter at 0.125% per day on the capital sums until payment of the entire amount; and

3.5.3 undertook to repay the capital together with the aforesaid discounting fees by no later than 30 June 2007.

[4] The applicant further averred that in an action previously instituted by

it against the respondents under Case no. 12463/2007 for payment of the capital sums and interest at the legally prescribed rate, the respondents had, in their plea, admitted:

4.1 signing the AOD;

4.2 the terms of the written AOD;

4.3 that they failed to discharge their indebtedness under the AOD by 30 June 2007; and

4.4 that the sum of R500 000.00 was the capital amount repayable in terms of the AOD.

[5] The only defences raised by the respondents in the said action were that: (a) they were not jointly and severally liable for the debt, but only jointly, (b) the applicant had not complied with the provisions of s 129 of the NCA, and (c) they had tendered to pay the applicant their indebtedness under the AOD and taxed costs on an attorney and client scale to date of the tender, all of which is said to have taken place on 10 September 2008.

[6] It is common cause that the above action was withdrawn by the applicant on 21 October 2009. It is further common cause that the applicant

did not accept the tender by the respondents, hence the institution of the present application.

[7] In opposing the application the respondents first disputed that the applicant had properly complied with the provisions of 129 of the NCA, second they averred that the applicants were seeking to impose a rate of interest which was in excess of the maximum rate prescribed in terms of the NCA, and third, they disputed that they were jointly and severally liable to the applicant inasmuch as the AOD only provides for "joint liability". In my view, and in light of the applicant's claim for joint liability in its amended notice of motion, the third contention raised by the respondents falls away.

[8] On the merits of the matter, the case advanced by the respondents is that the payment of interest as provided for in clause 1.4 [2] of the AOD is made under the guise of being a "*discounting fee*". They contended that the AOD had in fact novated the original discounting agreement and was subject to the NCA. According to them the AOD was nothing more but a money lending agreement and as such the interest rate prescribed therein was impermissible in terms of the NCA. They further contended that while they were always prepared to pay the capital amount to the applicant and are still

2 Clause 1.4 reads as follows: "The discounting fee is calculated as 4% if the capital sums of the first 30 days from the date the capital sums were advanced and thereafter 0.125% per day of the capital sums until settlement of the whole amount.

willing to do so, they will only pay interest at the rate of 15.5% per annum from date of service of summons. A tender to this effect was made by them to the applicant on 10 September 2008.

[9] The following issues arise from the contentions advanced by the respondents, viz:

(a) Has the AOD novated the original discounting agreement?

(b) Is the AOD subject to the NCA? The answer to this question is dependent on whether a discounting fee can be considered to be an interest charge.

(c) If the discounting fees are in fact interest charges and the AOD is subject to the NCA, then the question which arises is whether the rates of interest charged are excessive and therefore impermissible in the terms of the NCA? While the respondents were initially of the view that the entire AOD would be invalid and unenforceable, it was conceded in oral argument on their behalf that only the impermissible interest rates would be invalid.

(d) Did the respondent make a proper tender on 10 September 2008?

These issues are dealt with hereunder.

[10] *Issue 1* – **Novation**

[10.1] The applicant argued that the respondents had failed to discharge their onus of proving that novation was intended. Relying on clause 1.5 of the AOD which defines the cause of indebtedness as being the discounting agreement entered into between the applicant and the respondents, it was argued on behalf of the applicant that the parties had intended the AOD to merely confirm the existing obligation. Furthermore, the applicant's averment in paragraph 11 of its founding affidavit was never disputed by the respondents in their answering affidavit. Paragraph 11 reads as follows:

'Both of these payments were made pursuant to a written discounting agreement whereby the applicants purchased certain amounts payable to the respondents at a discounted fee. The respondents did not comply with their repayment obligations in terms thereof and accordingly agreed to sign the attached acknowledgement of debt.'

[10.2] According to the respondents the AOD created an entirely new obligation that novated the discounting agreement in its entirety. They argued that the applicant put up the AOD only and not the discounting agreement. This was a further indicator, so it was submitted, that the

applicants cause of action was based on the AOD and not on the discounting agreement. Reference was made to the matter of *Adams v SA Motor Industry Employers Association* [3] where the court held, per Jansen JA, that there can be no objection in principle to a second obligation arising in respect of an existing debt. The learned Judge held that the pivotal question was whether the acknowledgement of debt contained an express or implied undertaking to pay. The intention of the parties was important in this regard [1198 D-E]. On the facts it was found that the acknowledgement of debt contained an express undertaking to pay. The parties had clearly intended to create a new obligation in respect of payment of the balance of the purchase price under the deed of sale [1199A]. The court held that there is a presumption against novation and that where novation was not intended it was possible for two obligations to co-exist. These obligations would be interdependent. It was noted that the creditor does not have a free election to enforce the original obligation [1199 H].

[10.3] An acknowledgement of debt, sometimes referred to as an IOU, is evidence of a debt which is due but differs from a promissory note as it does not contain an express promise to pay.[4] Where, however, the acknowledgement of debt is coupled with an undertaking to pay, it will give

3 1981 (3) SA 1189 (A).
4 19 LAWSA 17.

rise to an obligation in terms of that undertaking.[5] *Malan* [6] comments that this new obligation will seldom replace the existing debt and would not amount to a novation of the old obligation. *Christie* [7] defines novation as the replacing of an existing obligation by a new one where the existing obligation becomes discharged. With voluntary novation where the existing contract is between the same parties, the issue is essentially a matter of intention and consensus. [8] Since it involves a waiver of right, there is a presumption against novation and the onus to show it has occurred lies with the party asserting this. [9] Thus where a creditor enters into a second contract there must be a clear, cogent and unequivocal proof of novation[10] as he or she is more likely to have intended to strengthen and confirm their existing right with the new contract than to destroy them through novation. [11] Our courts have often said that the giving of a promissory note does not necessarily mean that parties intended to substitute a debt for the note, but rather that the creditor merely obtain liquid proof of his claim.[12] Furthermore, the mere giving of the acknowledgement of debt coupled with

---

5 *Adams* at 1192.

6 Malan et al 'Malan on Bills of Exchange, Cheques and Promissory Notes in South African Law' 4 Ed p. 198.

7 Christie 'Law of Contract in South Africa' (2006) 5 Ed, p 449.

8 *Swadif (Pty) Ltd v Dyke N.O.* 1978 (1) SA 928 (A).

9 Note 7 above at 452. The author refers to *Marendez v Marendez* 1953 (4) SA 218 (C) where the court found that the applicant, who had allaged novation, bore the onus and had failed to prove it. See also *Woolfsons Credit (Pty) Ltd v Holdt* 1977 (3) SA 720 (N) at 724E which reinforces the view that when novation is raised as a defence, the onus lies with the defendant.

10 *Marendez* at 226-227*; Wolfsons* 1953 (4) SA 218 (C) at 724.

11 *Wolfsons* at 724.

12 *Milner v Webster* 1938 TPD 598 at 601.

an express undertaking to pay the debt, means that the creditor may sue either on the acknowledgement or on the original debt. [13]

[10.4] In light of the above legal principles and the undisputed allegation contained in paragraph 11 of the applicants founding affidavit, I'm of the view that the parties intended the AOD to merely confirm an existing obligation viz. the prior discounting agreement.[14] Bearing in mind the presumption against novation, I am of the opinion that the respondents have failed to discharge the onus resting on them of proving that they had intended a novation of the discounting agreement.

I accordingly find that the AOD did not novate the prior discounting agreement.

[11] *Issue 2* – **Is the AOD subject to the NCA?**

[11.1] The determination of this issue depends on whether or not a discounting fee is different from an interest charge. On behalf of the respondents it was argued that the AOD is a credit agreement by virtue of subsection 8(4)(f) of the NCA. The relevant subsection reads:

13 *Somah Sachs (Wholesale) Ltd v Muller & Phipps SA (Pty) Ltd* 1945 TPD 284.
14 *Bridgeway Ltd v Markam* 2008 (6) SA 123 (W).

'(f) any other agreement, other than a credit facility credit guarantee, in terms which payment of an amount owed by one person to another is deferred and any charge, fee or interest is payable to the credit provider in respect of

(i) the agreement or

(ii) the amount that has been deferred'

In paragraph 6 of their answering affidavit, the respondents averred that the provision for the payment of interest is provided for in clause 1.4 of the AOD of debt under the guise of a discounting fee. They accordingly submitted that the AOD both deferred payment from February 2007 to June 2007 and charged interest. This being the case they submitted that the AOD is a credit agreement and subject to the NCA.

[11.2] The applicant submitted that there is a marked difference between a discounting agreement and a money lending transaction. A discounting agreement is not a credit agreement. Reliance was placed on the matter of *Bridgeway Ltd v Markham*[15] in which it was held that the agreement in question was a discount sale and was different from a money-lending transaction or credit transaction. The reason for this is that in a money-lending transaction the borrower undertakes to pay an equal amount to the

15 2008 (6) SA 123 (W).

amount lent in instalments or periodically and the lender is compensated by levying interest [para 21]. Mathopo J held that the undisputed facts revealed that the money was paid upfront when the agreement was concluded between the applicant and the respondent [para 22]. The learned judge held further that the breach clause contained in the agreement, which provided for the deferred payment of interest, could not detract from the fact that the applicant had made an immediate payment to the respondent. He accordingly found that a discounting sale is clearly distinguishable from a credit facility under the NCA.

[11.3] In *Zimbabwe Development Bank v Naga Salons and Others,* [16] the bank stood to benefit from the loan advanced to the defendant by charging an 'invoice discounting fee' and a processing fee on the total amount advanced. The fees were levied at a certain rate. The court was of the opinion that a discount rate is not interest but rather a fee levied for advancing the sum in question. It stated that although the discounting rate and interest were calculated in a similar manner, they were still different.

[11.4] In this case, the respondents have not provided any authority to support their contention that a discounting fee is an interest charge. In my view the matter of *Bridgeway* read together with the *Naga Salons* matter,

16 [2006] JOL 18488 (ZH).

supra, resolves this issue in favour of the applicant. I accordingly conclude that the discounting fee under the AOD is not on interest charge and falls short of the requirements set out in subsection 8(4)(f) of the NCA.

[11.5] The above finding disposes of this issue in favour of the applicant but for the sake of completeness I turn to briefly consider the finding made in the matter of *Carter Trading (Pty) Ltd v Blignaut* [17] which was referred to in argument. Here the court held that the acknowledgement of debt amounted to a credit agreement and as such fell within the ambit of the NCA. The facts were briefly the following: the defendant had on 23 December 2008 signed an acknowledgement of debt in respect of goods purchased from the plaintiff, undertaking to pay the outstanding amount on 24 December 2008 by 16h00. The defendant also undertook to pay interest on the amount owed and the cost of negotiating and preparing the acknowledgement of debt and collection commission calculated according to the Rules of the Law Society of the Cape of Good Hope. The defendant failed to pay the amount owed to the plaintiff. The plaintiff instituted action in the High Court for the amount outstanding and the defendant entered appearance to defend. The plaintiff thereupon filed an application for summary judgment. The application was opposed, the defended averring (a) that the acknowledgement of debt in question was a credit agreement described in s 8(4)(f) of the NCA and (b)

17 2010 (2) SA 46 (ECP).

that the plaintiff had failed to comply with the provisions of ss 129 and 130 of the NCA. It was held that since the agreement had deferred payment, a fee or charge was payable in respect of the cost of the acknowledgement of debt and interest and legal fees were payable in the event of the defendant's failure to pay timeously, the acknowledgement of debt constituted a credit agreement as envisaged in the NCA.

[11.6] The applicant submitted that the *Carter* case was distinguishable from the present application. I agree. I have already concluded that a discounting agreement is not a credit agreement in terms of the NCA. I also found that the present AOD had merely confirmed a prior indebtedness contained in the discounting agreement. Additionally, I concluded that the discounting fee under the AOD was not an interest charge. Based on these conclusions, it therefore follows as a matter of logic that the AOD in question cannot be a credit agreement.

[12] *Issue 3* - **Permissible Rates of Interest**

Since the NCA has no application because the AOD in question has not been shown to be a credit agreement as defined in the Act, the permissibility of the rates of interest charged have no application.

[13] *Issue 4* - **Was the tender by the respondent on 10 September 2008 a valid tender?**

[13.1] It is common cause that the respondents tendered in writing to pay the applicant the sum of R500 000,00, interest thereon at the rate of 15.5% per annum from date of service of summons to date of payment as well as the applicants costs on an attorney and client scale. This tender was rejected out of hand by the applicant.

[13.2] In argument before me, the applicant attacked the tender on two grounds. First, it argued that there was no basis for the respondents to tender *mora* interest. Second, it contended that the respondents had to actually make payment or in some other manner satisfy the creditor that payment would be received. It submitted that a mere offer to pay was insufficient. It relied in this regard on the case of *B & R Investments (Pty) Ltd v Laubscher*[18] in which the court held that the tender in question was an offer of compromise and that if the plaintiff accepted the offer it would be precluded from suing for the balance in excess of the defendant's tender.

[13.3] Save for repeating the tender before me, the respondents made no

18 1951 (2) SA 567 (T) at 570B.

further identifiable submissions on this issue. In my view, the applicant's reliance on the *Laubscher* case is misplaced. In *Unit Inspection Co of SA (Pty) Ltd v Hall Langmore & Co (Pty) Ltd,* [19] Grosskopf JA stated the following:

'Rule 34 was substantially amended in 1987 and the practice of actual payment into court was abolished.'

The Appellate Division was critical of the *Laubscher* judgment [at 802J – 803 A]. However, in view of my findings that a discounting fee is not interest and that the AOD is not subject to the NCA, there can be no basis for a tender which includes *mora* interest only.

[14] In the result, I make the following order:

(a) Judgment is granted in favour of the applicant against the respondents, jointly, for payment of the sum of R1162 988,28 together with discounting fee thereon at the rate of 0.125% per day on the sum of R450 000,00 from 22 June 2009 to date.

b) Costs of suit on the attorney and client scale.

19 1995 (2) SA 795 (A) at 801I.

SEEGOBIN J

For the Applicant	:	Adv. A. Stokes S.C
Instructed by	:	Johnston & Partners
For the Respondent	:	Adv. P. Quinlan
Instructed by	:	Cox Yeats Attorneys
Date of hearing	:	02 September 2010
Date of Judgment	:	18 February 2011