LOM Business Solutions t/a Set LK Transcribers/

IN THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG CASE NO: 30722/08

2009-10-30

In the matter between

ALOECAP (PTY) LIMITED Plaintiff

And

NTHWESE INVESTMENT HOLDINGS (PTY) LIMITED Defendant

---

J U D G M E N T

---

WILLIS, J:

[1] The plaintiff, in its amended particulars of claim, claims as follows:-

1. Payment of the sum of R890 000;
2. Interest on the aforesaid sum at the rate of 15,5% per annum *a tempore morae*:

2.1 On R890 000, from 27 November 2007 to date of payment;

2.2 On R250 000 from 27 November 2007 to date of payment, namely 2 June 2008;

3. Costs of suit.

[2] The claim arises from a written agreement which, it is common cause, was entered into between the parties on or about 30 July 2007. In May 2005, the defendant had borrowed some R250 Million, repayable with interest at prime plus 2 percent, to acquire an interest in a private company known as the Blue Label Investment Holdings (Pty) Limited ("Blue Label"). The defendant had borrowed the money from an entity known as Public Investment Corporation Limited. This entity was referred to by the witnesses for both sides as PIC ("PIC"). PIC is a State-backed or State-owned corporation.

[3] Essentially, the business of Blue Label was the sale of pre-paid airtime for cellular telephones. In view of the phenomenal growth in the use of cellular telephones in South Africa, it was anticipated that this would be lucrative business. When PIC had lent the money to the defendant, it had been anticipated that the loan would be repaid from dividends declared by Blue Label. By the time of the entering into the agreement between the plaintiff and the defendant, Blue Label had not declared any dividends and no portion of the loan by PIC to the defendant had been redeemed. Not surprisingly, PIC were becoming restless.

[4] The plaintiff owned shares in the defendant as well as Blue Label. At the time of the entering into the agreement between the plaintiff and the defendant, Mr Johannes (known to his friends as "Joe") Mthimunye, a qualified chartered accountant, who later became a corporate finance

specialist, was the executive chairman of the plaintiff, chairman of Blue Label and a member of the board of the defendant.

[5] In and or around March or April 2007, the idea was mooted that Blue Label would seek a listing on the Johannesburg Securities Exchange as a public company. The listed company would be known as Blue Label and Telecom Limited. Among the other advantages of the listing would be the opportunity to redeem all or part of the loan which PIC had made to the defendant. It was these opportunities and the possibility of redeeming the loan which PIC had made to the defendant, which gave rise to the agreement between the plaintiff and the defendant. At the time of entering into the agreement, both Mr Mthimunye for the plaintiff and Mr Theledi for the defendant stood to benefit from the listing. Essentially what was envisaged is that there would be what is known in the claim as "refinancing" of the loan from PCI, taking advantage of the listing.

[6] The relevant clauses of the agreement concluded between the parties are the following:-

"1. INTRODUCTION AND PURPOSE OF THE ENGAGEMENT:

1.1 The client (i.e. Mthwene Investment Consortium (Pty) Ltd) and the defendant hereby appoint AloeCap (the plaintiff) who hereby accepts the appointment to act as transaction advisor to the client as detailed in this letter.

1.2 This engagement letter sets out the terms of which AloeCap has been engaged by the client for the purposes of assisting the client in restructuring its funding for the Blue Label Investments interest.

1.3 This engagement letter outlines AloeCap's responsibilities as well as the fees in respect thereof.

2. SCOPE OF THE ENGAGEMENT:

2.1 The client has requested AloeCap, and AloeCap undertakes to render the following financial and transaction services to the client, to the extent necessary for the achievement of the purpose of the engagement;

2.1.1. Advising the client of a strategy;

2.1.2. structure and implementation process of the funding structure;

- Review current funding agreement;
- Design a funding structure for refinancing, taking into account opportunities of listing;
- Draft the refinancing proposal to current financier;
- Tax considerations.

2.1.3 Fund raising

- Funding a risk management;
- Preparing funding proposal for the funding;
- Engaging potential financiers;
- Negotiating the funding agreement.

2.1.4 Assisting with any documentation required for the implementation of the funding process.

2.1.5 Coordinating the implementation process.

2.1.6 The client will simultaneously furnish AloeCap with all relevant data information. The client will also make all decisions and appointments, which are necessary for AloeCap to fulfil the prescribed services under this appointment timeously."

"3.4 If the client determinates the refinancing process prior to its completion for any reason whatsoever, other than a material breach by AloeCap, or AloeCap's failure to raise the third party funding, a termination fee shall be payable by the client to AloeCap.

3.5 The termination fee will be equal to an amount calculated at the rate of R250 000 (excluding VAT), for every month or a portion thereof that AloeCap was engaged in the mandate." and

"10.1 This engagement letter constitutes the sole record of the agreement between the parties and relations to the appointment of AloeCap as the client's financial advisor. Neither party shall be bound by any expressed, tacit or implied term, representation, warranty, promise or the like, not recorded in the engagement letter. This engagement letter supersedes and replaces all prior commitment, undertaking to representations, whether oral or written, between the parties in respect of the subject matter hereof.

10.2 No addition to variation, novation or agreed cancellation of any provision of the engagement letter, shall be binding upon the parties unless reduced to writing and signed by or

on behalf of the parties; provided that any amendments which may be required in order to give affect to change the law or the regulatory repine to which AloeCap is subject, will become effective immediately upon such change becoming effective. AloeCap shall give written notice of such amendments to the client."

"9.1 Notwithstanding any other term of this engagement letter, the client will be entitled to cancel the engagement summarily in the event of a material breach by AloeCap of any of the provisions of this engagement letter, which goes to the roots of the engagement and which is not remedied and within 14 days, or such longer period as may be reasonably required in the circumstances, after a receipt by AloeCap for a written demand from the client for the remedy of such breach, in which instance AloeCap will not be entitled to payments of the completion fee."

[7] Mr Mthimunye, who was the only witness for the plaintiff, signed the agreement on behalf of the plaintiff. He was the author of the document. Mr Theledi, signed the agreement on behalf of the defendant, he was the only witness to testify on behalf of the defendant. Mr Theledi is also a director of the defendant and Blue Label. He has a B.Com degree. He describes himself as an "entrepreneur and a risk taker". It seems that he has made his fortune in property development, vehicle dealerships and pharmaceuticals.

[8] In the plaintiff's amended particulars of claim, it makes the following allegations:-

"6. As a direct result thereof (i.e. the sourcing of funding from third party by the defendant, namely Investec), the defendant was placed in a position of being able to enter into and conclude a third party funding agreement with Investec Bank Limited which, but for defendant's conduct, set forth in paragraph 7 hereunder, would have been consistent with the fulfilment of the plaintiff's mandate as provided for in annexure E1 hereto (E1 is the agreement which is common cause was entered into between the plaintiff and the defendant).

7. In breach, alternatively in repudiation of the agreement, (which repudiation the plaintiff has set);

7.1 The defendant after for the conclusion of the agreement constituting annexure "PCI" hereto, concluded a funding agreement with Investec Bank Limited on its own, without disclosing same to the plaintiff (thereby precluding the plaintiff from concluding the raising of the third party funding, as contemplated in terms of clause 3.2 of the agreement); and

7.2 The defendant, in so doing, expressly, alternatively implied further alternatively, tacitly, terminated the refinancing

process, prior to its conclusion, as contemplated in terms of clause 3.4 of the agreement.

[9] The defendant pleads as follows to these allegations:-

"Ad paragraph 7.1 and 7.2:

7.1 The defendant admits that it concluded a "funding agreement" with Investec Bank on 14 November 2007;

7.2 Same as aforesaid, the defendant denies each and every allegation contained in this paragraph as if specifically traversed.

7.3 In amplification of its denial and without derogating from the generality thereof, the defendant states that:-

7.3.1 Time was of the essence of the agreement;

7.3.2 The plaintiff failed timeously to raise the required funding."

[10] Significantly, the plea does not expressly aver that the reason for the defendant's non-liability is that the plaintiff failed to raise required funding on or before the date of listing of Blue Label, namely 14 November 2007. I shall deal with this aspect in more detail later.

[11] It is common cause that the defendant effected a payment of R250 000 to the plaintiff on 2 June 2008. The plaintiff's claim is for the four months of August, September, October and November in 2007, being R250 000 per month plus VAT, less this payment of R250 000.

The defendant alleges that this payment of R250 000 was made in full and final settlement of the plaintiff's entire claim.

[12] As I have already indicated, there may have been advantages in the listing of Blue Label as public company, apart from the general advantage of raising capital to expand business operations to increase profitability. These would have included the opportunity to redeem the loan which defendant had taken from PIC. It is common cause that Mr Mthimunye prepared documents relating to a presentation to back his proposals of the refinancing envisaged which would arise out of the proposed listing. It is also common cause that Mr Mthimunye sets up meetings with Absa Bank and Standard Bank and City Bank. City Bank declined to take any interest in the proposal. The other banks, not unsurprisingly, referred the proposal "down the line", or perhaps more accurately, "up the ladder". A large sum of money was involved, running into several R100 million, if interest is taken into account. There were also obviously attendant risks.

[13] At the time of the signing of the agreement between the plaintiff and the defendant, the date of the listing was uncertain. The reason for this was that approval first had to be obtained for the listing from the Competition Tribunal. This approval was ultimately obtained but the listing date was set at 14 November 2007.

[14] A "pre-listing statement" relating to the listing of Blue Label on the JSC was published on 26 October 2007. It was common cause that it was intended that both the plaintiff and the defendant would also approach the Investec Bank. It is also common cause that Mr Theledi had good contacts with Investec Bank arising from his past dealings with them. There is a dispute between the parties as to whether who exactly had made the initial approaches to Investec Bank and whether Mr Mthimunye and Mr Theledi agreed that Mr Mthimunye would himself contact the contacts of Mr Theledi to set up an appointment or whether Mr Theledi would himself do so. Nothing, in my view, really turns on which version is correct in this regard.

[15] Be that as it may, it is common cause that Mr Theledi went himself to see Investec Bank without taking Mr Mthimunye to accompany him. This occurred at the end of October and the beginning of November 2007.

[16] An agreement was signed by Mr Theledi acting on behalf of the defendant on 12 November 2007 and by Investec Bank on 14 November 2007 the date of the listing. It is common cause that the terms of the deal between the defendant and Investec Bank were, to say the least, "expensive". Mr Mthimunye became angry that the deal had been brokered without his participation and without his sanctioning of the terms thereof. Mr Mthimunye battled to get hold of Mr Theledi. Eventually he succeeded. Mr Theledi confirmed that the deal had indeed

been struck between the defendant and Investec Bank. Mr Theledi said that it was merely an interim agreement. He gave the documents to Mr Mthimunye to read and Mr Mthimunye came to the conclusion that this was far from an interim agreement and that for the defendant to extricate itself from this the agreement would be very costly indeed. Mr Mthimunye then resigned his directorship of the defendant.

[17] It is common cause that the defendant never put the plaintiff on terms to raise the finance on or before 14 November 2007. It is also common cause that the defendant never gave the plaintiff notice of the intended termination of the agreement, whether in writing or otherwise. There is a dispute, as I have already indicated, between the parties as to whether the payment of the R250 000 made by the defendant by the plaintiff was in full and final settlement. It is common cause that the parties did meet shortly before the payment was made. Mr Mthimunye's version of events was that this was a part payment and that, at the time, Mr Theledi indicated that he would "sort out" the plaintiff in respect of the balance.

[18] Mr Theledi's version is that after the meeting he spoke to Mr Mthimunye and told him that it was a payment in full and final settlement and requested a letter from Mr Mthimunye accepting this payment in full and final settlement. He said Mr Mthimunye undertook to send such a letter. On the strength of that assurance, the payment was made but no such letter was ever received. There is no correspondence

whatsoever from the defendant or on behalf of the defendant by its attorneys indicating a proposal to settle the claim at R250 000 as a full and final settlement.

[19] There is a resolution that appears to reflect the decision of the board of directors of the defendant that payment be made a full and final settlement but, as I have said, there is no correspondence at all exchanged between the parties indicating this.

[20] I should point out that the plea that time was of the essence, arose for the first time on the morning that the trial began. In determining the factual disputes in this case, I shall have regard to the principles set out in the well known case of *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at para [5]:

"The technique generally employed by courts in resolving factual disputes of this nature, may conveniently be summarised as follows. To come to a conclusion on dispute of issues, a court must make findings on:

(a) The credibility of the various factual witnesses;

(b) Their reliability; and

(c) The probabilities;

As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness, that in turn will depend on a variety of subsidiary factors, not necessary in orderly importance such as:-

i) The witness' candour and demeanour in the witness-box,

ii) His bias, latent and blatant;

iii) Internal contradictions in his evidence,

iv) External contradictions with what was pleaded or put on his behalf, with established fact or with his own extracurial statements or actions,

v) The probability or improbability of particular aspects of his version,

vi) The calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.

As to (b), a witness' reliability will depend apart from the factors mentioned under (a), (ii), (iv) and (v) above, on (i), the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof.

As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessments of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the *onus* on proof has succeeded in discharging it.

The hard case, which will doubtless be the rare one, occurs when a court's credibility finding compel it in one direction and

its evaluation of the general probabilities on the another. The more convincing the former, the less convincing will leave the latter. But when all factors are equipoised probabilities will prevail."

[21] I have also had regard to *African Eagle Life Assurance Co Ltd v Cainer* 1980 (2) SA 234 (W) at 237. The reasoning of Coetzee J, as he then was, was approved and developed slightly in *National Employers' General Insurance v Jagers* 1984 (4) SA 432 (ECD) by Eksteen AJP at 440E-441A. This passage by Eksteen AJP was unanimously approved by the Supreme Court of appeal in *Baring Eiendomme Bpk v Roux* [2001] 1 All SA 399 (A) at para [7] .See also *Koster Koöperatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens* 1974 (4) SA 420 (W) at 425; *National Employers Mutual General Insurance Association v Gany* 1931 AD 187 at 199. As has been said in the oft-quoted case of *AA Onderlinge Assuransie Assosiasie v De Beer* 1982 (2) SA 603 (A) at 614H [1]:

"Dit is, na my oordeel, nie nodig dat 'n eiser wat hom op omstandigheidsgetuienis in 'n siviele saak beroep, moet bewys dat die afleiding wat hy die Hof vra om te maak die enigste redelike afleiding moet wees nie. Hy sal die bewyslas wat op hom rus kwyt indien hy die Hof kan oortuig dat die afleiding wat hy voorstaan die mees voor-die-hand liggende en aanvaarbare afleiding is van 'n aantal moontlike afleidings."

[1]

This passage has been referred to with approval in numerous cases. See, for example, the judgment of Zulman JA in *Cooper & Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) at para [7]; *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport* 2000 (4) SA 21 (SCA) at para [9].

[22] In *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159C Holmes JA said:

"As to the balancing of probabilities, I agree with the remarks of Selke J, in *Govan v Skidmore* 1952 (1) SA 732 (N) at 734, namely

"… in finding facts or making inferences in a civil case, it seems to me, that one may, as Wigmore conveys in his work on *Evidence,* 3rd ed., para 32, by balancing probabilities select a conclusion which seems to be the more natural or plausible, conclusion from amongst several conceivable ones, even though that conclusion is not the only reasonable one."

I need hardly add that "plausible" is not here used in its bad sense of specious, but in the connotation which is conveyed by words such as acceptable, credible, suitable. (*Oxford Dictionary*, and Webster's *International Dictionary*)." This *dictum* has been referred to with approval in innumerable cases.

[23] I should record that Mr Mthimunye was an impressive, calm and confident witness who gave his evidence without any contradiction. Mr Theledi, on the other hand, often had difficulty in answering questions

from Mr *Nowitz*, counsel for the plaintiff, and questions seeking clarification from the court. It must be remembered that in regard to the seeking of refinancing, there would in the initial stages have been a very fluid situation. Interim arrangements would have to be agreed, as also with the period of repayment. There would be questions relating to finance raising fees, the provision of security (nowadays we tend, more often than not, to refer to the American term, "collateral") and then related issues such as the provision of incentives *et cetera*.

[24] In my view, Mr Mthimunye was unfairly criticised for the way in which he had approached the banks as he did. Not much more could reasonably have been expected of him in the circumstances. Clearly he had first to see whether there was interest in the matter, then whether there could be agreement into principle and, after that, obviously there would be a narrowing down of the issues so as to come up with a concrete agreement. Mr Mthimunye clearly had a relaxed approach as to whether or not the refinancing had to have been effected before or some time after the listing. Mr Theledi, on the other hand, seems to have been very anxious that the refinancing should have been put in place and effected (in the sense that PIC would have been repaid) before the listing.

[25] It has not been absolutely clear why Mr Theledi was so anxious to have the refinancing effected before the listing. It appears that this may well have to do with certain options which a company known as ITJE

Leswika Investment Holdings (Pty) Limited would have been able to exercise on the listing, Mr Theledi himself had a personal interest in this company ITJE Leswika. It should be borne in mind that the question of whether or not ITHE Leswika was to exercise options, is collateral to the agreement that had been concluded between the parties.

[26] There was some debate and indeed cross examination on the question of whether PIC had not been prepared to support the listing unless its loan had been repaid. It is clear from the evidence as a whole that PIC did express the view that the repayment of the loan was critical to it insofar as it would have been willing to support the listing concerned. The dispute is in fact a narrow but a very important one, namely:-

1) Did PIC actually require that it should have been repaid its loan in full *before* the listing took place; or
2) Must it have been *agreed* prior to the listing that the loan would be repaid from the sell down of shares at the listing?

[27] The apple-cart was very nearly upset late yesterday afternoon when Mr *Limberis*, moments before the court was about to adjourn, sought to reopen his case to hand in the prelisting statement issued in relation to a listing dated 26 October 2007. Mr *Nowitz*, who is an old warrior in this court, was charm incarnate. He graciously agreed to the handing in of the prelisting statement. This gesture avoided my having to give a ruling on this very issue. Having received the prelisting statement, I can now understand why Mr *Nowitz* adopted the generous stance that he did.

Replete in the documents are references to the loan which PIC had given to the defendant and the following words appear therein:-

> "The proceeds from the sale (the sale of Blue Label Telecom shares owned by Nthwese, the defendant) will go towards the settlement of a portion of the outstanding funding from the PIC".

[28] It is obvious that this prelisting statement could not have been issued with the approval of the JSE unless the PIC was agreeable to the listing in the terms stated. It is true that the prelisting statement refers to the fact that "the listing of Blue Label Telecom shares on the JSE is conditional upon the raising of a minimum amount of capital of R700 Million before listing expenses in terms of the offer/subscription and a minimum amount of capital of R200 million before listing expenses in terms of an offer is made." This raising of a minimum amount of capital of R700 million is not to be confused with the issues of the refinancing of the loan. It therefore seems to me that, if one has regard to this prelisting statement, not only insofar as it contents are concerned but also the fact that it was issued on 26 October 2007, before there was any refinancing in place, that PIC must have been content that the repayment of the loan was effected *after* the listing rather than *before*. Furthermore, I should point out that it would have made no sense for PIC to adopt a dog-in-the-manger attitude towards the listing, as Mr *Limberis* seems to argue, was its position. PIC was anxious to have its loan repaid and, in all the circumstances of the matter, there was no foreseeable way in

which this loan would be repaid other than by proceeding with this listing. Indeed, it made good sense to approve of the listing provided, however, that of course, arising from the listing, there would be a sale of shares sufficient to repay the loan.

[29] But the significance of PIC's attitude goes further. It shows that Mr Mthimunye was sensible not to have adopted a desperate attitude with regard to refinancing. In other words, he was sensible not to panic and not to take a view that the refinancing should be effected before the listing. Of course, there is always a risk that a listing would be undersubscribed, but entrepreneurs take risks and it seems fair to assume that in discussions about the listing and in determining the listing price, all these factors would have been taken into account in order to minimise the risk. It also seems fair to assume that the listing would have been designed to ensure that, as far as it is reasonably possible to do so, that the listing would have been oversubscribed. It so happened that the price rose from a listing price of R6,75 on the date of listing to some R8,50. Had Mr Mthimunye's advice been heeded, it is clear that in the circumstances of this particular case, the loan it could have been repaid on terms very much more favourable to the defendants than has actually been the case.

[30] I shall now consider the question of the alleged settlement. Mr Theledi, in his own account of himself as a business consultant, can hardly be described as a babe-in-the-woods. I think it must be accepted

that, as a matter of probability, only a fool would make a payment in full and final settlement without first securing a clear, unequivocal agreement to accept that payment in full and final settlement. As I have said, it is common cause that no such letter, as Mr Theledi says was promised to him, was ever received and, furthermore, the probabilities are strengthened by the fact that there was no letter sent, as I have already indicated, either by the defendant or the defendant's attorneys to the plaintiff offering to settle the claim at R250 000 as a full and final settlement. I therefore satisfied that the defendant's defence, that the matter has been settled in full, cannot be sustained on a balance of probabilities.

[31] I turn now to deal with questions of the interpretation of the actual agreement. It seems to me that the plain, ordinary, literal and grammatical reading of the contract does not stipulate that the refinancing or repayments of the loan had to have been effected before the listing. Mr *Limberis*, on the other hand, sought valiantly to persuade me that this should be read into the agreement. In particular, he referred me to clause 2.2 where there is a reference to the fact that the plaintiff would perform its prescribed services in terms of this appointment "timeously". He also referred to clause 2.1.1 where there is a reference to, into "designing" a funding structure for refinancing, taking into account, "opportunities at listing".

[32] It seems to me that the words "opportunities at listing" cannot simply be interpreted to mean "in order to refinance before the listing". Unsurprisingly, Mr *Limberis*, for the defendant, said that I must interpret this agreement "contextually" as well as taking into account the background and circumstances. He referred me to a number of cases, in particular the well known case of *Coopers Lybrand v Bryant*, 1995 (3) SA 761 (A) 767E-768E, which refers to background circumstances. He also referred me to the judgments of Seven Eleven *Corporation of South Africa v Cancun Grading 150 CC*, 2005 (5) SA 186 (SCA) 24, where Lewis JA, delivering the anonymous judgment of the court, referred to the importance of context and *Van Rensburg v City Credit (Natal) (Pty) Limited*, 1980 (4) SA 500 (N) where Kriek J referred to the well known *Delmas Milling Co Limited v Du Plessis* case (1955 (3) SA 447 (A)) which also refers to background.

[32] I hope it is clear from my analysis of the evidence, where if one has regard to context, it shows that, objectively, it was NOT necessary in order to effectively financing of the loan for it to have been completed before the listing.

[33] The last point that I need to consider is the question of time being of the essence. Mr *Limberis* referred to the fact that clause 3.4 allows the defendant to terminate the agreement in the event of the plaintiff's "failure to raise the third party funding". In the case of *Alfred McAlpine & Son (Pty) Limited v Transvaal Provincial Administration*, 1974 (3) SA 506

(SCA) the court dealt with the concept of time being of the essence and pointed out that this relates to the consequences of a breach and not the breach itself and if no time is fixed then there can be no breach by non performance, whether or not time is of the essence, until the creditor has informed the debtor when he maintains performance is due. When a time for performance is fixed however, the debtor's failure to perform by that time is a breach and no demand is necessary to place the debtor in *mora* .There is no date stipulated in the agreement by when the financing was to be raised and as I have already indicated, the defendant at no time called upon the plaintiff to have raised the financing and to have effected before the date of the listing (or any other date).

[34] It is also useful to refer to the case of *Breytenbach v Van Wijk*, 1923 AD 541 and 549 where the following was said:

> "Immediate performance having been impossible and not contemplated, and no date of transfer having being fixed by the contract, the respondent, if he considered that sufficient time had elapsed to enable him, on that ground, to procure his own release, should have taken steps – as the civilians express it – to place the appellant *in mora* by demanding that transfer should be passed on or before a specified date, reasonable under the circumstances. *Mora*

> *autem committitur quoties debitor opportune tempore et loco interpellatus non solvit*."

[35] It is also instructive to refer to the old case of *McKay v Naylor* 1917 TPD 533 at 537-538, where the court refers to the old authorities and states that "the general rule of law" had obligations for the performance of which no definite time is specified, are enforceable or with, that the rule is subject to the qualification that performance cannot be demanded unreasonably so as to defeat the object of the contract or to allow insufficient time for compliance. As Christie in the 5th edition, *Law of Contract in South Africa* Lexis Nexis 503 observes:

> "No demand is necessary in cases where immediate performance is contemplated, so we are concerned here with the cases that, although strictly classified as exceptions to the general rule stated by Mason J, are in fact very common and they have been described as cases in which immediate performance not been contemplated, performance must be within a reasonable time."

It is quite obvious that there could not have been immediate performance in the present case. It could never have been contemplated by the parties. One simply cannot obtain an agreement to refinance, to the extent of several hundred million, within the matter of a day or two. Therefore, it must have been within the contemplation of the parties and

at least implicit, that the plaintiff would be allowed a reasonable time in order to perform his mandate in terms of the agreement. If the defendant believed that a reasonable time had elapsed, he should have put the plaintiff on terms to comply, in other words to secure the refinancing and perhaps more importantly, to have ensured that the actual loan from PIC to the defendant had been repaid. I should also add that the question of the "time is of the essence defence" is hardly credible when it is raised for the first time on the morning of the trial.

[36] In my view, the plaintiff accordingly is entitled to the relief which it seeks and an order is granted in terms of prayers 1, 2 and 3 of the plaintiff's amended particulars of claim.

---oOo---

Date of hearing: 27/28/29 & 30 October 2009
Date of judgment: 30 October 2009
Counsel for the plaintiff: M Nowitz
Counsel for the defendant: E A Limberis SC
Attorneys for the plaintiff: Nowitz Attorneys
Attorneys for the defendants: Fluxmans Incorporated