THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 31739/2015

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

.....26 May 2016..... .....
DATE SIGNATURE

In the matter between:

NEL: RENIER ENHARDT **First Applicant**

LSC PROPERTY FINANCE CC **Second Applicant**

And

MONIQUE VERONICA FENSHAM t/a MV FINANCE **First Respondent**

JUDGMENT

RATSHIBVUMO AJ:

1. The applicants seek a relief whereby the respondent is ordered to pay a sum total of R1 050 000.00 plus interests and costs of suit. R800 000.00 of this is claimed by the First Applicant, an attorney practising under the name and style of Renier Nel Incorporated, whereas R250 000.00 is claimed by the Second Applicant. The reason the claims are brought through one application is that according to the First Applicant, who also represents the Second Applicant, the cause of action emanates from the same facts and it involves the same parties.

2. **Background**: It is common cause that during June/July 2013, the Respondent transferred R1 070 000.00 into Renier Nel Incorporated's the banking account. More than a year later, two payments were made from Renier Nel Incorporated into the Respondent's banking account; being R400 000.00 made on 02 October 2014 and R450 000.00 made on 03 November 2014. Another payment into the Respondent's account was effected on 27 November 2014 from the Second Applicant, in the amount of R200 000.00. There are no written agreements to explain these transactions and the terms and references if any. The transactions are based on oral agreements which are now the subject of dispute.

3. According to the First Applicant, the payment made by the Respondent in 2013 was a bridging finance to one, Cecil Uren (Uren) facilitated by the First Applicant. The First Applicant further alleges that the Respondent, represented by Mark Fensham, the Respondent's father (Fensham), approached Renier Nel Incorporated and the Second Applicant in October 2014 with a request for bridging finance on the Standard Bank bonds for purposes of development funds for another development being undertaken

by him (Fensham) and the Respondent. This resulted in an oral agreement being entered into between the Respondent represented by Fensham, Renier Nel Incorporated represented by the First Applicant in October 2014 at Roodepoort. It is alleged further that the Second Applicant (it is not clear who represented the Second Applicant) was also part of this agreement. This agreement resulted in the three transactions whereby money was paid into the Respondent's account. It is this money totalling R1 050 000.00, which is now being claimed by the Applicants.

4. The Respondent disputes the First Applicant's version. According to her, she never advanced a bridging finance to Uren. The payment of R1 070 000.00 made in 2013 was a loan advancement to Renier Nel Incorporated which had to be paid back. Therefore the deposits made by Renier Nel Incorporated and the Second Applicant in October and November 2014 were the repayments for the said loan. She denies that there is any oral agreement in terms of which she needed bridging finance. She also denies that her father, Fensham was party to any such deal or that he represented her at all. For these reasons, she denies that the amount claimed is owed and due by her.

5. **Issues for determination:** There is no dispute that the payment made by the Respondent into Renier Nel Incorporated was transferred to Uren although the full details as to the exact amount and the terms and conditions thereof remain unknown. It further appears that Uren has partially paid back the said loan into Renier Nel Incorporated. The major dispute is whether the advancement to Uren was based on an agreement between him and the Respondent or between him and Renier Nel Incorporated and/or the First Applicant. It follows to be decided as to whether there was an agreement between the Respondent and Renier Nel Incorporated and / or the First

Applicant and the Second Applicant entered into in October 2014. Lastly, it remains disputed whether Fensham's representations with the Applicants if any, are binding on the Respondent.

6. **The National Credit Act:** Before dealing with the merits of the application, the Respondent contends that the Applicants failed to comply with the provisions of sections 129 and 130 of the National Credit, no 34 of 2005 (the Act) in that the necessary letters of notification were not sent as provided for by the Act. For this reason, the Respondent submits that the application should be adjourned with the court making an appropriate order setting out the steps the credit provider must complete before the matter may be resumed.[1] The Applicants argue that the Act is not applicable because there was no credit transaction between the Applicants and the Respondents. According to the Applicants, the payment was a bridging finance which cannot be subjected to the provisions in sec 129 and 130 of the Act.

7. Sec 8 (3) of the Act attempts to define a credit facility as follows,

> (3) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2) or section 4(6)(b), constitutes a credit facility if, in terms of that agreement –
>
> (a) a credit provider undertakes –
>
> (i) to supply goods or services or to pay an amount or amounts, as determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and
>
> (ii) either to –
>
> (aa) defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of an amount contemplated in subparagraph (i); or

[1] As provided for in sec 130 (4) (b) of the Act.

(bb) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in subparagraph (i); and

(b) any charge, fee or interest is payable to the credit provider in respect of –

(i) any amount deferred as contemplated in paragraph (a)(ii)(aa); or

(ii) any amount billed as contemplated in paragraph (a)(ii)(bb) and not paid within the time provided in the agreement.

8. The Act stipulates circumstances under which an agreement becomes a credit transaction. Save for a few exceptions not relevant for purposes of this application, an agreement, irrespective of its form, constitutes a credit transaction "if it is any other agreement, other than a credit facility or credit guarantee, in terms of 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 the agreement; or the amount that has been deferred."[2] As Mathopo J (as he then was) observed in *Bridgeway LTD v Markam*,[3] a discount sale which provides the respondent with ready money cannot be classified as credit transaction. This is clearly distinct from a money-lending or credit transaction because in the latter instance the transaction occurs when a party borrows money from the lender and undertakes to pay an equal amount in full, in instalments or periodically. The lender is therefore compensated for laying out his money by the interests that he charges the borrower.

9. In *Renier Nel Inc and Another v Cash on Demand KZN (PTY) LTD*,[4] the full bench of this division referred to *Bridgeway LTD v Markam*[5] with approval and concluded,

[2] See sec 8 (4) (f) of the Act.
[3] 2008 (6) SA 123 (W)
[4] 2011 (5) SA 259 (GSJ)
[5] *Supra*

> "Even if one is wrong in concluding that the challenged transactions do not fall foul of the NCA, there remain other considerations why the respondents should not be able to evade payment of the debt. It is clear from a long line of cases that, ultimately, policy considerations lie behind the courts' unwillingness to condone illegal agreements. Nevertheless, as Kotze J said in *Burger v South African Mutual Life Insurance Society*, the doctrine of public policy 'ought not to be stretched beyond what is necessary for the protection of the public'. There would be no apparent advantage to the public if the applicant were to be denied a right of recourse against the respondents in this case."

10. There is therefore no merit in the argument by the Respondent that since in the founding affidavit, the First Applicant used words to the effect that he would "lend" money to the Respondent, it should make the agreement to be a credit transaction. A court may not admit evidence as to what the parties intended in an agreement if that has the effect of changing the terms on which they clearly agreed.[6] The court is therefore inclined to accept the Applicants' submission that there was no obligation on them to comply with the provisions of sec 129 of the Act, since the agreement as stated in their case does not constitute a credit transaction.

11. **The merits:** I now turn to the merits of the case to consider the issues for determination. It is clear that First Applicant and/or Renier Nel Incorporated had a contractual relationship with the Respondent dating as far back as 2006.[7] This relationship involved a cash flow from the Respondent to Renier Nel Incorporated and then to other third parties. While it is not certain whether these constituted agreements between the third parties and the Respondent or the third parties and Renier Nel Incorporated; it is however clear that the Respondent personally entered

[6] *ABSA Technology Finance Solutions (PTY) LTD v Michael Bid a House CC and Another* 2013 (3) SA 425 (SCA) para 20.
[7] See para 40 p. 16, being the First Applicant's affidavit and para 20.7 p. 99 being the Respondent's affidavit.

into these oral agreements with the First Applicant representing Renier Nel Incorporated, without being represented by an agent. The Respondent states in her affidavit that although the First Applicant was acquainted with her father, he approached her for advance loan in 2006.[8] Although these agreements were unwritten, it appears the parties had no dispute whatsoever over them, for many years. There is no suggestion by the First Applicant or the Respondent that Fensham represented the Respondent in these agreements.

12. It is not clear from the First Applicant's papers as to what formed the basis for Fensham to act in a representative capacity for the Respondent when negotiating the October 2014 loan advancement. He is only referred to as the Respondent's father. This cannot by any means suggest that the Respondent was a minor who required assistance from the guardian; for she was cited as a major businesswoman. The court remains in the dark as to whether Fensham could be an employee of the Respondent and if so, what position he held. Even after the Respondent made it clear in her affidavit that she disputed that Fensham had authority to represent her, the First Applicant does not even attempt to show that Fensham acted on her mandate.

13. One would have expected the First Applicant to produce evidence that proves that the Respondent ratified the deals negotiated for her by the said Fensham. Past similar conduct could also make the First Applicant to believe that he still had similar mandate, but it appears he has not acted as such even in the past. The First Applicant attempted to prove the existence of a contract between the Respondent and Uren. The importance thereof is that if proved to exist, then the explanation by the Respondent that money paid to her was a loan repayment falls to be rejected. But none of the correspondences from, to

[8] See para 20.7 & 20.8 of her affidavit.

or about Uren were copied to the Respondent or brought to her attention at any stage before this litigation.

14. Upon reading the founding affidavit of the First Applicant, an impression is created that the Respondent was aware of the fact that Fensham entered into an agreement on her behalf when it is suggested that the Respondent signed amended authorities to pay him as securities pursuant to such agreements.[9] In response to Rule 35 (12) Notice, the First Applicant failed to produce the said amended authorities to pay. It turned out that the Respondent never signed any authority to pay the First Applicant subsequent to the disputed agreement in October 2014. The only authority to pay Renier Nel Incorporated is dated 15 May 2014, some 5 months prior to the alleged date of the agreement.

15. The Applicants seem to rely on ostensible authority by Fensham. As Schultz JA observed in *NBS Bank Ltd v Cape Produce Company Pty Ltd and Others*,[10] ostensible authority emanates from the law of estoppel,

> "As Denning MR points out, ostensible authority flows from the appearances of authority created by the principal. Actual authority may be important, as it is in this case, in sketching the framework of the image presented, but the overall impression received by the viewer from the principal may be much more detailed. Our law has borrowed an expression, estoppel, to describe a situation where a representor may be held accountable when he has created an impression in another's mind, even though he may not have intended to do so and even though the impression is in fact wrong. Where a principal is held liable because of the ostensible authority of an agent, agency by estoppel is said to arise. But the law stresses that <u>the appearance, the representation, must have been created by the principal himself</u>. The fact that another holds himself out as his agent cannot, of itself, impose liability on him." [Own emphasis].

[9] See para 12.4.1, 12.4.2 & 12.2 on p. 10.
[10] 2002 (1) SA 396 (SCA)

16. Again, in *Glofinco v Absa Bank*[11], the SCA held,

> "A representation, it was emphasised in both the *NBS* cases, *supra*, must be rooted in the words or conduct of the principal himself and not merely in that of his agent (*NBS Limited v Cape Produce Company (Pty) Ltd*, *supra* at 411H-I). Assurances by an agent as to the existence or extent of his authority are therefore of no consequence when it comes to the representation of the principal inducing a third party to act to his detriment. In the instant case counsel for the appellant relied principally on the very appointment by the Bank of Horne as its branch manager, thereby enabling her to impress upon Braude that she was duly authorised, when in fact she was not, to commit the Bank to stand surety for Playtime's post-dated cheques; this impression was reinforced, so it was further contended, by the fact that eight earlier cheques of Playtime that Horne had marked 'good for funds' had been met by the Bank by the time Horne stood surety on its behalf for the last of the series of cheques." [Own emphasis].

17. The alleged email confirming the agreement (FA3) is written in the names of Monique but sent from markfensham@yahoo.com to "Renier." As to why the Respondent did not use her own email address or she did not append her own signature remains a mystery. But FA8 reflects that the Respondent does sign her own letters; and she does so in a personalised letterhead.[12] She denies any knowledge of the email contained in FA3 or that it was written with her authority. According to the Respondent, when she saw the emails and whatsapp messages written by Fensham, she confronted him since at the time they were written, she was not in speaking terms with him. Fensham informed her that he wrote emails and whatsapp messages as requested by the First Applicant who wanted *inter alia*, that Uren be intimidated into paying his debt. And indeed, the threats seem to have intimidated Uren into paying. This explanation is confirmed by Fensham in a separate affidavit.

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[11] 2002 (6) SA 470 (SCA). See also *National Board (Pretoria) (PTY) LTD and Another v Estate Swanepoel* 1975 (3) SA 16 (A).

[12] FA8 is a letter written by the Respondent to Standard Bank, p. 35

Given the vulgar and unprofessional language ultimately used by Fensham which the First Applicant as an attorney may have been reluctant to use, I do not find this possibility improbable.

18. Whether Fensham behaved like he was contracted to Uren is immaterial. Furthermore, Fensham is not a party to these proceedings since he was not cited as a respondent. There is no basis upon which the Respondent can be held liable for an agreement that she was not part of. There is no evidence suggesting that she expressly, tacitly or through ratification agreed to be part of this agreement. The Applicants chose to have their claim by way of an application fully aware that the oral agreement was in dispute and that there is no paper trail that proves its existence.

19. For the reasons stated above, it follows that the following order is made:

    19.1 The application is dismissed with costs.

T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

Date Heard:	**18 May 2016**
Judgment Delivered:	**26 May 2016**
For the Applicant:	**Adv. JH v d B Lubbe**
Instructed by:	**Nel Prokureurs** **Johannesburg** **C/O Charmain Gibbens Attorneys**

Johannesburg

For the Respondent:	**Adv. PM Van Reyneveld**
Instructed by:	**Herman Prinsloo Attorneys** **Pretoria** **C/O Gary Rachbuch & Associates** **Johannesburg**