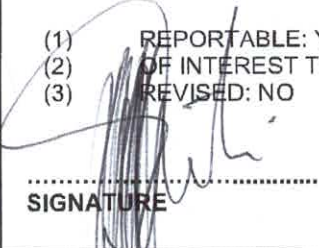


REPUBLIC OF SOUTH AFRICA

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

CASE NO: 43577/2019

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: NO
	
SIGNATURE	DATE
	21/5/2021

In the matter between:

DNI FINANCIAL SERVICES (PTY) LTD
(Reg No.2004/024824/07)**Applicant**

and

MORNINGSIDE THREE OF ERF ONE
THREE FOUR THREE CC
(Reg No. 1991/007426/23)**1st Respondent****JOANNA KOPEL****2nd Respondent****ROLAND MARTIN KOPEL****3rd Respondent****EMANUEL JEWELLERS****4th Respondent**

JUDGMENT

Delivered: *By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered. The date for hand-down is deemed to be 08 May 2021.*

SENYATSI J:

- [1] This is an opposed application for summary judgment in the sum of R7 889 091.50 as at 31 October 2019 together with interest of 36% per annum.
- [2] During 2014 and 2015, the parties concluded three loan agreements in terms of which the applicant lent and advanced monies to the first respondent and the second, third, and fourth respondents stood as sureties for the fulfilment of the contractual obligations of the first respondent to the applicant.
- [3] The first loan agreement which was concluded on 3 November 2014, was for the sum of R4 million and was to be secured by a first covering mortgage bond of R6 million in favour of the applicant together with a personal deed of suretyship by the second respondent in favour of the applicant. The interest to be charged was as set out in the pre-agreement statement and quotation, at 36% per annum compounded monthly.¹The pre-agreement statement and quotation were signed by the parties and formed part of the agreement. The third respondent also stood surety for the first respondent.
- [4] The second loan agreement dated 21 April 2015 was for the sum of R1.5 million. This loan was also secured by the first mortgage bond of R6 million.

¹ This is found on page 66 of the Case Line.

The second and third respondents stood as surety for the fulfilment of the repayment obligations by the first respondent to the applicant. The interest charged was at 36% per annum compounded monthly.

- [5] The third loan agreement dated 24 August 2015 was for the sum of R1 million. It was also secured by the first mortgage bond of R6 million together with deeds of suretyship from the second and third respondents for the fulfilment of repayment obligations by the first respondent. The interest rate was charged at 36% per annum and compounded monthly.
- [6] As a consequence of default in repayment obligations, the applicant issued summons which was defended. Following the plea, the applicant, as already stated, applied for summary judgment for the amount of the claim.
- [7] The respondents, in resisting the summary application raises the following defences, namely:
- (a) the transactions were simulated as such there was no *animus contrahendi*;
 - (b) they deny that the agreements provided for interest to be compounded;
 - (c) the interest charged is usurious;
 - (d) there has not been compliance with the provisions of S45(2) and (3) of the Companies Act 71 of 2008.
- [8] The Court, seized with the enquiry whether to grant the summary judgment, need not assess the merits of the case. All the court needs to determine is whether or not the defence raised is not merely intended to delay the action.

- [9] As regards the first defence that the three transactions were simulated, the facts, which from the face of the documents before this court, cannot be denied, are that all the loans advanced were not paid to the first defendant, but to the fourth defendant, Emanuel Jewellers, which is a trade name close corporation known as Rolko CC. The loans themselves were serviced by the fourth respondent which was trading in jewels.
- [10] It is also not denied that the first defendant never repaid any instalment. The fourth respondent went into voluntary liquidation on 8 July 2019 prior to the institution of this action.
- [11] It is also not in dispute that the first respondent has, as its sole member, the second respondent who is the wife of the third respondent. The latter was the sole member of Rolko CC, which traded under the name and style of Emanuel Jewellers. It follows therefore in my respectful view that in fact, it may well be that all the amounts lent and advanced were for Emanuel Jewellers. As a consequence, this assertion requires to be tested by oral evidence, and the defence is therefore not raised for the purpose of delaying the action.
- [12] The test on whether a transaction is simulated or not is whether the parties stated in the agreement intended to conclude a contract. The respondents contend that the first respondent never intended to borrow money as it was not in business and that the only asset it owned was a primary residence of the second respondent who is married to the third respondent. The only respondent that was in business was the fourth respondent.
- [13] In *Commissioner for the South African Revenue Service v NWK Ltd* ² Lewis

JA held as follows on the test of a simulated transaction:-

"In my view, the test to determine simulation cannot simply be whether there is an intention to give effect to a contract in accordance with its terms. Invariably where the parties structure a transaction to achieve an objective other than the one ostensibly achieved, they will intend to give effect to the transaction on the terms agreed. The test should thus go further and require an examination of the commercial sense of the transaction; of its real substance and purpose. If the purpose of the transaction is only to achieve an object that allows evasion of tax, or peremptory law, then it will be regarded as simulated. And the mere fact that the parties do perform in terms of the contract does not show that it was not simulated: The charade of performance is generally meant to give credence to their simulation."

[14] There are two forms of simulated transactions. Firstly, if parties make an agreement as a sham or pretence for instance to mislead the fiscus, then they do not intend to create obligations and their simulated agreement is invalid.³ If the simulated agreement is a disguise for some other type of transaction, the court will strip of the form of simulated agreement and reveal its true nature, so that the law may operate.

[15] Secondly where parties enter into an agreement and act in accordance with the agreement but for a different purpose than that which the agreement contends for. In this case, depending on the evidence to be adduced at trial, it

² See Commissioner for the South African Revenue Service v NWK Ltd 2(2011 (2) SA 67(SCA) at para 35

³ See Long Oak Ltd v Edworks (Pty)Ltd 1994(3)SA 370(E) at 375-379

may well be that the true intention was for the fourth respondent to be the lent and advanced the money for its jewellery business.

[16] If a transaction or agreement is genuine, would give effect to it, and if not, the court would give effect to the underlying transaction that is concealed.⁴ I am of the view, given the facts of what the respondents contend that the simulation defence should be referred to oral evidence.

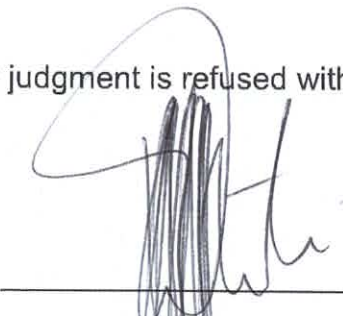
[17] In my respectful view, it is not necessary to enquire the remaining three defences raised, and for reasons already stated, these should also be referred for oral evidence.

[18] Having considered the facts of this case and the defences raised, I am of the view the application for summary judgment should not succeed.

ORDER

[19] The following order is made:

(a) The application for summary judgment is refused with costs.



SENYATSI ML
Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

⁴ See *Zandberg v Van Zyl* 1910 AD 302, *Vases Dry Cleaners v Twycross* 1979(1)SA 603(A) and *Michan v MaizeBoard* 2003(6) SA 459

REPRESENTATION

Date of hearing: 05 October 2020

Date of Judgment: 08 May 2021

Applicant's Counsel: Adv JG Dobie

Instructed by: Reaan Swanepoel Attorneys

Respondent's Counsel: Mr M Nowitz

Instructed by: Nowitz Attorneys