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

**CASE NUMBER: 2020/1935**

**REPORTABLE: Not**
**OF INTEREST TO OTHER JUDGES: Not**
**REVISED.**
**Date 22 July 2021**

**In the matter between:**

**NATURE'S CHOICE** **PLAINTIFF**

**AND**

**BALLENDENE MATTHEW JOHN** **DEFENDANT**

**Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for hand-down is deemed to be 22 July 2021**

**Summary:** Application – summary judgment. A credit provider obliged to registered in terms of the National Credit Act. Unjustified enrichment. Failure to registered as credit provider in terms of the National Credit Act. The agreement unlawful and invalid. Court may must make just and equitable order in terms of section 189(5) of the National Credit Act.

**JUDGMENT**

**Molahlehi J**

**Introduction**

[1] This is an application for summary judgment against the defendant/respondent, Mr. Ballenden. The plaintiff/applicant, Nature's Choice (Pty) Ltd, claims payment of the sum of R800 000.00, advanced as a bridge loan to the respondent/defendant during December 2018.

[2] The parties to the bridged loan agreement are Nature's Choice and Matthew John Ballenden. The "Borrower" in the agreement is defined as Matthew John Ballenden. The agreement permitted the respondent to choose the bank account in which the loan should be deposited. The respondent provided the following bank account in which the loan should be deposited:

Name of Account: Fresh Earth Bake House
Bank: Nedbank
Branch: Strydom Park
Account Number: [....]
Reference: Nature's Choice Loan

[3] It is common cause, if not that there is no dispute, that after the conclusion of the loan agreement, parties concluded two separate addenda whose purpose was to extend the due date for the payment of the loan. The first addendum extended the payment date to 1 April 2019, and the second extended the date to 31 May 2019. It is apparent from the copies of the addenda that the respondent was a party in the addenda. He also signed the same in his capacity.

[4] The parties further concluded a pledge and cession agreement also annexed to the papers as an annexure "POC5." The purpose of this agreement was to provide security for the performance of the defendant's obligations in terms of the amended loan agreement.

[5] The terms of the loan agreement for the summary judgment are summarised in the applicant's heads of argument as follows:

> "12.1 the applicant and the respondent intended concluding a sale agreement in terms of which the applicant would purchase all of the respondent's shares in, and claims against, a company registered and incorporated as Fresh Earth Food Store (Pty) Ltd ("fresh earth");
>
> 12.2 prior to the implementation of the contemplated sale agreement, fresh earth and another entity, [B]ake [H]ouse, required working capital
>
> 12.3 the applicant agreed to advance an amount of R800,000.00 ("the capital amount") to the defendant, as a loan, subject to the terms as contained in the loan agreement;
>
> 12.4 the respondent agreed and undertook to apply the whole of the capital amount towards advancing shareholder loans to fresh earth and/or bake house for their working capital requirements and/or to provide monetary assistance to fresh earth and/or bake."

[6] The applicant contends that it has complied with its obligations of the loan agreement in that it has advanced the loan in the sum of R 800,000 to the respondent. It further contends that the payment by the respondent became due and owing and payable by 3 May 2019. According to the applicant, the respondent has failed, despite the demand to effect payment in terms of the loan agreement.

[7] It is common cause that at the time of concluding the loan agreement and addendum thereto, the applicant was not registered as a credit provider in terms of section 40 of the National Credit Act (the NCA**).** Section 40 (1) provides for the circumstances under which a credit provider should register as such.[1]

[8] The loan agreement was accordingly unlawful and thus void. The applicant contends that in complying with its obligation of effecting the payment in the capital amount, it was unaware of the illegal nature of the loan agreement. The capital

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[1] Section 40(1) of the NCA provides: “A person must apply to be registered as a credit provider if –that person, alone or in conjunction with any associated person, is the credit provider under at least 100 credit agreements, other than incidental agreements."

amount of the loan was effected in two payments of R 790,020, and R10,009 January 2019.

[9] Based on the above, the applicant formulated its cause of action as unjustified enrichment of the respondent.

[10] In its affidavit in support of the application for summary judgment, the applicant avers that the respondent has failed to raise a *bona fide* defence in its plea and the answering affidavit.

**The respondent's defence**

[11] In the affidavit resisting the summary judgment application, the respondent contends that the applicant is not entitled to the relief sought because he has a bona *fide defence* to the claim. His main defence in this regard is that the sum claimed by the applicant was never paid to him but was rather paid to a company known as Flesh Gluten-Free Bake House (Pty) Ltd. However, he does not dispute the receipt of the amount but states that Metier Private Equity paid it to Fresh Earth. He states the following in his plea:

> "10.2 The Defendant admits receipt of the amount of R800 000.00.

[12] In paragraphs, 10.3 to 10.6, the plea the respondent essentially denies having received the sum of R800 000.00 from the applicant and that he has been enriched.

[13] As alluded to earlier, the respondent in his affidavit resisting the summary judgment contends that he did not receive the amount of R800 000.00. The explanation that he proffers for the above admission is as follows:

> "I am aware that in paragraph 10.2 of my plea I admit receipt of the amount of R800000. This is unfortunately some loose wording on my part which arose from confusion in my instructions to my attorneys prior to them drafting the plea. What I meant to convey is that payment of the R800 000 was made. As is clear from the plaintiff's own particulars of claim, that payment was not made to me but to Fresh Earth. This is a factual error on my part

which I intend to amend by way of a notice of amendment of paragraph 10.2 of my plea."

[14] In his heads of arguments, the respondent contends that he can amend his plea in light of the denial of receipt of the amount in question.

**Legal principles**

[15] It is trite that rule 32 of the Rules provides for a mechanism, in the form of summary judgment procedure, to enable an applicant to obtain a judgment against the respondent without having to get the same relief through the trial procedure. This rule which was amended on 1 July 2019, now provides for the following requirements for an application of summary judgment:

"(1) The plaintiff may after the defendant has delivered a plea, apply to Court for summary judgment on each of such claims in the summons as is only —

(a) on a liquid document;
(b) for a liquidated amount in money;
(c) for delivery of the specified movable property; or
(d) for ejectment, together with any claim for interest and costs."

[16] In terms of rule 32 (2) of the Rules, the plaintiff is required to file an affidavit "verifying the cause of action' and that the defendant has no *bona fide* defence to the claim. The plaintiff is also required to state that the notice of intention to defend by the defendant was served solely to delay the finalisation of the claim.[2]

[17] The other principle is that, in general, for the respondent to succeed in avoiding a summary judgment application, he or she has to satisfy the Court that he or she has a *bona fide* defence to the claim on which the summary judgment is being applied for.[3] In the often-quoted formulation of the approach to an affidavit opposing

[2] FirstRand Bank Ltd v Shabangu and others 2020 (1) SA 155 (GJ).
[3] *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (3) All SA 407 (SCA) at para 33.

summary judgment, the Court in *Maharaj v Barclays National Bank,*[4] said the following:

> "Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a *bona fide* defence to the claim."

[18] It is apparent from the pleadings that the applicant's claim is based on condition *ob turpen vel iniustam causa.* In National Credit Regulator v Opperman and Others,[5] the Constitutional Court in dealing with the enrichment action said at para 15:

> "A party who wants to claim the restitution of money paid or goods delivered in pursuance of an unlawful agreement cannot do so under the agreement and must make use of an action based on the unjustified enrichment of the receiver. Professor Visser describes the basic function of the law of unjustified enrichment as "to restore economic benefits to the plaintiff, at whose expense they were obtained, and for the retention of which by the defendant there is no legal justification." The enrichment action relevant to this matter is the *condictio ob turpem vel iniustam causam.* Its requirements are generally described as follows: ownership must have passed with the transfer; the transfer must have taken place in terms of an unlawful agreement; and the claimant must tender the return of what he or she received."

[19] Section 189 (5) of the NCA reads as follows:

> "If a credit agreement is unlawful in terms of this section, despite any other legislation or any provision of an agreement to the contrary, a court must make a just and equitable order including but not limited to an order that –
> the agreement is void from the date the agreement was entered into."

[20] To succeed in a claim of this nature the plaintiff/applicant must satisfy the following requirements:

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[4] 1976 (1) SA 418 (A) at 4268-C.

[5] (CCT 34/12) [2012] ZACC 29; 2013 (2) BCLR 170 (CC); 2013 (2) SA 1 (CC) (10 December 2012),

(a) The amount claimed must have been transferred pursuant to an illegal and thus void and unenforceable agreement.[6]

(b) Where the plaintiff has received a benefit out of the illegal contract, he/she must tender the return of ever he/she may have received.[7]

**Evaluation and analysis**

[21] It is important to note that there is no dispute as to the conclusion of the loan agreement. Similarly, on a proper analysis of the facts, the status of the agreement as being unlawful is also not in dispute. In addition, the payment of the amount in issue is not in dispute. The real issue is whether the respondent received the amount or some other entity received the amount.

[22] Although the respondent/defendant contends that the capital amount was not paid to him personally but rather to Fresh Food, he, as already indicated, conceded in his plea at paragraph 10.2 that he received the money. In my view, the suggestion in his affidavit opposing summary judgment that the concession was made due to the use of "loose wording" in the instruction given to his attorney is unsustainable. It is in fact, significant in this regard that there is no confirmatory affidavit from his attorney confirming the alleged "confusion" in the plea that arose as a result of "loose wording" in the instruction.

[23] It is also significant to note that the two addenda were concluded with the respondent/defendant in his personal capacity and with the risk of repetition, he conceded in his plea that he received the money. He received the money under an unlawful credit agreement. Thus considering his papers and the common cause facts, there is no doubt that the money was paid to him, and thus the just and equitable relief lies in restitution.

**Order**

[24] In the circumstances, the following order is made:

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[6] Afrisure CC and Another v Watson NO 2009 [2] SA 127 paragraph 5.

[7] MCC bazaar v Harris and Jones (Pty) Ltd 1954 [3] SA 158 [T] at 162A.

1. Summary judgment is entered in favour of the applicant against the respondent for-

(b) Payment of the sum of R800 000.00,

(c) Interest on the aforesaid amount at the prescribed rate, a *tempore morae.*

(d) Cost of the suit.

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E MOLAHLEHI J

JUDGE OF THE HIGH COURT

APPEARANCES:

For the plaintiff: Adv D Van Niekerk

Instructed by: Cliff Dekker Hofmeyer Inc.

For the defendant: Adv R Goslett

Instructed by: Dewey Hertzberg Levy Inc.

Heard: 4 May 2021

Delivered: 22 July 2021