He **IN THE NORTH GAUTENG HIGH COURT, PRETORIA**

REPUBLIC OF SOUTH AFRICA

29/11/12

CASE NO: A174/12

In the matter between:

NURCHA FINANCE COMPANY (PTY) LIMITED Appellant

and

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

27/11/12
DATE

SIGNATURE

MAHLAKU MOSEBO CONTRACTORS CC **FIRST RESPONDENT**

MOKGADI REGINA CHABA **SECOND RESPONDENT**

JUDGMENT

Tuchten J:

1 The appellant sued the respondents in a magistrates court for payment of money lent to the first respondent with interest, for which the second respondent stood surety.

2 The appellant's cause of action was based on a written loan agreement. The loan agreement provided for the appointment of an entity called the Paymaster. In terms of clause 11 of the loan

agreement, it was agreed that the Paymaster would cause the loan to be repaid to the appellant in accordance with a prescribed regime. However under clause 9.3 it was agreed that notwithstanding anything to the contrary in the loan agreement, the capital advanced and all interest would become due in one lump sum on a date described in the loan agreement as the fixed repayment date.

3 In its plea, the first defendant did not place in issue that the amount claimed by the plaintiff was due. It pleaded in an amended plea that it denied being indebted because

> ... its agent namely the paymaster disbursed funds from the project account not in accordance with the actual costs breakdown, and thus caused the First Defendant to suffer financial loss ... .

4 Before the trial began, the legal representatives of the parties agreed to hold what they called a telephonic pre-trial conference. The appellant submitted a written pre-trial agenda to the respondents, in which it stated that it wished to deal with certain specified issues at the pre-trial conference. Arising from the conference, the attorneys for the parties signed a pre-trial minute in which certain admissions were made and contentions advanced.

5 Paragraph 14 of the minute reads as follows:

> 14.1 The Defendants contended that the only issue in dispute was whether the Plaintiff advanced funds to be paid out of the actual costs breakdown Schedule and whether the exemptions as invisaged in Clause 3.3 of the Loan agreement being Annexure A to the particulars of claim avails the defendant.
>
> 14.2 The plaintiff accepted this formulation of the issue between it and the first defendant with one proviso, whether the aforegoing "defence" constituted a defence at all.

6 The actual costs breakdown schedule is referred to in the loan agreement but, for reasons which will emerge later, I need not explain further what it entailed because the representatives of the respective parties were agreed before the trial was called that the issue included the following question: When the Paymaster made a payment, was it acting as the agent of the appellant? The first defendant's contention in this regard was that because the Paymaster was the appellant's agent for making payment, if the Paymaster disbursed funds which ought to have reached the appellant, but did not, then the first defendant could not be held liable for such irregular payments; or, to put it another way, because the Paymaster was the appellant's agent to deal with the funds under the Paymaster's control, any amount so

irregularly disbursed by the Paymaster had to be equated to payment to the appellant by the first defendant.

7 As far as the second respondent was concerned, the parties agreed further in the pre-trial minute that the only issue in dispute between the appellant and the second respondent was, in accordance with and amended plea delivered by the second defendant, whether the suretyship itself was valid, in which event the second respondent would be jointly and severally liable with the first respondent.

8 When the trial was called, the appellant applied for the two issues which remained for determination to be disposed of separately and as matters of law under magistrates courts rule 29(6).

9 In her ruling on the application, the magistrate declined to allow the issue as to whose agent to make payment the Paymaster was to be decided separately because evidence was required. On the issue whether the suretyship was valid, the magistrate ruled there and then that the suretyship was valid. Argument on this latter issue had been presented as part of the argument on the separation and the ruling on the validity of the suretyship was not been challenged either during the trial or before us and therefore stands.

10 The appellant proceeded to call the evidence of Mr Lees, a program manager in its employ. He explained that the appellant was a registered credit provider, established as a company not for profit by the government of the Republic through the national department of housing ("the Department"). The business of the appellant is to provide funding to contractors and developers in relation to subsidy housing projects.

11 The appellant has access to finance made available by an American institution through a revolving credit facility of $20 million in the form of guarantees to Rand Merchant Bank. The appellant has as well financial arrangements with intermediaries which manage loans on behalf of the appellant. These are known as Paymasters. These Paymasters, Lees explained, are not the agents of the appellant but manage the contracts between eg contractors and the Department for the appellant. Paymasters are required in terms of their contracts to evaluate the work done by the contractors assigned to them and make payment from time to time for work done. The appellant has no rights to disburse money under the control of the Paymaster.

12 Typically, the contractor enters into a contract with the Department. The function performed by the appellant in relation to contractors is to provide bridging finance to contractors until they become entitled,

under their contracts with the Department, to payment from the Department.

13 The second defendant gave evidence in support of the respondents' case. She said she met a Mr Cronje who told her he was an agent for the appellant but worked for the entity which was ultimately designated the Paymaster in the loan agreement and that she then proceeded to make the financial and contractual arrangements necessary for her to be appointed a contractor in relation to the development concerned. It was clear that the second defendant did not understand the complexities of the financial arrangements to which she became a party. The loan agreement was put to her and she was asked for her comments on various provisions.

14 None of the second respondent's evidence was of the slightest relevance in view of the provisions of the loan agreement which I shall proceed to set out and her ignorance of the actual dealings between the appellant and the Paymaster. It is trite that where a contractual arrangement is reduced to writing on the basis that it is to be the sole memorial of the consensus between the parties, no oral evidence is admissible to contradict its terms. That principle is what is known as the parol evidence rule.

15 The loan agreement itself is quite clear on the role that the Paymaster was to play in relation to the parties. Under clause 3.2, the Paymaster was appointed the agent of the appellant for the specific purpose of executing any amendments to the Actual Costs Schedule from time to time. Under clause 3.1, it is expressly agreed between the appellant and the first respondent that the Paymaster is, save for any specific authority conferred by the appellant on the Paymaster outside the loan agreement from time to time, not the agent of the appellant.

16 One of the suspensive conditions in the loan agreement, all of which were fulfilled, was that the first respondent would execute a power of attorney in favour of the Paymaster in a specified form. The required power was indeed executed by the first respondent. It conferred wide authority on the Paymaster to act as agent for the first respondent in relation to financial matters.

17 The loan agreement recites that the Paymaster and the appellant entered into a written agreement, defined in the loan agreement as the Paymaster Agreement, to govern their relationship. The Paymaster Agreement itself was not before the trial court but, as recorded in clause 3.1, the Paymaster was to act, except as specifically provided in the loan agreement itself or recorded in writing, as principal and not as agent for the appellant.

18 In her judgment, the magistrate found that because the pre-trial conference was not held in terms of the applicable magistrates' court rule, the court would not have regard to the pre-trial conference and that the agreement which arose out of the parties' telephonic pre-trial conference was not "binding", by which I assume the magistrate meant not binding on the parties and should not be implemented by the court. In coming to this conclusion the magistrate erred.

19 The position regarding pre-trial conferences in the magistrates' courts is governed by s 54 of the Magistrates' Courts Act, 32 of 1944 and rule 25 of the Rules governing civil proceedings in those courts. Section 54 provides:

> (1) The court may at any stage in any legal proceedings in its discretion suo motu or upon the request in writing of either party direct the parties or their representatives to appear before it in chambers for a conference to consider-
> (a) the simplification of the issues;
> (b) the necessity or desirability of amendments to the pleadings;
> (c) the possibility of obtaining admissions of fact and of documents with a view to avoiding unnecessary proof;
> (d) the limitation of the number of expert witnesses;
> (e) such other matters as may aid in the disposal of the action in the most expeditious and least costly manner.
> (2) The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any

of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of the parties or their representatives.

(3) Such order shall be binding on the parties unless altered at the trial to prevent manifest injustice.

(4) If a party refuses or neglects to appear at the conference the court may, without derogation from its power to punish for contempt of court, make such order as it considers equitable in the circumstances and upon conclusion of the proceedings may order the party who has so absented himself to pay such costs as in the opinion of the court were incurred as a result of the said absence.

(5) The Court may make such order as to the costs of any proceedings under this section as it deems fit.

20 Rule 25 reads as follows:

(1) The request in writing referred to in section 54(1) of the Act shall be made in duplicate to the clerk of the court requesting the court to call a pre-trial conference and shall indicate generally the matters which it is desired should be considered at such conference.

(2) The clerk of the court shall forthwith place such request before a judicial officer who shall, if he decides to call a conference, direct the clerk of the court to issue the necessary process.

(3) The process for requiring the attendance of parties or their legal representatives at a pre-trial conference shall be by letter signed by the clerk of the court, together with a copy of the request, if any, referred to in sub-rule (1). Such letter shall be delivered by hand or registered post at least 10 days prior to the date fixed for the said conference.

21 It is always open to litigants in civil proceedings in the magistrate's court to settle issues or to agree that the resolution of specific identified issues would be dispositive of their dispute. Indeed, such agreements are entirely consistent with s 34 of the Constitution which confers on all persons the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. Such agreements are to be encouraged: they promote speedier resolution of disputes and help to ensure that the time of the civil courts is devoted to hearing evidence and argument on and determining the issues which are genuinely in dispute.

22 Such agreements, regardless of the label that is attached to them by the parties, are not to be viewed through the prism of the rules but through the prism of the law of contract. In general, contracts freely entered into are binding, unless vitiated eg by duress, undue influence, misrepresentation or conflict with boni mores or public policy. If such a contract is concluded at a pre-trial conference held in terms of the magistrates' courts rules and translated into an order in terms of s 54(2) of the Magistrates' Courts Act, such an *order* is binding on the parties unless "altered at the trial to prevent manifest injustice". It is unnecessary to consider the effect of s 54(3) because

no order was made under s 54(2). Section 54 does not deal with the validity or otherwise of an agreement reached at such a conference.

23 In *Filta-matix v Freudenberg and Others* 1998 1 SA 606 AD at 614B-D, the then Appellate Division held as follows:

> To allow a party, without special circumstances, to resile from an agreement deliberately reached at a pre-trial conference would be to negate the object of Rule 37, which is to limit issues and to curtail the scope of the litigation. ... If a party elects to limit the ambit of his case, the election is usually binding.

24 The same applies, in my view, to any agreement between litigants in relation to their pending civil proceedings reached otherwise than at a pre-trial conference. In the present case, moreover, neither party *sought* to resile from the agreement to limit the issues.

25 The correct approach is that while the agreement reached at the pre-trial conference was binding on the parties, the conference during or as a result of which it was concluded did not constitute a pre-trial conference for the purposes of the Magistrates' Courts Act and the rules. The consequence of this may be that the jurisdictional prerequisite for an order under s 54(2) was not present. As the magistrate was not asked to make such an order but merely to have

regard to the agreement between the parties and the issues they wanted the court to determine, I need not decide this question.

26 Agreements between civil litigants to settle or limit issues are an everyday occurrence in our courts, including our magistrates' courts. They are the rule, not the exception. The logical consequence of the magistrate's erroneous conclusion would be that agreements, for example, to settle quantum or to admit the pleaded status of one of the parties were invalid unless such agreements or admissions were concluded at a pre-trial conference held strictly in terms of s 54. The Act does not provide that agreements and admissions agreed outside the framework of s 54 are not binding on the parties. The proposition which directly arises in this case, that a magistrates' court cannot or ought not to have regard to or enforce such an agreement because it was not arrived at during a conference convened strictly in accordance with s 54 and rule 25, is so startling and so destructive of the proper administration of civil justice that it could never serve the purposes of the Magistrates' Courts Act. There is no justification for implying it into the measure.[1]

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1 For the proper approach to the interpretation of contracts and statutory measures, see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 SCA paras 18-26.

27 In the result, the agreement between the parties to limit the area of dispute between the appellant and the first respondent to the question whether monies were irregularly disbursed by the Paymaster and, if so, whether it was acting as the agent of the appellant must be upheld and it is to that question I shall now turn.

28 It is rather difficult to grasp what the magistrate's reasoning was in relation to the factual question whether the Paymaster made irregular payments of money under its control. She appears to have found that it did, and that the appellant was negligent in not picking this up. But in view of my conclusion on the agency issue, I need not investigate this question further.

29 The magistrate found that the Paymaster

> ... is the agent of the plaintiff as per clause 3.2 read with clause 3.1 of the [loan agreement] ... .

30 But as I have pointed out, the effect of those clauses is to constitute the Paymaster the agent of the appellant only for the limited purpose identified in clause 3.2, ie to effect amendments to the Actual Costs Breakdown Schedule from time to time. I mention in passing that the uncontradicted evidence of Mr Lees was that no such amendments were ever effected.

31 The effect of these clauses is abundantly clear: the Paymaster is not the agent of the appellant to make payments of money under the Paymaster's control. There was moreover no evidence at all to suggest that the appellant had, acting outside the loan agreement, constituted the Paymaster its agent for this purpose. The magistrate therefore erred in coming to the opposite conclusion. Whether in making such payments, insofar as they affected the first defendant, the Paymaster acted as principal or as agent of the first defendant need not be determined and I accordingly make no finding in that regard.

32 The appeal must therefore succeed. The parties were in agreement on the form of the order which should issue if the appeal were upheld. I make the following order:

1 The appeal succeeds with costs to be paid by the first and second respondents, jointly and severally.

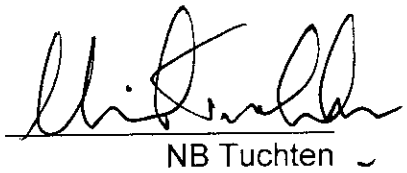
2 The order of the court below is set aside and replaced with the following:

2.1 The court grants judgment for the plaintiff against the defendants, jointly and severally for:

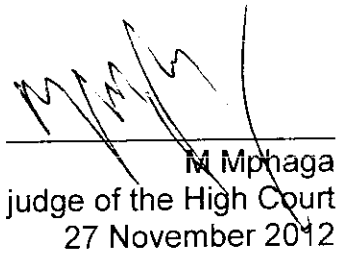
2.1.1 payment of the sum of R1 773 975,94;

2.1.2 interest on the sum of R1 773 975,94 from the date of issue of the summons at the rates set out in paragraph 9 of the plaintiff's pre-trial agenda dated August 2010 (page 116 of the record on appeal);

2.1.3 the costs of suit, to be paid by the defendants on the scale as between attorney and client.



NB Tuchten
Judge of the High Court
27 November 2012



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Acting judge of the High Court
27 November 2012

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