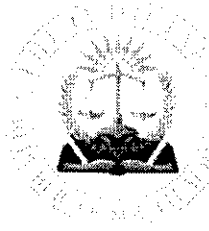


**REPUBLIC SOUTH AFRICA**



DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO  NO

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

(3) REVISED: \_\_\_\_\_

DATE: 29/01/16

SIGNATURE: [Signature]

**IN THE HIGH COURT OF SOUTH AFRICA  
(SOUTH GAUTENG HIGH COURT DIVISION)**

CASE NO: 68409/15

In the matter between:-

29/1/16

**NATSURE STEEL (PTY) LIMITED**

APPLICANT/ PLAINTIFF

and

**JAMIE KIM ILLING**

RESPONDENT/ DEFENDANT

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**JUDGMENT DELIVERED ON 29 JANUARY 2016**

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**VILAKAZI AJ:**

- [1] This is an action by the plaintiff against the defendant for payment of money allegedly lent and advanced to the defendant.
- [2] The plaintiff's claim is based on a written agreement concluded on 31 January 2014, headed "Agreement in respect of the relaxation of

the binding Restraint of Trade Agreement". Copies of these documents are attached and marked as annexure "A".

[3] In its particulars of claim, the plaintiff claims payment of a sum of R1, 134, 036.48 (one million, one hundred and thirty four thousand, thirty six rand and forty eight cents) and alleges that the provisions of section 4 of the National Credit Act 34 of 2005 ("The Act") does not apply to the agreement entered into by the parties by virtue of the provisions of section 4 of the Act, the agreement not being at arm's-length.

[4] The payment terms of the loan agreement briefly are as follows:

- a. The debt was repayable by means of a combination of a once-off payment at least R150, 000-00 (one hundred and fifty thousand Rand) payable by no later than 28 February 2014.
- b. No more than 22 (twenty two) equal payments of at least R53,174-44 (fifty three thousand one hundred and seventy four Rand and forty four Cents) each at the end of each month (the 1<sup>st</sup> of these payments being made by no later than 31 March 2014 and the last of the payments being made by no later than 31<sup>st</sup> December 2015), until the date of final payment of any outstanding amounts together with interest at 6,5% (annual nominal) per annum, calculated daily on the outstanding main debt, from 1 February 2014 and

capitalised at the end of each month, until the full main debt and interest owed to the creditor has been repaid in full.

- c. All payments received from the debtor shall firstly be utilised to amortize legal costs (if any) then interest, and capital only thereafter.
- d. The debtor renounced the legal exceptions *non numeratae pecunia, non causa debiti* and *errori calculi*, benefits of excussion, division, cession of action, revision of accounts and no value received.
- e. In the event that the debtor fails to make payment on any payment due date he acknowledges that the full capital, together with costs and interest, will become due and payable without further notice to him and that the creditor's rights against him shall not be deemed to have been amended or waived.
- f. The debtor binds himself for the due and punctual payment of all sums and the due and proper performance of all obligation which the debtor may in the past or now in the future owe to the plaintiff or to the plaintiff's successors in title or assigns arising out of or in connection with any cause of indebtedness whatsoever whether now existing or which may come into being in the future.
- g. For the purpose of any action instituted against the debtor whether for provisional sentence or otherwise a certificate by

a director or the secretary of the plaintiff as to the amount owing and to the effect that the due payment of such amount has arrived shall be sufficient and satisfactory proof of the facts herein until the contrary shall have been proved.

[5] The defendant opposes the application for summary judgement on the following basis:

- 5.1 That the loan agreement concluded between the parties on the aforesaid date was at arm's-length and subject to the provisions of section 129 of the Act in that the plaintiff should have issued a statutory notice prior to instituting legal action.
- 5.2 On 12 August 2013, the defendant (an employee) entered into an employee loan agreement with the plaintiff (the employer).
- 5.3 The salient features of the agreement was that the employee was to settle the loan as follows:
  - i. A monthly deduction from the employee's salary of R4, 750-00 plus interest rate calculated at 6.5% per annum;
  - ii. Any increase in salary as a result of future salary increases;
  - iii. All refunds received from SARS on an annual basis;
  - iv. All proceeds from the current court case against a defaulting tenant;
  - v. All proceeds from the potential sale of fixed property;
  - vi. All bonus payments due under any current or future bonus scheme;

- vii. All profit share payments due under any current or future profit share scheme;
- viii. The employee agreed that upon resignation or termination of employment with the employer any funds payable to the employee as a final salary, retrenchment payment, settlement payment or any funds available in the employees' pension fund will first be utilised in settling any outstanding amount payable to the employer under this agreement.

[6] It is common cause that the defendants' contract of employment was terminated and consequently the parties entered into an exit agreement inter alia a restraint of trade agreement. It is also apparent that on 31<sup>st</sup> January 2014, parties entered into an agreement wherein the terms and conditions of the restraint of trade agreement were relaxed.

#### LEGAL POSITION

[7] The term arm's-length is circumscribed for purposes of greater certainty, in section 4(2)(b) for present purposes, the aforementioned provision and section 4(2)(b)(iii) and (iv) are relevant. It reads as follows:

**“(2) For greater certainty in applying subsection (1) –**

**(b) in any of the following arrangements, the parties are not dealing at arm's length:**

- (iii) a credit arrangement between natural persons who are in a familial relationship and –**
- (iv) any other arrangement –**
  - (aa) in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction; or**
  - (bb) that is of a type that has been held in law to be between parties who are not dealing at arm's length.”**

[8] Counsel for the plaintiff argued that this was not an arm's length transaction and referred the court to the negotiations that the parties entered into prior to the conclusion of the exit agreement. Developing this argument further he submitted that the parties were dependant on each other in that the plaintiff knew that the defendant did not have the means to pay him and at the same time the plaintiff relaxed the terms of the restraint of trade agreement thus enabling the defendant affordability to repay the loan. It was contended on behalf of the plaintiff that the defendant makes no allegation that the 6.5% interest rate is some form of outmost advantage to the plaintiff.

[9] I am of the view that no co-dependence or dependence can be inferred from the transaction itself. It is very clear that the loan agreement entered into during 2013 changed its character when the contract of employment was terminated. In January 2014, the parties renegotiated the loan agreement, wherein the defendant agreed to repay this loan within a short space of time. The loan was

to be settled in full on 31<sup>st</sup> December 2015. Had the plaintiff not relaxed the restraint or trade terms, the loan would not have been settled. Comparing the 2 agreements the parties hereto strived to achieve the utmost advantage from each other.

[10] The **dictum of Trollip JA, in *Hicklin v Secretary for Inland Revenue***<sup>1</sup>

described the arm's length criterion as follows:

**"It connotes that each party is independent of the other and, in so dealing, will strive to get the utmost possible advantage out of the transaction for himself."**

[11] In a tax appeal relating to the taxation of forsaken interest on the unpaid price of shares sold to trust, **Froneman AJA held in *Commissioner, South African Revenue Services v Woulidge***<sup>2</sup> that:

**"A notional commercial arm's length transaction on interest would assume a lender who insist on payment of the interest he charges and a borrower able to pay that interest"**

[12] I am inclined to conclude that the parties were factually and legally independent of each other, the fact that there was an employer and employee relationship does not degenerate this transaction to fall outside the ambit of the Act. The parties strove to gain the maximum from the transaction for themselves. Interest rate was payable, it further provided an acceleration clause, failure by the defendant to pay timeously entitled the plaintiff to obtain judgement in terms of section 57 and 58 of the Magistrate Court Act 32 of 1944 and payment of legal costs on a punitive scale of attorney and own client for the recovery of any amount payable. I am satisfied that the defendant has raised a bona fide defence and consequently an application of summary judgement is refused.

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<sup>1</sup> 1980 (1) SA 481 (A) at 495 A-B

<sup>2</sup> 2002 (1) SA 68 (SCA) at para 12

[13] In the premises I find that:

- 13.1 The credit agreement was an arm's length transaction to which the Act applies
- 13.2 The plaintiff's action is fatally defective as it failed to comply with sections 129 and 130 of the Act.
- 13.3 The plaintiff is ordered in terms of section 130(4) to issue a section 129 statutory notice within 10 days of this order.

[14] That leaves the question of costs. Costs will stand over for determination at trial.




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**T D VILAKAZI**  
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

APPEARANCES:

|               |   |                                         |
|---------------|---|-----------------------------------------|
| FOR PLAINTIFF | : | ADV PA VENTER                           |
| INSTRUCTED BY | : | KLAGSBRUN EDELSTEIN BOSMAN DE VRIES INC |
| FOR DEFENDANT | : | ATTORNEY J VAN HEERDEN                  |
| INSTRUCTED BY | : | J VAN HEERDEN INC                       |
| DATE HEARD    | : | 4 NOVEMBER 2015                         |