IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 16892/2008

In the matter between:

AFRICAN DAWN PROPERTY TRANSFER FINANCE 1 (PTY) LIMITED Applicant

and

CARONET PROPERTIES (PTY) LTD 1st Respondent
(Registration no: 2004/010823/07)

DE JAGER, EVADNE ESTELLE 2nd Respondent

JUDGMENT DELIVERED ON THE 15th DAY OF FEBRUARY 2010

LOUW, J:

[1] The applicant seeks final relief on notice of motion in the form of an order against the respondents jointly and severally for payment of R370 284, 36 together with interest at the rate of 6,5% per month from 1 September 2008 together with costs on the attorney and client scale.

[2] On 7 January 2008 the applicant concluded a written loan agreement (the loan agreement) with the first respondent. The first respondent is a company and is a juristic person as defined by the National Credit Act 34 of 2005 (the Act).

[3] In terms of the loan agreement the applicant lent the amount of R 281 350, 40 to the first respondent, together with interest thereon at

the rate of 5% per month. The loan agreement provides that if the first respondent should fail to repay the loan on the terms agreed, the outstanding balance will attract interest at the rate of 6,5% per month compound.

[4] On 21 December 2007 the second respondent, a practising attorney who is also the sole director of the first respondent, executed a deed of suretyship (the deed of suretyship) in terms whereof she bound herself as surety and co-principal debtor to the applicant for the first respondent's indebtedness under the loan agreement. The second respondent agreed to pay the costs of recovery of any amount from her under the suretyship on the attorney and client scale.

[5] The suspensive condition contained in clause 7.1 of the loan agreement was not fulfilled, but the applicant waived compliance therewith.

[6] The respondents have filed answering papers in the form of an answering affidavit deposed to by the second respondent. The applicant has filed replying papers.

[7] The applicant complied with its obligations under the loan agreement by paying the following amounts on 7 January 2008:

1. R250 000,00 to the second respondent;
2. R707 540,00 to Mageza Le Roux Vivier & Associates;

3. R20 000,00 to Finspire; and

4. R4 275,00 to applicant;

[8] The respondents failed to effect payment of the amount of R370 284,36 with interest thereon from 1 September 2008 due to the applicant under the terms of the loan agreement.

[9] Section 4 of the Act provides that certain agreements are exempt from the provisions of the Act. Ms Feinstein on behalf of the applicant contended that the provisions of sections 4[1) (a) and 4(1) (b) apply to the loan agreement and exempt it from the provisions of the Act.

[10] Since the loan agreement is in any event excluded from the provisions of the Act by section 4(1)(b), it is not necessary to consider and decide whether, in the light of certain disputed facts on the papers, the provisions of section 4(1) (a) also apply to and exclude the loan agreement from the provisions of the Act.

[11] The effect of the provisions of section 4(1)(b) is that a large agreement (as defined in section 9(4)], in terms of which the borrower is a juristic person whose asset value at the time of the conclusion of the agreement is below the threshold value (in this case Rim), is nevertheless excluded from the provisions of the Act. Section 9(4) (b) defines a large agreement to include a credit agreement which is a credit transaction other than a pawn transaction or a credit guarantee and in respect of which the principal debt is at or above the threshold determined under the provisions of section 7(1) (b). The threshold

which has been determined is the amount of R250 000, 00.

[12] The principal debt under the loan agreement is R 281 350, 40, and the loan agreement is neither a pawn transaction nor is it a credit guarantee. The provisions of section 4(1) (b) therefore exclude the loan agreement from the provisions of the Act. It is common cause that if the loan agreement is excluded, the deed of suretyship is likewise excluded from the provisions of the Act.

[13] In argument, Mr White who appeared on behalf of the respondents took a different tack and did not contend that the loan agreement is subject to the provisions of the Act.

[14] Mr White pointed out that the applicant seeks final relief on notice of motion and that such relief may only be granted 'If those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order' (per **Corbett JA** in **Plascon-Evans Paints v Van Riebeeck Paints** 1984 (3) SA 623 at 634H-I). He contended that the applicant has not made out a case for the granting of the relief sought, because properly construed, the evidence shows that the transaction between the parties was in fact and despite the outward appearance, an agreement of loan between the applicant and the second respondent. Since it is common cause that the provisions of the Act would apply if the loan agreement was concluded with the second respondent, being a natural person and that the applicant has not complied with the provisions of Section 129 of the Act, the claim would

be unenforceable, he contended.

[15] Mr White submitted that the evidence shows that the contract of loan entered into between the applicant and first respondent and the deed of suretyship entered into by second respondent were simply devices employed by the parties to take what was in fact intended to be and in fact was a loan of money by the applicant to a natural person, the second respondent, out of the ambit of the Act and thus to deprive the second respondent of the consumer protection to which she is entitled to under that Act.

[16] Relying in the following authorities, Mr White contended that the court should give effect to what he called the actual transaction between the parties rather than the ostensible transactions evidenced by the loan agreement and the deed of suretyship:

> In **Kilburn v Estate Kilburn** 1931 AD 501, it was held by Wessels AC J at 507 that:
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> > 'It is a well known principle of our law that Courts of law will not be deceived by the form of a transaction. They will rend aside the veil in which the transaction is wrapped and examine its true nature and substance. *Plus valeat quod agitur quam quod simulate concipitur.*'

And

> In **Zandberg v Van Zyl** 1910 AD 302, it was held by Innes J at 309 that:
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> > 'Not infrequently, however (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavour to

> consume its real character. They call it by name, or give it a shape intended not to express but to disguise its true nature. And when a Court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is; not what it informs the Court to be. The maxim then applies *plus valeat quod agitur quam quod simulate concipitur.* But the words of the rule indicate its limitation. The Court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention. For, if the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstances that the same object might have been attained in another way will not necessarily make the arrangement other than it purports to be. The inquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down.'

[17] The question is whether the evidence as it appears from the papers bears out Mr White's contentions.

[18] It is common cause that the second respondent first approached the applicant for a loan and that the request was declined. The applicant's evidence is that this was done because the applicant does not provide finance to individuals. It is common cause that the first respondent then applied for a loan, that the loan agreement was concluded with the first respondent who warranted that it had an annual income in excess of R 1 m.

[19] The second respondent says that the applicant was fully aware that this warranty was not correct. Mr White contended that the

evidence shows that the applicant was aware that the first respondent could not repay the loan and that its income figure given to the applicant before the conclusion of the loan was only a projection. This he contended is borne out by supporting documentation obtained by applicant from the second respondent and the documents not required to be submitted by the second respondents to the applicant. He referred in this regard to annexure 'AD 19' to the applicant's replying affidavit.

[20] The second respondent states that the applicant accepted the warranty on the basis that the first respondent did not at the time have the income but had a projected income. This projected income, the second respondent explains, would have come from a property development which involved the first respondent purchasing two properties for redevelopment and the envisaged sale of 30 residential units cut from these properties. The sale of the properties to the first respondent was subject to a resolutive condition that failed and which resulted in the sale not going through. The second respondent's evidence then continues as follows:

> It now appears as if the Applicant granted the loan to the First Respondent *inter alia* on the strength of the potential of the First Respondent to have an annual income in excess of R 1,000,000 with a net monthly income sufficient to pay the loan amount. Had the development proceeded, I too was, at the time, of the opinion that the First Respondent would be able to honour the loan agreement and (I) therefore acquiesced.

[21] Later, the second respondent returns to the respondents' intention regarding the repayment of the loan. She states as follows:

> It has always been the intention of the First Respondent and myself to repay and honour the terms of the loan agreement. In this regard it needs to be said that first Respondent, prior to the deed of sale failing, also attempted marketing some of the stands it though would be approved for residential development in order to satisfy the claim of the Applicant. Due to adverse market conditions, First Respondent did not succeed in this.

[22] The second respondent's evidence is not that the parties intended the loan agreement to be between the applicant and the second respondent and that they intended to disguise that agreement as an agreement between the applicant and the first respondent. What is clear is that while the first respondent initially wished to conclude a loan agreement in her own name, this was not possible because the applicant did not advance loans to private individuals. The transaction was then intentionally structured as a loan to the first respondent. The import of the second respondent's evidence is that since she was at the time of the opinion that 'the First Respondent would be able to honour the loan agreement (she) therefore acquiesced'. She states that it had 'always been the intention of the First Respondent and myself to repay and honour the terms of the loan agreement' and that both she and the first respondent at the time believed that the first respondent would be able 'to repay and honour the terms of the loan agreement'.

[23] This evidence contradicts the contention that the parties to the loan agreement intended the loan to be between the applicant and the second respondent and that the parties, despite ostensibly entering

into the loan agreement and the deed ot suretyship, nevertheless intended to conclude and in fact did conclude a loan agreement between the applicant and the second respondent. The evidence does not establish that by signing the loan agreement, the parties intentionally sought to create the impression that they intended to bring about a contract between the applicant and the first respondent while they actually intended a different result, namely a contract of loan between the applicant and the second respondent in her personal capacity.[1] The evidence establishes that the parties intended and did, by signing the written loan agreement conclude the loan agreement between the applicant and the first respondent.

[24] In the result the applicant is entitled to the following order which I herewith make against the first and second respondents jointly and severally, the one paying the other to be absolved, save in respect of the order as to costs which is made severally:

1. Payment of the sum of R370 284,36;

2. Interest on the abovementioned amount at the rate of 6.5% per month, calculated and compounded on a daily basis from 1 September 2008 to date of payment, both days inclusive;

3. Costs on the party and party scale against the first respondent and cost on the attorney and client scale against the second respondent.

W J LOUW, J

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1 See **van der Merwe et al Contract General Principles, third edition** at p 24