THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between: Case A459/2013

QUINCE PROPERTY FINANCE (PTY) LTD	**APPELLANT**

And

VAN NIEKERK GROENWOUD & VAN ZYL INC	**FIRST RESPONDENT**
HL VAN ZYL	**SECOND RESPONDENT**
PJ GROENEWALD	**THIRD RESPONDENT**
PH WEHMEYER	**FOURTH RESPONDENT**
LJR VISSER	**FIFTH RESPONDENT**
H duP LOMBARD	**SIXTH RESPONDENT**
WJM SAAIMAN	**SEVENTH RESPONDENT**
PA VENTER	**EIGHTH RESPONDENT**
C HvR VAN OUDTSHOORN	**NINTH RESPONDENT**
ALD MOHOLO	**TENTH RESPONDENT**
AJ VAN GREUNEN	**ELEVENTH RESPONDENT**

Coram: DESAI & ROGERS JJ

Heard: 24 OCTOBER 2014

Delivered: 4 NOVEMBER 2014

JUDGMENT

Rogers J:

Introduction

[1] The appellant and the respondents were the plaintiff and defendants respectively in the court *a quo*. The appellant ('Quince') is a bridging finance company. The first respondent (the first defendant *a quo*) is an incorporated firm of attorneys ('VGV'). The other respondents (the remaining defendants *a quo*) were at the relevant time the directors of VGV and thus personally liable for any debt contracted by VGV during their term of office (s 23(1)(a) of the Attorneys Act 53 of 1979). I shall refer to the respondents collectively as the defendants.

[2] Quince alleged that VGV had by contract assumed responsibility to repay bridging finance which Quince had advanced to a client of VGV, Vexma Properties 219 CC ('Vexma '). Vexma was a property developer. Its sole member was Melda Nortje but her husband, Reynaldo Nortje (an rehabilitated insolvent), was the driving force.

[3] Quince relied for its claim on the terms of a financing agreement executed on 30 May 2006. This document was in the standard form then used by Quince. In terms thereof the borrower's attorneys undertook an obligation to pay the advanced sum plus finance charges if the transaction contemplated in the agreement was for any reason delayed for more than 90 days.

[4] The defendants raised a host of defences. Some were based on an oral statement which a Mr Mario Nel of Quince allegedly made to VGV's representative, Mr HL Van Zyl ('Van Zyl'), the second defendant, prior to the conclusion of the relevant financing agreement to the effect that Quince would never sue VGV. On this basis, the defendants relied on an undertaking not to sue, on misrepresentation

and on rectification. A further defence arose from the circumstance that additional sums were later advanced to Vexma on terms which allegedly amounted to a novation. The defendants averred that they had no liability in terms of the novated agreement. The defendants alleged, further, that the National Credit Act 34 of 2005 applied to the two additional loans and that there had not been compliance with that Act. The defendants also placed the quantification of Quince's claim in issue.

[5] Summons was issued on 8 of July 2009. Evidence ran on five days over the period April 2010 to June 2012. The principal witnesses were Mr W le Roux ('Le Roux') for Quince and Van Zyl for the defendants. The case was argued in October 2012. Quince was represented by its attorney, Mr Burger, and the defendants by counsel, Mr van Reenen. The magistrate delivered judgment in May 2013. He rejected the defences based on Nel's oral statement. He upheld the defence based on novation. He also concluded that Quince had not proved the quantum of its claim.

[6] Quince attacks the magistrate's judgment on the two defences which the magistrate upheld. The defendants support the magistrate's dismissal of the action on all the grounds they originally advanced, including those the magistrate rejected. The defendants noted a cross-appeal in respect of the grounds which the magistrate rejected. This was misconceived; an appeal lies against the order, not the reasons. In the appeal Quince was represented by counsel, Mr D van der Merwe. Mr van Reenen continued to represent the defendants.

[7] The magistrate's judgment is, regrettably, not of much assistance in resolving the factual and legal issues.

The facts

[8] According to Van Zyl, Nel approached him during 2005 with a view to cooperation between Quince (then known as ZS Rational Finance (Pty) Ltd) and VGV in regard to bridging finance transactions. Nel, who was based at Quince's head office in Bloemfontein, met with Van Zyl in Cape Town on several occasions.

The idea was that VGV would introduce clients in need of bridging finance to Quince and share in the profits or receive commission on the ensuing bridging transactions.

[9] Van Zyl testified that at an earlier time another bridging finance company had sought to hold VGV liable where its client, having terminated VGV's mandate and caused transfer to be effected by other attorneys, failed to repay the financier. Van Zyl said that he told Nel this and that the latter assured him that Quince would not sue a party with whom it had a business relationship. Van Zyl testified that he relied on this as an undertaking. No written cooperation agreement was signed though according to Van Zyl his firm thereafter introduced a number of transactions to Quince and received commission.

[10] In about 2005 Vexma embarked on a property development in the Hermanus area called Mooizicht. There were two phases. The bulk of the erven (numbering 60) comprised phase 1. There were eight erven in phase 2. Vexma engaged VGV as its conveyancers. The primary financier was Mainfin Finance (Pty) Ltd ('Mainfin') in whose favour mortgage bonds in amounts totalling R9,8 million were registered.

[11] During mid-2006 Vexma required bridging finance for rates so as to obtain clearance certificates. VGV approach Nel of Quince on Vexma's behalf. A telephonic discussion was followed by a letter from VGV dated 30 May 2006, addressed to Quince's directors with Nel as the reference, in which Van Zyl confirmed that Vexma urgently needed a bridging loan of R1,25 million by 1 June 2006. He said that his firm was ready to lodge the first 50 transfers in phase 1 subject to obtaining clearance certificates from the municipality and that the proceeds of the first 50 transfers should be sufficient to settle Vexma's indebtedness to Mainfin and leave a substantial balance from which the bridging finance could be discharged in full. He added that he expected to be able to lodge an additional ten transfers by the time the first 50 transfers were lodged. He proposed that the bridging loan be repaid at a rate of R22 500 per transfer, meaning that the capital would be fully settled by the time of the 55th transfer. He concluded by saying that his firm would give an irrevocable undertaking to repay the bridging loan and finance charges from the proceeds of the sales in phase 1, which should be registered by

not later than the end of July 2006. He asked Quince to send him the prescribed application forthwith, as Nortje would be calling later in the day to sign.

[12] Later that day Vexma, represented by Mrs Nortje, and VGV, represented by Van Zyl, signed Quince's then standard financing agreement and sent it to Quince. One of the preambles stated that signature of the document signified that all parties thereto had read and understood its terms and reached consensus thereon. Another preamble stated that variations of the agreement would not be valid or binding unless reduced to writing and signed by the parties.

[13] The 'initial period' of the transaction was specified in part B on page 1 to be 60 days commencing 1 June 2006. Vexma undertook to repay the amount of R1,25 million within the initial period together with an application fee of R300 and a 'service fee' of 1,6% per month (both of which were to attract VAT) plus finance charges of 16,8% per annum. Excluding VAT, the service fee and finance charges together amounted to 36% per annum.

[14] In clauses 1 and 2 of the terms and conditions forming part of this document, VGV gave certain warranties and undertakings regarding the intended use of the bridging finance and the unconditional character of the relevant sale agreements. Clause 3, which was the target of the pleaded rectification, reads thus:

'3. The Attorney's Undertakings

The Conveyancing Attorney hereby irrevocably undertakes to:

(i) Pay [Quince] the full and complete some of the sum borrowed plus the interest ... within a period of 72 hours from the date of registration of transfer of the property or registration of the bond, as the case may be, as described above.

(ii) Pay [Quince] the application fee and service charges as set out above within a period of 72 hours from the date of registration of transfer of the property as described above.

(iii) In the event of cancellation of the transaction or the borrower becoming deceased, to pay Quince within 72 hours of demand by Quince the full amount advanced as described in B above.

(iv) Pay [Quince] on demand all the amounts due including finance charges and fees in the event of the transaction being delayed, for whatever reason for a period of more than 90 days.'

[15] Clause 5 made provision for a certificate of indebtedness in respect of any amount which might be due or owing by the attorneys. Vexma and VGV inserted their respective *domicilia* addresses in clause 6. In clause 10 the parties consented to the jurisdiction of the magistrate's court.

[16] The document contained a reference number. According to Van Zyl, this reference number was necessary in order for VGV to earn commission on the introduction of the loan to Quince.

[17] On the following day, 31 May 2006, VGV wrote to Quince's directors, again with Nel's reference, confirming that the firm had received instructions from Vexma to give, subject to the making of the bridging loan, the following undertaking (I translate from the Afrikaans):

'This firm hereby irrevocably binds itself to you to pay you the amount of R22 500 per erf transferred by Vexma to each of the respective buyers of the subdivided portions of Erf 1444 Hermanus, as soon as registration thereof has been registered in the Deeds Office Cape Town, until the full amount owing by Vexma to you is paid in full.

This undertaking is not transferable and can only be enforced by a competent court.'

[18] Until this stage, so it seems, Van Zyl had dealt with Nel. However, on 31 May or 1 June 2006, and subsequent to Quince's receipt of the above undertaking but prior to the advancing of funds, Le Roux contacted Van Zyl to clarify the status of the pending transfers. Van Zyl confirmed his oral response by way of a letter to Quince's directors dated 1 June 2006, this time with Le Roux's reference, stating that his firm could have lodged at least 50 transfers that same day if Vexma had the clearance certificates.

[19] Quince thereupon paid R1,25 million into VGV's trust account.

[20] Vexma was required to repay the loan by 30 July 2006. It did not. This was because the transfers (expected to be 50 or more) had not by then been registered. The reasons for the delay were not explained in the evidence. One must assume that, in order to procure the transfers, Vexma needed to pay amounts in excess of the bridging finance but failed to do so. In the event, 59 of the phase 1 erven together with three of the Phase 2 erven were registered in November and December 2006. Even then, Quince was not repaid. Van Zyl testified that, with the delay in registration, the interest owing to Mainfin had built up, such that there was no free surplus.

[21] Le Roux said that he made frequent enquiries about progress. During March 2007 Van Zyl emailed Le Roux to say that Mr Nortje would like to meet with Le Roux because he felt bad about the delays in the Mooizicht development and wanted personally to set Le Roux's mind at rest. Le Roux said that he would like to meet Nortje. It does not appear from the evidence whether such a meeting took place. Certainly no further money was paid at that stage.

[22] Instead, on 15 June 2007 Van Zyl forwarded correspondence to Le Roux from which it appeared that Vexma wanted to borrow an additional R61 300 to procure the transfer of six of the last eight Mooizicht erven. The money was needed to settle the project engineer's fees and thus obtain a completion certificate. In Van Zyl's email to the engineer, which he forwarded to Le Roux, the incorrect statement was made that there were no bonds over these erven. In fact, the amount owing to Mainfin had not yet been settled. In his email to Le Roux, Van Zyl confirmed that the amount of R63 100 would be repaid from the proceeds of the six erven.

[23] In reply, Le Roux sought confirmation of various matters, including that there would be sufficient surplus from the transfers to repay the original loan plus the additional loan. Le Roux added that he took Van Zyl's email to be an undertaking to repay the additional R63 100 plus interest and the initiation fee on date of registration of the transfers.

[24] Van Zyl responded on the same day by stating that his firm was in a position to lodge at least five of the transactions, that documentation in respect of the sixth

was expected shortly, that the free residue from the six transactions would amount to at least R1,65 million and that there were, in addition, the last two Mooizicht erven which had not yet been sold. In regard to any shortfall, Vexma was holding VGV covered from other projects which ought to be registered within two months. He confirmed the undertaking regarding the repayment of the R63 100.

[25] Quince thereupon paid the amount of R63 100 into VGV's trust account.

[26] On the same day, 15 June 2007, the details of the first additional loan were entered on Quince's then standard bridging finance agreement. Le Roux's evidence was that this document was not signed or submitted by Vexma or VGV; the completion of the particulars was for Quince's internal records. Not much turns on this because the standard agreement had by then changed and did not contain the same undertakings as clause 3 of the initial loan agreement. Although the later standard agreement contained certain undertakings by the conveyancing attorneys, they were not such as to render the attorneys liable for repayment of the loan.

[27] The standard agreement required the loan to be repaid on the earlier of date of transfer or expiry of 90 days from the date of advance. In Quince's letter to VGV of 15 June 2007, formally approving the additional loan and providing proof of payment, Quince furnished a repayment schedule for a period of 60 days, the same period as stipulated in the initial loan. Nothing turns on whether the repayment date was 60 days or 90 days.

[28] In mid-July 2007 Le Roux contacted Van Zyl to enquire about progress. Van Zyl emailed him on 20 July 2007 to say that he had received the rates accounts for the six erven and that bulk service fees were still payable. He said he should be getting funds for that purpose from another transaction that he was registering shortly for the Nortjes.

[29] Le Roux pressed for further progress in an email of 26 July 2007. Van Zyl informed him that he had not yet lodged the Vexma transfers because the amount received from the other transaction had been too little to settle the rates and bulk services fees. He had asked his partners temporarily to finance the difference. He

repeated that there were two unsold erven which should be sufficient to cover the shortfall (implying, as I understand it, that Quince would receive only partial repayment from the transfer of the six erven). He proposed that Quince register a covering bond as security.

[30] Le Roux met with Van Zyl on 27 July 2007. The latter made certain proposals which Le Roux recorded in an email of the same day, stating that the proposals were acceptable. The proposals were that (i) Quince would take cession of a R5 million mortgage bond from Mainfin; (ii) Quince would lend Vexma a further R63 000 as a contribution towards a total amount of R172 000 needed to settle the rates and bulk services fees (the rest would be financed by VGV and from another Nortje project); (iii) VGV would lodge the six Mooizicht transfers immediately upon paying the bulk services fees and obtaining the clearance certificates; (iv) VGV would pay Quince R1 662 700 upon transfer of the six erven; (v) the balance of the amount owing to Quince (ie on the initial loan and on the two additional loans) would be settled from the sale of the last two Mooizicht erven or from other Nortje projects. Le Roux sought confirmation that he had understood the proposals correctly and said that he wished to use Van Zyl's reply as an undertaking for repayment of the additional amount (ie the further loan of R63 000).

[31] On 31 July 2007 Van Zyl confirmed Le Roux's understanding of the proposals. In response, Le Roux sought confirmation on certain matters, which Van Zyl supplied on the same day, including the precise amount needed to settle the bulk services fees. Le Roux then informed Van Zyl that Quince would pay the amount required (adjusted, in the light of Van Zyl's reply, to the figure of R66 697,09) upon the Nortjes' signing the email exchanges between VGV and Quince.

[32] On the following day, 1 August 2007, Van Zyl emailed the Nortjes' signed confirmation to Le Roux, whereupon Quince paid the sum of R66 697,06 into VGV's trust account.

[33] The details of the second additional loan were entered on Quince's standard bridging finance agreement. Le Roux said that this was, again, a matter of internal

record-keeping and that the document was not signed or submitted by Vexma or VGV. He said the agreement relating to the second additional loan was constituted by the correspondence.

[34] The standard agreement required, once again, that the amount of the loan be repaid on the earlier of date of transfer or expiry of 90 days from the date of advance. In Quince's letter to VGV of 1 August 2007, formally approving the additional loan and providing proof of payment, Quince furnished a repayment schedule for a 60-day period, the same period as stipulated in the initial loan. Again, nothing turns on whether the repayment date was 60 days or 90 days

[35] On 2 August 2007 VGV paid the bulk services fees to the municipality (R175 697,09).

[36] On 14 August 2007 Le Roux made enquiries to Van Zyl concerning progress. Van Zyl replied that the municipality had not yet issued the clearance certificates. He said he would phone Le Roux regarding the cession of the bond. He indicated that his firm would lodge the six transfers immediately on obtaining the clearance certificates.

[37] There was further delay. Behind the scenes, Standard Bank had sent a letter of demand to Vexma foreshadowing a liquidation application. VGV corresponded with the bank's attorneys on that matter. It seems that VGV was able to placate the bank.

[38] Various transactions lodged by VGV were registered at the deeds office on 4 October 2007. These were (i) the transfer of the six Mooizicht erven mentioned in the earlier correspondence; (ii) the cession to Quince of a Mainfin mortgage bond for R2,3 million. Although a mortgage bond of R5 million was meant to have been ceded, Mainfin was not willing to release its other two bonds because Vexma was still indebted to it.

[39] Van Zyl performed calculations pursuant to which he determined that only R1 480 081,71 (not R1 666 700 as specified in the email exchanges of late July

2007) was available to Quince from the six transfers. He testified that the deficit was attributable to the fact that an amount had to be paid to Mainfin to settle Vexma's indebtedness to that company. It also emerged from supplementary discovery made by the defendants while Van Zyl was under cross-examination that payments from the transfer proceeds were made to certain other parties, for example to another firm of attorneys to whom VGV had given an undertaking and to Mr Nortje himself in respect of commissions he had advanced to his agents. Van Zyl was not able to say how much had been paid to Mainfin or precisely how the sum of R1 480 081,71 was calculated.

[40] Be that as it may, Van Zyl's evidence was that, in advance of the transfers registered on 4 October 2007, he spoke with Le Roux and explained to him the reduced amount available for Quince. Van Zyl said that, in view of his firm's undertaking in the earlier correspondence to pay Quince R1 662 700 on transfer (an amount which, so it had transpired would not on his calculations have been available for that purpose), he would not have registered the transfers unless Quince had agreed upon transfer to accept the lesser amount. He said that Le Roux gave him the go-ahead to register. Le Roux was comfortable that the proceeds from the last two unsold Mooizicht erven, in respect of which Quince would have the security afforded by the ceded mortgage bond, would be sufficient to cover the amount which would remain owing to Quince after payment of the sum of R1 480 081,71.

[41] Although this version was not put to Le Roux in cross-examination, it may well be correct. There is no evidence that, upon being paid the lesser sum of R1 480 081,71, Quince remonstrated that VGV had breached its undertaking.

[42] Thus it was that on 10 October 2007 VGV paid Quince an amount of R1 480 081,71. The evidence regarding the manner in which that payment was appropriated is unsatisfactory. It appears that neither Vexma nor VGV on its behalf made any appropriation at the time of payment. Le Roux testified that to the best of his recollection Quince initially appropriated the amount *pro rata* to the initial loan, the first additional loan and the second additional loan. On 12 December 2007 Quince addressed to Vexma a notice in terms of s 129 of the National Credit Act. It

is apparent from the schedule to this letter that Quince appropriated the payment firstly in discharge of the two additional loans and the balance of R1 337 663 to the initial loan. In an action which Quince instituted against Vexma in the magistrate's court during February 2008, the payment was apparently treated as having been appropriated in full to the initial loan (I say 'apparently', because this is a matter of inference from Vexma's affidavit opposing summary judgment – the particulars of claim are not in the record). The methods of appropriation reflected in the s 129 letter and in the action are both at odds with Le Roux's recollection of a *pro rata* appropriation.

[43] In Vexma's affidavit opposing summary judgment in the magistrate's court action, the Nortjes asserted that the amount owed on the initial loan was not yet due and that the payment of R1 480 081,71 had thus fully discharged the additional loans, with only the balance being applied in reduction of the initial loan. This was the appropriation initially adopted by Quince in the s 129 notice and is also the appropriation Quince asserted in the current proceedings against the defendants. In other words, Quince treated the additional loans as having been repaid in full, leaving a larger unpaid balance than would otherwise have existed on the initial loan. This is relevant to quantification, because VGV was only alleged to have incurred a personal liability on the initial loan. Quince's case was and is that only an amount of R1 337 419,36 was available to be appropriated to the initial loan, and that this appropriation, which discharged all the interest and some of the capital, reduced the balance on the initial loan as at 10 October 2007 from R1 907 131,22 to R571 022,68.

[44] I have mentioned that Quince instituted action against Vexma during February 2008 and that Vexma opposed the action. While those proceedings were pending Vexma was, during October 2008, placed in provisional liquidation at Quince's instance. The order was made final in July 2009. It was also in July 2009 that Quince issued summons against the defendants in the present case.

Interpretation and application of clause 3(iv) of initial loan agreement

[45] Leaving aside the defences raised, VGV was liable, in terms of clause 3(iv) of the initial loan agreement, to repay the amount owing thereon 'in the event of the transaction being delayed, for whatever reason, for a period of more than 90 days'. The standard contract contemplated that details of the 'property transaction' would be inserted in part A of the document. Those details were not inserted in the present instance but the parties were *ad idem* that the relevant property transaction was the sale of Mooizicht erven in phase 1 as mentioned in the correspondence preceding the conclusion of the agreement.

[46] Part B of the document specified a 'commencement date' and an 'initial period'. Here they were 1 June 2006 and 60 days. Vexma was obliged to repay the loan plus charges within that 60-day period.

[47] In my view, the 90-day period contemplated in clause 3(iv) started to run on the commencement date, 1 June 2006. What the contract envisaged was that the property transaction would be registered within the initial 60-day period. If this did not occur, and if that transaction still had not been registered after the expiry of 90 days, the conveyancing attorney incurred the liability imposed by clause 3(iv). That would only be so, of course, if registration of the transaction was still pending. If, within the 90-day period, the transaction was registered, the conveyancer's obligation would be the one specified in clauses 3(i) and (ii). If, within the 90-day period, the transaction was cancelled or the borrower became deceased, the conveyancer's obligation would be the one specified in clause 3(iii).

[48] In his evidence Van Zyl said that the undertaking in clause 3(iv) was not enforceable because it was a suretyship which did not comply with the prescribed formalities. This was, correctly, not pleaded as a defence. Clause 3(iv) imposes a primary obligation to pay in specified circumstances; it is not a suretyship (see *List v Jungers* 1979 (3) SA 106 (A) at 117H-119G). It is unnecessary, in the circumstances, to decide whether, if the undertaking were construed as a suretyship, there was compliance with the prescribed formalities. The undertaking

was in writing and signed by VGV. The question would be whether the failure to insert the details of the property transaction was a fatal formal defect.

[49] Clause 3(iv) is quite distinguishable from the undertaking considered in *Kruger v Property Lawyer Services (Edms) Bpk* [2014] ZASCA 80, which Mr van Reenen mentioned in his written argument. The Supreme Court of Appeal was concerned with an undertaking, contained in a letter given by the conveyancer, to pay a certain amount upon transfer. The court did not say that the undertaking was a suretyship but found that, construing it in the context of the bridging finance loan which had given rise to it, the undertaking did not compel the attorneys to pay more than the net proceeds received on registration. Clause 3(iv) naturally cannot bear a similarly limited meaning because it expressly applies in the event of the transaction being delayed, ie applies where no registration has occurred.

[50] Subject, therefore, to the defences raised, VGV became liable, by not later than the end of October 2006, to pay to Quince the amount owing on the initial loan.

[51] I may mention, before moving on, that the rationale for imposing a direct obligation on the conveyancer was presumably the following. Quince did not necessarily know or deal directly with the borrowers. The latter were introduced to Quince by conveyancing attorneys. It suited conveyancing attorneys that clients in need of bridging finance should obtain it, because this facilitated completion of property transactions and thus the earning by the conveyancers of their fees. The conveyancers would have control of the property transaction. Quince would typically have depended on the conveyancers for information about the quality of the proposed property transactions and the likely time lines. All these considerations obtained in the present case.

Specific performance or damages?

[52] Mr van Reenen argued that Quince's claim was for damages rather than specific performance. This distinction was said to be relevant when it came to quantification of the claim.

[53] In my view, Mr van Reenen's characterisation of the claim is incorrect. Paras 15-23 of the final amended particulars of claim constitute a claim for specific performance of the undertaking in clause 3(iv). Paras 23A-26 are an alternative claim for damages. The alternative of damages was added by way of amendment in response to a special plea that in terms of s 46(1) of the Magistrates' Court Act 32 of 1944 the magistrate's court did not have jurisdiction to hear a claim for specific performance without an alternative of damages. The special plea was, I may add, misconceived and the amendment thus unnecessary: the phrase 'specific performance' in s 46(1) has been held not to include an order for the payment of money (see *Tuckers Land & Development Co v Van Zyl* 1977 (3) SA 1041 (T); *Otto v Basson* 1994 (2) SA 744 (C); Jones & Buckle *The Civil Practice of the Magistrates' Courts in South Africa* Vol 1 at 305).[1]

Nel's oral statement

[54] Van Zyl's evidence was that, in the co-operation discussions between himself and Nel, the latter said that his company 'has…never ever been involved in any litigation with attorneys and they don't foresee to, and undertake that they never will take any action against a firm that is in a business relationship with them'. In cross-examination he said that Nel made the statement with specific reference to clause 3 of the then standard bridging financing agreement. Van Zyl relayed Nel's words as being (I translate from the Afrikaans): 'Hennie, I promise you, we have never claimed against any attorney in terms of this clause and won't do so and if we go into co-operation forget about it, it will never happen.'

[55] Le Roux, who in my view gave his evidence very fairly, said that he did not have personal knowledge of what Nel and Van Zyl discussed but could not believe that Nel had given such an undertaking. Nel's availability as a witness does not appear from the record.

[1] See also *Ndlovu v Santam Ltd* [2005] ZASCA 41 where the court and litigants evidently took it for granted that the magistrate's court had jurisdiction to order an insurer to pay the agreed indemnity to the plaintiff .

[56] I accept that Nel made some statement along the lines indicated by Van Zyl. But the latter was testifying five years after the conversation. I think it doubtful that Nel would have categorically undertaken that Quince would not enforce its rights against VGV under future financing agreements. Van Zyl conceded during cross-examination that Quince could have sued VGV on undertakings of the kind contained in the correspondence (ie to pay a specified amount on transfer). The precise content of such an undertaking would depend on its wording. It strikes me as more probable that Nel was conveying to Van Zyl that he would not expect Quince ever to sue the conveyancing attorneys. This would be an expression of opinion falling short of an undertaking.

[57] Van Zyl's evidence, to the effect that on his understanding clause 3 of Quince's standard bridging finance agreement would not apply to transactions between VGV and Quince, is at odds with a resolution passed by VGV's directors on 31 May 2006. This resolution was among various documents of which the defendants made supplementary discovery during July 2011, shortly before the resumption of Van Zyl's cross-examination on 28 July 2011. In terms of the resolution VGV's directors approved the making of bridging loans by Quince to VGV's clients on the terms of a draft contract annexed to the resolution. Although the annexed draft was not identical to the Vexma bridging finance agreement of 30 May 2006, clause 3 of the draft contained substantially the same undertakings as clause 3 of the Vexma contract, including the contentious clause 3(iv). (The precise reasons for the passing of the resolution at this particular point in time do not appear from the evidence. One thus does not know whether it is purely coincidental that the resolution was passed on the same date as the signing of the Vexma bridging finance agreement.)

[58] Nevertheless, I shall assume in favour of the defendants that Nel gave the oral undertaking they allege.

Nel's authority

[59] On this assumption, the question obviously arises as to whether Nel was authorised by Quince to make the undertaking. In its plea the defendants alleged

that Nel represented Quince in giving of the undertaking. It was for the defendants to allege and prove Nel's authority (see *Van Niekerk v Van den Berg* 1965 (2) SA 525 (A) at 537E-G) though it has also been said that a litigant who disputes the authority of his alleged agent must specifically plead this (*Kwikspace Modular Buildings Ltd v Sabodala Mining Company Sarl & Another* 2010 (6) SA 477 (SCA) para 16).

[60] In its replication Quince denied that any representation had been made. There was some debate on the opening day of the trial as to whether Nel's authority (if he had said what was alleged) was in issue. Mr van Reenen for the defendants told the magistrate that he thought it safe to assume that Nel's authority was in issue even though this might not clearly appear from the pleadings. There is nothing in the record to suggest that this assumption ever changed. Quince at no stage admitted Nel's authority. The circumstances of the case were such as to have made it highly unlikely that Quince would have admitted Nel's authority. Accordingly, and although Quince ought to have pleaded, in the alternative, that if Nel made the alleged statement he was not authorised to do so, the trial was conducted on the assumption that Nel's authority needed to be proved. Since the function of pleadings is to alert parties to the issues, Quince's failure specifically to plead an absence of authority should not in the particular circumstances of this case be held against it.

[61] Nel was not one of Quince's directors. The undertaking he allegedly gave was contrary to the standard financing agreement then in use by Quince. No express authority was proved, and the giving of the alleged undertaking would not have been within the usual authority of someone like Nel. Le Roux testified that the initial loan was a large one by Quince's standards and that it thus needed to be approved by the board. Insofar as ostensible authority is concerned, there is no evidence that Quince held Nel out as a person who could bind Quince to undertakings of the kind in question.

[62] Mr van Reenen, in written argument, alluded to Van Zyl's evidence that Nel held himself out to be a director of Quince. Van Zyl said that he inferred that Nel was a director but gave no detail of Nel's behaviour which gave rise to this belief. In any event, one cannot rely on a representation by the purported agent himself in order to

establish ostensible authority (*Glofinco v Absa Bank Ltd t/a United Bank* 2002 (6) SA 470 (SCA) paras 12-13).

[63] The magistrate was thus right, in my view, to conclude that Nel did not have authority to make the alleged representation or give the alleged undertaking.

Rectification, misrepresentation and undertaking

[64] If it were found that Nel made the alleged representation or gave the alleged undertaking, it by no means follows that the defences based on rectification, misrepresentation or undertaking should have succeeded.

[65] As to rectification, it is clear from Van Zyl's evidence that he was under no misapprehension as to the terms contained in Quince's standard financing agreement. He testified that Nel's statement was made with specific reference to clause 3. VGV concluded a number of transactions with Quince in the same form. Van Zyl did not, on this or any other occasion, strike out any part of clause 3 when signing the document on behalf of his firm.

[66] We are thus not dealing with a case where, by virtue of an error common to the parties, their written contract was formulated in a manner contrary to their common intention. VGV signed the document knowing what it contained. Its case is that, because of an earlier oral agreement, clause 3 (or at least clause 3(iv)) is not enforceable.

[67] There is authority for the proposition that an agreement which is in the form intended by the parties but which has a consequence which is contrary to the common intention can be rectified (see, for example, *Tesven CC & Another v South African Bank of Athens* 2000 (1) SA 268 (SCA) paras 15-18; *Brits v Van Heerden* 2001 (3) SA 257 (C) at 268G-269H). The defendants' case on rectification is that, although both parties knew that the bridging finance agreement reflected the provisions contained in clause 3, neither side intended those provisions to be operative.

[68] None of the cases where rectification has been granted because of unintended consequences has gone as far as holding that a clause which both parties knew was contained in the document may be disregarded because the parties did not intend it to be operative. In principle, though, I am prepared to accept that rectification could be granted in such a case. However, it would in the nature of things be difficult for a party who relies on rectification in such circumstances to discharge the burden of proof resting on him, because it is unusual for contracting parties to include a clause which they intend not to be operative. Even in a pre-printed document, a clause can simply be struck out if it is not intended to take effect. The difficulty is more pronounced where the party relying on rectification is an experienced firm of attorneys and the document is on its face one intended to create legal relations between the attorneys and the other party.

[69] Be that as it may, the defence of rectification would fail in the present case because there is no evidence that Quince, in concluding the initial bridging finance agreement, intended clause 3 to be inoperative. The fact that Nel, at an earlier point in time and in the context of co-operation discussions, gave an undertaking within his authority does not mean that Quince, when it concluded the bridging finance agreement on 30 May 2006, did not intend its standard terms to apply. It was not the defendants' case that Nel represented Quince in the conclusion of the bridging finance agreement. The evidence did not establish whether anyone actually signed the document on behalf Quince. Le Roux testified, however, that the transaction was approved by Quince's board and we know from the evidence that Le Roux had communication with Van Zyl prior to the advancing of the funds on 1 June 2006. The defendants certainly did not prove that Le Roux or Quince's board intended clause 3(iv) to be inoperative.

[70] It was argued for the defendants that one could infer, from Quince's delay in demanding payment from VGV, that Quince appreciated that clause 3(iv) was not enforceable. I do not agree. When that proposition was put to Mr Le Roux in cross-examination he denied that the delay had anything to do with Nel's alleged statement. He said that VGV channelled a lot of business to Quince and that Quince was trying to save the relationship. I find it quite plausible that Quince decided, in

the particular circumstances of the case, to exhaust other avenues before enforcing its claim against VGV.

[71] The defendants also argued, with reference to the claim which Quince lodged in Vexma's liquidation, that Quince, in stating in the claim form that no person apart from Vexma was liable for the debt or any part thereof, was recognising that it had no claim against VGV. Quince's statement was in fact that no other person was liable 'otherwise than as surety or co-principal debtor' for the debt or any part thereof 'save as may appear from any annexures hereto'. Accepting in the defendants' favour that VGV's liability in term of clause 3(iv) was not encompassed by the expression 'co-principal debtor', the fact is that the initial loan agreement was an annexure to the claim form,[2] and VGV's liability appeared from that contract.

[72] At one point in his evidence Van Zyl indicated that VGV did not regard the standard form document as constituting a contract at all between Quince and VGV. It was simply an 'order form' so that VGV could earn commission on the loan. However, that was not the defendants' pleaded case. They pleaded that the agreement should be rectified by the deletion of clause 3. They pleaded that the remaining terms of the agreement between Quince and VGV were those contained in the standard document.

[73] The case based on Nel's oral undertaking is misconceived. The general principle is that, except where the requirements for rectification are proved, reliance on an earlier oral promise is precluded by the conclusion of a later inconsistent written contract. Clause 3 of the written contract imposed certain obligations on VGV. The earlier alleged oral agreement was that there would be no such obligations. For similar reasons, the argument that, by virtue of the alleged breach of the oral undertaking, Quince is liable to VGV for damages in an amount equal to the amount for which VGV is liable to Quince in terms of clause 3(iv) is untenable.

[74] The case which treats Nel's oral statement as a misrepresentation (allegedly fraudulent) rather than a contractual promise also does not withstand scrutiny. Nel's

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[2] Record 10/906-907.

statement, as a representation that Quince would not seek to hold VGV liable on the undertakings in clause 3, could have been no more than Nel's belief as to how Quince would behave in the future. It was not shown that Nel misrepresented his own state of mind in that regard. He may well have believed that Quince would not sue VGV.

[75] Furthermore, Quince did not, at the time of the conclusion of the bridging finance agreement, make any misrepresentations. On Van Zyl's evidence, VGV's error was to assume that it could disregard the provisions contained in clause 3 because of an undertaking given sometime previously by Nel. That was its own mistake.

The additional loans - novation

[76] There is a presumption against novation because it involves a waiver of existing rights (Christie *The Law of Contract in South Africa* 6th Ed at 469). In that regard, Leon J said the following in *Woolfsons Credit (Pty) Ltd (Formerly Vavasseur (SA) Credit (Pty) Ltd) v Holdt* 1977 (3) SA 720 (N) at 724F-G:

'Moreover in the principal case the onus will lie upon the defendant to establish the defence of novation. Clear and cogent proof of such novation would be required in view of the fact that it involves a waiver of rights. (*Marendaz v Marendaz* 1953 (4) SA 218 (C) at pp 226-227.) Where an intention to novate is sought to be established by implication the intention must be "clear and unequivocal" because it is more likely that a creditor, who has an existing enforceable right, will intend, when he enters into any new arrangement in regard thereto, to reinforce rather than destroy that right and accept something else in its place. (*Trust Bank of Africa Ltd v Dhooma* 1970 (3) SA 304 (N) at p 307D-G.)'

[77] The defendants' case is that such obligations as Vexma and VGV had under the initial bridging financing agreement were superseded by the two additional loan agreements so that the rights and obligations under the initial agreement were discharged. In the case of VGV in particular, this requires one to find that Quince gave up the rights it had in terms of clause 3(iv).

[78] Unless a later contract expressly novates an earlier one, novation is generally a matter of inference from the terms of the new contract. I do not think that the terms of the two additional loan agreements were such as to bring about a termination of the rights and obligations under the initial bridging finance agreement. By the time the additional loan agreements were concluded Quince had already advanced the amount of the initial loan. The terms contained in the initial bridging finance agreement plainly continued to operate, for example in relation to the service fee and finance charges and the choice of *domicilia citandi et executandi*.

[79] The primary purpose for the coming into existence of the additional loan agreements was that Vexma needed additional funds in order to procure the transfers from which it could repay what it should long since have paid to Quince. The additional agreements regulated those further loans. To the extent that the standard financing agreement forms completed by Quince in respect of the additional loans have contractual force or reflect terms agreed orally or in correspondence, they deal exclusively with the additional loans. They make no reference to the initial loan.

[80] A waiver of Quince's rights under the initial agreement cannot be inferred from the fact that Quince, as a condition for agreeing to advance further funds, required undertakings that monies already owing to it be paid upon the transfer of the Mooizicht erven. The *causa* of the indebtedness in respect of the initial advance remained the initial bridging finance agreement. In this regard, reference can be made to *Adams v SA Motor Industry Employers Association* 1981 (3) SA 1189 (A) where a purchaser (the appellant), who had fallen into breach of his obligations under an agreement for the purchase of shares, signed an acknowledgment of debt. The sellers thereafter ceded their rights under the acknowledgment of debt to the respondent. Among the questions were whether the acknowledgment novated the purchase agreement and whether the acknowledgment could be ceded separately from the rights under the sale agreement. Jansen JA rejected the argument that an acknowledgment of debt could not found an independent cause of action unless it amounted to a novation, saying that there was no objection in principle to a second obligation arising in respect of an existing debt (1198E).

[81] When Van Zyl wrote to Le Roux on 15 June 2007 in respect of the first additional loan, there was no hint that the advancing of the additional sum would have any effect on the original loan. In his reply, Le Roux made only passing reference to the initial loan, enquiring whether there would be sufficient surplus from the proposed transfers to repay the additional loan as well as the original loan. The only undertaking Le Roux sought was that the amount of the additional loan together with interest and the initiation fee be repaid on date of transfer of the Mooizicht erven. Van Zyl responded by indicating that the surplus would be at least R1,65 million. He furnished the requested undertaking in respect of the additional loan. By no stretch of the imagination can this be regarded as a novation of the initial loan agreement. There was not even, as I see it, a contractual extension of time for repayment of the amount of the initial loan. Van Zyl was simply indicating, as a matter of practical reality, when and from what sources Vexma would be able to repay what it owed.

[82] The proposal that Quince take security in the form of a ceded mortgage bond originated from Van Zyl's response to Le Roux's email of 26 July 2007. The proposal was made because it now appeared that the residue available to Quince from the six Mooizicht transfers would be less than previously indicated by Van Zyl. It is hardly surprising that this was one of several proposals which Quince subsequently accepted. The ceded bond secured Vexma's indebtedness to Quince from any cause whatsoever and thus provided security in respect of the initial loan and the two additional loans. The taking of security in respect of an amount which a debtor already owes is not unusual and does not suggest an intention to novate. On the contrary, the ceded mortgage bond here did not itself create an indebtedness; the *causa* of the debts secured by the bond would need to be sought in other contracts.

[83] In the context of the second additional loan, the exchange of emails of late July 2007 record an agreement that VGV would pay Quince R1 662 700 upon transfer of the six Mooizicht erven and that the balance would be paid from the sale of the last two Mooizicht erven or other Nortje projects. Quince, in its amended particulars of claim, pleaded this arrangement as an extension of the due date for repayment. In context, the 'extension' would have related to the initial loan and the

first additional loan, because the second additional loan had not yet been advanced. I am somewhat doubtful whether there was in truth a contractual extension of the due date. Quince was shoring up its position by obtaining commitments as to when and how amounts, which were already due and payable, would in fact be paid. Be that as it may, the extension of time in relation to the initial loan and first additional loan can hardly be regarded as a novation of either of those contracts (cf *Estate Liebenberg v Standard Bank of South Africa Ltd* 1927 AD 502 at 507-508; *Optima Fertilizers (Pty) Ltd v Turner* 1968 (4) SA 29 (D) at 34D-G). The exchange of emails is entirely consistent with the understanding that there were two existing outstanding loans (the initial loan and the first additional loan), that there would now be a second additional loan, and that Quince was wanting to pin down when and from what sources the total amounts owed on the three loans would as a fact be repaid. This does not suggest a novation of the initial loan or the first additional loan. At most there was an extension of time.

[84] In the light of these conclusions, it is unnecessary to decide whether the non-variation clause in the initial agreement precluded reliance on novation and Quince's contention that VGV was not a party to the additional loan agreements.

The additional loans – the National Credit Act

[85] In my view, the defendants' contention that there was non-compliance with the National Credit Act in respect of the additional loans is a red herring. The issue was not raised on the pleadings. What Quince did plead (and this is common cause) is that, by virtue of s 4(1)(b), the National Credit Act did not apply to the initial loan agreement because Vexma was a juristic person and because the credit agreement was a 'large agreement' as contemplated in s 9(2)(c). On the defendants' case the same would have been true in respect of the novated agreement allegedly concluded in July/August 2007. As a matter of argument, however, the defendants contended in the court *a quo* that, on Quince's case (ie if there was no novation), the two additional loan agreements were governed by the Act and that there should thus have been compliance with the enforcement procedures of the Act. Although the point was not taken in the pleadings, one might say it was one of law in that it was

for Quince to allege and prove either that there had been compliance with the Act or that there was a relevant exemption.

[86] I do not see how the defendants can derive any assistance from supposed non-compliance with the National Credit Act in relation to the two additional loans. Quince did not claim that VGV was liable in respect of the additional loans. The only entity with a possible interest in non-compliance was Vexma. A s 129 notice was in fact sent to Vexma, albeit on the basis that the additional loans had been repaid and that the only outstanding balance was in respect of the initial loan. Vexma did not, in the magistrate's court proceedings, take any point of non-compliance with s 129 in relation to the additional loans. Indeed, its case was that the additional loans had been fully repaid. Furthermore, judgment was at some stage taken against Vexma. The matter is thus *res judicata* as between Quince and Vexma.

[87] In any event, the evidence sufficiently established that the National Credit Act was not applicable to the additional loans. Those loans were concluded in the period June-August 2007. One knows that Vexma at that time owned eight Mooizicht erven, that six of those erven had been sold for prices totalling more than R1,662 million, and that the remaining two erven had some value. Vexma's asset value thus exceeded the threshold contemplated in s 4(1)(a)(i). One also knows, by virtue of the numerous transfers registered during November and December 2006, that Vexma's turnover as a property developer must have exceeded the prescribed threshold.

[88] Finally, in view of the conclusion I have reached on the quantification issue below, and in particular regarding the appropriation of the payment of 10 October 2007, the enforceability of the two additional loan agreements in any event has no bearing on Quince's claim against the defendants arising from the initial agreement.

Quantification

[89] Le Roux gave evidence on the quantification of the indebtedness with reference to three loan schedules. There was no challenge to the accuracy of the calculations. There was some debate about whether the interest was usurious.

However, no such point was taken on the pleadings nor does the evidence disclose that the interest exceeded the maximum interest then permitted by law (by 'interest' I mean the monthly service fees and finance charges). The interest was high but the maximum permitted rates on short-term loans are typically high relative to more conventional lending.

[90] Based on the submission that Quince's claim was in truth one for damages, Mr van Reenen repeated the argument made to the magistrate to the effect that Quince had been required to prove the value of the last two Mooizicht erven and of the dividend likely to be received from Vexma's liquidation. In the event, and prior to the conclusion of the trial, the last two Mooizicht erven were sold for R80 000 each, and credit was allowed for this in the computation.

[91] As I said earlier, on my reading of the particulars of claim the primary cause of action was for specific performance, with damages as an alternative. I thus consider that Quince was entitled to sue the defendants for the outstanding indebtedness without taking into account the value of possible future recoveries from Vexma. In regard to the amount of R160 000 from the realisation of the last two Mooizicht erven, Quince would naturally not be permitted to make a double-recovery. In its final computation, Quince allowed a credit for this amount as at 23 March 2012. This may be regarded as generous to the defendants, because although the last two Mooizicht erven were sold by the liquidators on 27 August 2011, they had not yet been transferred when Mr October gave evidence on 22 June 2012. Quince would thus only have received the proceeds (which would have been less than R160 000 after deduction of costs) at some stage later.

[92] The only point that need be considered in relation to quantification is the appropriation of the payment made on 10 October 2007. The evidence I summarised earlier shows that there was no express or tacit declaration of an appropriation by either Vexma (or VGV, acting on its behalf) or Quince at the time the payment was made or received. The residual rules of appropriation thus apply (see Christie *op cit* at 444-447; *Zietsman v Allied Building Society* 1989 (3) SA 166 (O) at 177F-178C). Vexma's contention, when sued in the magistrate's court, was that the payment should first have been appropriated to extinguish the two additional

loans, because payment of them was due whereas payment of the initial loan was not. That contention is incorrect and was not advanced by Quince in the present proceedings. In my view, at least the initial loan and the first additional loan were due, because a period of 90 days had expired from the relevant dates of advance. Alternatively, to the extent that the email correspondence of late July 2007 has a bearing on due date, it affected the due date of all three loans in identical fashion. They thus ranked equally in that respect.

[93] One of the residual rules is that payment should be appropriated to a debt secured by a suretyship before an unsecured debt (*Northern Cape Co-Operative Livestock Agency Ltd v John Roderick & Co Ltd* 1965 (2) SA (O) at 73E-H; Wessels *Law of Contract* 2nd Ed para 2306(vii)). VGV's undertaking was not in my view a suretyship but one might reason by analogy that a similar rule should apply where, as here, the creditor has the benefit of a primary undertaking from a third party. However, if this is not the correct position, the same result would follow from the last residual rule, which is that where the debts are equal in all other respects payment should be appropriated to the oldest. (As I understand the law, the rule that payments are appropriated to interest before capital applies only where the payment has to be appropriated to the interest-bearing debt. Where there are two interest-bearing debts, payment is not appropriated to the interest of the later debt in priority to the capital of the earlier debt: cf *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (In Liquidation)* 1998 (1) SA 811 (SCA) at 829I-832C.)

[94] In argument Mr van der Merwe, relying on the rule that payment must be appropriated to the more onerous debt even if it is not the oldest, submitted that the two additional loans were more onerous because they bore interest at 36,5% *per annum* whereas the rate in terms of the initial agreement (service fee plus finance charges) was 36%. To this may be added that the standard forms used in the two additional loan agreements stated that interest would be capitalised annually whereas there was no provision for capitalisation in the initial loan agreement. However, the applicability of this rule of appropriation was not canvassed at the trial. Le Roux's evidence was that, in the case of the second and third loan agreements, the standard forms were only used for internal purposes. He also said that Quince at no stage capitalised interest. The email correspondence relating to the additional

loans did not record that the interest would be determined differently from the initial loan. There may well have been such an agreement but it does not appear from the evidence. Furthermore, if one includes the VAT component of the service fee charged in terms of the initial loan agreement, the monthly charge payable by Vexma was actually 38,68% whereas no VAT was charged on the interest levied on the additional loans (36,5%). Mr van der Merwe submitted that the VAT would not have affected Vexma because the VAT was a deductible input credit. However, VAT is accounted for in arrears so that Vexma would only have got the benefit of the input deduction (or refund) sometime after it had paid the full charge to Quince, ie there would have been some negative cash flow effect. I thus do not think it would be fair, as against the defendants, to base our decision regarding appropriation on the argument relating to the interest rates.

[95] One can see from the schedule relating to the first loan that, immediately prior to payment, the outstanding balance was R1 907 131,22 and that appropriation in full would have reduced this balance to R427 049,51 (rather than R571 022,68) as at 10 October 2007. The payment would naturally have been appropriated to interest on the initial loan and then to capital. The result is that all interest on the first loan was repaid and the reduced balance as at 10 October 2007 comprised only capital. Although there was some reference to the *in duplum* rule, it is clear that interest on the capital as at 10 October 2007 had not yet reached that capital amount at the time summons was issued in July 2009. The *in duplum* rule did not prevent interest from running in excess of the capital after that date (*Oneanate supra* at 832H-834I).

[96] The effect of my conclusion on appropriation is that Quince's claim is somewhat lower than claimed in the original summons and as updated in the final amended particulars of claim of 24 May 2012. The quantification, though tedious, is a matter of mere arithmetic. At the court's request counsel after the hearing submitted an agreed calculation up to 31 October 2014 on the basis of appropriating the payment of 10 October 2007 in full to the initial loan and allowing a credit of R160 000 as at 23 March 2012. This is reflected in the order below.

Conclusion

[97] For all these reasons I would uphold the appeal. Although Quince has not succeeded in full on the quantification issue, it has achieved substantial success. The appropriation issue took up virtually no time at the trial. I thus consider that Quince is entitled to its costs here and below. In accordance with the bridging finance agreement, those costs are to be paid on the attorney/client scale (I decline to go further and to approve attorney/own client costs).

[98] I would make the following order:

(a) The appeal succeeds with costs on the attorney/client scale.

(b) The order of the court *a quo* dismissing the appellant's action with costs is set aside and there is substituted an order in the following terms:

> 'The defendants, jointly and severally, are directed to pay the plaintiff:
>
> (i) R1 438 256,28 plus a service charge thereon of 1,6% per month plus VAT (simple, not compounded) and finance charges thereon of 16,8% per annum (simple, not compounded) from 1 November 2014 to date of payment.
>
> (ii) costs of suit on the attorney/client scale.'

Desai J:

[99] I concur and it is so ordered.

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DESAI J

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ROGERS J

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