THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case 8102/2020

In the matter between:

EAZI ACCESS RENTAL (PTY) LTD	**First Applicant**
EAZI ACCESS RENTAL HOLDINGS (PTY) LTD	**Second Applicant**

and

NETPRACTICE (PTY) LTD	**Respondent**

Coram: Rogers J

Heard on: 25 April 2022

Delivered: 3 May 2022 (electronically at 09h30)

JUDGMENT

ROGERS J:

Introduction

[1] The issue in this case is whether a sum of R1.6 million, which the applicants lent to the respondent (Netpractice) in terms of written loan agreements concluded in February 2013 and April 2015, is or is not repayable, having regard to the terms of an enterprise development agreement (ED agreement) which they concluded in September 2017. The second applicant was the initial lender. In July 2016, and with

Netpractice's written consent, the second applicant's rights, obligations and interest in the loan agreements were ceded and assigned to the first applicant. Since there is no issue about the first applicant's substitution in place of the second applicant, I shall simply refer to the applicants as Eazi Access, which is a reference to the first or second applicant as the context requires.

Events leading to conclusion of ED agreement

[2] What is in issue is the proper interpretation of the ED agreement. It is, however, necessary to place the ED agreement in context. It was to Eazi Access' advantage to score points for broad-based black economic empowerment (BEE) in terms of the Codes[1] promulgated in terms of the Broad-Based Black Economic Empowerment Act (BEE Act).[2] One way in which Eazi Access could score points was to lend money on favourable terms to a qualifying beneficiary. Netpractice was a qualifying beneficiary. This explains the conclusion of the loan agreements.

[3] The first loan agreement was concluded on 22 February 2013. In terms of this agreement, Eazi Access lent Netpractice R1.2 million. The money was to be repaid as and when possible but within 26 months, that is by not later than 22 April 2015. The loan would only attract interest if not repaid on due date. One of the default events which would entitle Eazi Access to take earlier enforcement action was Netpractice's failure to provide Eazi Access with certain documents which Eazi Access needed for its BEE audits. Netpractice also gave a warranty that the full value of the loan, multiplied by 1.25, would be recognised as an enterprise development contribution in terms of the BEE Act. In February 2015 the parties concluded an addendum to extend the repayment period from 26 to 36 months, that is to 22 February 2016.

[4] The second loan agreement was concluded on 28 April 2015. In terms of that agreement, Eazi Access lent Netpractice R400,000. The money was to be repaid as

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[1] At the time of the 2013 and 2015 loans, the applicable Codes then in force would have been the Codes of Good Practice on Broad-Based Black Economic Empowerment, 2007 (as amended). These Codes were substituted, with effect from 1 May 2015, by the Codes of Good Practice on Broad-Based Black Economic Empowerment, 2013. These various Codes were promulgated in terms of section 9(1) of the BEE Act.

[2] 53 of 2004.

and when possible but within 18 months, that is by not later than 22 April 2015. In all other respects the second loan agreement was on the same terms as the first.

[5] On 19 September 2016 the parties concluded a further addendum to the first loan agreement, and an addendum to the second loan agreement. In terms of these addenda, the repayment period of the first loan was extended from 36 months to 54 months, that is to 22 August 2017, while the repayment period of the second loan was extended from 18 months to 30 months, that is to 28 October 2017.

[6] One can assume that in 2013 and ensuing years, Eazi Access reaped the benefits of BEE points for enterprise development, as envisaged in the loan agreements, while Netpractice enjoyed the benefit of interest-free loans. The ED agreement was concluded in mid-September 2017, shortly after the expiry of the first loan's repayment date and shortly before the scheduled expiry of the second loan's repayment date.

[7] The immediate prelude to the conclusion of the ED agreement was an email which Ms Shernon Davis, a "senior transformation facilitator" with a firm called Transcend, sent to Eazi Access' Ms Catharina Delport, on 11 September 2017. She wrote:

> "Unfortunately the auditor is requesting an Enterprise Development agreement with Netpractice, not just the loan agreements.
> I will draft one today and back date it. If you could please assist in getting Megan and Netpractice to sign this some time this week?"

The "auditor" mentioned in this email was the auditor responsible for Eazi Access' BEE audit.

[8] Ms Delport promptly replied, "Not a problem. I will be on it once you send it through. Think it is better." About an hour later, Ms Davis emailed the draft agreement to Ms Delport with the message, "Please find attached for signature." Ms Delport immediately forwarded, to Netpractice's Mr Mpatle Ditabo, the email thread

of her exchanges with Ms Davis and the attached draft ED agreement, adding the following message:

> "Please can you sign the attached agreement and send back a scanned copy for myself. This is very important for our BEE audit that is underway. Please can you treat the matter with high importance."

The next day, 12 September 2017, Mr Ditabo emailed the signed agreement to Ms Delport with the following message:

> "See attached. Perhaps we should fit in a meeting sometime. I am sure we participate in other areas such as your procurement spend etc and help you *[sic]* maximise on the program."

Ms Delport's reply was that Eazi Access was doing a "focus on development" in October, and that they could arrange a meeting then.

[9] The signing of the ED agreement was not preceded by any oral discussion or negotiation. I understood both sides to argue the case on the basis that the ED agreement came into existence solely in consequence of the emails set out above.

The ED agreement

[10] The ED agreement was styled an "Enterprise & Supplier Development Agreement" but counsel were agreed that it did not contain terms dealing with "supplier development". The agreement bore the false pre-typed signature date of 28 February 2017. Clause 1.1 defined the "signature date" as "the date of signing of" the agreement by the party last signing. An outsider would have understood the "signature date" to be 28 February 2017, whereas it was in truth 11 or 12 September 2017.

[11] The agreement consists of three clauses. Clause 1.1 defines the "enterprise development period" as meaning "the 2017 calendar year period immediately following the signature date, or such longer period as the parties may agree in writing". Clauses 2 and 3 of the ED agreement read as follows:

“2 **INTRODUCTION**

2.1 The parties have agreed in principle that Eazi Access will assist Netpractice as its enterprise development beneficiary, toward enabling the growth and sustainability of the enterprise for the ‘enterprise development period’

2.2 The assistance offered is supported by the following process:

2.2.1 The development plan below was informed by the needs analysis conducted by the parties (annexure 1).

2.2.2 An enterprise development champion, David Miller, will oversee the implementation of the enterprise development and update the development plan on a 6-month basis.

2.3 Eazi Access undertakes to offer the following contributions:

Date	**Contribution type**	**Contribution format**	**Contribution value**
28 Feb 2017 – 27 Feb 2018	Enterprise Development Support	Loan outstanding	R1 600 000

2.3.1 This agreement will remain viable between Eazi Access and Netpractice for the next 1 years *[sic]*: 28 February 2017 – 27 February 2018. When this time period expires, an option of a renewed agreement satisfactory to both parties exist *[sic]*.

2.3.2 It is to the understanding of Eazi Access and Netpractice that this financial support is not repayable to Eazi Access, as long as the terms and conditions of their enterprise agreement (i.e. time commitment and quality of services rendered to Eazi Access) are adhered to.

2.4 Netpractice as the enterprise development beneficiary undertakes:

2.4.1 That the company is greater than or equal to 51% black owned. This status is evidenced through the empowerment declaration is attached in annexure 2 to this document.

2.4.2 The company is required to report in so far as is relevant to the nature of the contributions received, the use and impact of these contributions in the business. It is understood that this

information will be used exclusively for the purposes of accurately recording Eazi Access' supplier development reporting. Specifically, the following information will be shared with the rating agency:

- Needs analysis
- Development program with milestones
- Schedule of activities to address development areas
- Allocated Resources.

2.4.3 The company understands that this offer of support is given for the enterprise development period herein defined and does not in any way obligate Eazi Access for continued support outside this period.

CONFIDENTIALITY

2.5 The undertaking by Eazi Access not to disclose the confidential information shall not apply to any confidential information which becomes known to Eazi Access from a third party as a matter of right, or is published or otherwise becomes public property.

3 SUPPORT CLAUSE

The parties undertake at all times to act in good faith in their dealings with one another in regard to this MOU, the negotiation of the formal agreements, and the manner in which their future relationships will be conducted."

The annexures mentioned in clause 2.2.1 and 2.4.1 were not attached to the agreement and seemingly never came into existence.

Events subsequent to conclusion of ED agreement

[12] Later events may bear on the interpretation of the ED agreement. In October 2017, Mr Ditabo emailed Ms Delport about the possibility of a meeting in Johannesburg on two particular days. She replied that she was busy in a workshop on those days and that he should let her know when he would be in Johannesburg again.

[13] On 3 December 2017, Ms Delport emailed Mr Ditabo as follows:

> "As you know, the current agreement between Eazi Access Rental and yourselves has expired and the money was refundable in Oct 2017.
>
> Can you please indicate if you are in the position to repay the money at this point so I can take discussions further with my CFO on the way forward with our relationship."

When Mr Ditabo did not reply, she sent a chasing email on 14 December 2017 as follows:

> "Please can you reply to my previous email.
>
> Can you please send me your latest financials and confirm if you are in a position to repay the loan due to us and by when.
>
> We want to discuss the way forward with … Netpractice and Eazi."

On Monday, 8 January 2018, Ms Delport sent an identical chasing email. Mr Ditabo replied that he would respond by Wednesday. She sent him a reminder on 17 January 2018.

[14] On 18 January 2018, Mr Ditabo sent Mr Delport the following email:

> "Please accept my apologies for the delayed response. I am in between airports at the moment and only getting back to SA on the 31st January.
>
> Otherwise I had a look at the agreement and recent version we signed seems to [state] end of February as due date … [Be] that as it may, we are not in a position to settle and we would love to extend. I will send you financials as soon as possible and perhaps we can also arrange a meeting on the 1st or 2nd February."

[15] It is common cause that over the period January 2018 to January 2020 Eazi Access and Netpractice engaged in discussions in an attempt to agree further written extensions and addenda, but these were unsuccessful.[3] Mr Ditabo states that in February 2018 he and Mr Kenneth Jones, a business development expert, met with

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[3] Paras 43-4 of the founding affidavit, admitted in para 80 of the answering affidavit. The record does not include any correspondence which came into existence during these negotiations.

Ms Delport and Mr Miller (the "enterprise development champion" mentioned in the ED agreement). Mr Miller was present for only a short while. As far as Mr Ditabo could tell, Mr Miller thereafter did nothing in relation to Netpractice. Mr Ditabo introduced Mr Jones to Ms Delport as a person who would interact with Eazi Access for the purpose of generating an enterprise development plan and agenda and who would explore possible procurement opportunities with Netpractice and liaise with Eazi Access's IT manager to see whether Netpractice could provide IT support to Eazi Access.

[16] Mr Ditabo states that, after this meeting, Mr Jones made a series of attempts to meet with Ms Delport, but she seemed to have no interest in Netpractice's enterprise development and did not respond to his approaches.[4] In reply to these allegations, Eazi Access's deponent, Mr Kurt Blaize Wulfsohn, states that Eazi Access considered using some of Netpractice's software services and applications but they were not "fit" for Eazi Access, so no business resulted.

[17] About a year later, on 26 March 2019, Ms Delport emailed Mr Ditabo, asking him to assist with two documents for Eazi Access' BEE audit for the year ended February 2019, namely a "loan confirmation" from Netpractice, and Netpractice's latest BEE certificate. She attached the form of loan confirmation she needed. On the same day, Mr Ditabo emailed the required documents to her. The one document was a "loan balance confirmation", signed by Mr Ditabo and reading thus:

> "We hereby confirm the loan balance of R1 600 000.00 (One million six hundred thousand rand) due to Eazi Access Rental (Pty) Limited as at the 28 February 2019."

Ms Delport, in a replying email, thanked him for the documents, adding:

> "We might need to sign an addendum to the agreement in place to renew it till the end of Feb 2020. I will let you know.

[4] There are emails in the record sent by Mr Jones to Ms Delport on 19 February 2018 and 9 April 2018.

> Please can you indicate what your commitment could be towards a repayment on this loan monthly."

Mr Ditabo's responding email said that closer to his next visit to Johannesburg he would get in touch to set up a meeting with Ms Delport and Mr Miller.

[18] On 26 November 2019, some eight months later, Mr Wulfsohn sent an internal email to Ms Delport as follows:

> "Please find attached all the updated documents required for signature in regard to the Netpractice loan and the Enterprise Development Agreement. Please also note the Extract of Directors meeting which needs to predate the signed agreement (I have thus dated it 25 November 2019).
> I would also suggest if possible to get the confirmation of the balance on Netpractice letterhead of the loan of R1.6 million owing to Eazi Access Rental as at 29 February 2020 at the same time to avoid having to obtain this in the New Year (same format as last year attached). One would have to date this after 3 March 2020.
> Please shout if you require anything else or have any questions. Thanks for your assistance herewith.

[19] The attachments to Mr Wulfsohn's email included a new draft ED agreement. On 27 November 2019, Ms Delport forwarded Mr Wulfsohn's email and attachments to Mr Ditabo with the following message:

> "I trust you are well.
> It is that time again and we are in the process of getting our documentation ready for the BBBEE audit for next year.
> The company has decided to extend the loan to you (as attached) if you *[want?]* for a further period. If you are in agreement please sign the attached and send back to me.
> Please also draft and send a new confirmation letter as at Feb 2020 (attached an example) and also send me the latest BBBEE

certificate/affidavit and financial statements and the latest management accounts."

[20] In December 2019 Mr Ditabo left a voice message for Mr Wulfsohn to call him. Mr Wulfsohn seems not to have picked up the message. When this came to light in January 2020, Mr Wulfsohn on 20 January emailed Mr Ditabo in anticipation of a telephone call. He reattached the documents previously sent to Mr Ditabo, adding that

> "[t[he reason for the update is we need to extend the loan so as to extend the repayment date and as per requirements of the BBBEE codes."

[21] According to Mr Ditabo, he explained to Mr Wulfsohn in their telephonic conversation on 22 January that Netpractice was not prepared to sign an ED agreement on terms materially identical to the previous one, given the lack of enterprise development from Eazi Access and the manner in which Netpractice's attempts to engage with Netpractice had been disregarded. He conveyed to Mr Wulfsohn that he was very upset by the way Eazi Access had treated Netpractice.

[22] On 23 January 2020, Mr Wulfsohn emailed Mr Ditabo, saying that he was sorry that Mr Ditabo had been left feeling offended and frustrated, and he apologised for Mr Ditabo's "poor experience" with Eazi Access. He told Mr Ditabo that he would raise it with Eazi Access's new CFO, and that he was happy to manage Eazi Access' future dealings with Mr Ditabo. He concluded:

> "To confirm our discussions and the way forward, we agreed that you will call Rudi[5] to discuss the matter with him and also forward the documents for signature to your legal team for review. You will then revert to me in 8 weeks' time on the matter in order to finalise the way forward."

[5] This may be a reference to Mr Rudi Stumpf. In his answering affidavit, Mr Ditabo states that Netpractice's relationship with Eazi Access began in late 2012/early 2013 when he was approached by Mr Stumpf "who was associated with the second applicant". Mr Stumpf introduced Mr Ditabo to Mr Wulfsohn.

[23] The draft contracts sent to Mr Ditabo comprised a new ED agreement and addenda to the loan agreements. In terms of the loan addenda, the repayment period of the first loan was extended from 54 months to 102 months, that is to 22 October 2021, while the repayment period of the second loan was extended from 30 months to 76 months, that is to 28 August 2021.

[24] The new ED agreement defined the "enterprise development period" as "the 2019 and 2020 calendar years, or such longer period as the parties may agree in writing". Clauses 2 and 3 were substantially similar to the previous ED agreement. Clause 2.1 of the new draft was a recordal of the old ED agreement between the parties. Clauses 2.2 to 2.6 of the new draft were adaptations of clauses 2.1 to 2.5 of the old ED agreement. The new draft no longer referenced an annexure 1 in clause 2.3.1. The new "enterprise development champion" was Mr Marcus Coetzee, and the reference to updating the development plan on a six-monthly basis was jettisoned. Clauses 2.5, 2.6 and 3 of the draft were identical to the old agreement. Clause 2.4 of the new draft read as follows:

"2.4 Eazi Access undertakes to offer the following contributions:

Date	**Contribution type**	**Contribution format**	**Contribution value**
1 March 2019 to 31 July 2021	(Enterprise Development Support)	Interest Free Loan	R1,6 million as per loan agreements

2.4.1 This agreement will remain effective between Eazi Access and Netpractice for the period: 1 March 2019 – 31 July 2021 notwithstanding date of signature of this agreement. When this time period expires, an option of a renewed agreement satisfactory to both parties exists.

2.4.2 It is to the understanding of Eazi Access and Netpractice that this financial support of a waiver of interest on the loan amount is not repayable to Eazi Access subject to the terms of the loan agreements and the addendums thereto."

[25] In a telephonic discussion between Mr Wulfsohn and Mr Ditabo in February 2020, the latter – for the first time, according to Mr Wulfsohn – denied that Netpractice had any liability to Eazi Access under the loan agreements, claiming that Eazi Access had "written off" the loan amounts. There were unsuccessful settlement negotiations, leading to a letter of demand in March 2020 and the issuing of the present application at the end of June 2020.

The parties' contentions

[26] Eazi Access' contends that the ED agreement merely extended the interest-free loans to 27 February 2018 in a format acceptable to its BEE auditors. Some of the language of the draft supplied by Ms Davis was, it was submitted, ill-suited to the uncomplicated relationship between the parties. They did not require the needs analysis referred to in clause 2.2.1 – that had been done when the loans were initially advanced in 2013 and 2015. Since the enterprise development contribution was simply to allow loans to remain outstanding at no interest, there was no real need for an enterprise development champion or the updating of a development plan.

[27] Netpractice contends that the ED agreement brought about a fundamental change in the commercial relationship between the parties. The effect of clause 2.3.2, so it was contended, was to cause Netpractice's loan indebtedness to fall away at the end of the enterprise development period on 27 February 2018, provided up to that time it complied with its obligations under the ED agreement. Those obligations were admittedly modest – to retain black ownership of 51% or more and to report to Eazi Access in accordance with clause 2.4.2. In argument, Netpractice's counsel submitted that, subject to Netpractice's compliance with these obligations, the interest-free loan was converted to a grant when the enterprise development period ended on 27 February 2018.

Interpreting the ED agreement

[28] Contractual interpretation is a unitary exercise in which the court seeks to ascertain the parties' meaning as expressed in the language of their contract. The search for the parties' meaning is informed by the ordinary grammatical meaning of their language, unless such meaning gives rise to an absurdity. The language of a

contract is, however, no longer understood to have a self-defining ordinary grammatical meaning which can be rightly discerned by simply reading the contentious words. From the outset, those words must be read in the context of the contract as a whole and with due regard to the contract's apparent purpose and such circumstances giving rise to the conclusion of the contract as were known to both parties. A meaning that frustrates the apparent purpose of the contract or that leads to results which are not businesslike or sensible should not be preferred where an interpretation which avoids these consequences is reasonably possible.[6] It is also permissible to have regard to the parties' subsequent conduct if this casts light on their shared understanding of the contract's meaning.[7]

The language of the ED agreement

[29] In clause 2.3, the format of the contribution which Eazi Access was making was described as "loan outstanding", with a value of R1.6 million. It was not described as a "grant". The historical context known to both parties was that the "loan outstanding" was the sum of R1.6 million already advanced in terms of the loan agreements of 2013 and 2015. The ED agreement did not state that the previous loan agreements were being cancelled or that their terms, on matters not expressly regulated by the ED agreement, were no longer operative.

[30] Clause 2.3.1 specified a one-year period during which the ED agreement would remain "viable". In context, "viable" here must mean "in operation". Importantly, clause 2.3.1 went on to say that when the enterprise development period ended on 27 February 2018, "an option of a renewed agreement satisfactory to both parties exist[s]". The word "renewed indicates a renewal dealing with the same subject-matter, namely the outstanding loan of R1.6 million. If, as Netpractice would have it, the loan would be converted to a non-repayable grant at the end of the enterprise development period, there would be nothing to "renew". Of course, the

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[6] These principles are by now trite. For recent expositions, see *University of Johannesburg v Auckland Park Theological Seminary* [2021] ZACC 13; 2021 (6) SA 1 (CC); 2021 (8) BCLR 807 (CC) at paras 65-9 and *Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd* [2021] ZASCA 99; 2022 (1) SA 100 (SCA); [2021] 3 All SA 647 (SCA) at paras 39-51.

[7] *MTK Saagmeule (Pty) Ltd v Killyman Estates (Pty) Ltd* 1980 (3) SA (A) at 12F-H; *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) at para 14; and *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Ltd* [2012] ZASCA 126 at para 15.

parties could always conclude a different ED agreement in respect of some other enterprise development contribution, but they would have been free to do so anyway, regardless of whether the existing ED agreement was still in force or had expired.

[31] Clause 2.4.3 expressly stated that the enterprise development support offered in the ED agreement was given only for a one-year period and did not in any way obligate Eazi Access to grant "continued support outside this period". Self-evidently, Eazi Access would not have been obliged to grant Netpractice other enterprise development support, that is support unrelated to the outstanding loan of R1.6 million. It would have been unnecessary to make so obvious a point in the contract. More naturally, clause 2.4.3 was emphasising to Netpractice that Eazi Access would be under no obligation to allow the loan amount of R1.6 million to remain outstanding on an interest-free basis after 27 February 2018.

The purpose of the ED agreement

[32] The purpose of the ED agreement was twofold. First, it had the same purpose as the loan agreements, namely to provide financial support to a BEE beneficiary on favourable terms while allowing the lender to earn BEE points. Second, and uniquely, it was intended to formulate the parties' contract in terms acceptable to Eazi Access' BEE auditors. This latter circumstance was known to Mr Ditabo, because the email thread starting with Ms Davis' first email to Ms Delport on 11 September 2017 was forwarded to him when he was asked to sign the agreement.

[33] As to the first of these purposes, both an interest-free loan and a grant would have given Netpractice favourable financial support while allowing Eazi Access to earn BEE points.[8] In argument, Netpractice's counsel referred to the part of the Codes dealing with enterprise and supplier development.[9] In the formula for

[8] The measurement of enterprise and supplier development is dealt with in Amended Code Series 400 of the 2013 Codes. Item 9.1 of Series 400 lists the non-exhaustive forms which enterprise and supplier development may take.

[9] Counsel referred to the current version of the Amended Code Series 400. This includes a substantial amendment promulgated on 31 May 2019, which took effect on 30 November 2019, i.e. after the conclusion of the ED agreement. Nevertheless, in the respects mentioned by counsel, the form of Amended Code Series 400 in September 2017, when the ED agreement was concluded, seems to have been materially the same as the current version.

calculating the value of enterprise development by way of financial contributions,[10] a grant and an interest-free loan both use the amount of the grant or outstanding loan as the starting point. In the case of a grant, however, the "benefit factor" applied to the capital amount is 100% whereas in the case of an interest-free loan it is only 70%. Netpractice's counsel inferred from this that Eazi Access would earn more BEE points by making a grant than by merely allowing an interest-free loan to remain outstanding.

[34] Neither the affidavits nor the attached correspondence mention the supposed superior BEE scoring which Eazi Access could earn by converting the outstanding loan into a grant. There is simply no evidence that Eazi Access had any such intention or that Mr Ditabo believed Eazi Access to have any such intention. The initiative for executing the ED agreement came from corporate advisors in order to satisfy Eazi Access' BEE auditors. Since an interest-free loan was a qualifying form of enterprise development for purposes of the Codes, the BEE auditors would have had no reason to insist that the loan be converted to a grant. There is nothing to suggest that the draft ED agreement which Ms Davis supplied was intended to bring about such a result.

[35] Furthermore, since the distinction between grants and interest-free loans, for purposes of the Codes, was not canvassed in the papers, the argument by Netpractice's counsel – that Eazi Access' BEE scoring would have been optimised by converting the loan to a grant – cannot be accepted as necessarily correct. In reply, Eazi Access' counsel argued that the BEE points scored for making a grant were presumably scored only in the year in which the grant is made. In the case of an interest-free loan, by contrast, the financial support continues to be granted for as long as the loan is allowed to remain outstanding.[11] Over two or more years, the BEE points which Eazi Access could score by allowing an interest-free loan to

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[10] See Annexe 400B to Amended Code Series 400.

[11] Whether that is correct, in the light of item 4.11 of Amended Code Series 400, is not something on which I feel able to venture an opinion. Item 4.11 provides that where "[c]ontributions, programmes and/or initiatives that span over multiple years, the total contribution amount must be divided by the number of years, and the average per year is then to be utilised for the annual contribution". Assuming that this applies to interest-free loans, it is unclear how one would deal with the case of an interest-free loan which is initially advanced for only one year, with extensions being negotiated annually.

remain outstanding would exceed the points scored by a once-off grant. We also do not know how big a part Eazi Access' enterprise development contribution to Netpractice played in Eazi Access' overall BEE score. There is no evidence to justify the inference that the enhanced BEE value of financial support to Netpractice would have been sufficient to induce Eazi Access to write off the loan of R1.6 million at the end of February 2018.[12]

[36] As to the second purpose, I have already touched on the significance of the fact that the spur for the conclusion of the ED agreement was a requirement from Eazi Access' BEE auditors. The ED agreement was not concluded because the parties themselves saw the need for a change. Furthermore, upon receipt of the draft agreement from Ms Davis, neither party engaged in substantive discussions. This strongly suggests that they did not see the ED agreement as fundamentally changing the nature of their commercial relationship. One can infer, from the terms of the draft supplied by Ms Davis, that the BEE auditors required the provider of enterprise development finance not to be a passive funder but to be an active participant in the development of the beneficiary's enterprise; and that they required the beneficiary to report more fully to the funder than was provided for in the loan agreements. These features did not require the funding to be converted from loans to a grant.

[37] These considerations lead me to conclude that clause 2.3.2 is to be interpreted as meaning that the "financial support" constituting the enterprise development contribution, that is the "loan outstanding" of R1.6 million, would not, during the enterprise development period, be repayable as long as Netpractice complied with the terms and conditions of the ED agreement. The terms and

[12] At all material times (i.e. until the amendment of Amended Code Series 400 came into force on 30 November 2019), enterprise and supplier development carried a maximum score of 40 points out of 109 points; and of those 40 points, a maximum of 5 points could be scored for enterprise development in the form of financial contributions, the remaining 35 points being available for enterprise and supplier development in the form of preferential procurement and supplier development. In Eazi Access's BEE certificate issued on 20 April 2020 (record 132), it scored a total of 89.25 points out of a potential 109 points, of which 36.97 out of 40 were scored for enterprise and supplier development. At most, 5 of those 36.97 points were attributable to financial support, and of course Eazi Access might have financially supported a number of qualifying beneficiaries, not only Netpractice. It is unknown how many, if any, of the 5 points were attributable to Eazi Access' loan to Netpractice.

conditions of the ED agreement were, in the absence of a renewal, only binding on the parties during the defined enterprise development period. It was ongoing compliance during that period ("as long as") which was the condition on which the loan would be allowed to remain outstanding. If, during the currency of the ED agreement, there ceased to be compliance, the loan would be immediately repayable, and Netpractice would no longer benefit from the suspension to 27 February 2018. This served the important function of ensuring that Netpractice would not be entitled to the ongoing use of interest-free money if Eazi Access was, due to Netpractice's non-compliance, no longer entitled to the envisaged BEE points. There had to be reciprocity of benefit. This was a continuation, in different language, of the understanding contained in clauses 6.1.2 and 6.1.6 read with clause 9 of the loan agreements.

Subsequent conduct

[38] This interpretation is reinforced by the parties' later conduct. Over the period 3 December 2017-17 January 2018, Ms Delport sent Mr Ditabo four emails which conveyed in unambiguous language that Eazi Access regarded the loans as repayable. Ms Delport paid so little attention to the ED agreement that in her first email she said that the loans had become repayable in October 2017, thus disregarding the extension to 27 February 2018 brought about by the ED agreement. Be that as it may, it was not until 18 January 2018 that Mr Ditabo responded. When he did respond, he did not say that the sum of R1.6 million was not a repayable loan. What he said was that in terms of the most recently signed agreement (he was obviously referring to the ED agreement), the due date for repayment of the loans was only at the end of February 2018 (that is, the money had not become repayable in October 2017, as Ms Delport's first email said). And he did not claim that if Netpractice continued to comply with the ED agreement for the last few weeks of the enterprise development period, it would not have to repay the money at all. Instead, he said that Netpractice was not in a position to "settle" (that is, repay the loan) "and we would love to extend". No doubt in order to motivate an extension, he promised to send Eazi Access its financial statements as soon as possible.

[39] More than a year later, on 26 March 2019, Mr Ditabo was content to sign a document confirming a loan balance of R1.6 million due to Eazi Access as at 28

February 2019. He knew that this was a document on which Eazi Access would rely in its BEE audit.

[40] It is also common cause that over the period January 2018-January 2020 the parties were engaged in negotiations about "written extensions and addendums",[13] or – as Mr Ditabo himself put it in his answering affidavit – "good faith efforts to renew the [ED agreement].[14] As I have previously observed, if the loans ceased to be repayable at the end of the enterprise development period on 27 February 2018, there were no contracts requiring renewal, extension or addenda. They had all fallen away. This terminology would be inapposite to describe negotiations about a new enterprise development contract unrelated to the outstanding loan of R1.6 million.

[41] Mr Ditabo's email of 18 January 2018, the loan confirmation, and the ongoing negotiations for a renewal or extension, reflect a state of mind which accords with the interpretation of the ED agreement for which Eazi Access contends. It is irreconcilable with the stance Mr Ditabo adopted with Mr Wulfsohn in February 2020 and with which he now persists. One cannot but wonder whether his belated volte-face was brought about by an argument suggested to him by a lawyer.

[42] In the answering affidavit, Mr Ditabo has given a garbled explanation for having signed the loan confirmation. He says that he "had to provide" such a letter, as it was one of the source documents Eazi Access needed to claim enterprise development points. He believed that Eazi Access was entitled to claim those points. He had no objection to providing the confirmation, as "this was the very benefit [Eazi Access] was entitled to for having concluded the [ED agreement]". He claims that his understanding at the time (March 2019) was that the sum of R1.6 million had been "subsumed" by the ED agreement, which had stipulated that the amount was not repayable provided Netpractice complied with its obligations under the ED agreement. Although the signed confirmation "confirmed the loan amount under the [ED agreement]", it did not state that the amount of R1.6 million was repayable or

[13] Founding affidavit at paras 43-4, admitted in answering affidavit at para 80.

[14] Para 5 of the answering affidavit.

that interest was accruing on it: “The letter confirmed no more than the obligation under the [ED agreement”].[15]

[43] This confusing explanation does not make sense. If Netpractice only had to comply with the ED agreement until the end of the enterprise development period, and if, at that point (27 February 2018), the erstwhile loan ceased altogether to be repayable, the loan (which had, on this version, been converted to a grant by the end of February 2018), was irrelevant to Eazi Access’ BEE score for the period March 2018-February 2019; and in any event, Netpractice was under no contractual obligation to provide BEE documentation to Eazi Access as at March 2019. Mr Ditabo does not explain the meaning of his cryptic sentence that the confirmation letter “confirmed no more than the obligation under the [ED agreement]”. That sentence must mean that he believed in March 2019 that there remained in existence, as at 28 February 2019, an obligation by Netpractice to Eazi Access in respect of the sum of R1.6 million.

[44] Counsel for Netpractice submitted that, because negotiations continued between the parties over the period January 2018-January 2020, Mr Ditabo’s email and his signing of the loan confirmation were explicable on the basis that he expected the parties to come to terms. I cannot accept that submission. First, it is not a version which Mr Ditabo himself has put up. Second, if Mr Ditabo thought the ED agreement had the effect for which he now contends, he could not have been expecting a further agreement dealing with the erstwhile loan of R1.6 million, because it would have become a non-refundable grant at the end of February 2018. Even if he expected the parties to conclude a new agreement relating to some other form of enterprise or supplier development, such expectation would have been no basis for his treating the sum of R1.6 million as a repayable loan. The ongoing negotiations, as he himself admitted in the present proceedings, were negotiations about “further written extensions and addendums”, not negotiations about a new enterprise or supplier development.

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[15] Answering affidavit at paras 39-40.

[45] Counsel for Netpractice argued that the changes in the new draft sent to Netpractice on 27 November 2019 show that the earlier signed ED agreement must have meant something different. I disagree. For present purposes, the most important feature of the new draft is the clear assumption that the sum of R1.6 million still remained owing as a loan. The drafter could not have thought that the previous agreement provided for a discharge of the loan indebtedness. It was Mr Ditabo who attached the new draft to his answering affidavit. He did not highlight any change in wording. On the contrary, he said that the new draft was "materially similar to" the old ED agreement.[16] He claimed that Netpractice could not sign a new ED agreement on those terms, because it would create the misleading impression that Eazi Access was providing enterprise development to Netpractice, "whereas absolutely no such support was being provided". He did not say that the new draft was unacceptable because it revived a discharged indebtedness.

[46] Because the answering affidavit did not highlight and attach significance to changes in formulation, the changes were not addressed in the replying affidavit. The result is that there is no evidence as to why the changes were made or of the extent, if any, to which they gave effect to the ongoing negotiations between the parties. The main changes in clauses 2.3 and 2.4 were to emphasise the interest-free nature of the loan and to make explicit reference to the loan agreements. The old agreement, while clearly referencing the money lent under the loan agreements, had failed to spell this out. There was thus, for example, no explicit statement in the old agreement that until 27 February 2018 the loan amount would not attract interest nor any provision as to the rate of interest which would apply as from 27 February 2018 or as from any earlier date on which Netpractice fell into breach. Particularly in the absence of a whole-contract clause in the signed ED agreement, there is no difficulty in concluding that the loan agreements continued to be operative save where their terms were inconsistent with the ED agreement, but one can understand why the drafter of the new agreement might have thought it best to say so explicitly. In the absence, however, of evidence, this is speculation.

[16] Answering affidavit at para 47.

Conclusion and order

[47] For these reasons, the application must succeed. The amount which Netpractice must pay, inclusive of interest up to the end of May 2020, has been properly established by certificates which Netpractice has not challenged.

[48] As to costs, the loan agreements entitle Eazi Access to claim costs "as between attorney and own client", and Eazi Access sought such an order. Leaving aside the question whether the word "own" in this formulation has any meaning and can be the subject of a court order, the contractual provisions do not deprive the Court of its discretion on the matter of costs. I do not think that costs on any special scale should be awarded.

[49] My reason for confining Eazi Access to party and party costs is this. In the founding affidavit, Mr Wulfsohn alleged that the ED agreement was concluded "on or about 28 February 2017", and this allegation was confirmed by the person who signed the ED agreement on Eazi Access' behalf. This allegation was false. Eazi Access failed to disclose the emails of September 2017 which gave rise to the signing of the agreement on 11 or 12 September 2017. This was disreputable, as was the backdating of the ED agreement. Depending on the circumstances, parties may properly agree that their contract will be effective from a date earlier than the date on which it is concluded, but it is never acceptable to misrepresent the date on which a contract is signed. The backdating in this instance was clearly intended to be relied upon by the BEE auditors as evidence that on 28 February 2017 the parties had committed themselves to act, for a one-year period, in accordance with the terms of the ED agreement. In truth, the ED agreement was concluded at a time when only slightly more than five months of the enterprise development period remained. Even then, both parties seem to have disregarded the terms of the ED agreement, and their contract proclaimed the existence of annexures which did not in truth exist.

[50] Thus, as a mark of the Court's disapproval, I will confine Eazi Access to ordinary costs. Its conduct is not so egregious, however, as to disentitle it to costs altogether, having regard *inter alia* to the fact that Netpractice was itself partially

complicit in the misrepresentations made in the ED agreement and that it has opposed the application on a basis I regard as contrived.

[51] The following order is made:

1. The respondent shall pay to the first applicant:
   (a) an amount of R1,354,765; and
   (b) interest thereon at the rate of 7.25% per annum, calculated from 1 June 2020 to date of final payment;
   (c) an amount of R451,588.33;
   (d) interest thereon at the rate of 7.25% per annum, calculated from 1 June 2020 to date of final payment.
2. The respondent must pay the applicants' costs.

O L ROGERS
Judge of the High Court

For the Applicants: W Strobl instructed by LDA Incorporated Attorneys.

For the Respondent: G Kairinos SC instructed by TWB – Tugendhaft Wapnick Banchetti & Partners.