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

CASE NO: A07/2023

In the matter between:

MANDY PETZER

Appellant

And

KAREN DIXON

Respondent

Heard: 17 March 2023

Delivered: 24 March 2023

This judgment was handed down electronically by circulation to the parties' representatives via email and released to SAFLII. The date and time for hand-down is deemed to be 24 March 2023 at 10h00.

JUDGMENT

LEKHULENI J

INTRODUCTION

[1] This is an appeal against the whole judgment granted against the appellant by the Cape Town Magistrates Court on 12 August 2022 for payment of R47,000 plus interest payable to the respondent pursuant to a personal loan of R117 000 advanced by the respondent to the appellant on 18 March 2014.

[2] The respondent issued summons against the appellant on 30 July 2019 in which she claimed the sum of R47 000 arising from a personal loan agreement she advanced to the appellant. In the summons, the respondent averred that on 18 March 2014 at Cape Town, she lent and advanced the sum of R117 000 to the appellant in terms of an oral loan agreement. The loan was repayable on demand, with interest at 10 percent per annum. The respondent pleaded that the appellant paid her the sum of R70 000 on 30 August 2016, leaving the balance of R47 000 due and payable.

[3] The appellant defended the claim and raised two defences. The appellant admitted the loan but averred that the loan agreement conflicted with the provisions of the National Credit Act 34 of 2005 ("the NCA") in that the respondent was not a registered credit provider at the time of the loan agreement. The appellant also instituted a counterclaim and sought to rectify the settlement agreement between the appellant and the respondent in which the respondent sold her shares to the appellant. The appellant pleaded in her counterclaim that the parties' settlement agreement extinguished the R47 000 that the respondent claimed against her.

[4] The trial court dismissed the appellant's defences and the counterclaim and granted judgment in favour of the respondent. The appellant seeks to overturn this finding. The appellant further seeks an order in this court to uphold the appeal with costs, dismissing the respondent's claim in terms of the loan agreement.

THE FACTUAL MATRIX

[5] The appellant and the respondent ("the parties") became friends around 2008 – 2009 through a mutual friend. They got acquainted and became friends to the point where they spent much time together. They met each other's families and attended each other's weddings. It came to pass that the appellant wanted to purchase a

franchise from Sorbet. The appellant wanted her own business, and as friends, they started to talk about it.

[6] The appellant and the respondent decided to start the business, and a lot of funding was required to set up the business. The parties agreed that each would fund a portion of the capital into the business and get shareholding therein. The parties further agreed that the respondent would have 35 percent shareholding in the company and the appellant would have 65 percent shareholding. The respondent provided her 35 percent capital contribution. Unfortunately, the appellant could not fund her 65 percent share of the funds required to start the business. To assist her, the respondent provided the appellant with a loan of R117 000 to enable the appellant, as a friend, to realise her desire to set up a Sorbet franchise business under the company, Kandy & Co (Pty) Ltd.

[7] The respondent funded the appellants' share of the capital from her extra access bond facility which she had with the bank. The respondent knew that the appellant was eager to pursue the opportunity of opening a franchise. She knew that with these funds, the appellant would pursue an opportunity that she really wanted. The loan was made available to the appellant on the basis that the appellant would pay the same interest rate that the bank was charging the respondent. The effect of this was that the respondent would not make any profit on the loan to the appellant. The overall purpose of the loan was to assist the appellant as a friend and to do her a favour.

[8] The respondent testified in the court *a quo* that she was not in the business of loaning people money. She testified that she had never before lent money to anybody else and only made this loan to the appellant because of their friendship. She valued the friendship she had with the appellant, and it is something that she would not do for anyone else. She would not even do it for all her friends. Her relationship with the appellant was exceptional, and she thought it was the right thing to do.

[9] During the business operation, the parties had to make another additional capital injection to the business. The appellant paid the sum of R70 000 on behalf of

the respondent, thus reducing the loan amount from R117 000 to R47 000. At the beginning of 2019, the respondent urgently needed to exit the business operation due to her work commitments to W[...]. The parties agreed that they would get a valuation of the respondent's shares to see how much they were worth. They decided they would get three valuations; one from the franchise Sorbet, one from their accountant, and one from an independent external party.

[10] The shareholding was valued, and after several email exchanges, the appellant eventually made an offer to the respondent. On 12 February 2019, in an email addressed to the respondent, the appellant made the following offer: 'My full and final offer is R672 500 for all outstanding loans and your 35 percent shareholding in Kandy & Co (Pty) Ltd'. The appellant also noted that this is her full and final offer of what she is prepared to pay the respondent. The appellant agreed to pay this amount as follows: R100 000 within seven days of the signature of the agreement and, thereafter, a minimum of R23 854 per month for 24 consecutive months on the first of every month commencing on 01 April 2019.

[11] Attached to that email was a draft sale agreement of the respondent's shares to the appellant and a resolution for the respondent to resign as a director. The two documents were attached for the respondent's signature. The attached sale of shares agreement did not refer to the settlement of any loans. The appellant informed the respondent that there was nothing more she could offer, and should the respondent not accept her offer, she would have to wait until the appellant sold the business in two to three years, and this would mean that the respondent would still be obliged to meet the requirements from the franchisor as a shareholder and to meet all the operating requirements.

[12] On 13 February 2019, the respondent emailed correspondence to the appellant. In it, the respondent stated, among other things, that, as far as she understood, her loan account with the company was settled. The respondent stated that she has agreed to the amount of the respondent's offer for her shareholding. The respondent also stipulated in her email that she requested the appellant three times the balance of the loan amount ('R47 000') between them. She was not sure why the appellant was not answering her on this. The respondent requested the

appellant to give her feedback on this so that she could plan ahead. In response, the appellant informed the respondent that there was a smaller amount due. However, she will check the respondent's loan account and revert.

[13] On 15 February 2019, the respondent signed the sale of shares agreement and returned same to the appellant for signature. The appellant as well signed the agreement. It is worth repeating that the sale of shares agreement did not include the outstanding loans that the appellant referred to in her email attaching the agreement. On 21 February 2019, the respondent sent an email to the appellant in which she sought clarification regarding the R47 000 loan amount that was still due and outstanding. In that email, the respondent informed the appellant that all other loan accounts were paid except the personal loan that she made to the appellant. There was no response to this correspondence. On 08 March 2019, the respondent wrote a follow-up email to the appellant stating that a shortfall of R47 000 was still outstanding from the loan advanced to the appellant.

[14] In response, on 23 March 2019, the appellant informed the respondent via email that she was still waiting for the 2019 figures to be completed and signed off and that once that was done she would revert. However, on 02 June 2019, the appellant informed the respondent that her offer of 12 February 2019 included the personal loan settlement. She denied being indebted to the respondent for the sum of R47 000 or any sum of money.

[15] Pursuant thereto, the respondent issued summons against the appellant and claimed payment of the loan balance in the sum of R47 000. On the other hand, the appellant defended the action and raised the two defences discussed above to the respondent's claim.

[16] The appellant contended that to the extent that her email of 12 February 2019 was inclusive of all outstanding loans and expressly stated that it is in full and final settlement of the respondent's claim, the respondent's claim against her has been extinguished. As explained above, the appellant also instituted a counterclaim in which she sought the rectification of the sale of shares agreement to reflect that against payment of the purchase consideration of shares, the appellant's

indebtedness to the respondent on account of the loan agreement of 18 March 2014 was extinguished and that neither party would have a claim against the other arising out of the loan.

THE DISPUTED ISSUES

[17] From the foregoing, this court finds that there are two issues for consideration in this matter. The first issue is whether the court *a quo* was correct in finding that the NCA does not find application in this matter and, *secondly*, whether the outstanding balance due under the personal loan agreement was settled in terms of the sale of shares agreement concluded between the parties on 15 February 2019, in terms of which the appellant purchased the respondent's 35 percent shareholding in Kandy & Co (Pty) Ltd. These issues will be considered in turn below.

RELEVANT LEGAL PRINCIPLES AND DISCUSSION

The applicability of the NCA

[18] The appellant contends that the credit agreement between the parties conflicted with the NCA as the respondent was not registered as a credit provider when the loan agreement was concluded. The appellant ostensibly relied on section 40(4) of the NCA, which provides that a credit agreement entered into by a credit provider who is required to be registered in terms of subsection 1 but who is not so registered is an unlawful agreement and void to the extent provided for in section 89. Meanwhile, the respondent pleaded that the NCA did not apply to their loan agreement because the parties did not deal with each other at arm's length when they concluded the personal loan agreement.

[19] Section 4(1) of the NCA provides that the NCA applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, save for a few exceptions. Section 4(2)(b)(iv) states that parties are not dealing at arm's length in any agreement in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction. Simply put, the NCA does not

apply to credit agreements concluded between parties where the parties are not dealing at arm's length.

[20] The term "arm's length" is not defined in the NCA however; the term is circumscribed for purposes of greater certainty in section 4(2)(b) of the NCA. For present purposes, the relevant parts of section 4(2)(b) provides as follows:

'(2) For greater certainty in applying subsection (1)-

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

(i) a shareholder loan or other credit agreement between a juristic person, as consumer, and a person who has a controlling interest in that juristic person, as credit provider;

(ii) a loan to a shareholder or other credit agreement between a juristic person, as credit provider, and a person who has a controlling interest in that juristic person, as consumer;

(iii) a credit agreement between natural persons who are in a familial relationship and- (aa) are co-dependent on each other; or (bb) one is dependent upon the other; and

(iv) any other arrangement-

(aa) in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction; or

(bb) that is of a type that has been held in law to be between parties who are not dealing at arm's length.'

[21] In *Heydenrych v Forsyth* 2022 JDR 1655 (GJ) para 19, the court noted that although the NCA does not define dealing at arms' length, it is apparent that the legislature intended that credit agreements between natural persons who are (a) in a familial relationship, and who are co-dependent on each other or where the one is dependent upon the other, and (b) any agreement where each party is not independent of the other and does not strive to obtain the utmost advantage out of the transaction, are not within arm's length and thus not susceptible to the provisions of the NCA.

[22] In *casu*, the respondent averred that the NCA does not apply to the personal loan agreement concluded between them as the parties did not deal at arm's length when they entered into the personal loan agreement. At the hearing of this appeal, *Mr Van der Linde*, who appeared for the appellant, argued that the court *a quo* placed undue weight on the oral evidence of the respondent that she believed that the loan was not conducted at arm's length. Counsel contended that the court *a quo* did not consider whether the appellant and the respondent were independent of each other when the contract was concluded.

[23] It is worth mentioning that the wording of section 4(2)(b)(iv)(aa) of the NCA discussed above is a codification of the dictum of Trollip JA, in *Hicklin v Secretary for Inland Revenue* 1980 (1) SA 481 (A) at 495 A-B, where the learned justice describes the arm's length criterion as follows: 'It connotes that each party is independent of the other and, in so dealing, will strive to get the utmost possible advantage out of the transaction for himself.'

[24] In this case, the appellant and the respondent had a closely knitted friendship. The respondent testified that she became involved in opening the Sorbet franchise with the appellant because she knew it was something the appellant wanted. If not for that, she would not have become involved in opening the said business. When the appellant could not raise her 65 per cent share of the capital required to start the business, the respondent was willing to assist her and provided the appellant with a personal loan of R117 000. This loan enabled the appellant, her close friend, to realise her dream of setting up the Sorbet franchise business.

[25] It is common cause that the appellant funded the loan from an access bond facility she had with her bank. The loan was made available to the appellant on the basis that the appellant would pay the same interest rate the respondent was being charged by her bank. The appellant would repay the respondent the same amount plus interest that the respondent would have paid the bank on the amount withdrawn from her access bond account. The respondent stood to gain nothing from the loan agreement transaction. During the trial at the court below, the respondent testified that the loan agreement was concluded on terms that did not benefit her. She did not profit from the loan, but for all intents and purposes, she just wanted to help her friend start a business.

[26] In my view, the parties were not independent of each other. The appellant sought the respondent's assistance for financial support to fund her share of the capital. The respondent was a silent partner and needed the help and expertise of the appellant to start and operate the franchise business. From the evidence led at the court *a quo*, it cannot be said that the parties strove to gain the maximum possible benefit for themselves out of the transaction. To the contrary, the parties assisted each other as acquaintances. Even after the expiration of five years since the loan was concluded, the respondent only claimed what was agreed upon. She only charged the appellant the interest she paid to the bank. She did not charge the appellant penalties on the arrears. She loaned the appellant R117 000, and the latter paid her R70 000 leaving a balance of R47 000 due and payable. She claimed this amount in her summons at the court *a quo* and nothing more.

[27] In the circumstances, I am of the view that the NCA does not find application in this matter. The appellant and the respondent were certainly not dealing at arm's length. See *Cloete v Van Den Heever* NO 2013 JDR 1075 (GNP). In my opinion, the transaction between the parties fell within the ambit of the provisions of section 4(2)(b)(iv) of the NCA discussed above.

[28] Furthermore, I share the views expressed by *Mr Engelbrecht*, who appeared for the respondent, that the respondent was in any event not required to be registered as a credit provider to lawfully conclude the personal loan agreement in

that the personal loan agreement was concluded on 18 March 2014. At that time, section 40(1) of the NCA provided as follows:

‘(1) A person must apply to be registered as a credit provider if –

(a) That person, alone or in conjunction with any associated person, is the credit provider under at least 100 credit agreements, other than incidental agreements; or

(b) The total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold (‘R500 000 at the time’) prescribed in terms of section 42(1).’

[29] The respondent’s evidence was that her loan to the appellant was the first she had ever made to anyone. It was only for R117 000. The respondent was not in the business of lending credit to consumers. She did not strive to benefit or profit from the loan. This was the once-off transaction that she concluded to assist her friend. See *Friend v Sendal* 2015 (1) SA 395 (GP). But in any event, as pointed out by *Mr Engelbrecht*, the total of the loan to the appellant of R117 000 plus the loans advanced by the respondent to the company of R67 245, and even including other amounts paid by the respondent during 2014 for the franchise to be purchased and commence business of R221 722, i.e. R405 967, fell below the R500 000 threshold at the time.

[30] In my view, the respondent was not required to be registered as a credit provider at the time of the conclusion of the personal loan agreement. Thus, section 40(4) of the NCA does not apply. Given these considerations, it follows that the court *a quo* was correct in its conclusion that the NCA does not find application to the loan agreement between the parties. This leads me to the alternative defence raised by the appellant that the sale of shares agreement extinguished the respondent's claim.

Rectification of the sale of shares agreement

[31] The appellant contended that the written sale agreement concluded between the parties on 15 February 2019, in which the respondent sold her shares in Kandy & Co to the appellant, does not correctly reflect the parties' agreement or common intention. The appellant contended that the sale of shares agreement did not record the settlement of the respondent's claim under the personal loan agreement against the appellant. The appellant asserts that this was caused by a bona fide mutual mistake between the parties.

[32] *Mr Van der Linde* argued on behalf of the appellant that on a plain reading of the appellant's offer to the respondent of 12 February 2019, to which the sale of shares agreement was attached, two things are suggested: *first*, that the offer is for all outstanding loans, and *secondly*, that the offer is also for the 35 percent sale of the shares. He contended that the court *a quo* erred in dismissing the appellant's counterclaim seeking the rectification of the sale of shares agreement to reflect that that sale agreement was inclusive of all outstanding loans that the appellant owed the respondent. It was asserted on behalf of the appellant that the reference to *all outstanding loans* in the appellant's offer (in the 12 February 2019 email) included the respondent's claim under the personal loan agreement.

[33] Meanwhile, *Mr Engelbrecht* argued on behalf of the respondent that the respondent understood the reference to loans in the appellant's offer to be referring to her business loans to the company and not the personal loan to the appellant. *Mr Engelbrecht* argued that the respondent did not understand it to include her claim regarding the personal loan agreement, which she considered separate from the company's business. He submitted that when the respondent signed the share sale agreement, for all intents and purposes, it was for the sale of her shares in the business and nothing else.

[34] For the sake of completeness, the email correspondence incorporating the alleged offer is reproduced hereunder and states as follows:

"My full and final offer is R672 500 for all outstanding loans and your 35 % shareholding in Kandy & Co (Pty) Ltd.

This is my full and final offer and what I can and am prepared to pay you.

I simply cannot pay you more and don't know where I'm going to get the money.

My intention will be to pay you a lump sum of R100 000 within 7 days of signing and the balance of R572 500 to be paid off in monthly instalments of R23833 33 each over 24 months.”

[35] It is trite that a document that incorrectly records the contract between two parties may be rectified to conform to the common intention. In such a case, the parties are in agreement, and what is rectified is not the contract itself as a juristic act but the document in question because it does not reflect what the parties intended to be the content of their juristic act. See Hutchison and Pretorius (eds) *Law of Contract in South Africa* 4 edition (2022) at 121. Thus, the rectification of a written agreement is a remedy available in instances where the agreement, through a common mistake, does not reflect the true intention of the contracting parties or where it erroneously does not record the agreement between the parties. See *P V v E V* (843/2018) ZASCA 76 (30 May 2019) para 16.

[36] The predominant requirement for rectification is a common continuing intention of the parties, which is not reflected in the agreement. See *B v B* [2014] ZASCA 14 para 20. In *Tesven CC v South African Bank of Athens* [1999] 4 All SA 396(A) para 16, the Appellate Division, as it then was, held that ‘to allow the words the parties actually used in the documents to override their prior agreement or the common intention that they intended to record is to enforce what was not agreed, and so overthrow the basis on which contracts rest in our law.’

[37] The onus is on the party claiming rectification, in this case, the appellant, to show, on a balance of probabilities, that it should be granted. In *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 (6) SA 29 (SCA), the Supreme Court of Appeal held that such an onus is difficult to prove and a party

seeking to obtain a rectification must show the facts entitling him to obtain that relief in the clearest and most satisfactory manner.

[38] In *casu*, and during the trial at the court *a quo*, both parties acknowledged that they distinguished their loans to the company and the respondent's loan to the appellant. During cross-examination, the respondent testified that in their dealings, the personal loan to the appellant and the loan account to the company were always treated separately. In her evidence in chief, the appellant as well distinguished the two loans. She testified that the respondent made a loan to her personally and to the company. In her email correspondence to Rudi Rudolf and Robyn Zinman of Sorbet on 09 November 2018, requesting them to give her the fair price of the respondent's shares in the company, the appellant expressly informed them that she intended to deal with the respondent's loan account in the company separately from the sale of the shares.

[39] In harmony with this approach, the appellant sent a written draft agreement to the respondent regarding the sale of the respondent's shares in the company. The draft agreement was sent to the respondent under cover of the email dated 12 February 2019. The draft agreement was silent on the outstanding loans and only dealt with the sale of shares, the purchase price, and the payment plan. This was consistent with the intention of the parties throughout their business exigencies to keep the loan to the company, the personal loan to the appellant, and the sale of the respondent's shares separately.

[40] This conclusion, in my view, is fortified by the subsequent email correspondence exchanged between the parties immediately before the contract was signed and soon after the sale agreement was concluded. For instance, the appellant's email of 12 February 2019 to the respondent, referring *to all outstanding loans*, is indicative that the sale of shares agreement and the personal loan are two distinct juristic acts and the parties intended to treat it as such. The contents of this email are different from the draft agreement. In her email of 13 February 2019, the respondent made it abundantly clear to the appellant that she has agreed to the amount of her offer for her shareholding. She further stressed that her loan account

with the company had been settled. However, what was due was the personal loan which she demanded payment from the appellant three times to no avail.

[41] As pointed out by *Mr Engelbrecht*, and correctly so in my view, it is apparent from the respondent's response that she interpreted the appellant's reference in her email of 12 February 2019 *to all outstanding loans* as a reference to her loan account in the company. The respondent considered her claim against the appellant under the personal loan agreement as a separate matter.

[42] Interestingly, and in response to the respondent's email demanding payment of the shortfall, the appellant did not inform the respondent that her offer of 12 February 2019 to the respondent included the personal loan. Instead, the appellant reiterated that she remembered that the respondent loaned her R117 000, and she paid back R70 000. The appellant further indicated that she felt another smaller amount was due but would check and revert.

[43] Crucially, even after signing the agreement, the respondent continued to demand payment of the balance of the loan. On 21 February 2019, the respondent wrote to the respondent and informed her that the only issue still remaining was the personal loan agreement. She wrote another follow-up email on 8 March 2019, demanding the shortfall of R47 000 from the appellant.

[44] From the mosaic of all the evidence, it is evident that the respondent did not consider the agreement reached on 15 February 2019 to have included a compromise of the personal loan agreement. For more than once, she demanded the repayment of the shortfall immediately before the agreement was signed and soon after the agreement was signed. Significantly, the appellant did not dismiss the respondent when she demanded the balance of the loan. The appellant did not inform the respondent that the personal loan was settled as part of the agreement concluded on 15 February 2019. In response to the respondent's demand for the shortfall, on 23 March 2019, the appellant informed the respondent that she was still waiting for figures (financials) to be completed and signed off and would revert once this was done.

[45] In my view, the appellant's response of 23 March 2019 to the respondent's demand for the shortfall is diametrically opposed to her version. The appellant's response is inconsistent with the appellant's version that there was a common intention between the parties that the agreement reached on 15 February 2019 compromised the respondent's personal loan claim against the appellant. If indeed there was such common intention, the appellant would have easily dismissed the respondent and indicated to her that her claim was extinguished in terms of their agreement. It was an utter surprise that on 2 June 2019, the appellant asserted for the first time that her offer of 12 February 2019 included the personal loan settlement.

[46] I believe that this version is contrived and engineered by the appellant to avoid paying the respondent her money. It seems to me the defence the appellant raised five months after the sale agreement was signed was an afterthought. The respondent has demanded payment of the shortfall amount consistently. She made it clear and in no uncertain terms to the appellant more than once that the outstanding balance due in respect of the personal loan was not extinguished. She was unequivocal that the balance of the loan did not form part of the agreement to sell her shares to the appellant.

[47] Furthermore, during her evidence in the court below, the respondent was consistent that she never understood nor intended that the sale of shares agreement would compromise her claim for the payment of the balance of the loan. It is further common cause that the appellant did not challenge her on these averments even after the sale of shares agreement was signed. The belated email of 2 June 2019 appears to have been a plan that the appellant contrived to escape liability. In my view, the respondent's version in this regard is corroborated in all material respects by the appellant's email correspondences dated 13 February 2019 and 23 March 2019, discussed above.

[48] On a conspectus of all the evidence placed before court, I am of the view that the appellant has failed to prove on a balance of probabilities a continuing common intention in terms of which the parties had agreed that the respondent's claim under the personal loan agreement would be compromised as part of the sale of shares

agreement. The court *a quo* was correct in dismissing the appellant's defence and her counterclaim for rectification.

[49] In view of the above considerations, it follows that the appellant's appeal must fail.

ORDER

50. In the result, I would propose the following order:

The appeal is hereby dismissed with costs.

LEKHULENI JD
JUDGE OF THE HIGH COURT

I agree and it is so ordered:

CLOETE J
JUDGE OF THE HIGH COURT