REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: HC-MD-CIV-ACT-CON-2019/00478

In the matter between:

ARYSTEQ FINANCIAL SERVICES (PTY) LTD **PLAINTIFF**

and

QUINTO OCKHUIZEN **DEFENDANT**

Neutral citation: *Arysteq Financial Services (Pty) Ltd v Quinto Ockhuizen* HC-MD-CIV-ACT-CON-2019/00478 [2022] NAHCMD 16 (21 January 2022)

Coram: Schimming-Chase J
Heard: **7, 8 and 10 June 2021; 23 September 2021**
Delivered: **21 January 2022**

Flynote: Statute – Interpretation – Banking Institutions Act, 2 of 1998 – Legislature's intention – Statute construed as a whole – Banking business – Prohibition of conducting banking business by persons not authorised to conduct banking business – Creating criminal offence – Prohibition to be restrictively interpreted – Does not render agreement null and void in absence of express provision to that effect

Contract – Essential allegations in claim for rectification – Written agreement; written document incorrectly reflecting parties' intention, both parties intended to

conclude agreement, including terms relating to interest payment; mistake in failing to include the interest clause.

Evidence – Witness – Calling, examination and refutation – Failure to call material witness – Circumstances in which adverse inference to be drawn.

Summary: Plaintiff and defendant concluded written loan agreement. Plaintiff applied to rectify certain terms of the agreement relating to payment of interest on the capital amount, which plaintiff alleged was discussed and agreed during oral negotiations preceding signature of agreement. Plaintiff's draftsman forgot to include clause in the final draft. Claim for reification was instituted on grounds of mistake common to parties. Defendant pleaded that the agreement was null and void because plaintiff effectively conducted banking business in lending money to defendant without being authorised to do so in terms of the Banking Institutions Act, 2 of 1998. Defendant also denied that the agreement fell to be rectified.

Held, even if plaintiff was running a banking business and not authorised to lend the money, the Banking Institutions Act did not expressly visit voidability for non-compliance with its provisions.

Held, as regards the question of rectification, defendant elected not to testify and favour the court with his version of the events leading to the conclusion of the agreement, where the clause sought to be rectified was discussed and agreed on. Plaintiff's evidence on this score was not meaningfully tested and accordingly plaintiff's evidence on the fact that the term relating to interest was discussed and agreed to prior to signature was accepted by the court. Plaintiff discharged its onus in this regard.

ORDER

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1. The written agreement concluded between the parties dated 19 June 2017 is hereby rectified by the insertion of a new sub clause described and numbered as clause 5.1.2 to read as follows:

> 'The borrower, Quinto Ockhuizen, undertakes to pay the monthly interest of the loan (presently an amount of N$18 983.26) on or before the 10th day of each succeeding month into the bank account referred to in paragraph 5.3 of the agreement at Nedbank Namibia, Account Number: 1199 022 1466, Branch code: 461-617, Business Centre Windhoek, held in the name of Simonis Storm Securities (Pty) Ltd. The borrower shall be entitled, if he so wishes, to pay greater instalments into the abovementioned bank account of the lender, which would then constitute a reduction in the capital in respect of the additional amount paid.'

2. The defendant is ordered to pay the plaintiff's costs of suit.

JUDGMENT

SCHIMMING-CHASE J

[1] The plaintiff and defendant in this action entered into a written loan agreement ("the agreement") on 19 June 2017.[1] In terms of the agreement, the plaintiff agreed to lend to the defendant an amount of N$1, 25 million, repayable according to the terms of the agreement.

[2] It is the plaintiff's case that the agreement does not correctly record the agreed terms between the parties in that it fails to provide for the monthly interest payable by the defendant, as well as the manner and place in which the interest payment should be effected.

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[1] In para 3 of its particulars of claim the plaintiff avers that the agreement was concluded on 14 June 2017. The date of signature of the agreement annexed to the particulars records that the agreement was concluded on 19 June 2017.

[3] According to the plaintiff's version of events – which is disputed on the pleadings by the defendant – during oral negotiations, the parties agreed to the contractual terms which would govern the loan agreement, including certain terms governing the monthly interest payable by the defendant. These terms were, however, inadvertently omitted from the written agreement due to an oversight by the draftsman who reduced the agreed terms to writing. The plaintiff avers that both parties signed the agreement in the bona fide but mistaken belief that the agreement recorded the true agreement between the parties. Plaintiff thus seeks an order for rectification of the agreement to insert the excluded terms.

[4] Prior to instituting this action in February 2019, the plaintiff demanded rectification of the agreement from the defendant by means of a letter dated 8 October 2018, which demand was rejected by the defendant.

[5] The defendant noted his defence of the plaintiff's action, the basis of which can be summarised as follows. Although the defendant does not dispute that the parties entered into the written loan agreement, he pleaded that the plaintiff concluded same within the course of its business, which may he described as "banking business", as defined in section 1 of the Banking Institutions Act, 2 of 1998 ("the Act"). The defendant further pleaded that in terms of the Act, the plaintiff is proscribed from conducting banking business as it is not authorised to do so in terms of Act. The plaintiff was thus acting in contravention of section 5(1) of the Act, which in terms of the Act is a criminal offence. It is the defendant's case that in consequence of the plaintiff's alleged contravention the agreement concluded between the parties is 'unlawful, illegal, null and void' and the sought rectification would therefore amount to a nullity.

[6] The defendant further denied that the parties had concluded an agreement concerning the monthly repayment of the interest during the oral negotiations, or that there was any mistake as regards the drafting and preparation of the agreement. However, in the event that it be found there was a mistake, the defendant averred that – based on the plaintiff's pleadings – such mistake was unilaterally and exclusively made by the plaintiff.

[7] In replication, the plaintiff denied that it acted as a banking institution in granting the loan to the defendant and therefore denied that the agreement was unlawful, illegal or null and void. It pleaded however that in the event that the court should find in favour of the defendant, then the plaintiff claims immediate repayment of entirety of the outstanding loan as well as all arrear interest.

[8] The plaintiff also took issue with the manner in which the defendant formulated his plea, namely that he did not definitively state whether he admits or denies the provisions relating to the repayment of the interest being omitted from the agreement, nor did he state whether such omission was an error and should be rectified. The plaintiff further contended that the defendant was required to state whether his case was that in light of the alleged illegality of the agreement, he was never required to pay any instalments in respect of the interest or the capital.

[9] The parties filed a pre-trial report enumerating the issues of law and fact for determination by this court. These issues can be tapered down to the following: Firstly, whether the agreement concluded by the parties is illegal by virtue of the provisions of the Banking Institutions Act, and therefore null and void; and secondly whether or not the plaintiff is entitled to the sought rectification.

[10] Before delving into the evidence adduced during the trial and the parties' respective arguments, it bears noting that counsel for the defendant applied for absolution from the instance after the plaintiff closed its case, which application was dismissed. The defendant did not call any witnesses after the application for absolution was dismissed and closed his case.

[11] The plaintiff called two witnesses to testify on its behalf, namely Mr Purvance Heuer and Mr Andrew Jansen. Their evidence, which is of relevance to the determination of the issues before court may be summarised as follows:-

The evidence of Mr Heuer

[12] Mr Heuer testified that he is a director of the plaintiff, which according to his recollection was duly registered as a company in 2014, but only became operational during 2015.

[13] The plaintiff is a subsidiary of Lexus Securities (Pty) Ltd and thus a sister company of Simonis Storm Securities (Pty) Ltd. The plaintiff's function in the group is to lend money to borrowers. In order to perform this function the plaintiff makes use of an account at Simonis Storm Securities, which account is in the plaintiff's name.

[14] Mr Heuer had been a part of the plaintiff since its inception, in which he shared charge of the company's operations; the lending of money and arrangements with borrowers regarding the agreements, and ensuring that such borrowers pay the interest and capital back to the company.

[15] Mr Heuer testified that the defendant, who is also a qualified chartered accountant, approached the plaintiff for a loan in the amount of N$1,25 million. According to Mr Heuer, he had two meetings with the defendant. During the first meeting he and the plaintiff had a discussion about the loan and the assets the defendant would pledge as security for the loan. During the subsequent meeting the defendant was advised of the terms of the agreement.

[16] Mr Heuer referred to defendant's loan statement[2] which indicated that the loan was advanced in various tranches over a period of four months, from 19 June to 14 September 2017, after the defendant had signed the loan agreement.

[17] The loan statement further reflects that the defendant paid an amount of N$322,517 towards repayment of the loan during February 2018, shortly whereafter the defendant borrowed a further amount of N$100,000 on 2 March 2018. Thereafter Mr Heuer and the defendant had a further meeting during which Mr Heuer advised the defendant of terms of relating to the payment of interest, which would be on a monthly basis.

[2] Exhibit A3.

[18] According to Mr Heuer, it was agreed that the interest would be paid monthly on the amount outstanding as per the monthly statement which the defendant would receive every month. The capital of the loan, however, would be repaid as and when and according to the amount of stock the defendant was able to sell.[3]

[19] Mr Heuer testified that thereafter, he prepared the agreement and made an appointment with the defendant for signature. Mr Heuer signed the agreement on behalf of the plaintiff, and the defendant signed it in his personal capacity.

[20] Mr Heuer testified further that despite the parties' agreement that the interest provisions on the loan was payable on a monthly basis, the inclusion of the term under clause 5 of the agreement was mistakenly overlooked by him during its preparation.

[21] Mr Heuer pointed out that the defendant had made regular monthly payments on the interest, as agreed, during the first year of the loan. This however ceased around March 2018 when the defendant began experiencing financial difficulties. Mr Heuer testified that payment was demanded from the defendant and that he was provided with monthly statements reflecting the outstanding amount on the loan.

[22] During cross-examination Mr Heuer was questioned on the type of business conducted by the plaintiff. He confirmed that the plaintiff is a financial services business. He testified that they did not receive funds from the public, but from private investors and shareholders. It was his understanding of the Act that it was not necessary for the plaintiff to register as a banking institution as they did not receive funds from the public.

[23] When confronted with the omission of the terms from the agreement

[3] At the time in question the defendant was trading in automotive parts. It was agreed that repayment of the loan capital was linked to the defendant's sale of stock. This is not in dispute.

which the plaintiff seeks to rectify, Mr Heuer confirmed that he was the draftsman of agreement, and that the error in including the interest terms previously discussed and agreed to, was made by him alone and not by the defendant.

[24] Mr Naude on behalf of the defendant put to Mr Heuer that the agreement expressly states that it constitutes the sole record of the agreement between the parties; that in terms of the contract neither party would be bound by any terms, express or otherwise, other than what is recorded in the agreement, and that the written agreement supersedes and replaces all prior commitments. Mr Heuer's response was that he merely wanted the written agreement to reflect the true intentions of the parties. Mr Naude reiterated his point that the intention referred to was not recorded in the agreement and therefore did not form part of the agreement.

[25] After having concluded his re-examination of the witness, Mr Vaatz for the plaintiff requested an opportunity to question Mr Heuer on an aspect he had forgotten to deal with in re-examination. His request was granted, and defendant's counsel was also granted an opportunity to question the witness on anything raised during the additional re-examination..

[26] Mr Vaatz asked the witness whether the plaintiff's auditors had ever expressed any concerns surrounding the plaintiff's business activities and its registration. Mr Heuer responded that the auditors had never raised such concern.

[27] Mr Naude questioned the whether the plaintiff, which is a private company, was registered with any organisation to perform its financial services. Mr Heuer testified that the plaintiff is duly registered. It was put to him that the plaintiff had not registered as a banking institution as the plaintiff is not a public company as required by the Act. Mr Heuer disputed this, stating "No, we did not register with…because we believed that we were not receiving funds from the public".

The evidence of Andrew Jansen

[28] Mr Jansen was the second witness to testify on behalf of the plaintiff. In a nutshell, Mr Jansen's evidence-in-chief is that he is a director of Simonis Storm Securities (Pty) Ltd, which he testified is a separate entity from the plaintiff. Although the defendant had been previously employed by the Simonis Storm Securities (Pty) Ltd, the loan in question was granted to the defendant by the plaintiff

[29] Mr Jansen denied that the plaintiff was neither authorised nor entitled to grant the loan to the defendant in terms of Namibian law. He also denied that the law requires every person to who lends money to another to be registered as a banking institution in terms of the Act to enable such person to enter into an agreement such as the one concluded by the parties.

[30] He further testified that, the defendant who describes himself as a 'qualified chartered accountant' had entered into the agreement without objection and had not raised any of the issues complained of in his amended plea prior to summons being issued.

[31] Mr Jansen corroborated the evidence of the first witness during cross-examination, stating that the plaintiff had never raised funds publicly. He also corroborated Mr Heuer's evidence during re-examination, confirming that the plaintiff's auditors had never questioned the legality of the plaintiff's business activities.

[32] During the trial the plaintiff sought an amendment of prayer 1 of its particulars of claim, to include the account into which payment of the interest is to be made. Although the amendment was initially opposed, the defendant acquiesced to the amendment and same was granted.

[33] As already mentioned, this court was tasked with determining the following: Firstly, whether the agreement concluded by the parties is illegal by virtue of the provisions of the Banking Institutions Act, and therefore null and

void; and secondly whether or not the plaintiff is entitled to the sought rectification.

[34] As determination of the second issue will be necessitated only if the court finds in the negative regarding the first issue, I will first deal with the purported illegality of the agreement.

The Banking Institutions Act, 2 of 1998

[35] The purpose of the Act according to its long title is, inter alia, 'to provide for the authorisation of a person to conduct business as a banking institution' and 'to protect the interests of persons making deposits with banking institutions'.

[36] The defendant's main gripe is that the plaintiff, whom it alleges conducts banking business as defined in the Banking Institutions Act, is not authorised to do so in terms of the Act.

[37] Section 1(1) defines banking business as business that consists of –

> '(a) the regular receiving of funds from the public; and
> (b) the using of funds referred to in para (a), either in whole, in part or together with other funds, for the account and at the risk of the person conducting the business –
> (i) for loans or investments; …'

"Authorised" for purposes of the Act, is defined as meaning authorised under the Act to conduct banking business.

[38] Section 5(1)(a) proscribes unauthorised persons from conducting banking business.[4]

[4] 'Section 5 (1) No person shall –
(a) Conduct banking business;
…
unless such person is under this Act authorised to so conduct business as a banking institution.'

[39] Contravention or failed compliance with the provisions of s 5 amount to a criminal offence in terms of s 72 of the Act, which visits convicted offenders with either a fine not exceeding N$1 million or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment.[5]

Applicable case law

[40] In *Claud Bosch Architects CC v Auas Business Enterprises Number 123 (Pty) Ltd*[6] the Supreme Court had to determine whether the Architects' and Quantity Surveyors' Act, 13 of 1979 prohibits an agreement by a non-natural person to provide architectural services and whether the Act intends that such an agreement is void and unenforceable.

[41] The facts of the case are briefly as follows: the appellant, a close corporation, instituted action proceedings in this Court for the recovery of money due to it for architectural services rendered to the respondent. The appellant's sole member was a duly qualified architect and registered as such in terms of the Architects' and Quantity Surveyors' Act. The respondent raised an exception that the contract relied on by the appellant was concluded in violation of the Architects' and Quantity Surveyors' Act, which prohibits any person other than a natural person from performing architectural work for gain. The High Court upheld the exception, finding in favour of the respondent which contended that the agreement between it and the appellant was unenforceable as a result of the prohibition.

[42] In its interpretation of the Architects' and Quantity Surveyors' Act, the Supreme Court followed the oft-quoted approach referred to in *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC*[7]:

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[5] Section 72(2)(a) of the Act.

[6] *Claud Bosch Architects CC v Auas Business Enterprises Number 123 (Pty) Ltd* 2018 (1) NR 155 (SC).

[7] *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC* 2015 (3) NR 733 (SC).

'[18] South African courts too have recently reformulated their approach to the construction of text, including contracts. In the recent decision of *Natal Joint Municipal Pension Fund v Endumeni Municipality* Wallis JA usefully summarised the approach to interpretation as follows –

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used.'"

[43] The Supreme Court confirmed the common law position that agreements prohibited by law are unenforceable by virtue of the maxim *ex turpi causa non oritur actio* ('from a dishonourable cause, an action does not arise'). This principle is absolue and admits no exception.[8]

[44] The applicable section (s 13 of the Architects' and Quantity Surveyors' Act), however, did not expressly prohibit non-natural persons from entering into agreements to provide architectural services which are in turn performed by a registered architect. Furthermore, the Supreme Court found that the prohibition in s 13 being visited with criminal sanction, is to be construed in accordance with the cannons of construction of statute – so as not to deprive rights unless expressly stated.

[8] *Moolman and another v Jeandre Development CC* 2016 (2) NR 322 (SC) at 78.

[45] The Supreme Court accordingly set aside the High Court's finding and ordered that the respondent's exception be dismissed.

[46] The Act neither expressly nor impliedly prohibits agreements by unauthorised persons conducting banking business. It does not state that transactions flowing from the offensive act prohibited by s 5 are of no force, null or void. It visits criminal sanctions on those who conduct banking business when they are not authorised to do so.

[47] Where a statutory provision does not itself expressly provide that such transaction is null and void and of no force and effect, the validity of the transaction depends on the intention of the Legislature.[9]

[48] The criminal sanction imposed on persons who contravene s 5 of the Act speaks to the purpose of the Act which is to protect depositors against the loss of their deposits with persons not authorised to conduct the business regulated by the Act. In following the approach of the Supreme Court in *Bosch*, the criminal sanction provided for in s 72 is to be construed in accordance with the cannons of construction of statute, which require that rights are not deprived unless expressly stated. To interpret the Act to prohibit agreements such as the one concluded by the parties would be to unjustly deprive rights of the plaintiff and allow the defendant, who had accepted the loan from the defendant, to escape liability therefrom.

[49] Based on the above, the agreement is considered valid and binding on the parties.

[50] Having concluded that the Act does not expressly prohibit the conclusion of loan agreements entered into by unauthorised persons conducting banking business, I find it unnecessary to make a finding on whether or not the plaintiff is indeed conducting banking business without authorisation. in contravention of

[9] *Claud Bosch* para 55 quoting the court in *Hubbard v Cool Ideas* 1186 CC 2013 (5) SA 112 (SCA).

the Act. In any event, the Act empowers the Bank of Namibia to investigate any persons whom it believes to be conducting banking business in contravention of s 5 and to take appropriate action against such persons if they are found to be in contravention.

Rectification

[51] Generally, there are three classic mistake situations in contract. These are:

(a) where the parties contract without *consensus ad idem;*

(b) the parties contract under a mistaken common assumption; and

(c) the parties contract in terms of a written agreement, which incorrectly records the terms they intended.

[52] The mistake pleaded by the plaintiff falls into the third category, in which case the court may rectify the agreement to record to the true intention of the parties.[10]

[53] A party who wants a rectification must allege and prove the following:

(a) an agreement between the parties which was reduced to writing;

(b) the written agreement did not correctly reflect the common intention of the parties;

(c) an intention by both parties to reduce the agreement to writing; and

[10] B R Bamford 'Rectification in Contract' – SALJ Vol LXXX 1963 at 528.

(d) a mistake in drafting the written agreement (which may have been the result of a *bona fide* mutual error or an intentional act of the defendant in this case); and

(e) the wording of the agreement as rectified.[11]

[54] The plaintiff pleaded and presented evidence that the parties had orally negotiated the terms of the agreement, including those relating to the monthly repayment of interest on the capital loan. When the plaintiff's Mr Heuer drafted the agreement, he erroneously omitted to include the terms sought to be rectified and the agreement was signed by the defendant. It was however the intention of both parties that the agreement reflect the terms relating to interest and both parties signed the agreement under the bona fide but mistaken belief that the agreement recorded the true agreement between the parties.

[55] As mentioned earlier in this judgment, the defendant opted not to give evidence during the trial and closed his case after his application for absolution was dismissed. Counsel for the defendant submitted that as the plaintiff had failed to prove its case for rectification or to satisfy its onus it was unnecessary to have called the defendant to testify.[12]

[56] This court in making a determination as to whether the plaintiff has made out a case for rectification can only consider the evidence before it, which is that of the plaintiff, given the defendant's election not to place its opposition to this aspect of the claim in evidence. He was available to elucidate the facts, having concluded the agreement with Mr Heuer of the plaintiff. [13]

[57] It was not put to the plaintiff's witnesses in cross examination, that the defendant denied that the interest payment clause which was omitted was not

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[11] *Futeni Collection (Pty) Ltd v De Duine (Pty) Ltd* 2015 (3) NR 829 (HC); *Denker v Cosack and Others* 2006 (1) NR 370 (HC).

[12] (Para 19 – 20 of the defendant's heads of argument).

[13] *Pexmart CC and Others v H Mocke Construction (Pty) Ltd and Another* 2019 (3) SA 117 (SCA) at par [69] and [70].

agreed between the parties. Also, it was not in dispute that the defendant had initially made interest payments in terms of the clause sought to be rectified. The only other aspect raised in cross examination, and not pleaded, was the existence of a non-variation clause in the agreement, which in any event, is not a bar to a claim for rectification.
[14]

[58] Therefore, despite the plaintiff's onus, the veracity of the plaintiff's evidence with regards to the agreement, the negotiations preceding its conclusion, and basis of its claim for rectification was not meaningfully tested during the trial.

[59] It was put to Mr Heuer that the mistake in omitting the terms was unilateral and exclusively his, which Mr Heuer conceded. I however understood Mr Heuer's testimony to be that although he – as the draftsman – failed to include the term in the agreement as a result of an oversight (which was admittedly his own), the parties were both under the *bona fide* assumption that the terms governing repayment of the monthly interest were included in the agreement.

[60] In light of the foregoing, I find that the mistake was a result of a *bona fide* mutual error, and the plaintiff has on a balance of probability met the requirements in this regard.

[61] A copy of this judgment will be transmitted to the Bank of Namibia.

[62] The following order is made:

1. The written agreement concluded between the parties dated 19 June 2017 is hereby rectified by the insertion of a new sub clause described and numbered as clause 5.1.2 to read as follows:

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[14] *Leyland (SA) (Pty) Ltd v Rex Evans Motors (Pty) Ltd* 1980 (4) SA 271.

"The borrower, Quinto Ockhuizen, undertakes to pay the monthly interest of the loan (presently an amount of N$18 983.26) on or before the 10th day of each succeeding month into the bank account referred to in paragraph 5.3 of the agreement at Nedbank Namibia, Account Number: 1199 022 1466, Branch code: 461-617, Business Centre Windhoek, held in the name of Simonis Storm Securities (Pty) Ltd. The borrower shall be entitled, if he so wishes, to pay greater instalments into the abovementioned bank account of the lender, which would then constitute a reduction in the capital in respect of the additional amount paid."

2. The defendant is ordered to pay the plaintiff's costs of suit.

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EM Schimming-Chase

Judge

APPEARANCES

PLAINTIFF	Andreas Vaatz Andras Vaatz & Partners
DEFENDANT	Abraham Naude Dr Weder, Kauta & Hoveka Inc.