IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG.

CASE NUMBER: 434755/2019

(1) Reportable:
(2) Of interest to other Judges: No
(3) Revised: Yes

Date 22 June 2022

The matter between

DISSILIO INVESTMENTS PTY LTD PLAINTIFF

AND

NEDBANK LTD DEFENDANT

Heard on: 2-4 March 2022

Decided on: 5 May 2022

Summary: **Bank charging early repayment of a loan fee as well as a breakage fee despite full and final settlement agreement concluded.**

ORDER

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1. The defendant is not entitled to levy a breakage cost nor to levy an early repayment fee.

2. The defendant must refund the plaintiff the full breakage fee in the amount of R1 107 556.78.

3. The defendant must refund to the plaintiff the full early repayment fee of R1 080 470.58.

4. Interest a temporae morae at the legal rate.

5. The defendant shall pay the costs of suit, including the reserved costs of 2 November 2020.

JUDGMENT

VICTOR J

Introduction

[1] At the heart of this matter lies the proper interpretation of a Loan Agreement together with two addenda. During the trial the Loan Agreement and the Addenda were referred to as Annexures A, B and C. Specifically, the proper interpretation of clause 2.2.3 in Addendum C to the Loan Agreement is central and reads as follows:

> "This Agreement constitutes the whole agreement between the Parties as to the subject matter hereof and no agreement, representations or warranties between the parties other than those set out herein are binding on the Parties."

[2] This action brings to the fore the more recent developments on the proper interpretation of contracts.

Parties

[3] The plaintiff in this matter is Dissilio Investments Pty Ltd, a private company which was formed at the instance of the defendant as a special purpose vehicle for transacting the loan finance it made available to the Plaintiff. The defendant is Nedbank Ltd, a duly incorporated and registered bank with its principle place of business at Sandown.

The facts

[4] On or about 15 October 2013 the defendant lent and advanced a bank loan to the plaintiff for the purpose of financing a retail centre development in Heidelberg, Gauteng, south of Johannesburg. The plaintiff held a 25 percent undivided share in the development project. The amount loaned was R122 800 000.00. The loan term was 75 months from date of registration of

the mortgage bond or from date of the advance of the loan to the plaintiff and consisted of advances for a building period of 15 months and an amortisation period of 60 months being 75 months altogether.

[5] The schedule to the signed Property Loan Agreement, Annexure A made provision for various charges which included a bank service fee of R2.8 million to be capitalised to the loan.

[6] During August 2013 and also in September the parties duly represented on the part of the plaintiff by Mr Jaron Jacob Tobias and Mr Jacobus Marthinus Johannes Coetzer acting on behalf of the company to be formed and one Ms Brenda Sithole and Mr Mbuso Mashinini acting for the defendant, agreed to enter into a loan agreement for the development as described.

[7] That agreement was formalised on or about 5 November 2013 with the plaintiff duly represented by the same parties and the bank also represented by its duly authorised employees and the purpose of the loan, as indicated, was for the development of a shopping mall complex known as the Heidelberg Shopping Mall.

[8] The plaintiff participated in the development project to the extent of 25 percent; there were other parties in the project, including Flanagan and Gerhard who held a 50 percent share and another investor for the remaining 25 percent. The amount loaned by the defendant to the plaintiff in terms of the loan agreement was R122 800 000.00. The loan agreement Annexure A provided for the plaintiff to repay the loan early and the early repayment clause is found at 5.4 of the Agreement.

[9] On 10 April 2014 the parties entered into a Fixed Rate Addendum referred to as Annexure B during the trial. Mr Tobias was reluctant to do so

and the Addendum was signed under protest. Clause 5.3 of the Fixed rate addendum provided for breakage costs in the event that the loan is repaid early.

[10] On 31 October 2017 the parties entered into a further Agreement titled "Addendum to the Loan Agreement and referred to as Annexure C. It is this Addendum to the Loan Agreement which forms the primary debate in this trial. The plaintiff contends that this Addendum C took the place of Agreements A and B in relation to the total amount owed by the plaintiff to the defendant. Mr Tobias understood it to be a new agreement.

[11] A further important issue for determination is whether the amendments sought to be introduced by the plaintiff in its particulars of claim in relation to the repayment of the breakage fee of R1 107 556.78 which had been automatically and electronically debited by the defendant should be refunded. In addition, the amendment also introduced the apportionment of the service fee of R2.8 million. The defendant asserts that both these claims had prescribed by the time the amendment was sought to be introduced. The amendment was opposed and was heard before another Court prior to this trial. It was vigorously opposed but ultimately the plaintiff succeeded in introducing its further claims.

[12] The plaintiff's case in relation to the service fee was that it was paid off well in advance of the 75 months anticipated in the property loan agreement Annexure A, and the defendant was therefore not entitled to levy the full service fee of 2.8 million and sought a pro rata reimbursement of R933 333.33.

[13] The defendant admits various aspects of the agreement, but of course pleads that the introduced claims have prescribed and thus prescription remained a triable issue. In addition, in relation to Annexure C, the defendant contends that the addendum to the loan agreement did not take the place of the terms and the conditions of Annexure A being the loan agreement and Annexure B the fixed rate agreement. Its case is that save for the amounts amended in

Annexure C the remaining clauses in A and B remained intact and operable. Therefore, according to the defendant, the breakage fee and the fixed rate agreement remained intact.

The proper interpretation of the Addendum to the Loan Agreement Annexure C

[14] Annexure C was an agreement drafted by the defendant. In its recordal the parties agree that there are two loans, loan 1 and loan 2 and for convenience they have account numbers ending in …20 and …21 be consolidated.

[15] In terms of the recordal in Annexure C, the parties wished to consolidate loan 1 and loan 2 into one loan with a new account number 30165873. The loan balance for loan 1 was at the effective date, meaning 31 October 2017 R20 247 091.22.

[16] The loan balance for loan 2 as at the same effective date was R83 517 229.53 which *includes the breakage cost fee of 1 107 556.78*. This breakage fee became payable when the fixed interest rate which was applied pursuant to the fixed rate addendum applicable to loan 2 dated 10 April 2014 was broken.

[17] In clause 1.5 of C the following is stated:

> "The parties have agreed to consolidate loan 1 and loan 2 on the terms and conditions contained in this addendum."

[18] Clause 2.1.6 defines the loan agreement as follows:

> "The loan agreement means a loan agreement entered into between the parties on 5 November 2013 as well as the schedule thereto entitled “Loan (to the property loan agreement”) as amended from time to time and which was more specifically broken down into Loan 1 and Loan 2”.

[19] Clause 2.1.7 of Annexure C provides,

"The loan balance is defined as meaning the loan amount outstanding and or capitalised and accrued i*nterests fees, costs and other charges to which Nedbank is entitled in terms of the loan agreement* and the 'Loan 1 loan balance' and the Loan 2 loan balance shall be construed accordingly."

[20] The definition and interpretation clause, 2.2.1 provides as follows:

"In this addendum, unless clearly inconsistent with or otherwise indicated by the context terms as defined in the loan agreement shall bear a corresponding meaning in the addendum. The provisions of clause 1.2 of the loan agreement shall be deemed to be incorporated in this addendum."

[21] In terms of Clause 2.2.3.

"The loan agreement constitutes the whole agreement between the parties as to the subject matter hereof and no agreement representations or warrantees between the parties other than those set out herein are binding on the parties."

[22] The amendments to the loan agreement are clearly spelled out in clause 3.1. Loan 1 and loan 2 is described and it is then termed a new loan constituted under a new contract number 30 165 873. The new loan amount was R103 764 320.75 which was the aggregate of the loan 1 loan balance and loan 2 loan balance.

[23] It was a short term loan; it would expire on 31 January 2018 or the date of transfer of the property to the new buyer of the Mall. The interest rates applicable to the new loan were defined as the prime rate and payable monthly in arrears. On the expiry date the loan would be repaid in full. The existing security would remain in place.

[24] The contentious clause in Annexure C and on which the defendant relies provides as follows:

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Continuity

> "The provision of loan agreement shall, save as amended in this agreement to be of full force and effect."

[25] It is, as I have indicated, a strenuously contested issue between the parties. In my view, the continuity clause such as it is, must be read in the context and the purpose of Annexure C. The continuity clause does not save other payment obligations once it was signed by the parties.

[26] The starting point is always to consider the plain, ordinary, grammatical meaning of the words in question.[1] However, the locus classicus on legal interpretation, *Endumeni*, explains that we must go further:

> "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 weighed 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 businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the

[1] *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC) at para 47.

purpose of the provision and the background to the preparation and production of the document."[2]

[27] The import of this is that a solely literal approach to legal interpretation has been emphatically rejected. We are enjoined to consider context, language and purpose together and it must not be used in a mechanical fashion as held in *Capitec*

" It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined."[3]

[28] The rules of interpretation, which have now crystallised, demonstrate that a purely textual approach has been jettisoned. On the plain reading of Annexure C, the purpose and context is glaringly obvious. The purpose was to settle all financial claims the defendant had against the plaintiff. It was termed a new loan. Those words cannot be ignored in the context of this commercial agreement.

[29] However, in *Capitec* Unterhalter AJA stated

Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.[4]

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[2] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (*Endumeni*) at para 18.

[3] *Capitec Bank Holdings Pty Ltd and others vs Coral Lagoon Investment 194 Pty ltd and others* para 8

[4] Id at para 51

[30] The interpretation of a contract like statutory interpretation is a "unitary" exercise to be approached holistically: simultaneously considering the text, context and purpose.[5] A consideration of the entire constitutional architecture is necessary in this interpretive exercise. As stated by the author Mr Fareed Moosa interpretation is a legal craft which entails giving a meaning and applying judicial logic.[6] With the adoption of the Constitution and the principles set out in *Endumeni* there is a move away from a purely textual to contextual interpretation.

[31] In my view even before moving to consider the evidence on the textual interpretation it is clear from a plain reading of Annexure C that the parties intended all the amounts payable to be included in the final sum when Loans 1 and 2 were consolidated. The definition of "Loan Balance" in clause 2.1.7 could not be clearer. It includes accrued interest, fees costs and *other charges to which Nedbank is entitled*. Breakage costs and an early repayment fee can only be considered as "fees, costs and other charges to which Nedbank is entitled" as per the clause. The full and final settlement of the claims shows that it is' moored to the text and its structure.' However out of caution it is also necessary to consider the evidence led by the parties in relation to Annexure C.

Evidence of the parties in respect of Annexure C

[32] Mr Tobias testified fully on the conclusion of Annexure C. He testified with great candour, making concessions where it was necessary, but it was clear from his evidence that he was certain about the effect of the Addendum to the loan agreement, Annexure C namely that it constituted a new agreement.

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[5] See *Chisuse* above n 2 as cited in *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (6) SA 1 (CC); 2021 (8) BCLR 807 (CC) at fn 45.

[6] *Journal of Forensic Legal & Investigative Sciences Category: Forensic science Type: Review Article* Understanding the "Spirit, Purport and Objects" of South Africa's Bill of Rights *Fareed Moosa*[1] Department Of Mercantile And Labour Law, University Of The Western Cape, Bellville, South Africa

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[33] When he testified and even under cross-examination, although the other two agreements were put to him in cross-examination, he was consistent in saying that he understood that Annexure C, was a replacement of Annexures A and B. He also testified that the three loan agreements could not coexist in tandem.

[34] He described the relationship between the plaintiff and the defendant as that of David and Goliath. He felt that he personally and the plaintiff were treated very poorly by the defendant. In effect he was of the view that the plaintiff was regarded as a nuisance factor when compared with the way the defendant treated Flanagan and Gerhard who of course held the 50 percent share in the development. In addition, he could not understand why the plaintiff's account was relegated to more junior employees of the defendant who were inexperienced and really struggled to provide answers to his questions.

[35] At some stage Ms Sithole and Mr Mashinini left the defendant's employment. He described their relationship with the plaintiff as being amateurish. He felt that the plaintiff was pushed from pillar to post and he could not understand why the service rendered to Flanagan and Gerhard was so excellent as compared to the treatment the plaintiff received. He could not understand why the plaintiff was not attended to by the same personnel that attended to Flanagan and Gerard as it was the same development project.

[36] He describes how the various addenda came into existence. He described that on 10 April 2014 in relation to Annexure B he received a phone call from Ms Sithole, who advised that there was no fixed rate addendum in place and that there would be no further drawdown of additional funds for the development for the development if this fixed addendum agreement was not signed. He was surprised by the additional requirement.

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[37] He advised her that he was not happy with the fixed rate amount and she reverted to him on three occasions and advised him on the third occasion that it was the best rate she could obtain and if the plaintiff did not sign the fixed rate addendum, there would be no more funds advanced for the development. All this was imposed on the plaintiff in extreme haste with the threat of no further funding.

[38] Mr Tobias could not properly read the fixed term agreement, because it came up on his phone which is a small device and he was in the middle of a very busy meeting in Cape Town and did not have the original loan agreement at his disposal to make comparisons. But in any event he advised Mr Coetzee that the document should be signed without prejudice, otherwise, there would be no funds to pay the builders. This poor relationship with the defendant led to a heightened sense of scrutiny on the part of Mr Tobias in relation to all his dealings with the defendant.

[39] Mr Tobias also described how the Annexure C came into being. It was discussed over a period and the question of the unwinding of the fixed rate agreement was also discussed.

[40] By this time, he was dealing with a Mr Barnard of the defendant who assured him that the fixed rate was a good deal and he accepted that. Something went wrong in his communication with the defendant when the fixed rate loan was to be unwound. It should have been unwound on Friday 27 October 2017 but instead it was only on Tuesday 31 October 2017 that the officials of the defendant got the final figure. From the Friday to the Tuesday the plaintiff had to pay a lot more to unwind the fixed rate of interest agreement. Arising out of complaints made by him, he finally got the defendant to accept responsibility for the higher amount which the plaintiff was liable for as a result of the delay. In relation to Annexure B the plaintiff points out that at the very latest in

September 2017, if not sooner, the plaintiff had sent an e-mail regarding the consolidation of the loans and the unwinding of the fixed rate.

[41] This meant that the plaintiff's intention to unwind was well in advance of the five business days that the defendant required to unwind.

[42] After a meeting with a senior staff member, Mr Reynolds, the defendant credited the plaintiff with the amount of R89 862. In relation to Annexure B the plaintiff points out that at the very latest in September 2017, if not sooner, the plaintiff had sent an e-mail regarding the consolidation of the loans and the unwinding of the fixed rate.

[43] Mr Tobias took the Court through the schedule prepared by the defendant and he explained to the Court how he had paid penalty upon penalty and that this amounted to an overcharge and a breach of the new agreement Annexure C.

[44] I now turn to further arguments by the parties in relation to Annexure C. It is clear from the evidence that the negotiation of Annexure C by the parties was an active engagement that led to the conclusion of Annexure C.

[45] But in any event, based on a proper interpretation of the clauses in Annexure C, it was a new agreement that took the place of Annexures A and B.

Evaluation of the Evidence

[46] It is necessary for me to assess the evidence adduced at the trial and I start with that of Mr Jaron Tobias. I have already indicated that how the loan Annexure A was signed. I have already considered the voluminous correspondence in this matter and I find that his evidence was consistent and clear.

[47] He described each and every step that was taken and how in his view the early repayment cost and the breakage costs were a penalty upon a penalty.

[48] In my view the evidence given by Mr Tobias was that of an honest witness. He did not seek to obfuscate issues when he was cross-examined. Even during his cross-examination, he did not embellish his evidence, he steered a clear path on his version. He described how annexure C came into being. Flannagan and Gard wanted to sell their 50 percent in the development and this meant the plaintiff had to follow suit. Once the exit from the loan was inevitable Mr Tobias sat with Mr Barnard and they agreed a short loan and to consolidate all the loans until the funds from the shopping Centre came in. The final date of payment was uncertain since the sale and transfer of the land would not come through on a defined date, hence they agreed a short term loan. In order to sell off the development, the fixed rate agreement had to be unwound. The defendant drew up the agreement and inserted the terms. It was explained to Mr Tobias as a new agreement "a totally new agreement."

[49] As regards the other witness called by the plaintiff Mr Eric Barnard he really repeated the mantra of the defendant stating that breakage costs were always payable and that it was a part of the bank's practice to levy breakage costs in the event of the fixed rate term being broken or terminated.

[50] Mr Barnard also testified that he did not see the breakage costs as a penalty or as double dipping. He came into the picture at a late stage, long after the initial agreement Annexure A was signed. He testified that the breakage costs and early repayment were two separate fees and that even if there is inconsistency in Annexure C he is clear that two separate fees can be charged.

[51] On behalf of the defendant, Mr Craig Jacobson testified. He endeavoured to introduce evidence of banking trade and custom. I disallowed the expert nature of his evidence and very little was left then. He simply reiterated the

policy of the defendant in relation to the practice of the bank making provision for those two charges. He was not involved in the discussions leading up to Annexure C.

[52] The evidence of Mr Barnard and Mr Jacobsen did not take the matter any further. Once I find that Annexure C replaced the relevant provisions of Annexure A and B, then unless the defendant's witnesses could undermine the Annexure C then it is Annexure C which is a central determinate. Both those witnesses testified to the best of their ability, but could not of course deal with the facts and context surrounding the conclusion of Annexure C then the testimony relating to the defendant's policy could not take the defendant's case further.

[53] Mr E Posthumus also testified on behalf of the defendant. He was the portfolio manager of the property finance division and he only arrived at the Head office in Sandton in 2015. His evidence was also characterised by the mantra of the defendant, namely that the early settlement repayment fee and the breakage costs was payable.

[54] Mr Posthumus became involved in this matter very late in 2017, after Annexure C was already in place and therefore he could really only deal with the bank's policy as he saw it.

[55] Of importance, there were times where he refused to answer a question; however, the Court does take into account that Mr Posthumous is a person who really focuses on the point he is making, even if his responses are long in nature. The Court cannot find that he was not frank with the Court. He could only repeat the defendant's policy and could not address the context surrounding the conclusion of Annexure C.

[56] It is quite clear that he stating and repeating the policy of the defendant and he could not furnish any plausible counter explanation as to why Annexure C could not have replaced Annexure A and B. He simply relied on bank policy and sought support in the continuity clause.

[57] He described how the calculations for the breakage costs were made, but once I find that Annexure C is the agreement to be analysed and that it takes the place of Annexure A and B, the question of his examination in chief and his cross examination really does not take the matter further, since he was not there when Annexure C was signed.

[58] There were very technical aspects reflected in his evidence. He emphasised that he was a senior person in the defendant and he is well versed in its policy. When it was put to him that the plaintiff had already paid R39 million in interest charges alone to the bank, his answer was that it was not a source of profit for the bank, but that it was really the normal business practice in the bank.

[59] The third witness called by the defendant was Ms Naicker and her evidence was really to confirm her signatures in Annexure C. She did not take the matter further, nor could she place any further clarity on the Annexure C. She was a creature of instruction and she did what she was told. She was not involved in the negotiations leading to its conclusion.

[60] Mr Posthumous produced a spreadsheet setting out the figures and the repayments and in that calculation which is to be found in the document as referred at Caselines 028-316 he describes the figures in loan 1 and 2 and the new loan. Loan 1 was R32 000 800, loan 2 with account figure ending in 21 was R86 million.

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[61] He reflects what the charges were as at 21 December 2017 and it is in this column that he includes the breakage fee of R1 107 556.78 and having included that into the figure, an amount owing by the plaintiff was R83 517 229.53. Then the two loans were referred to and there is a charge for the early repayment fee of 1 percent.

[62] So not only is the breakage fee included in the earlier calculation, but now the early repayment fee does not take into account that that breakage fee should have been deducted. So, the early repayment fee is a penalty upon a penalty.

[63] The document prepared by Mr Posthumous also takes into account the credit of R89 862 and the final figure what was paid by the plaintiff in respect of the remainder of the loan was R104 844 791.33.

[64] Mr Tobias on the other hand also handed in a document utilised the format authored by Mr Posthumous. Mr Tobias' calculations appear in the far right hand column. Based on Annexure C Mr Tobias does not provide for a breakage fee and he has inserted the figure zero there and he has also inserted a zero for the early repayment fee.

[65] He has then taken into account the various deductions, including a VAT deduction of R12 580.68 and comes to a figure of 102 554 321.29. So, the difference between Mr Posthumous' figures and Mr Tobias then is the difference between R104 844 791.33 and Mr Tobias figure 102 554 321.

[66] Mr Tobias then added the overcharge in relation to the breakage fee and the early repayment fee and that figure is R 2 290 470.04 and then he adds in a deduction for the refund of the pro rata serve fee of R933 332.40. The narration describes that a portion of the service fee that was not utilised. In the light of

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the order that I grant being the refund of specified amounts, no further analysis is required in relation to the spread sheets.

[67] Having regard to the conclusion that I have come to in relation to Annexure C, it is unnecessary for me to deal with the unjust enrichment claim and the acrimony between the plaintiff and the defendant.

[68] In the result I find that the plaintiff succeeds in relation to the two items which are listed as the breakage costs and the early repayment fee.

Service Fee pro rata

[69] The further controversial issue is that of the service fee of R2.8 million which appears in the disbursement clause 3(A) of Annexure A to which I have already referred. The fee was capitalized into the loan amount and cannot be unscrambled.

[70] Upon a proper reading of that particular clause, it does seem to me that it is a defined as an upfront payment which does not allow for an approach that there should be a pro rata reduction.

[71] The column under disbursement deals with a number of costs and it is also qualified by the fact that the plaintiff would pay 25 percent of the costs of the land, the building, the escalations, professional fees, development costs, rates and taxes, the interest was capped and then the bank fee is listed.

[72] All those costs seem to be fixed costs and the amount of R2.8 million in my view does not allow for an interpretation that it should be pro-rated for the period. One has to look at the context of those disbursements and accordingly in relation to that claim, the plaintiff has not succeeded in proving an adjustment of the service fee.

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[73] I am of the view that that claim should be dismissed.

Prescription

[74] The defendant asserts that the amendments were sought after the prescription period of three years. The amendment in terms of Rule 28(1) notice is dated 4 January 2021 was served on the defendant on 7 January 2021 in which the plaintiff sought to amend its particulars of claim. I have already referred to the two claims that the plaintiff wished to introduce.

[75] In terms of the Prescription Act, section 15(1), the word 'debt' is not defined in the Prescription Act and it therefore bears a wide and general meaning and does not bear the technical meaning given to the phrase cause of action as used in the context of pleadings. The property loan addendum Annexure C would terminate on 21 December 2017. The Mall was sold and registration took place and the loan relationship came to an end on 22 December 2020 when the banking accounts were closed off. This means that that prescription would run from 22 December 2020. The plaintiff alleges that at best for the defendant it would run from 21 December. The *dies non* period for 2020 ran from 15 December to 8 January 2021. The amendment was served on the defendant on 7 January 2021 being within the *dies non* period.

In *First Rand Bank Ltd versus Nedbank Swaziland Ltd*[7] the particulars which were sought to be introduced should be recognisable as the same or substantially the same as that relied upon in the particulars of claim in its original form. Then facts in that case are distinguishable from the facts in this case. The plaintiff issued summons on 4 October 2019. Its cause of action was already clear on that date in relation to the three interrelated agreement. Annexure A, B and C.

[7] 2004 (6) SA 317 (SCA) at paragraph 15

[76] The plaintiff also argues that the life span of Annexure C ended on 21 December 2020 and it could not issue legal process before the end of the agreement. The plaintiff's position in regard to Annexure C was clear from the outset and referred to in the original summons save for the aspects referred to below. It was only after the end date of Annexure C that it became clear that the defendant had deducted both for breakage costs and early termination fee and ignored the provisions of Annexure C being a new agreement. This submission has merit since it would have been premature to sue on a cause of action which was not yet ripe.

[10] The plaintiff also relies on the *Masindi* principle as formulated in *Road Accident Fund v Masindi* (586/2017) [2018] ZASCA 94 (1 June 2018) paragraph 20 the court held:

"... on a proper interpretation of section 23(3) of the RAF Act where the five-year period for bringing a claim ends on a day when the court is closed, so that summons cannot be issued and served on that day, the five-year period should end on the next working day'

[77] The Masindi case also referenced the English Law principle set out in *Pritam Kaur v S Russel and Sons* Ltd [1972] 1 All ER 306 where Lord Denning concluded "... I am prepared to hold that, when a time is prescribed by statute for doing any act, and that act can only be done if the court office is open on the day when the time expires, then, if it turns out in any particular case that the day is a Sunday or other dies non, the time is extended until the next day on which the court office is open.'

Underlining for emphasis

[78] The SCA agreed with Lord Denning when it noted that a *dies non* provision makes it is permissible to file on the next day on which the court office is open. In this case that day would be 8 January 2020.

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[79] The defendant referred the Court to a number of cases, including that of *Evans v Shield Insurance* [8] where a creditor has two rights or causes of action. Then there are two corresponding debts when it comes to the judicial interruption of prescription in terms of section 15.

[80] Then if the litigation process seeks to enforce two debts or causes of action, it will only interrupt prescription in respect of both "if it is effective as a means of commencing legal proceedings in respect of both. If it is effective only in respect of one, then this will not enure for the benefit of the creditor in respect of the other debt." In this case the right of action in relation to the agreements in the original particulars of claim relied on the same facta probanda. I am of the view that the particulars of claim as amended were recognisable as the same in its original form.

[81] I was also referred to the case of *DND Deliveries*[9]. The court there found that the introduction of a delictual claim for damages was not recognisable in the unamended summons. In *Alfa Laval Agri (Pty) Ltd v Fereira*.[10] the debt which the plaintiff proposed to introduce was a totally different debt which arose out of enrichment. The facts in the cases referred to are completely distinguishable from the facts in this case.

[82] Arising from all those cases the question is whether the Court can objectively find that the amended particulars of claim must at least be recognisable as the same or substantially the same as the rights disclosed in the original claim.

[83] Upon a careful analysis of what was the original right of claim in this case, it is clear that in relation to the breakage cost claim the facts were

[8] 1980 (2) SA 814 (AD) at 842e-g

[9] D&D Deliveries (Pty) Ltd v Pinetown Borough 1991(3) SA 250 (D)

[10] Alda Laval Agri (Pty) Ltd v Ferreira NO 2004(2) SA 68(O) at 80 D/E-H

mentioned and the new Agreement annexure C was pleaded in relation to the early termination agreement. It is clear that the right of action was set out save that the breakage cost was incorrectly conceded. The complaint in effect related to the double charge. The rights of action in the amended particulars certainly arise out of the same loan and the subsequent conclusion of Addenda B and C. Whilst the original particulars of claim states that the defendant duplicated the early repayment fee and the breakage fee, the defendant was not entitled to both the early repayment fee and the breakage fee. The plaintiff in the original particulars of claim pointed out that the breakage fee had already been deducted electronically so it had no control over the deductions. The plaintiff in the original summons defendant claimed that the defendant could not deduct the early repayment fee as well. The original particulars of claim places reliance on the provisions of Clause 2.2.3 of Annexure C as the full and final settlement clause to counter the duplicate payment.

[84] At the stage of the amendment the plaintiff included the claim for the repayment of the breakage fee. The only deviation in the amended particulars of claim is the claim for the breakage fee. The change is none the less based on all the pleaded facts and a proper application of Annexure C. This in my view is a recognisable claim.

[85] On behalf of the plaintiff, Mr Ascar submitted that the claim had not prescribed; the defendant had not sought to set down the prescription point as a special plea and dealt with it at that stage. There was no significant cross examination on the point. It seems to me that that is an aspect that should have been addressed when the objection to the amendments were argued at the time.

[86] On behalf of the plaintiff, it was submitted that when Nyathi AJ granted all of the 20 amendments that plaintiff sought, implicitly would have considered the point of prescription raised in respect of the two introduced claims.

[87] It also bears mention that the plaintiff relies upon the fact that Nyathi AJ's order did not order that the question of prescription should stand over to the trial court for adjudication and therefore it must have been a consideration for him at the time when he granted the amendment. In the absence of a specific reference to the prescription point in Nyathi AJ's judgment, in my view the prescription point remained a triable issue.

[88] The Plaintiff submits that the calculation by the defendant as to the prescription date of the claims did not take into account that there were *dies non*. If this is taken into account, the amendment would have been served timeously as the dies *non* in 2020 ended on 8 January 2020 and the pleading was filed on 7 January 2020. It was served timeously and that the plea of prescription should fail.

[89] The plaintiff also contends that the property loan addendum, Annexure C was terminated on 21 December 2017, alternatively 31 January 2018. It is common cause that the loan relationship ended and the banking accounts were closed off on 22 December 2017.

[90] This according to the plaintiff would entail prescription being operated at best for the defendant from 21 December 2020 and as I have indicated the defendant failed to factor in the *dies non* period. In my view the plea of prescription cannot stand.

[91] I was also referred by the plaintiff to the unreported case of *Gubuza vs Road Accident Fund* [11] handed down on 15 August 2018 in the Gauteng Division in Pretoria, where the aspect of section 34 of the Constitution entrenching the right to have a dispute resolved before the court was imperative.

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[11] (70524/16) [2018] ZAGPPHC 634; 2020 (2) SA 228 (GP) (29 August 2018)

However, in this case that the constitutional point was not something that came up in the pleadings

[92] In summary on the prescription point, the plaintiff succeeds by reason of the *dies non* submission and the identifiable cause of action in the original particulars of claim as being substantially the same as that relied upon in the particulars of claim.

Costs

[93] On the question of costs, there was a hearing on 2 November 2020 where the costs were reserved. That was at the time when the plaintiff introduced the additional claims. The fact that the plaintiff was justified in including the new claims, means that it was substantially successful for that day. It follows therefore that the reserved costs of 2 November 2020 should follow.

[94] A further comment on the question of costs. I have been asked to make an order of costs on the attorney / client scale because of the conduct of the defendant. I cannot make such an order. There was a robust commercial relationship between the plaintiff and defendant; they are both business entities wanting to obtain the best result for their respective sides.

[95] In that regard costs on the attorney / client scale are not justified.

In the result I make the following order

[1] The defendant is not entitled to levy a breakage cost, nor to levy an early repayment fee.

[2] The defendant must refund to the plaintiff the full breakage costs in the amount of R1 107 556.78.

[3] The defendant must refund to the plaintiff the full early repayment fee of R1 080 470.58.

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[4] Interest a temporae morae at the legal rate.

[5] The defendant shall pay the costs of suit, including that and the reserved costs of 2 November 2020.

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Judge M Victor

Counsel for the Plaintiff: Adv C. C. Ascar
Attorney for the Plaintiff: Beder Friedland Inc

Counsel for the Defendant: Adv E Kromhout
Attorney for the Defendant: Victor & Partners

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