THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case No: 239/2018

In the matter between:

TABEA JACOBS	**FIRST APPELLANT**
CLIFFORD JACOBS	**SECOND APPELLANT**

and

HERRN SEBASTIEN BAUMANN NO	**FIRST RESPONDENT**
SAMUEL SPYCHER	**SECOND RESPONDENT**
JOHANNES SPYCHER	**THIRD RESPONDENT**
RAHEL SPYCHER	**FOURTH RESPONDENT**
THERESE SPYCHER	**FIFTH RESPONDENT**
DAVID SPYCHER	**SIXTH RESPONDENT**

Neutral citation: *Jacobs and another v Baumann NO and others* (239/2018) [2019] ZASCA 128 (27 September 2019)

Coram: Leach, Saldulker, Swain and Mokgohloa JJA and Hughes AJA

Heard: 4 September 2019

Delivered: 27 September 2019

Summary: South African Reserve Bank – debt rescheduling arrangements – oral agreement of loan – loan of money by foreign national to individuals prohibited – requirement that debtor a company or close cooperation – written loan agreement between foreign national and close corporation – money paid to close corporation – substitution of debtors precluded – close corporation failing to make payment – oral agreement not novated by written agreement – oral agreement enforceable against individual debtors.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Le Grange J sitting as court of first instance):

1 The appeal is dismissed with costs.

2 The order of the court a quo is altered to read as follows:

'Judgment is granted in favour of the First Plaintiff in the amount of CHF 730 804.43 or the South African Rand equivalent thereof, plus interest from date hereof against the First and Second Defendants jointly and severally, the one paying the other to be absolved, including costs of suit.'

JUDGMENT

Swain JA (Leach, Saldulker and Mokgohloa JJA and Hughes AJA concurring):

[1] It is alleged that the late Mr H R Spycher (the deceased), a Swiss foreign national, orally agreed to loan CHF 600 000[1] to his daughter, Mrs Tabea Jacobs, a permanent resident in South Africa, and that the debt remains unpaid. Payment was accordingly sought in an action instituted by Mr Herrn Baumann NO (first respondent in this appeal), in his capacity as trustee of the estate of the deceased, together with the second to sixth plaintiffs (second to sixth respondents in this appeal) in their

[1] CHF is the currency abbreviation for Switzerland's currency, the Swiss Franc. The abbreviation 'CHF' is derived from the Latin name of the country, 'Confoederatio Helvetica', with the 'F' standing for 'franc'.

capacity as heirs in the estate. Mrs Jacobs was cited as the first defendant (first appellant in this appeal) and her husband, Mr Clifford Jacobs, was joined as the second defendant (second appellant in this appeal), because it was alleged that the loan was for the benefit and use of both of the appellants and that both of them had guaranteed repayment of the loan to the deceased.

[2] The issues to be decided are not those usually associated with a claim for payment by recalcitrant debtors. The cause of action was complicated by the necessary joinder of Tabia Investment Holdings CC (registration no. CK 88/25344/23, hereafter referred to as the CC), as the third defendant. The respondents alleged that in terms of the oral agreement, the loan was for the use and benefit of the appellants, 'through the third defendant for the purposes of making certain financial investments.' Consequently, it was alleged that on 2 December 1988 and at Cape Town, 'in pursuance of' the oral agreement concluded between the deceased and the first appellant, the deceased and the CC concluded a written agreement in terms of which the amount of CHF 600 000 was loaned by the deceased to the CC.

[3] With regard to the written loan agreement it was common cause that:

(a) The introduction of the CC as the borrower in the written loan agreement was a legal requirement of the so-called debt 'standstill arrangements' of the South African Reserve Bank (SARB) in force at the time. Natural persons were not permitted to contract for new or further debt with foreign nationals in terms of these arrangements; such debtors were limited to juristic persons: a close corporation or a company.

(b) The written loan agreement required the sanction of the Exchange Control Department of the SARB, which was granted.

(c) The following terms were implied by law in the written loan agreement:

(i) The debt of the CC to the deceased was an 'affected debt', in respect of which capital repayments were coordinated by the Public Investment Commissioners established in terms of the Second Interim Arrangements, between the South African Government and foreign creditors; and

(ii) Substitution of the South African debtor was permitted, provided that the prior consent of the Exchange Control Department of the SARB, was obtained.

[4] In resisting payment of the loan, the appellants pleaded that the requisite consent for a substitution of the first appellant for the CC, as the debtor, in terms of the written agreement of loan, had not been obtained. As a result, the first appellant was not liable to repay the loan. It was also pleaded that the first appellant could not have accepted liability for the debt in law, even if she had wished to do so. The conclusion of the written loan agreement between the deceased and the CC was therefore admitted, but it was alleged that only the CC was obliged to repay the loan.

[5] The court a quo (Le Grange J) dismissed the defence that the requisite consent for a substitution of debtors had not been obtained. It found on the evidence that the appellants had, in various letters and communications with the deceased and the heirs, acknowledged personal liability for the loan. It was held that the CC had been incorporated as a 'mere corporate vessel' to facilitate the transfer of the money into South Africa, and that the loan was intended for the benefit and use of the appellants' business enterprise. It was also held that the appellants understood that they, and not the CC, were responsible for repayment of the loan – 'in whatever form'.

[6] For these reasons the court a quo rejected the appellants' argument that the respondents had sued the wrong defendants, finding that the respondents had established, on a balance of probabilities, that the appellants were indebted to the estate of the deceased. Judgment was then granted in favour of the respondents for payment of the amount of CHF 730 804.43, or the South African Rand equivalent, plus interest from the date of the judgment against the appellants, jointly and severally, including costs of suit. The court a quo refused leave to appeal, which was subsequently granted by this court.

[7] At the outset, the ambit and effect of the so-called debt 'standstill arrangements', relied upon by the appellants to avoid payment of the loan, must be

considered. During the 1980's, the apartheid policy of the South African Government resulted in trade and financial sanctions being imposed by the international community. Capital withdrawals and disinvestment from South Africa followed, and certain international banks refused to renew credit facilities. The temporary closure of the foreign-exchange market was therefore announced by the South African authorities on 28 August 1985, followed by a declaration on 1 September 1985 of a suspension in the repayment of South Africa's foreign debt. The country was therefore forced to reschedule the repayment of its foreign debt, over a prolonged period of time, through a series of what were referred to as debt 'standstill arrangements', more correctly referred to as 'rescheduling arrangements'.

[8] The first of these rescheduling arrangements, described as the First Interim Arrangements, ended on 30 June 1987. This was followed by the Second Interim Arrangements, which endured from 1 July 1987 to 30 June 1990 and, thereafter, by the Third Interim Arrangements which lasted from 1 July 1990 to 31 December 1993. The Final Arrangements for the rescheduling of foreign debt came into effect on 1 January 1994 and were terminated on 15 August 2001, when the rescheduling of the country's foreign debt came to an end.

[9] A consequence of these rescheduling arrangements was that a foreign national, such as the deceased, could not lend money directly to a permanent resident, such as the first appellant, in South Africa. A loan could only be made in the following manner. The foreign lender would have to purchase South African foreign debt owned by a foreign creditor bank, at a prevailing discount rate, by concluding a sub-participation agreement with the foreign creditor bank. The South African borrower would then have to apply to Exchange Control, at the SARB, for approval to receive a new foreign loan from the foreign lender, for the face value of the loan purchased. The foreign lender, as the new owner of the foreign debt, would request the Public Investment Commission (the PIC), being the entity responsible for co-ordinating all debt affected by the moratorium, for approval to pay the face value of the foreign debt to the South African borrower, at the prevailing commercial rand exchange rate. In return, capital and interest payments had to be made by the South

African debtor to the foreign creditor via the PIC (which controlled payment to the foreign bank), and thence via the sub-participation agreement from the foreign bank to the foreign creditor, at the commercial Rand equivalent.

[10] In compliance with these requirements, the appellants acquired the members' interests in the CC and the amounts of CHF 378 000 and CHF 222 000 were paid to the CC on 1 November 1988 and 4 November 1988, respectively, in terms of the written loan agreement. In accordance with the Second Interim Arrangements, these payments were initially made by the deceased to Lazard Bros and Co Ltd (Lazard Bros), an English Bank, in terms of a written Sub-Participation Agreement, to purchase South African foreign debt owned by the bank. Lazard Bros in turn made payment to the PIC, which then made payment to Investec Bank, who then made payment into the account of the CC, held at First National Bank. At a later stage Lazard Bros, with the approval of the SARB, concluded an Assignment Agreement with the deceased, in terms of which the deceased was substituted for Lazard Bros as the owner of the South African foreign debt. Payment of the loan then had to be made by the CC to the deceased.

[11] A resolution of the appeal requires a determination of three issues:

(a) Whether an oral agreement of loan was concluded between the deceased and the appellants.

(b) If an oral agreement of loan was concluded, whether the agreement is valid and enforceable in terms of the regulations contained in the Interim Arrangements.

(c) If the oral agreement of loan is valid and enforceable, whether the appellants and the deceased regarded the oral agreement of loan as governing their contractual relationship, after the conclusion of the written agreement of loan between the deceased and the CC. In other words, the issue is whether they ever agreed to a novation of the oral agreement of loan by the written agreement of loan, or whether they regarded the written agreement of loan simply as a formality to comply with the requirements of the Interim Arrangements, to enable the appellants to receive the loan from the deceased in terms of the oral agreement of loan.

[12] Evidence as to the conclusion of the oral agreement of loan was given by Mr Johannes Spycher, the son of the deceased. He stated that his sister, the first appellant, asked the deceased for a loan and proposed the idea of a 'debt purchase'. At that time nobody in Switzerland understood what this entailed, so the argument went, but the first appellant organised everything, with the result that the deceased gave her a loan of CHF 600 000. This resulted in the first appellant being credited with an amount of approximately CHF 941 000 in South Africa, as a result of the deceased having purchased the South African foreign debt at the prevailing discount rate and the first appellant, having received the face value of the loan purchased, at the prevailing commercial rand exchange rate.

[13] He stated that, although the deceased never wanted to make an investment in South Africa, he wanted to help his daughter and the only way in which he could do this, legally, was by way of a close corporation. The deceased, however, regarded the loan as one to the appellants; that it was the appellants who were liable to repay the loan to him and not the CC. This was because the loan had been given to them and they introduced the need for a close corporation in order to receive the loan. He stated that the deceased was clear in his mind, that the appellants owed the debt and that the CC was nothing more than a vehicle to facilitate the loan to them. When asked about the assignment agreement concluded between Lazard Bros & Co Ltd and the deceased, which reflected the CC as the debtor, he stated that the deceased understood that all of this was arranged by the first appellant in order to receive the loan.

[14] Despite this evidence, counsel for the appellants nevertheless submitted that the only contract in respect of which evidence was led was the written agreement of loan. This submission was based upon certain answers that Mr Johannes Spycher gave whilst being cross-examined. Having been referred by counsel to the allegation in the particulars of claim, that an oral agreement was concluded between the first appellant and the deceased, the following exchange took place between Mr Spycher and counsel:

'What you say is that as far as you're concerned, there was no oral agreement. — No, never.'

However, when his answer is considered in the context of his evidence as a whole, it is clear that, as a layman, he was confused as to whether it was the oral agreement of loan or the written agreement of loan that was relied upon. This is clearly illustrated by the following exchange with counsel, after he was later referred to the written agreement of loan:

'This is the written loan agreement that you are suing on today? — Yes.

You're not suing on a different agreement? — As I declared you, this was the vehicle.

Yes, that's the vehicle, but I'm asking you, are you suing on this agreement or any other agreement? — This was – ja, this was the agreement, the final agreement.

Only this agreement? — (No audible reply).

You're nodding your head, you must say yes, please, you must provide an audible answer – Yes and no.

Yes. So that is the agreement you're suing in (sic) and no other agreement, right. Now… (intervention) — There is also a moral agreement.

No, but you said earlier on there wasn't an oral agreement — Yes, a moral, not an oral.'

[15] In further support of this submission counsel for the appellants, following the same line of cross-examination with Mr David Spycher (the sixth respondent), submitted that his answers were to the same effect. Having referred Mr Spycher to the written agreement of loan, the following exchange then took place between Mr Spycher and counsel:

'There's no other agreement that you rely on in this matter. — I'm not sure if they made other agreements. That Johnny knows, as I know, this is the only one.

You don't know about any other agreement? — Yes.'

However, earlier in his cross-examination, the following exchange took place:

'Yes. So what she said to you [referring to the first appellant] is that if your father loans the money, then he has to enter into a written agreement with a company or a close corporation. Is that correct? — Yes.'

The meaning of the affirmative answer is clear. It is this: the deceased would have to agree to loan the money to the first appellant and the deceased would then have to

enter into a written agreement of loan, with a company or a close corporation, for the first appellant to receive the loan.

[16] It is clear that Mr Johannes Spycher had a very close relationship with the deceased and was privy to his attitude concerning the loan. The admission of this evidence was never challenged, nor were its contents rebutted, because neither of the appellants gave evidence. In any event, it is obvious that the conclusion of an oral agreement of loan between the deceased and the first appellant would had to have preceded the acquisition of the CC and the necessary approvals, as well as the purchase of South African debt owned by an English bank, to enable the first appellant to receive the loan. I am accordingly satisfied that it was proved, on a balance of probabilities, that an oral agreement of loan in the amount of CHF 600 000 was concluded between the deceased and the first appellant.

[17] The next issue to be determined is whether the validity of the oral agreement of loan was affected by the Interim Arrangements. The question is whether the purpose of the regulations, framed in terms of the Interim Arrangements, was to render a contract concluded in contravention of their provisions void *ab initio*. The oral agreement of loan contravened the Interim Arrangements because a loan was made by a foreign national, being the deceased, to a South African permanent resident, being the first appellant, without the necessary SARB approval. In addition, the loan was made to an individual and not to a close corporation or company.

[18] The answer to this enquiry is to be found in Schedule 1 to the Third Interim Arrangement, where the Regulations made in terms of s 9 of the Currency and Exchanges Act 9 of 1933 (the Exchange Control Regulations) are set out. Regulation 2 provided that:

‘No person shall with effect from 1 July 1990 until 31 December 1993 make payment to or in favour of any foreign creditor except payment in a special restricted account and except payment in respect of - ’

A list of exceptions to the prohibition then followed, none of which are relevant to the present enquiry. Regulation 7 went on to provide as follows:

'Any person who contravenes or fails to comply with any provision of regulation 2 or 3 or any condition referred to in regulation 5 shall be guilty of an offence and liable on conviction to a fine not exceeding R250 000 or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment.'

Although we have not been favoured with copies of the regulations in respect of the other Interim Arrangements, it can safely be assumed that they are couched in identical terms. This is because the regulations were promulgated in terms of the Currency and Exchanges Act 9 of 1933 and each of the Interim Arrangements sought to achieve the same objective.

[19] In *Schierhout v Minister of Justice* 1926 AD 99 at 109 the following was stated:

'It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect.'

In G B Bradfield *Christie's Law of Contract in South Africa* 7ed (2016) at 395, the author, having quoted this passage, adds the following:

'An extension of this principle is that, when a contract is not expressly prohibited but it is penalized, that is the entering into it is made a criminal offence, then it is impliedly prohibited and so rendered void . . . .'

However, as pointed out in *Wierda Properties v Sizwe Ntsaluba Gobodo* [2017] ZASCA 170; 2018 (3) SA 95 (SCA) para 17, these are not inflexible rules and;

'What must ultimately be determined is the purpose of the legislative provision. These principles are mere guidelines in ascertaining that purpose.'

In similar vein the following was stated in *Standard Bank v Estate Van Rhyn* 1925 AD 266 at 274:

'After all, what we have to get at is the intention of the Legislature, and, if we are satisfied in any case that the Legislature did not intend to render the Act invalid, we should not be justified in holding that it was. As *Voet* (1.3.16) puts it – "but that which is done contrary to law is not *ipso jure* null and void, where the law is content with a penalty laid down against those who contravene it." Then after giving some instances in illustration of this principle, he proceeds: "The reason of all this I take to be that in these and the like cases greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act itself done contrary to the law."'

[20] The Interim Arrangements together with the regulations, designed as they were for the purpose of protecting the revenue of South Africa, are akin to a revenue statute. In *McLoughlin NO v Turner* 1921 AD 537 at 544, the following was stated:

'This is a revenue statute and it is a well-recognised rule of construction that the mere imposition of a penalty for the purpose of protecting the revenue does not invalidate the relative transaction . . . . But, of course, the Legislature may prohibit or invalidate the transaction even where the sole object is to protect the revenue. And if that intention is clear effect must be given to it.'

[21] In the present case, there is no express provision in the regulations invalidating the underlying causa in respect of a prohibited payment to a foreign creditor, nor an express provision invalidating the payment itself. In addition, a severe penalty of a fine not exceeding R250 000 or imprisonment for a period not exceeding five years, or both such fine and imprisonment, are imposed. As pointed out in *Swart v Smuts* 1971 (1) SA 819 AD at 831F-G, a severe penalty may support the conclusion that the Legislature regarded this as a sufficient sanction, without rendering the prohibited conduct a nullity.

[22] In my view, when regard is had to the fact that what is expressly prohibited is a payment to a foreign creditor, the breach of which results in the imposition of a severe penalty, the regulations do not result in the underlying causa for the payment being rendered null and void. Consequently, the failure of the oral agreement of loan to comply with the requirements of the Interim Arrangements does not affect its validity, nor the validity of a payment made in accordance with its terms.

[23] I turn to consider the third issue, namely whether the appellants and the deceased regarded the oral agreement of loan as governing their contractual relationship, even after the conclusion of the written agreement of loan. In other words, whether the appellant and the deceased ever intended to novate and replace the oral agreement of loan with the written agreement of loan. The appellants did not plead that the oral agreement of loan was novated by the written agreement of loan. Although the appellants denied the conclusion of the oral agreement of loan, they nevertheless admitted the allegation made by the respondents, that the written

agreement of loan was concluded 'in pursuance of the deceased and First Defendant's agreement', being the oral agreement. Whether inadvertent or intended, the admission was correctly made, as it is clear that the written agreement of loan was only concluded pursuant to the oral agreement in order to comply with the formalities of the Interim Arrangements, so that the appellants could lawfully receive the loan.

[24] Of central importance, in determining whether the evidence shows that the appellants and the deceased regarded the oral agreement as governing their obligations in respect of the loan, is the evidence that the appellants sold their members' interest in the CC, on 3 May 1993, to third parties (the Unzens) for the sum of R470 000. Clause 9.1.3 provided that the appellants indemnified the purchasers against 'any claim of whatsoever nature by Hans Rudolph Spycher arising out of the loan agreement concluded between the Corporation and the said Spycher'. Clause 12.1 provided that the appellants would be entitled to retain the name Tabia Investment Holdings CC, which they then registered as the name of a new close corporation, with registration number, CK 93/21115/23. The new owners of the CC with registration number CK 88/25344/23 then renamed it as 'Unzens Investment Holdings CC', as they were entitled to do in accordance with clause 12.2 of the sale agreement.[2] The CC retained its original registration number CK 88/25344/23 and was deregistered on 15 December 2005. The deceased was never notified of the sale by the appellants of their members' interest in the CC.

[25] As a result, because the appellants had divested themselves of control over the CC, it could not and would not perform its obligations in terms of the written loan

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[2] To avoid confusion, the close corporation with registration number CK 88/25344/23 will continue to be referred to in the judgment as 'the CC', despite the alteration of its name from 'Tabia Investment Holdings CC' to 'Unzens Investment Holdings CC', to distinguish it from the new close corporation with registration number CK 93/21115/23, named 'Tabia Investment Holdings CC'.

agreement after 3 May 1993. At this time, an amount of CHF 484 220.36 was still owed by the CC to the deceased, in terms of the written loan agreement. This amount is based upon the allegations made in the appellants' plea, that between 16 February 1989 and 19 October 1992 ie before they divested themselves of its control, the CC paid interest in the amount of CHF 261 644.26 and capital in the amount of CHF 115 779.64 to the deceased.

[26] This evidence is a clear indication that the appellants did not regard the written loan agreement, in which the CC was the debtor, as the governing agreement. If they had, they would have obtained the consent of the Exchange Control Department of the SARB for a substitution of the new close corporation, albeit with the original name Tabia Investment Holdings CC (with registration number CK 93/21115/23) for the CC (with the original registration number CK 88/25344/23), in the written loan agreement. That the appellants had no intention of doing this is clearly illustrated by the indemnity that they furnished to the purchasers of their members' interest in the CC. The furnishing of this indemnity by the appellants also shows that, even as laymen, they knew that the CC, albeit with a change of name to Unzens Investment Holdings CC (but with the original registration number CK 88/25344/23), remained as the debtor in terms of the written agreement of loan,[3] but with no prospect of performing its obligations. They must therefore also have known, even as laymen, that the new close corporation, albeit with the original name Tabia Investment Holdings CC (with registration number CK 93/21115/23), was not the debtor in terms of the written loan agreement. This factor, together with the evidence of later payments made directly by the appellants to the deceased, as well as acknowledgements of their personal liability to repay the loan, supports the conclusion that the appellants regarded the oral agreement of loan, and not the

[3] In terms of s 21(1) of the Close Corporations Act 69 of 1984, a change of name of a close corporation in terms of the Act does not affect any right or obligation of the close corporation.

written agreement of loan, as the governing agreement in respect of the loan from the deceased, and that the written agreement had merely been the vehicle used to move the loan funds from abroad into this country.

[27] Before examining the evidence as to the payments made directly to the deceased by the appellants, the manner in which some of these payments were dealt with in the appellants' plea must be considered. The respondents alleged in their particulars of claim that:

'19. On the 12th January 1989 First Defendant [first appellant] started making repayments to the deceased and continued making repayments erratically over the years. At times both First and Second Defendants [first and second appellants] made payments to the deceased. The last payment made by First Defendant [first appellant] was on the 5th March 2004.'

In reply, the appellants pleaded, that:

'30. The First Defendant [first appellant] did not make any repayments on the aforesaid loan to the deceased in her personal capacity.'

However, after the appellants had divested themselves of control of the CC, any payments made to the deceased could only have been made by the appellants personally, in terms of the oral agreement of loan. This was because neither the new close corporation, albeit named Tabia Investment Holdings CC (with registration number CK 93/21115/23), nor the appellants were parties to the written loan agreement.

[28] The appellants also pleaded that:

'31. The First Defendant [first appellant] did, however, make a number of *ex gratia* payments to the deceased after the latter had represented to her that he was in dire financial straits. The First Defendant [first appellant] remitted a monthly amount of SwFc 1,010.00 to the deceased from 24 February 2002 to 22 September 2003 and, thereafter, until his death during or about February 2004, SwFc 1,000.00.'

As will be seen, it is clear from the evidence that the first appellant made repayments on the loan in her personal capacity and that, by no stretch of the imagination, could these monthly payments be regarded as '*ex gratia* payments'.

[29] Despite the appellants having divested themselves of control of the CC as from 3 May 1993, the first appellant in a letter dated September 1993, addressed to the deceased and her mother, stated the following:

'The two parties to the loan agreement of SFR 600 000 are T.A.B.I.A. Investment Holdings, members Cliff and Tabea Jacobs on the one side and on the other side H.R. Spycher. The agreement exists explicitly between these two parties and is limited to both these parties. No further party including Johnny or others have a legal right to interfere with this agreement.'

It is incomprehensible how the first appellant could make this statement to her parents without revealing to them that she and her husband, the second appellant, had four months earlier sold their members' interest in the CC and acquired a new close corporation. Furthermore, that although the new close corporation was registered with the original name of the CC, ie Tabia Investment Holdings, it was not a party to, nor bound by, the written loan agreement. It was also not disclosed that, in the future, the CC now renamed as Unzens Investment Holdings CC, under the control of new owners but still bound by the written loan agreement, could not and would not perform any of its obligations in terms of that agreement.

[30] Later in this letter the first appellant referred to a discussion she had held with her parents in May 1993, before they flew back to Switzerland, and said the following:

'The agreement stipulates 10% interest per annum and capital repayments after 10 years. The "concept" is clear. Before you flew back to Switzerland in May this year we discussed the repayments (interest) for this year. *Cliff and I discussed with Papa that we cannot pay the interest mid of August but only in November*. Papa discussed his situation with Tobli and Papa also said *that if he needs the money mid of August he would let me know by the end of May; in this case I would sell my land in order to meet the payment deadline*. This conversation took place between the legal parties to the loan agreement.' (Emphasis added.)

Because, to the knowledge of the appellants, the CC would no longer make interest payments in terms of the written loan agreement, and because neither Tabia Investment Holdings CC, nor either of the appellants were parties to that agreement, their personal undertaking to pay interest – ie 'we cannot pay the interest' – could only have been made in terms of the oral agreement of loan. In confirmation of this

understanding, the first appellant then personally undertook to transfer an amount of CHF15 000 on 15 November 1993, and a further amount of CHF 15 000 on 15 December 1993, as payment of interest.

[31] That the first appellant understood and accepted that both of the appellants were personally liable to repay the loan is clearly illustrated by a further extract from this letter:

'Up to now I have not said much about the personal aspect of the loan. I would like to say the following: In 1988 the possibility of the assumption of liabilities arose from pure "coincidence" or also as an act of God. Cliff and I prayed to God at that time *that if we were unable for whichever reason to repay the loan and the interest* then the assumption of liabilities shall not materialize and we do not want any shares of that money. *The loan amount is enormous and the responsibility lies sometimes heavily on my shoulders.* Not one day passes when I do not think of the loan; and *I can only find peace when Cliff and I have repaid it all.* I know that the money comes from your "old-age pension" and that your financial situation has been aggravated by the recession in Switzerland. Cliff and I pray together every day that God guides us in our business and that he also guides South Africa through these bad times. *I am fully aware that if we do not repay the money in full some family members will never forgive me. Therefore Cliff and I dedicate ourselves 100% to settle this debt*.' (Emphasis added.)

[32] The next step in the saga was that Mr Johannes Spycher obtained a Power of Attorney from the deceased on 8 May 1995 and travelled to Cape Town, where he met the appellants. It was agreed at this meeting that the interest rate would be reduced from 10 per cent to 5 per cent and that the appellants undertook to start repaying the loan as soon as they could. This agreement was confirmed in a letter written by the second appellant and endorsed by the first appellant, by way of her signature, in which the following was stated:

'*We acknowledge our debt to you and, indeed, have never denied it*. We hereby sincerely thank you for giving us this wonderful start in our lives . . . . *We do not hide from our creditors, and certainly not from a creditor such as yourself*, who we love and respect . . . . [My proposed solution is that the] original interest rate agreed upon (10 percent) be reduced to 5 percent. Johnny has already agreed to this in your name. Tabea and I sincerely thank

you for this concession . . . . *Tabea and I accept responsibility as the debtor of your loan to ourselves of November 1988.*' (Emphasis added.)

It bears repetition that the acceptance by the appellants of 'responsibility as the debtor of your loan to ourselves of November 1988' could only be an acceptance of responsibility in terms of the oral agreement of loan, because neither the new close corporation, albeit named Tabia Investment Holdings CC (with registration number CK 93/21115/23), nor the appellants were parties to the written loan agreement. The letter also serves as an acknowledgement and acceptance that both of the appellants were parties to the oral agreement and liable to repay the loan.

[33] In addition, of significance with regard to the agreement to vary the interest rate is that the written loan agreement contained a non-variation clause in the following terms:

'No variation or amendment hereof or addition hereto shall have any force or effect unless reduced to writing and signed by the parties or their duly authorised representatives.'

Consequently, the oral agreement to vary the interest rate, which was thereafter implemented by the parties, could only be enforceable in terms of the oral agreement of loan. In addition, the appellants no longer possessed any authority to agree to this variation on behalf of the CC, now named Unzens Investment Holdings CC, who, as we have seen, remained the debtor in terms of the written loan agreement.

[34] The same theme of personal liability on the part of the appellants was repeated in a letter written by them to the deceased dated 28 January 1996, in which the following was stated:

'Our forward projections take into account the following:

- Our interest re-payments to yourself over the next (approximately) 3 years.
- . . .
- Our plan for the re-payment of loan capital to yourself in November 1998.'

Although the letter was headed 'Loan – H R Spycher – Tabia Investment Holdings CC', the reference to Tabia Investment Holdings CC was erroneous and grossly misleading because this was now the name of the new close corporation, which was not a party to the written loan agreement.

[35] In a letter dated 12 May 1996 and with the same misleading heading as in the prior correspondence, the appellants addressed a proposal to Mr David Spycher (the sixth respondent) that interest and capital would be paid over a period of 10 years from November 1988. The proposal was again couched in terms indicating a personal liability, for instance 'Should we be unable to repay the capital amount in November 1998, or a portion thereof . . .'.

[36] Thereafter, and on 21 February 1997, the appellants wrote to the deceased and the third respondent. The letter had the same misleading heading, namely, 'Loans of SFr 378,000 & SFr 222,000 – H R Spycher / Tabia Investment Holding CC', and said the following:

'Whilst it is and has always been our intention to comply with the provisions of the above Loan Agreement as amended on 2 June 1995, it is our contention, duly supported by conclusive documentation in our possession, that the dates and amounts of interests payable as reflected in said letter are fundamentally incorrect and are therefore not due and payable on the dates mentioned in said letter.'

Their statement that they wished to comply with the provisions of the 'above Loan Agreement as amended on 2 June 1995', which is a reference to the written loan agreement, with a purported reduction in the interest rate payable from 10 per cent to 5 per cent, was disingenuous. The appellants knew that they no longer controlled the debtor in terms of the written loan agreement, being the CC, now named Unzens Investment Holdings CC, and that their new close corporation, named Tabia Investment Holdings CC, and themselves were never parties to the written loan agreement. Consequently, their legal obligation to comply with the provisions of the 'loan agreement' could only be located within the oral agreement of loan.

[37] Mallinicks, the attorneys for the appellants at the time, then became involved and, by way of a letter dated 27 November 1998, made an offer to 'Family Spycher'. The letter was headed 'Affairs Mrs Tabea Jacobs and Mr Cliff Jacobs' and offered a 33.4 per cent shareholding in all properties trading as Villa Belmonte. A further offer was made in the following terms:

'In addition *our clients will pay you R5000 (five thousand rands) per month, on account of the indebtedness* escalated at 10% (ten percent) annually, payable quarterly in South African

Rands into a local trust account controlled by Family Spycher. It may be possible to legally pay this in Switzerland.' (Emphasis added.)

No mention is made of the close corporation, Tabia Investment Holdings CC, and the offer is made on behalf of the appellants in respect of 'the indebtedness', indicating a personal liability to repay the loan, which again is only comprehensible within the provisions of the oral agreement of loan.

[38] In June 2001, the first appellant then wrote to the deceased, in the following terms:

'What I really believe is that you are in financial difficulties and I am very sorry to hear that you are financially destitute. I am willing to pay you SFR 1500 = R6000 per month and I am currently in the process of obtaining the approval from the Reserve Bank . . . . In your last letter you write for the first time what is actually possible, before that *you just insisted on your contractual right* without considering the above circumstances and the exchange rate. *My debt has tripled in Rand. It was simply impossible to repay the capital and interest at the same time*.' (Italics my own; underlining original.)

Yet again, the first appellant acknowledges the existence of 'my debt', which consists of capital and interest, and also that the deceased has a 'contractual right' to demand payment. The first appellant also gives a personal undertaking to make payment at the rate of R6000 per month. These acknowledgements are irreconcilable with the pleaded case of the appellants, as referred to above, that these were 'ex gratia payments' to the deceased after he had represented to the first appellant that he was in dire financial straits. These acknowledgements are only comprehensible within the provisions of the oral agreement of loan.

[39] It is therefore clear that the deceased and the appellants regarded the oral agreement of loan, and not the written agreement of loan, as the governing agreement in respect of the loan from the deceased. However, whether the appellants are liable to make payment to the respondents of the outstanding amount of CHF 730 804.43 requires a determination of two special pleas raised by the appellants to the claim of the respondents, as well as a challenge to the authority of the first respondent. The special pleas were as follows:

(a) The first special plea was that, because the respondents alleged that the first and second appellants had undertaken to repay the loan to the deceased, as guarantors of the loan to the CC, this claim against the appellants was in the nature of a suretyship. It was pleaded that the provisions of the General Law Amendment Act 50 of 1956 had not been complied with, because the terms of the guarantee were not embodied in a written document, duly signed by or on behalf of the sureties and, as a result, the guarantee was unenforceable. There is no merit in this. As set out above, the evidence establishes that the appellants were personally liable, in terms of the oral agreement of loan, and not as sureties in respect of the written agreement of loan.

(b) The second special plea raised the defence of extinctive prescription. It was alleged that, because of the failure of the CC to make payment of interest on the loan on 1 June 1993, the acceleration clause in the written agreement of loan was triggered, with the result that the entire balance outstanding became due and payable immediately. The three-year period of prescription provided for in the Prescription Act 68 of 69 expired by 31 May 1996, whilst the summons was only served on 1 February 2005. The answer to this special plea of prescription is that it was raised in respect of the written agreement and not in respect of the oral agreement of loan. However, even if it had been raised in respect of the oral agreement of loan, it would have failed. This is because the appellants pleaded that the first appellant made monthly payments to the deceased from 24 February 2002 to 22 September 2003 and, thereafter, until his death in February 2004. These constituted an acknowledgement of the debt and interrupted the running of prescription.

[40] I turn to the challenge raised as to the authority of the first respondent. In the respondents' particulars of claim it was alleged that the first respondent acted in his official capacity as Trustee [Erbenvertreter (Superprovisorisch)] of the estate of the deceased, 'having been so appointed by a competent court in Switzerland in accordance with the laws of Switzerland in terms of the Civil Code Article 554 Section 1.4 read with Article 556 Section 3'. These allegations were denied by the

appellants and it was submitted that the first respondent was therefore required to prove both his locus standi and his authority to sue.

[41] In order to place this challenge in context, it is necessary to consider two previous judgments in this matter. In the first judgment, the High Court (Bozalek J) upheld an application by the respondents for the substitution of the first respondent, as 'representative of the heirs' of the estate of the deceased, for a Mr Wirz. The appointment of Mr Wirz as 'administrator of the estate' of the deceased had been set aside by a Swiss Canton Court on 25 April 2005, at the instance of the appellants. The decision was based upon a finding that the procedural rights of the first appellant had been seriously infringed as a result of a failure to afford her a hearing before his appointment.

[42] Thereafter, on 21 September 2005 the first respondent was appointed as the 'representative of the heirs.' His appointment was unsuccessfully challenged by the appellants and he then approved the present action that was pending at the time. The appellants then appealed the order of substitution granted by the High Court to this court.[4] The appellants contended that a substitution of the executor was impermissible because the summons in the action was a nullity, as there was no duly appointed executor when it was issued, and Mr Wirz lacked authorisation to litigate on behalf of the deceased estate.

[43] In dismissing the appeal, this court noted at para 11 that the first question to be considered was the role of a 'representative of heirs' of a deceased estate, in the context of Swiss law. Noting that no evidence was led in this regard, and that little could be gleaned from the translation from Swiss German to English of the two

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[4] *Jacobs & others v Baumann NO & others* [2009] ZASCA 43; 2009 (5) SA 432 (SCA).

judgments from the Swiss Canton Court, because of their poor quality, it then stated the following at para 13:

'In that case, it must be presumed that Swiss law is the same as South African law on this aspect. The rule in our law is that the only proper person to litigate on behalf of a deceased estate, in the vindication of its assets, is its executor even to the exclusion of the beneficiaries in the estate. This means that a Swiss equivalent of an executor of the deceased estate was required to initiate and conduct the action instituted on 1 February 2005. It must then be considered whether Wirz's appointment as administrator of the estate and involvement in the action meet this requirement.'

This court then noted at para 15 that the crisp question for decision was whether Wirz's appointment was lawful. If it was, then the institution of the action was proper, as his appointment was set aside after this date. If it was unlawful, then the summons was a nullity, that could not be amended by the substitution of the first respondent for Mr Wirz.

[44] This court, at para 20, then noted that the only flaw found by the Swiss appeal court in Mr Wirz's appointment was merely procedural. The order for his appointment would therefore stand, until it was properly set aside. The consequence of this was that any steps taken by him, on the authority of the court order appointing him as administrator of the estate, before being withdrawn, were not unlawful. As a result, the summons issued in his name on behalf of the deceased estate was not a nullity. Of particular significance to the present issue is what was stated by this court at para 21:

'The effect of the substitution is not to introduce a new party, *but merely to replace an irregularly appointed executor with the proper one.*' (Emphasis added.)

What this court decided therefore, was that the first respondent was properly appointed as the Swiss equivalent of an executor of the estate of the deceased. As a result, the first respondent possessed the necessary authority in South African law to litigate on behalf of the estate of the deceased in the vindication of its assets, and to proceed with the action against the appellants.

[45] There is accordingly no basis for the submission made by the appellants that the first respondent failed to prove his appointment by the Swiss court and that there

was no evidence that, under Swiss law, the first respondent had authority to institute legal proceedings on behalf of the estate of the deceased. As regards the challenge that the particulars of claim incorrectly referred to the wrong articles of the Swiss Civil Code as the basis for the appointment of the first respondent (which was conceded by the third respondent), this can have no effect upon the finding of this court that the first respondent possessed the necessary authority to litigate on behalf of the estate of the deceased.

[46] As correctly conceded by counsel for the respondents, the second to the sixth respondents, as beneficiaries of the estate of the deceased, do not have locus standi to litigate on behalf of the estate. The order of the court a quo will therefore be amended, to provide for judgment in favour of the first respondent, alone, against the appellants. In the exercise of my discretion, I do not regard this amendment as a sufficient ground to alter the costs order granted by the court a quo in favour of the respondents, or the costs order I intend making in favour of the respondents in the appeal.

[47] I make the following order:

1 The appeal is dismissed with costs.

2 The order of the court a quo is altered to read as follows:

‘Judgment is granted in favour of the First Plaintiff in the amount of CHF 730 804.43, or the South African Rand equivalent thereof, plus interest from date hereof against the First and Second Defendants jointly and severally, the one paying the other to be absolved, including costs of suit.’

K G B Swain

Judge of Appeal

Appearances:

For Appellants:	P Tredoux
	Instructed by:
	JMB Gillan Attorneys, Cape Town
	Honey Attorneys, Bloemfontein
For Respondents:	J Butler SC
	Instructed by:
	Luitingh & Associates, Rondebosch
	McIntyre van der Post, Bloemfontein