REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

28/01/2014

CASE NO:19428/11

(1)	REPORTABLE: YES / ~~NO~~
(2)	OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3)	REVISED.

28/01/2014 .... DATE

.... SIGNATURE

In the matter between:

FRED VAN HEERDEN Excipient
(Defendant in the main action)

and

CHRISTIAAN JOHANNES NOLTE Respondent
(Plaintiff in the main action)

JUDGMENT

MURPHY J

[1] The excipient (the defendant) has excepted to the plaintiff's particulars of claim on the grounds that they lack averments necessary to sustain an action in that they fail to allege compliance with essential provisions of the National Credit Act[1] ("the NCA").

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[1] Act 34 of 2005

[2] The plaintiff alleges in the particulars of claim that the defendants owes him three amounts arising from various agreements. It is alleged that in April 2008 the plaintiff and defendant entered into a written agreement for the sale of immovable property in terms of which the defendant sold the property to the plaintiff for an amount of R700 000. The plaintiff paid the full purchase price to the defendant and took occupation of the property. It subsequently became apparent that the defendant was unable to transfer the property to the plaintiff because it had been unlawfully transferred to a close corporation, Import Export 2020 CC, and was bonded to a financial institution. The plaintiff then agreed to advance monies to the defendant to enable him to repay the amounts due to the financial institution in order to allow the property to be transferred to him.

[3] According to the particulars of claim, the parties entered into three oral agreements. In terms of the first, the defendant agreed to pay interest on the purchase price of R700 000 calculated at the prime rate from 25 April 2008 capitalised monthly, in consequence of which the defendant owed the plaintiff R249 347,78 as at 30 April 2012. The second loan, concluded on 15 July 2010, was for an amount of R467 734,97 and was advanced by the plaintiff to the defendant to pay the financial institution for the purpose of cancelling the bond over the moveable property in order to allow the transfer of the property to the plaintiff. The defendant agreed to pay interest on this loan at a rate of 10% per annum from 10 November 2010 capitalised monthly. Various amounts were paid by the defendant in redemption of this loan with the result that the amount owing on 30 April 2012 was R269 826,34. Finally, on 15 July 2010 the plaintiff advanced the defendant an amount of R85 964,91 to pay VAT on the transfer transaction, at a rate of 10% interest capitalized monthly. The amount owing in respect of this loan at 30 April 2012 was R101 856,96. The plaintiff claimed the three amounts separately in his summons on the grounds of the defendant's failure to repay the outstanding amounts.

[4] In the alternative to these claims the plaintiff sued for an amount of R632 397,07 plus interest at a rate of 15,5% per annum *a temporae morae*

from 1 September 2010 allegedly owing in terms of an acknowledgement of debt concluded on 22 July 2010 in terms whereof the defendant acknowledged to the plaintiff that he was indebted to the amount of R882 397,07. It is alleged that the defendant has paid R250 000 of the capital amount and hence that only the balance claimed by the plaintiff remains owing.

[5] The defendant's exception to the particulars of claim raised various grounds of objection. He however confined himself during argument to two grounds related to the plaintiff's alleged non-compliance with the requirements of the NCA.

[6] The first ground of exception is that because the agreements are credit agreements and the total amount of the principal debt owing under them exceeds R500 000, the plaintiff was obliged to make the allegation in his particulars of claim that he is a registered credit provider in terms of the NCA, which he has not done with the result that the particulars of claim are excipiable.

[7] It is common cause that the agreements in question are credit agreements. The relevant part of section 8 of the NCA reads:

> "(1)Subject to subsection (2), an agreement constitutes a credit agreement for the purpose of this Act if it is -
>
> ....
>
> (b) a credit transaction as described in subsection (4)."

Section 8(4) of the NCA provides:

> "An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is -
>
> ....
>
> (f) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one

> person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of -
>
> (i) the agreement; or
> (ii) the amount that has been deferred."

[8] Accepting that the agreements are credit agreements, the plaintiff is accordingly a credit provider as defined in section 1(h) of the NCA which defines a credit provider as "the party who advances money or credit to another under any other credit agreement".

[9] At issue for the purpose of determining the exception is whether the plaintiff was obliged to register as a credit provider. Section 40(1) of the NCA provides:

> "A person must apply to be registered as a credit provider if -
>
> (a) that person, alone or in conjunction with any associated person, is the credit provider under at least 100 credit agreements, other than incidental credit agreements: or
>
> (b) the total principal debt owed to that credit provider under all outstanding credit agreements, exceeds the threshold prescribed in terms of section 42(1)."

The Minister set the threshold at R500 000 in Government Gazette No. 28893 on 1 June 2006.

[10] The plaintiff has argued that while the total principal debt owed to him under the outstanding credit agreements exceeds R500 000 he was not obliged to register as a credit provider under section 40(1) because he is not a person who frequently provides credit. The submission is to the effect that the purpose of the NCA is to regulate the credit providing industry and the credit market and hence that section 40 is directed exclusively at persons who engage regularly in the provision of credit to consumers and not at "once-off"

transactions, as in the present case where an individual purchases immovable property from another individual.

[11] In support of this submission, counsel for the plaintiff relied on the unreported decision of a Full Court of this division in *Friend v Serdall* [2] in which Legodi J held that section 40(1)(b) of the NCA "must be seen as having been directed at those who are in the credit market or industry or at those who intend to participate in the credit market and/or industry". In reaching this conclusion the learned judge had regard to section 40(2)(a) of the NCA which provides that in determining whether a person is required to register as a credit provider the provisions of section 40(1) "apply to the total number and aggregate principal debt of credit *agreements* in respect of which that person, or any associated person, is the credit provider" and concluded that section 40(1) did not apply to once-off loans or to a single credit agreement which exceeds the threshold.

[12] While I appreciate the pragmatism of the underlying idea that it may be socially and economically imprudent to regulate lending to the extent that all loans above R500 000 will be illegal unless the lender is registered, the interpretation, in my respectful opinion, is strained. The intention and purpose of section 40(1) of the NCA is to require credit providers, who make more than 100 loans or who lend more than R500 000, to register. The intention of the legislature appears from the plain and unambiguous language of section 40(1)(b). In terms of that provision, it is the total amount of the principal debt which is relevant. The reference to "all outstanding agreements" does not evince an intention to exclude a single agreement in excess of R500 000. It is linguistically permissible to consider an amount owing under a single agreement as being the principal debt owed under "all outstanding agreements". If there is only one transaction then it will constitute "all" of the outstanding agreements. Section 40(1)(a) regulates the position from the perspective of the number of agreements, while section 40(1)(b) is intended to govern the position with regard to the total capital advanced by any provider.

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[2] (Case No. A973/2010 - 3 August 2012).

The fact that such a policy may be unwise and stifling of economic activity for small and medium enterprises is in itself insufficient reason for a court to strain the meaning of the provision to offer exemption to single transactions above R500 000. If the total principal debt exceeds R500 000, in my view, the Act requires the credit provider to register.

[13] Considering that the *Friend* decision is a judgment of the Full Court of this division, as a single judge I would normally be bound by it, despite my reservations about its correctness. However, it would seem to me that the *ratio decidendi* in *Friend* is limited to a finding that the requirements of section 40(1) do not apply to single credit agreements with a principal debt exceeding R500 000. In the present case, the main cause of action is constituted by two (or perhaps three) credit agreements with an aggregate principal debt exceeding R500 000. Thus, even were the *ratio* in *Friend* correct, the exemption there laid down would not apply to the plaintiff in this case; coincidentally demonstrating its somewhat arbitrary reach, namely that one agreement will suffice for exemption, but not two, irrespective of the total principal debt of the single agreement – a single agreement of R10 million will be exempt while two agreements making up R500 000 will not.

[14] In any event, the *ratio decidendi* in *Friend* is inconsistent with the approach taken by the Constitutional Court in *National Credit Regulator v Opperman and others*,[3] handed down in December 2012, three months after the Full Court handed down its judgment in *Friend*. The basic facts in *Opperman* are not dissimilar to those in the present case. Opperman had lent his friend a total amount of R7 million under three separate credit agreements. The Constitutional Court found that he had been obliged to register as a credit provider despite the facts that he was not in the business of providing credit, was unaware of the requirement to register as a credit provider and had no intention of violating the NCA. It held further that Opperman was required to

[3] 2013 (2) BCLR 170 (CC)

register as a credit provider because the "total principal debt exceeded the R500 000 threshold prescribed in terms of section 42(1) of the NCA".[4]

[15] In the result, the plaintiff was indeed obliged to register as a credit provider in terms of the NCA before extending credit and making a loan with an aggregate principal debt in excess of R500 000. Section 40(3) of the NCA provides that a person who is required to be registered as a credit provider, but who is not so registered, must not offer, make available or extend credit, enter into a credit agreement or agree to do any of those things. In terms of section 40(4) of the NCA, a credit agreement entered into by a credit provider who is required to be registered but who is not registered is an unlawful agreement and void to the extent provided for in section 89. In terms of section 89(2)(d), a credit agreement is unlawful if at the time the agreement was made the credit provider was unregistered and the Act required the credit provider to be registered. In terms of section 89(5)(a) if a credit agreement is unlawful in terms of section 89 it is void as from the date the agreement was entered into.

[16] It follows that when an unregistered credit provider who is required to be registered lends money to a consumer he or she will have no contractual cause of action and will be obliged to sue the consumer under the law of unjustified enrichment, by means of the *condictio ob turpem vel iniustam causa*, to recover the money.

[17] In light of the legal position, the defendant has contended that where a plaintiff sues contractually to recover money owing under a credit agreement, and the principal debt is in excess of R500 000, he or she is obliged to make the allegation in his or her particulars of claim that he or she is registered as a credit provider. I agree. The failure to plead such facts renders the summons excipiable for want of necessary averments on which to found a contractual cause of action. This is not a matter that should be left for evidence at trial. Registration as a credit provider is an essential allegation in an action on a

[4] Para 4 and 8.

credit agreement with a principal debt in excess of R500 000, in the absence of which the particulars fail to disclose a cause of action. It is procedurally appropriate to take the exception at this stage, which in the event of the plaintiff not being able to make the allegation will most probably result in the dispute between the parties being properly ventilated in pleadings sustaining an action based on the law of unjustified enrichment.

[18] A similar approach was followed in *IS and GM Construction CC v Tunmer*,[5] and *Tyrone Selmon Properties (Pty) Ltd v Phindana Properties 112 (Pty) Ltd* [6] where exceptions were upheld on the ground that the particulars of claim did not disclose a cause of action in that the plaintiffs had failed to allege compliance with the provisions of protective legislation which visited non-compliance with the sanction of nullity.

[19] The particulars of claim are also excipiable on the grounds that they do not allege compliance with section 129 of the NCA other than in relation to the alternative cause of action based on the acknowledgement of debt. If the agreements are credit agreements, then the averments in the particulars of claim must include allegations that the plaintiff has complied with the provisions of section 129 and 130 of the NCA, which permit a credit provider to enforce an agreement only once alternative procedures have been pursued.

[20] In the premises, the following orders are made:

i) The exception is upheld with costs.

ii) The plaintiff is afforded the opportunity to amend his particulars of claim within 20 days of this order failing which the defendant is granted leave to apply for dismissal of the action.

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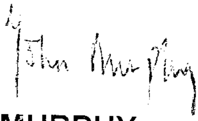
[5] 2003 (5) SA 218 (W)
[6] [2006] 1 All SA 545 (C)



JR MURPHY
JUDGE OF THE HIGH COURT
NORTH GAUTENG

Representation for the excipient/defendant:

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Instructed by Attorneys:	Froneman Roux & Streicher

Representation for respondent/plaintiff:

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