

SOUTH AFRICA / JUDGMENT

Cemblock (Pty) Ltd v Mmege Construction and Projects CC and Others (64838/18) [2019] ZAGPPHC 442 (20 August 2019)

[2019] ZAGPPHC 442

COURT

North Gauteng High Court, Pretoria

BEFORE

NN Bam

CASE / FILE NUMBER

64838/18

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH
AFRICA

GAUTENG DIVISION, PRETORIA

(1)

REPORTABLE:

NO/YES

(2)

OF

INTEREST TO OTHER JUDGES: NO/YES

(3)

REVISED.

CASE NO: 64838/18

20/8/2019

In

the matter of: CEMBLOCK(PTY)LTD
APPLICANT
REG
NO: 1981/007595/07
and
MMEGE
CONSTRUCTION AND PROJECTS CC
FIRST RESPONDENT
(REG
NO: 87 0119 5980 08 6)
MUSHI
SOMO
SECOND RESPONDENT
THE
RUSTENBURG LOCAL MUNICIPALITY
THIRD RESPONDENT

JUDGMENT

Bam AJ

1. On 4 September 2018, applicant launched the present proceedings against the respondents, jointly and severally, the one paying the other to be absolved, in terms of which it sought the following orders:
 - (i) That the Acknowledgement of Indebtedness (AOD), attached and incorporated as annexure 'A' be made an Order of Court;
 - (ii) That the first and second respondents be ordered to make payment to the Applicant in the amount of R617 621.36 (Six hundred and seventeen thousand six hundred and twenty one rand and thirty six cents), their liability, jointly and severally, the one paying the other to be absolved, together with interest calculated on the sum of R548 844.00 at the rate of prime plus 3 % per annum, compounded monthly in arrears, and calculated from 11 August 2018 to date of final payment;
 - (iii) Confirmation that the first respondent's rights to all and / or any retention monies and /or certificate payments held by the third respondent are ceded in favour of the applicant for purpose of collecting the outstanding indebtedness as per prayer 2 supra;
 - (iv) The third respondent is ordered /directed to give effect to the provisions of prayer 3 supra;
 - (v) Costs of Suit on the scale as between attorney and own client, which costs include ancillary charges, related disbursements / expenses incurred and VAT.
2. The third respondent chose not to participate in these proceedings and has accordingly filed a notice to abide by the decision of the court.

3. The application is opposed by the respondents. From what I could discern of the respondents' argument, it is claimed that the National Credit Act, (the NCA or the Act) is applicable to the transaction. Respondents further oppose the alternative relief of restitution raised by the applicants.

4. For ease of reference, I use respondent/respondents interchangeably.

Condonation

5. At outset, applicant indicated that it does not oppose the respondents' application for condonation for filing the latter's opposing

affidavit out of time and shall abide by the decision of the court. Having perused the file and listened to respondents' brief address on this issue, I conclude that it is in the interest of justice that I grant condonation[1].

Background

6. The background facts are largely common cause. They point to the following: On 16 January 2017, first respondent, duly represented by its authorized representative, the second respondent, completed an application for the approval of credit (credit application) by the applicant, in order for the latter to supply it with bricks and other related material. At that same time, second respondent signed a suretyship agreement in terms of which he bound himself, jointly and severally, as surety and co-principal debtor with first respondent, to and in favour of the applicant, for proper and timeous payment by the first respondent of all / any amounts owing by first respondent to the applicant. The third document completed by the second respondent was a Credit Assessment Form. For present purposes, the following questions asked and answered by the second respondent in the Credit Assessment Form are pertinent:

Customer Warranties:

17.1.1 In the event the Customer is a juristic person, the customer herewith warranties to the company that, as at date of signature, hereof the customer's: (Tick the applicable)

17.1.2 Asset value (after allowance for depreciation) is equal to, or exceeds, R2 000 000. The answer selected is NO.

17.1.3 Annual turnover is equal to, or exceeds, R2 000 000. The answer selected is YES

17.2 The customer warrants that it will advise the company by no later than the time of placing the order, in writing, in the event that any of the warranties even in clause 17.1 is no longer applicable due to a change in the customer's annual turnover (emphasis mine).

7. Consequent to the conclusion of the credit agreement, applicant began supplying bricks to the first respondent from time to time. It appears that the relationship between the parties ran into difficulties when the respondents defaulted in making payment. A reconciliation

statement marked Annexure H, dated 30 September 2017 demonstrates the outstanding balance of R548 844. Following demand of the outstanding amount, the parties negotiated a settlement which led to the signing of the AOD[2] on 5 June 2018. In signing the AOD, second respondent represented the first respondent while a Nicolaas Albert represented the applicant. Second respondent is cited in the AOD as second debtor/surety.

8. In terms of the AOD, first respondent was to liquidate the outstanding amount at a rate of no less than R20 000 per month, with the first installment due on 30 July 2018. Notwithstanding the signing of the AOD, first respondent failed to adhere to the agreed terms, leading to the applicant issuing letters of demand in terms of section 129 read with 130 of the Act on 2 August 2018.
9. The main defence raised on behalf of both respondents is that the Act is applicable to the transaction. In terms thereof, the AOD amounts to reckless lending as applicant had failed to carry out an assessment of both respondents in terms of section 80 (1) of the NCA at the time of signing the AOD. Respondents further submitted that the applicant ought to be registered as a credit provider. Owing to the latter's failure to register as a credit provider, they sought to have the AOD declared unlawful in terms of section 89 (5) of the NCA.
10. The relevant clauses of the AOD may be paraphrased as:

Preamble:

The debtors owe the creditor payment of such goods sold and delivered in the sum of R543 844.00 as at 15 September 2017, excluding interest thereon calculated at the rate of prime plus 3% per annum, compounded monthly in arrears, calculated from 15 September 2017 to date of final payment (hereinafter referred to as 'the capital indebtedness').

- (5) The debtor agrees to accept a certificate of balance issued by a duly appointed representative of the creditor specifying the amount of the debtor's indebtedness to the creditor. In the event of default, the debtor's indebtedness shall include interest and untaxed legal costs and the certificate of balance so issued shall serve as prima facie proof of the amount owed and will also serve as liquid document.
- (7) This agreement does not constitute a novation of any prior actions against the debtors or any of the creditor's rights and or remedies.
- (9) It is expressly agreed that this acknowledgment of debt be made an order of court and the parties waive the requirements of notice of application as far as may be necessary.
- (12) The existing Deed of Suretyship for the second debtor shall remain effective until there has been full compliance with all the terms and conditions contained herein, and upon receipt of written confirmation from the creditor that full compliance has been achieved.

Applicant's case

11. Applicant, in its argument, dealt with the issues as follows: (i) first respondent and the applicability of the NCA; (ii) second respondent, particularly the relationship between applicant and second respondent, and the applicability of the NCA; and, (iii) whether the AOD was a credit transaction or simply an affirmation of the parties' indebtedness to the applicant in terms of the underlying agreement.

i) first respondent and the applicability of the NGA

12. In so far the applicability of the NCA to the first responder is concerned, applicant placed before the court that the NCA was not

applicable to the credit agreement, given the warranties made by the first respondent that its turnover was equal or in excess of R2 million and the fact that the latter is a juristic person. It was also added that the transaction between the parties was a large transaction given the amounts involved which exceed R250 000 and the provisions of section 4 (1) (b) of the Act.

(ii) the relationship between applicant and second respondent, and the applicability of the NCA

13. It was submitted that the relationship between applicant and the second respondent is nothing more than a credit guarantee as described in section 8 (5) of the Act with the resultant effect that the NCA is not applicable because same was not applicable to the underlying transaction. Further, that the AOD with regard to the second respondent merely involved an undertaking and/or promise to satisfy the obligation of first respondent, as second respondent was not a party to the initial agreement. Section 8 (5) of the NCA reads:

'An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit guarantee if, in terms of that agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which this Act applies.'

iii) whether the AOD was a credit transaction

14. On the question of whether the AOD constituted a credit agreement, it was submitted that the AOD was signed by the parties as a result of first respondent's indebtedness in favour of the applicant in terms of the initial agreement. As the initial agreement was excluded from the NCA for the reasons stated in para 12, the AOD was thus excluded from the NCA. In this regard, the AOD contains clauses such as: (a) the AOD does not constitute a novation of any prior rights; (b) the obligations between the parties in terms of the initial agreement and those under the new (AOD), are interdependent. Therefore, it was suggested that the AOD was merely

an affirmation or guarantee of the obligations under the initial agreement. Counsel in this regard referred the court to *Rebeiro and O, v Slip Knot Investments 777 (Pty) Ltd* 2011 SA 575 SCA and to the provisions of section 4 (2) (c) of the NCA.

Section 4 (2) (c) of the Act reads:

'this Act applies to a credit guarantee only to the extent that this Act applies to a credit facility or credit transaction in respect of which the credit guarantee is granted'.

Respondents' case

15. The respondents made no effort to state the facts upon which they concluded that the Act applies to the AOD. They simply stated that the applicant failed to conduct an assessment of the respondents, thus its conduct amounts to reckless lending; and owing to applicant's non-registration status as a credit provider, the transaction between the parties (the AOD) should be declared null

and void.

16. On a proper analysis of the respondents' submissions, their defence amounts to nothing more than a circular argument. Their defence is: 'the AOD is reckless lending; the applicant should be registered as a credit provider and it is not; and finally, that the Act is applicable to the transaction (AOD). What they do not do, is:

- (i) deal with, nor deny the fact that there is an underlying credit transaction between first respondent and applicant, in terms of

which, on the basis of the representations[3] made by the former, the NCA does not apply;

- (ii) deal with, or deny that the second respondent, in terms of the underlying transaction, became involved as surety and co-principal debtor;

- (iii) that owing to the failure of the first respondent to meet its obligations towards the applicant, both parties agreed to settle their

differences by signing the AOD and that, aligned to his status as surety and co-principal debtor in the underlying transaction, second respondent was called upon to sign the AOD in that same status[4].

- (iv) no credit was ever advanced to the second respondent in terms of the original transaction;

- (v) that the terms of the AOD in its preamble trace the history between the parties to the underlying transaction and further make it pellucid that the terms of the AOD and those of the underlying agreement are interdependent;

- (vi) that one of the terms of the AOD is that it (the AOD) does not constitute a novation of any prior action against the debtor or any of the creditor's rights and/or remedies;

- (vii) that the intention of the parties, as can be inferred from the above, was never to constitute a new or self-standing credit agreement in signing the AOD but to settle the parties' dispute and affirm the indebtedness of the parties in terms of the underlying agreements.

See in this regard the reasoning of the court in *Ratlou v Man Financial Services*[5]:

'[24] MAN's reliance on three cases in which our courts have used the purposive approach in determining whether the NCA was applicable to settlement

agreements, is well placed. In *Grainco (Pty) Ltd v Broodryk NO & others*[6] the court found that although the settlement agreement referred to deferral of payment and interest, the agreement did not constitute a credit transaction because the underlying transaction was a damages claim in respect of which the plaintiff, by agreement, afforded the first, second, and third defendants deferment of payment. It was held that the transaction did not fall within the business of money lending and the furnishing of credit, in the ordinary sense of the word. The NCA was not intended to encompass an underlying causa of the postponement of payment of damages.

[25] In *Hattingh v Hattingh*[7], a settlement agreement in which two brothers terminated their business relationship and provided for payment of R6,6 million in annual instalments of R734 000, together with interest on the capital, was found not to fall within the ambit of the NCA. The court found specifically that there had been no credit provider-consumer relationship. This and the parties' intention viewed against the background of the objects of the NCA showed that it could not have been the intention of the Legislature that an agreement such as the impugned agreement should be regarded as a credit agreement. Although the one brother, prima facie, fell within the definition of a credit provider as intended in the NCA, it could not - given the purpose and the context of the NCA - have been the intention of the Legislature that the brother would be regarded as a credit provider subject to the obligations imposed by the NCA.

[26] In *Ribeiro & another v Slip Knot Investments 777 (Pty) Ltd*⁷ it was found that the underlying causa remained extant despite settlement, and that the two agreements were interdependent. In this case the underlying agreement was a damages claim pursuant to the repossession and re-sale of the vehicles. There was also no credit provider - consumer relationship and the settlement agreement and the underlying agreements were interdependent. There can only be one conclusion, that the NCA was not designed to regulate settlement agreements where the underlying agreements or cause, would not have been considered by the Act.

17. In its avowals in the opposing affidavit and during counsel's argument in court, respondent stuck to its circular argument and, as a consequence, made no case for the respondents. One can understand their difficulty, in that tracing the history of the AOD would have forced them to acknowledge the facts set out in paragraph 16 of this judgement which lead to only one rational conclusion, that the AOD amounted to an affirmation of both the first and second respondent's indebtedness in the terms already specified. Therefore, the NGA does not apply to the AOD as it did not apply to the underlying agreement and, the underlying agreement and the AOD were interdependent. In the result, respondents' case must necessarily be rejected.

18. I agree with the applicant's case and reject respondents' contentions as unsustainable under the circumstances.

ORDER

19. In the result, applicant's case succeeds. It is hereby ordered that:

- (i) the Acknowledgement of Indebtedness (AOO), attached and incorporated as annexure 'A', is hereby made an Order of Court;
- (ii) the first and second respondents are hereby ordered to make payment to the Applicant in the amount of R617 621.36 (six hundred and seventeen thousand six hundred and twenty one rand and thirty six cents), their liability, jointly and severally, the one paying the other to be absolved, together with interest calculated on the sum of R548 844.00 at the rate of prime plus 3 % per annum, compounded monthly in arrears, and calculated from 11 August 2018 to date of final payment;
- (iii) the first respondent's rights to all and/ or any retention monies and /or certificate payments held by the third respondent are ceded in favor of the applicant for purpose of collecting the outstanding indebtedness as per prayer 2 supra;
- (iv) the third respondent give effect to the provisions of prayer 3 supra;
- (v) costs of Suit on the scale as between attorney and own client, which costs include ancillary charges, related disbursements/ expenses incurred and VAT.

NN BAM

ACTING JUDGE OF THE HIGH COURT,

PRETORIA

DATE OF HEARING:

12 August 2019

DATE OF JUDGMENT:

20 August 2019

APPEARANCES

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- [1] Ntayiya v South African Revenue Services (3613/16) (2018) ZAECMHC 1 (23 January 2018), para 33
- [2] Annexure A, page 14 of the record
- [3] See paragraph 5 of this judgment
- [4] para 6 of this judgement
- [5] (1309/2017)[2019] ZASCA 49 (01 April 2019)
- [6] Grainco (Pty) Ltd v Broodryk NO & others [2009] ZAFSHC 143; 2012 (4) SA 517 (FB)
- [7] Hattingh v Hattingh (2010} ZAFSHC 173; 2014 (3) SA 162 (FB)

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