

SOUTH AFRICA / JUDGMENT

Chivers v Padayachee (2023-074039)
[2024] ZAGPPHC 931 (20 September 2024)
[2024] ZAGPPHC 931

COURT
North Gauteng High Court, Pretoria

BEFORE
Kubushi

CASE / FILE NUMBER
2023-074039

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IN
THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION,
PRETORIA)
Case No. 2023-074039
(1)
REPORTABLE: NO
(2)
OF INTEREST TO OTHER JUDGES: NO
(3)
REVISED

DATE: 20 September 2024
SIGNATURE
In

the matter between: ROHAN
CHIVERS
Plaintiff/Respondent
and
TREVESHEN
PADAYACHEE
Defendant/Excipient
This
matter was heard in open court and disposed of in terms of the
directives issued by the Judge President of this Division.
The
judgment and order are accordingly published and distributed
electronically.

JUDGMENT**KUBUSHI J**

- [1] The exception raised by the Defendant/Excipient in this matter revolves around the question of whether the Consumer Protection Act 68 of 2008 ("the CPA") applies to the transaction upon which the Plaintiff/Respondent relies for his claim in the particulars of claim.
- [2] Initially, there were four grounds of exceptions raised by the Defendant/Excipient. The first and third grounds were abandoned at the commencement of the hearing. Only the second and fourth grounds, are persisted with. The two grounds of the Defendant/Excipient's complaint are that –

"2. The Plaintiff alleges in paragraph 6 of the POC [particulars of claim] that "The loan amount was in terms of the loan agreement, repayable on or before 31 January 2021." The Plaintiff's POC fails to disclose a cause of action, alternatively is vague and embarrassing, for one, or more, of the following reasons:—

2.1 The alleged agreement does not comply with the Consumer Protection Act 68 of 2008 ("the CPA), specifically

with:

2.1.1

Section 48(1)(a)(ii) in that the Plaintiff offered to supply, supply or entered into an agreement to supply goods or services on terms that are unfair, unreasonable or unjust, by unilaterally insisting payment of an amount of R2,241.350.00 ("the amount") within less than two months of the amount having allegedly been loaned to the Defendant.

2.1.2

Section 48(2)(a) in that the agreement, terms or conditions of the agreement or notice to which the terms or conditions is purportedly subject, is unfair, unreasonable or unjust as the agreement is excessively one-side in favour of the Plaintiff.

2.1.3

Section 48(2)(b) in that the terms of the agreement are so adverse to the Defendant as to be inequitable.

2.2 In the light of the above, it is submitted that the alleged agreement is void as it does not comply with the CPA.

2.3 It is therefore not possible for the Defendant to ascertain what the Plaintiff's cause of action is;

2.4 Consequently, the Plaintiff's claim against the Defendant:-

2.4.1

Lacks averment necessary to sustain a cause of action;

2.4.2

Does not formulate a cause of action as the pleadings stand;

2.4.3 Is bad in law in the manner pleaded, alternatively is vague and embarrassing, in that the Defendant is unable to ascertain the basis in law upon which the Plaintiff is entitled to claim.”

and

4. The Plaintiff alleges in paragraph 18 of the Plaintiff's POC that "The plaintiff elected to accept the repudiation and terminated the loan agreement, alternatively terminates it hereby. The election is hereby conveyed to the defendant." The Plaintiff's POC fails to disclose a cause of action, alternatively is vague and embarrassing as the Plaintiff has failed to comply with the provisions of Section 14(2)(b)(ii) of the CPA, in that, prior to cancelling the alleged agreement, the Plaintiff failed to give written notice to the Defendant of a material failure by the Defendant to comply with the agreement within the time prescribed by Section 14(2)(b)(ii) or at all.
5. The Defendant will be prejudiced and embarrassed in pleading to the POC if the above grounds of complaint are not removed or corrected.”
- [3] Based on the afore stated grounds, the Defendant/Excipient seeks an order that the exception be upheld and that the Plaintiff/Respondent's particulars of claim be struck out, with costs.
- [4] The exception is primarily proceeded with on the basis that the particulars of claim do not disclose a cause of action due to the loan agreement's non-compliance with section 48(1)(b)(ii) and 48(2)(a) and (b) of the CPA and the Plaintiff/Respondent's non-compliance with section 14(2)(b)(ii) of the CPA.
- [5] It is the Defendant/Excipient's submission that the CPA applies to the specific transaction referred to in the particulars of claim, and that failure to set out in the particulars of claim that the provisions of section 48(1)(b)(ii) and 48(2)(a) and (b) of the CPA have been complied with, renders the loan agreement void, which in turn renders the particulars of claim excipiable. The Defendant/Excipient, also, submits that failure to set out in the particulars of claim that the Plaintiff/Respondent complied with section 14(2)(a) of the CPA renders the particulars of claim excipiable.
- [6] The parties are in agreement that what requires determination by the court is fundamentally, whether the CPA applies to the transaction that is stipulated in the particulars of claim. If it is found that the CPA does apply, the next question is whether the Plaintiff/Respondent has complied with the provisions of sections 14(2)(b)(ii) of the CPA, or whether the loan agreement complies with section 48(1)(b)(ii) and 48(2)(a) and (b) of the

CPA. And, if it is found that there was compliance with the said sections of the CPA, the issue that follows will be whether failure to comply with the provisions of the said sections renders the particulars of claim excipiable.

- [7] In the particulars of claim, the Plaintiff/Respondent alleges that during a telephone conversation on or about 10 December 2020 and at Johannesburg, alternatively Centurion, the parties entered into an oral agreement in terms of which the Plaintiff/Respondent agreed to loan the Defendant/Excipient an amount of R 2 241 350 ("the loan agreement"). The Plaintiff/Respondent alleges further that the loan agreement was not governed by the provisions of the National Credit Act 34 of 2005 as no charge, fee or interest was payable in terms thereof. Consequent to the said loan agreement, the Plaintiff/Respondent advanced the loan amount to the Defendant/Excipient by paying into the trust account of a certain Smith Attorneys an amount of R 600 000

on 10 December 2020, and a further amount of R 1 641 350 on 11 December 2020 ("the loan amount"). The loan amount was, in terms of the loan agreement, repayable on or before 31 January 2021. The Defendant/Excipient failed or refused to pay the loan amount on the due date or at all thereafter.

- [8] It is further alleged that pursuant to email correspondence between the parties, on 15 May 2023, which was two years after the loan amount became due and payable, the Defendant/Excipient proposed to repay the loan amount with an initial payment of R 200 000 by close of business on 25 May 2023, and a payment of R 45 000 per month thereafter until the outstanding balance shall have been settled. The Plaintiff/Respondent accepted the Defendant/Excipient's proposal on 25 May 2023 by emailing the Defendant/Excipient his banking account details and, thus, concluding a new agreement which amended the initial agreement. Notwithstanding the amended agreement, the Defendant/Excipient has, despite numerous requests from the Plaintiff/Respondent, failed and/or refused to pay the loan amount.

- [9] In addition, it is averred that the Defendant/Excipient subsequently repudiated the loan agreement by, inter alia, claiming that the loan agreement is illegal and unenforceable, and concomitantly refusing to repay the Plaintiff/Respondent the loan amount or any portion thereof. The Plaintiff/Respondent accepted the Defendant/Excipient's repudiation, terminated the loan agreement, and now claims repayment of the loan amount.

- [10] Rule 18(4) of the Uniform Rules of Court, is a good starting point for considering a pleading to assess whether it is susceptible to an exception. The Rule provides that –

"Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto."

- [11] It is, however, important to note that in this matter, the Defendant/Excipient in the second ground of exception complains that the agreement upon which the Plaintiff/Respondent founds his claim is void and the results thereof is that the particulars of claim do not disclose a cause of action. In the fourth ground of exception, the Defendant/Excipient's complaint is that the particulars of claim do not disclose the cause of action due to the Plaintiff/Respondent's non-compliance with CPA.
- [12] The Defendant/Excipient's submission is that the CPA applies to the transaction that occurred between the parties. In this regard, the Defendant/Excipient relies on the provisions of section 5(1)(a) of the CPA which provides that the CPA applies to all transactions that occur within the Republic unless they are specifically exempted in terms of section 5(2),
- (3) and (4), thereof. It is contended on behalf of the Defendant/Excipient that the transaction in this matter is not exempted from the said subsections, particularly when considered in light of the definition of "transaction" as contained in the CPA.
- [13] Counsel for the Defendant/Excipient, during oral argument, submitted that the email that is attached to the particulars of claim, which was sent on 14 May 2023 by the Plaintiff/Respondent to the Defendant/Excipient, suggests that the transaction in this matter is a transaction that was carried out in the ordinary course of business of the Plaintiff/Respondent and thus, the CPA applies to such a transaction. And, because the CPA applies to such a transaction, then, there are certain consequences for the Plaintiff/Respondent.
- [14] The consequences, according to counsel, are that there are sections in the CPA that the Plaintiff/Respondent had to comply with prior to approaching the court for the relief he seeks. One of the sections, counsel suggests, which pertains to the second ground of exception, is section 48(1)(b)(ii) and 48(2)(a) and (b) of the CPA. The said section deals with unfair, unreasonable and unjust terms of an agreement. In this regard, counsel for the Defendant/Excipient contends that the time period given for the Defendant/Excipient to repay the loan amount was less than two months, as such, it was unfairly one sided in favour of the Plaintiff/Respondent and contrary to section 48(1)(b)(ii) and 48(2)(a) and (b) of the CPA.
- [15] The second section, that relates to the fourth ground of exception, is section 14(2)(b)(ii) of the CPA, which requires the supplier [the Plaintiff] to give the consumer [the Defendant] a 20 business day written notice of a material failure by the consumer to comply with the agreement before the supplier can cancel the agreement. Counsel, in fortifying the above argument, submitted that there was no written notice given to the Defendant/Excipient informing him of his breach of the agreement, or that a material breach had occurred and should be rectified, in that regard, the Plaintiff/Respondent has not complied with section 14(2)(b)(ii) of the CPA, so she argues.

- [16] It is upon the afore stated submissions that counsel argues that the CPA applies to the transaction in this matter. Specifically, in that the loan agreement does not comply with section 48(1)(b)(ii) and 48(2)(a) and (b) of the CPA and that the Plaintiff/Respondent did not, also, comply with section 14(2)(b)(ii) of the CPA. The contention is that the said subsection sets out the consequences of failure to comply with the Act, consequently, the exception based on the second and fourth grounds, should be upheld with costs, so counsel argues.
- [17] It is indeed so that the Act applies to every transaction that occurs within the Republic. This provision has a caveat, in that the CPA does not apply to transactions that are exempted in terms of subsections 5(2), (3) and (4). The contention by the Defendant/Excipient's counsel that the transaction in this matter is not exempted from the application of the CPA, is correct.[1]
- [18] The fundamental question is whether the CPA applies to the transaction in this matter.
- [19] In terms of section 5(1), the CPA applies to –
- “(b) the promotion of any goods or services, or of the supplier of any goods or services, within the Republic, unless—*
- (i) those goods or services could not reasonably be the subject of a transaction to which this Act applies in terms of paragraph (a); or
 - (ii) the promotion of those goods or services has been exempted in terms of subsections (3) and (4);
 - (c) goods or services that are supplied or performed in terms of a transaction to which this Act applies, irrespective of whether any of those goods or services are offered or supplied in conjunction with any other goods or services, or separate from any other goods or services; and
 - (d) goods that are supplied in terms of a transaction that is exempt from the application of this Act, but only to the extent provided for in subsection (5).”
- [20] The phrase “transaction” is defined as follows in the CPA:
- “‘transaction’ means—*
- (a) in respect of a person acting in the ordinary course of business—
 - (i) an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration; or
 - (ii) the supply by that person of any goods to or at the direction of a consumer for consideration; or
 - (iii) the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration; or

(b) an interaction contemplated in section 5(6), irrespective of whether it falls within paragraph (a).”

[21] Section 5(6) of the CPA extends the definition of a “transaction”. However, from the reading of the subsection, it is patently clear that the transaction in this matter does not fall within that definition.[2]

[22] The definition of “transaction” in the Act presupposes that the transaction must be carried out in the ordinary course of business and for consideration. From the reasons that follow hereunder, if regard is had to the pleading before court, there is no indication at all that the transaction was carried out in the ordinary course of business, nor was it for consideration.

[23] The phrase “in the ordinary course of business” is defined to refer to all such acts and transactions undertaken by the company, including, but not limited to sale or purchase of goods, property or services, leases, transfers, providing of guarantees or collaterals, in the normal routine in managing trade or business and is not a standalone transaction.[3]

[24] “The ordinary course of business” is, also, defined as a standard used to indicate within a specified period, a business: has been conducted consistently within the scope of past commercial customs and practices; has not incurred any liabilities outside the day-to-day operations; has engaged in activities considered normal for that specific business; and has adhered to the industry

practices.[4]

[25] The main reason the Defendant/Excipient proffers, in argument, that the CPA applies to the transaction in this matter is that it was carried out in the ordinary course of business. In support of this submission, the Defendant/Excipient’s counsel refers to an email sent on 14 May 2023 by the Plaintiff/Respondent to the Defendant/Excipient.

[26] The email reads as follows:

“Hi Treveshen the one part of the legal proceedings.

You have still not provided a schedule on the so called "Production product supply proposal"

This is awaiting,

I am willing to allow for the R200k end this month by COB 25"

And 45 k by COB every month thereafter,

However: what's exactly is your plan to close off the outstanding,

R200k plus 45k per month with the outstanding balance of R2,241,350.00, Your payment of R200k plus a R45k per month is a 45 month repayment proposal,

Is this your proposal”

(My underlining)

- [27] In particular, the Defendant/Excipient's counsel relies on the phrase "Production product supply proposal" stated in the email as proof that the transaction was in the ordinary course of business. She contends that the phrase indicates that the Plaintiff/Respondent must have supplied the Defendant/Excipient with some product in the ordinary course of business.
- [28] On a proper reading of the email, it confirms that there are two transactions mentioned therein. One transaction relates to one part of the legal proceedings wherein a schedule on the so called "Production product supply proposal" is still to be provided and is awaiting (sic!). The second relates to the loan agreement whereat the terms of the loan agreement are being amended.
- [29] What counsel's argument misses is that according to the particulars of claim, the cause of action is a loan agreement and not payment of money for goods supplied. The relief sought by the Plaintiff/Respondent is repayment of money lent and advanced to the Defendant/Excipient. Importantly so, the Defendant/Excipient does not say the money was loaned in the ordinary course of business of lending money by the Plaintiff/Respondent. He could not have argued as such because nowhere in the particulars of claim is it mentioned that the Plaintiff/Respondent is in the business of lending money. He only loaned the Defendant/Excipient the money simply in a gesture of goodwill.
- [30] Of utmost importance is the second element of the definition of transaction, which is consideration. What the Defendant/Excipient fails to establish in his heads of argument or in oral argument by his counsel, is the consideration which the Plaintiff/Respondent is to receive for the loan that he had supplied to him (the Defendant/ Excipient).
- [31] In accordance with the Act, a "consideration" denotes anything of value given and accepted in exchange for goods or services, including: (a) money, property, a cheque or other negotiable instrument, a token, a ticket, electronic credit, credit, debit or electronic chip or similar object; (b) labour, barter or other goods or services; (c) loyalty credit or award, coupon or other right to assert a claim; or (d) any other thing, undertaking, promise, agreement or assurance, irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly, or involves only the supplier and consumer or other parties in addition to the supplier and consumer.
- [32] Nothing in the Defendant/Excipient's heads of argument is said about consideration. The Defendant's counsel made no argument about this requirement during her oral argument. She could not have argued as such because from the reading of the particulars of claim, there is nothing that indicates that the money loaned to the Defendant/Excipient was for consideration. What appears clearly from the particulars of claim is the allegation that the loan agreement is not governed by the provisions of the National Credit Act as no charge, fee or interest was payable in terms thereof.

[33] It is trite that for a pleading to be excipiable, it must be so on every reasonable interpretation.[5] The only interpretation that can be arrived at in this matter is that the cause of action relates to a loan of money and not the supply of a product, as the Defendant/Excipient's counsel wants to argue. On that basis, the Defendant/Excipient has failed to prove the two elements of the transaction, that is, that it must be in the ordinary course of business; and it must be for consideration. Both elements must be proved, if one is missing, the exception cannot be upheld. In this matter, the Defendant has failed to prove both elements, and as such, the CPA is not applicable and the loan agreement is, as such, not void – it was not necessary for the agreement to comply with section 48(1)(b)(ii) and 48(2)(a) and (b) of the CPA; and it was unnecessary for the Plaintiff/Respondent to comply with section 14(2)(b)(ii) of the CPA.

[34] The particulars of claim as they stand are satisfactory. They set out the material facts upon which the Plaintiff/Respondent relies and contain sufficient particularity to enable the Defendant/Excipient to reply thereto. The exception ought to be dismissed.

[35] In the premises, the exception is dismissed with costs on scale B.

M KUBUSHI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

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Date of argument:

05 August 2024

Date of judgment:

- [1] “(2) This Act does not apply to any transaction— (a) in terms of which goods or services are promoted or supplied to the State; (b) in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister in terms of section 6; (c) if the transaction falls within an exemption granted by the Minister in terms of subsections (3) and (4); (d) that constitutes a credit agreement under the National Credit Act, but the goods or services that are the subject of the credit agreement are not excluded from the ambit of this Act; (e) pertaining to services to be supplied under an employment contract; (f) giving effect to a collective bargaining agreement within the meaning of section 23 of the Constitution and the Labour Relations Act, 1995 (Act No. 66 of 1995); or (g) giving effect to a collective agreement as defined in section 213 of the Labour Relations Act, 1995 (Act No. 66 of 1995). (3) A regulatory authority may apply to the Minister for an industry-wide exemption from one or more provisions of this Act on the grounds that those provisions overlap or duplicate a regulatory scheme administered by that regulatory authority in terms of— (a) any other national legislation; or (b) any treaty, international law, convention or protocol. (4) The Minister, by notice in the Gazette after receiving the advice of the Commission, may grant an exemption contemplated in subsection
- (3) — (a) only to the extent that the relevant regulatory scheme ensures the achievement of the purposes of this Act at least as well as the provisions of this Act; and (b) subject to any limits or conditions necessary to ensure the achievement of the purposes of this Act.”
- [1] “(2) This Act does not apply to any transaction—
- (a) in terms of which goods or services are promoted or supplied to the State;
 - (b) in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister in terms of section 6;
 - (c) if the transaction falls within an exemption granted by the Minister in terms of subsections (3) and (4);
 - (d) that constitutes a credit agreement under the National Credit Act, but the goods or services that are the subject of the credit agreement are not excluded from the ambit of this Act;
 - (e) pertaining to services to be supplied under an employment contract;
 - (f) giving effect to a collective bargaining agreement within the meaning of section 23 of the Constitution and the Labour Relations Act, 1995 (Act No. 66 of 1995); or
 - (g) giving effect to a collective agreement as defined in section 213 of the Labour Relations Act, 1995 (Act No. 66 of 1995).

- (3) A regulatory authority may apply to the Minister for an industry-wide exemption from one or more provisions of this Act on the grounds that those provisions overlap or duplicate a regulatory scheme administered by that regulatory authority in terms of—
 - (a) any other national legislation; or
 - (b) any treaty, international law, convention or protocol.
- (4) The Minister, by notice in the Gazette after receiving the advice of the Commission, may grant an exemption contemplated in subsection
- (3) —
 - (a) only to the extent that the relevant regulatory scheme ensures the achievement of the purposes of this Act at least as well as the provisions of this Act; and
 - (b) subject to any limits or conditions necessary to ensure the achievement of the purposes of this Act.”
- [2] ”(6) For greater certainty, the following arrangements must be regarded as a transaction between a supplier and consumer, within the meaning of this Act: (a) the supply of any goods or services in the ordinary course of business to any of its members by a club, trade union, association, society or other collectivity, whether corporate or unincorporated, of persons voluntarily associated and organised for a common purpose or purposes, whether for fair value consideration or otherwise, irrespective of whether there is a charge or economic contribution demanded or expected in order to become or remain a member of that entity; (b) a solicitation of offers to enter into a franchise agreement; (c) an offer by a potential franchisor to enter into a franchise agreement with a potential franchisee; (d) a franchise agreement or an agreement supplementary to a franchise agreement; and (e) the supply of any goods or services to a franchisee in terms of a franchise agreement.”
- [2] ”(6) For greater certainty, the following arrangements must be regarded as a transaction between a supplier and consumer, within the meaning of this Act:
 - (a) the supply of any goods or services in the ordinary course of business to any of its members by a club, trade union, association, society or other collectivity, whether corporate or unincorporated, of persons voluntarily associated and organised for a common purpose or purposes, whether for fair value consideration or otherwise, irrespective of whether there is a charge or economic contribution demanded or expected in order to become or remain a member of that entity;
 - (b) a solicitation of offers to enter into a franchise agreement;
 - (c) an offer by a potential franchisor to enter into a franchise agreement with a potential franchisee;
 - (d) a franchise agreement or an agreement supplementary to a franchise agreement; and

-
- (e) the supply of any goods or services to a franchisee in terms of a franchise agreement.”
- [3] <https://www.lawinsider.com/dictionary/in-the-ordinary-course-of-business> – accessed on 27 August 2024.
- [4] https://www.law.cornell.edu/wex/ordinary_course_of_business accessed on 27 August 2024.
- [5] First National Bank Southern Africa Ltd v Perry NO and Others 2001
- (3) SA 960 (SCA) at para 6. Also see Theunissen en Andere v Transvaalse Lewendehawe Koöp Bpk 1988
- (2) SA 493 (A) at 500E - F.
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