

SOUTH AFRICA / JUDGMENT

Els v Swart N.O. and Another (MG10/2015) [2016] ZANWHC 43 (16 September 2016) [2016] ZANWHC 43

COURT

North West High Court, Mafikeng

BEFORE

Kgoele, Gura

CASE / FILE NUMBER

MG10/2015

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IN

THE NORTH WEST HIGH COURT

MAHIKENG

CIVIL

APPEAL MG 10/2015

In

the matter between:

PETRUS
JOHANNES STEPHANUS ELS
Appellant
and
DAVID
GERHARDUS CORNELIUS SWART N.O.
1st
Respondent
JOYCE
SWART
N.O.
2nd Respondent
CIVIL
APPEAL
GURA
J & KGOELE J
DATE

OF HEARING :

29 JULY 2016
DATE

OF JUDGMENT : 16 SEPTEMBER 2016
FOR

THE APPELLANT : Advocate Zwiegelaar
FOR

THE RESPONDENTS : Advocate Van der Berg

JUDGMENT

KGOELE J:

- [1] The appellant, who was the plaintiff in the Court a quo issued summons against the respondents for payment of an amount of R37 252-18, plus 9 per centum interest and a further interest of 15.5 per centum.
- [2] The respondents are duly authorised trustees of the Dawie Swart Familietrust (the Trust) and together with the appellant are members of Microbras Investments CC, both holding 50% member's interest in the said Closed Corporation.
- [3] On or about 1st August 2010, the appellant and the Trust, duly represented by the first respondent, entered into a joint venture agreement for the development of a property which was located at 229 Beyers Naude Avenue, Rustenburg.
- [4] A material term of the agreement was that both parties would bear the costs and expenses of the said development in equal parts. A further term was that should the appellant incur any loans in the costs and expenses for the development of the property, the Trust would be liable for repayment of 50% of the said loan to the appellant plus interest at the rate of 9% per year. A dispute arose between the two parties to the effect that the respondents did not keep to the end of their agreement, and that there is still an amount owed to the appellant.
- [5] The amount of R34,768.50 claimed by the appellant is alleged in the particulars of claim to be 50 per centum of a payment of R63,000.00 made by the appellant to a certain Buzz Electric as well as payment of wages in the amount of R6,405.00 made by the appellant, which totals R69,537.00.
- [6] The first and second respondents raised a special plea and a counter claim alleging that instead it had over paid the expenses agreed upon. The special plea, which was the only issue decided by the Court a quo was to the effect that the appellant's claim was based on a credit agreement as contemplated in section 8 of the National Credit Act, Number 34 of 2005 ("the NCA"), and the appellant should have amongst other requirements complied with the provisions of section 129(1) of the Act prior to the institution of the action.

- [7] It is important to highlight at the beginning that the particulars of claim are silent on whether the agreement is subject to the NCA or not. The appellant elected not to file a replication to the special plea. It is also common cause between the parties that no notice was given in terms of section 129 of the NCA.
- [8] The question which the Court a quo grappled with during the hearing of the special plea was whether the transaction was subject to the provisions of the NCA or not.

The appellant's contention was that the agreement is nothing else but a set-off between the parties and the claim was for the repayment of 50 per centum of certain expenses paid by appellant which they had agreed to bear in equal parts. Further that the claim of interest of 9 per centum was mistakenly included in the claim and thus the claim is not based on a credit agreement and or does not fall under any definition of a "Credit agreement".

- [9] Despite the appellant's contention that the 9% was mistakenly reflected, he did not, in the proceedings before the Court a quo, file a notice of intention to amend the particulars of claim. The respondents submitted that the appellant's attempt to amend the particulars of claim during argument can be construed as a concession that their transaction was subject to the provisions of the NCA. It was further contended on behalf of the respondents that based on the interest he is charging in his summons, the NCA applies, and therefore amongst the requirements that the appellant was supposed to comply with, was the fact that the section 129 notice should have been served on them first. The Court a quo did not accept the submissions by the appellant and upheld the special plea. This appeal is against the whole of the judgment of the Court a quo.
- [10] A careful analysis of the agreement between the parties is crucial to determine whether the agreement is regulated by the NCA. If one has regard to the claim of the appellant that was before the Court a quo, one will realise that the amount in question in exception of the interest claimed, constitutes half of the costs and expenses that were incurred by the appellant. As to why the appellant included the interest of 9% and a further 15.5% is a mystery to this Court. The appellant provided a reason during their arguments in the Court a quo that it was a mistake, nevertheless the appellant did not give reasons why he did not apply for an amendment of the particulars of claim timeously. It appears that this was the reason that swayed the Court a quo in upholding the special plea.
- [11] One need not only concentrate on the issue of the interest charged to finally resolve this matter. It also appears from the particulars of claim of the appellant that no loans were included in the amounts. During the arguments before us Mr Voster appearing on behalf of the respondents submitted on the contrary that appellant's claim consists of loans. To bolster his argument he referred us to paragraph 3.12 of the appellant's (plaintiff's) plea on the counterclaim instituted by the respondents (defendants) which was couched as follows:-

“The contents of this paragraph is denied and the Defendants are put to the proof thereof, regard being had of the contents of paragraph 3.8 hereabove. Plaintiff avers that Defendants failed to reimburse him, as agreed upon, for all loans incurred by him (Plaintiff), with 9% interest per annum, in the amount of R37 252.18, which amount is due and payable to Plaintiff by Defendants.” [My own emphasis]

- [12] It was conceded by the appellant’s Counsel Advocate Zwiegelaar that in addition to the issue of a mistake relating to the 9% interest which was raised above, the inclusion of the words “all loans” in the paragraph quoted above (plea in the counterclaim) definitely makes the pleadings of the appellant to be clumsily phrased.

She maintained that although this is the case, this does not detract from the fact that the agreement of the parties does not amount to a credit agreement.

- [13] I fully agree with the submissions made by Advocate Zwiegelaar and the reasoning thereof that this argument also cannot assist the respondents’ case. Firstly, even if we can accept that the claim was based on the agreement between the parties that should the appellant incur any loan the trust would be liable for repayment of 50 per centum of such a loan to him plus interest of 9 per centum per year, which fact I do not find, the agreement per se is not a credit agreement as contemplated in section 8 of the NCA read with the definition of “credit agreement”. It cannot be classified under section 8(3) – credit facility or section 8(5) – credit guarantee.
- [14] The next question to be looked at is whether the agreement is a credit transaction in terms of section 8(4) and therefore a credit transaction.
- [15] Section 8(4)(f) provides for a catch-all category to cater for the granting of credit which falls outside the above definitions.

It covers any deferral of payment of an amount when a charge, fee or interest is payable in respect of the agreement itself or in respect of the amount deferred. This category of credit transaction may for convenience sake be called the extended credit agreement. This category of agreement may include, for example, a sale of land in terms of which payment of the price is deferred and interest is payable, or a house-improvement scheme in terms of which the building contractor is paid over a period of time and, by agreement, adds interest to the contract amount. See: Scholtz: Guide to The National Credit Act, para 8.2.3.8.

- [16] A contract may on the face of it fall within the wide definition of section 8(4)(f), yet a court may decide on the facts and the substance of the contract between the parties that it should nonetheless not be treated as a credit agreement subject to the Act. This may happen if a Court is of the opinion that, bearing in mind the purposes of the Act, it was not the intention of the legislature to cover the type of agreement under consideration. This scenario was demonstrated in the case *Hattingh v Hattingh* 2014

(3) (SA) 162 (VB) where two brothers who had a business relationship stretching over decades decided to terminate their relationship. The contract provided that the one had to pay the other a certain amount over a period of time. The Court decided that there was no credit provider- consumer relationship between them and it was not the intention of the legislature to cover such a relationship.

[17] In our matter, it is clear that there was no credit provider – consumer relationship between the parties. A more convincing argument was raised by Adv Zwegelaar on behalf of the appellant to the effect that the provisions of the NCA would still not be applicable to the agreement between the parties even if the claim was for a loan amount as agreed by the parties above and bore 9% interest because their agreement is not “a credit agreement between parties dealing at arm’s length” as contemplated in Section 4(1) of the NCA.

[18] Section 4 of the NCA deals with the application of the Act. Subsection (1) thereof provides that the Act applies to every credit

agreement between the parties at arm’s length and made within or having an effect within the Republic of South Africa.

Section 4 sets out certain types of credit agreements that are excluded from the application of the NCA. To bolster this

argument, Advocate Zwegelaar submitted that the agreement between the appellant and the trust is expressly excluded from the application of the NCA in terms of Section 4(2)(b)(iv)(aa) which provides:-

“(2) For greater certainty in applying subsection (1) -

...

(b) In any of the following arrangements the parties are not dealing at arm’s length - ...

(iv) any other arrangement-

(aa) in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage

out of the transaction.”

[19] It does not require one to be a rocket scientist to know that family members who are mutually dependent when concluding an agreement their agreement will not be regarded as the one at arms-length. A credit agreement between natural persons who are in familiar relationship and are co-dependent on each other or one is dependent upon the other, will not also be regarded as dealing at arms-length. Loans/credit between a juristic person and a person with a controlling interest in that juristic person is not dealing at arms-length.

[20] In addition to the above, Advocate Zwiigelaar further referred this Court to a Judgment delivered on the 3rd August 2012 by the Full Bench of the Gauteng North Division on an appeal in the matter of *Friend v Sendal* 2015 (1) SA 395 (GP).

[21] The facts in the abovementioned matter were that the appellant had on or about the 10th December 2006 acknowledged in writting that he was indebted to the respondent in the amount of R1 225 500.00. He further undertook

to pay the said amount in full on or before the 1st December 2007 to the respondent and the interest thereon. By 1st December 2009 the appellant had paid a portion of the capital amount, but failed to make payment of the remainder of the capital amount leaving an outstanding balance of R620 000.00. The respondent subsequently instituted motion proceedings in the Gauteng Division of the High Court of South Africa, Pretoria (“the Court a quo”) against the appellant for the payment of R620 000.00 plus interest.

[22] The appellant contended in the Court a quo that the acknowledgment of debt was a credit agreement and further that the respondent was a credit provider who was required to register as such but had not done so and that the acknowledgment of debt was thus null and void.

[23] The Full Bench on appeal held in paragraph [14] and [15] of the judgment that the acknowledgment of debt concluded between the appellant and the respondent was indeed a credit agreement as contemplated in section 8(4)(f) of the NCA in that it deferred

payment of the sum of R1,225,000.00 and provided for payment of interest. In addition it concluded that the fact that it was a credit agreement did not necessarily make the respondent a credit provider as contemplated in the definition of “credit provider” in section 1 of the NCA who was required to register as such in terms of section 40 of that Act.

[24] Furthermore, in paragraph [18] of the judgment the Full Bench held that 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 paragraph (a) of subsection (1) apply to the total number of credit agreements in respect of which a person or any associated person is the credit provider” makes it clear that section 40(1)(a) of the Act envisages a situation where a person frequently provides credit or concludes credit agreements as defined and not a once-off transaction as was the position therein.

[25] After having stated in paragraph [21] and [22] of the judgment that it does not understand the provisions of section 40(1)(b) of the NCA to refer to a single principal debt exceeding the threshold or to a single credit agreement in respect of which the amount exceeds the threshold and that the provisions of section 40(1)(b) of that Act should be interpreted as they read, namely that it is ‘the total principal debt ... under all outstanding credit agreements’ that bring on an obligation to register as a credit provider, the Full Bench made a finding in paragraph [24] of the judgment that section 40(1)(b) must be seen as having been directed at those who are in the credit market and/or industry, or at those who intend to participate in

the credit market and/or industry and that the respondent in this once-off transaction cannot be seen as participating in the credit market. It concluded by saying in paragraph [28] that the respondent was consequently not obliged to register as a credit provider in terms of section 40 of the National Credit Act for a once-off transaction.

- [26] However, Murphy J sitting as a single Judge in a reported matter of *Van Heerden v Nolte* 2014 (4) SA 584 (GP) had reservations about the correctness of the decision of the Full Bench. He remarked:-

“In any event, the ratio decided in Friend is inconsistent with the approach taken by the Constitutional Court in National Credit Regulator v Opperman and Others, 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 that Opperman was required to 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’.”

- [27] Fortunately the scenario depicted in the above two judgments from the Gauteng North Division does not play itself in our matter. Even though the decision of the Constitutional Court Murphy J referred to would have had a binding effect on us, there is no need to analyse further the criticism by Murphy J because there is no evidence or any indication in casu that the appellant is a person who lent more than R500,000.00 to the respondent or any other persons. The amount claimed by the appellant in casu is R34 768.50 which is 50 per centum of the costs and expenses which the respondent has to repay to the appellant in respect of the costs and expenses paid by the appellant

for the development of the property.

- [28] Unfortunately the following remarks by the Court a quo tend to reveal that the Court a quo was concerned with form over substance in coming to the conclusion it reached:

“It is of great concern to the Court that the summons herein was served on 6 June 2013, the Special Plea was served and filed on 24 January 2014 which is after six months and the arguments were only heard in Court a year later on 2 February 2015.

The plaintiff's argument is not on the point of law raised by the defendants but it is simply a concession that a mistake was made on the papers.

The argument goes further to the fact that the defendants should have read, understood and interpreted the particulars of claim the same way as the plaintiff that the 9% was a mistake. The question is if the particulars of claim do not clearly outline the claim and the coming in of the 9% which was discussed regarding a condition of the agreement, how is defendant or how were the defendants supposed to know.

Previously such costly omissions or mistakes were clarified by a request for further particulars.

Now in this matter you see the saying that you rise and fall with your papers clearly playing itself out. The plaintiff concedes his mistakes and submits that the papers can be amended. The question is why did the plaintiff not do that for more than a period of a year, rather than simply coming to Court and arguing or placing on record that it was a mistake and that mistake should have been interpreted the same way by the defendants.

The rules of this Court are accommodative on issues of such a nature and one of the important reasons except for saving time and protected litigating is found in Rule 1(2) of the Magistrate's Court Rules dealing with the purpose and application of the rules that are to be applied so as to facilitate the expeditious handling of disputes and the minimisation of costs involved. The emphasis of the Court is on minimisation of costs and dealing with matters expeditiously.

The application before Court is not for an amendment of the Particulars of Claim which is a recourse that plaintiff should have resorted to, rather than to just consider a mistake”.

[29] I fully agree with the submissions by Adv. Zwegelaar on behalf of the appellant that the Court a quo erred in upholding the special plea. The agreement does not amount to a credit transaction and is therefore not a credit agreement.

The appellant was also not a credit provider as contemplated in the definition of “Credit provider” in Section 1 of the NCA who was required to register in terms of section 40. The NCA is therefore not applicable to the appellant's claim in whatever form it may take flowing from the contents of the terms of their agreement. As a result, it was also not necessary for the appellant to comply with the provisions of Section 129 (1).

[30] The argument that the appellant did not file a replication to the special plea does not detract from the fact that the point raised is a point of law which can be argued solely on the papers before Court.

[31] I must hasten to mention that the Court a quo only dealt with the special plea raised and not the merits. Therefore nothing will be said in as far as the counter-claim that the respondents raised is concerned.

[32] In as far as costs, I am of the view that there are reasons that persuade me not to follow the normal rule that the costs follow the results in its strict sense. I am of the view that but for the clumsy way in which the appellant drafted its particulars of claim, the exception would not have been raised. What lend credence to this is that the appellant nevertheless sought an amendment of the pleadings before the argument started in the proceedings before the Court a quo. I am of the view that it will be in the interest of justice that this Court demonstrates its displeasure by not awarding the appellant the costs. An order that each party pays its own costs is appropriate in the circumstances of this matter.

[33] Consequently the following order is made:-

33.1 The appeal is upheld;

33.2 The decision of the Court a quo upholding the Special Plea raised by the respondents (defendants in the Court a quo) is hereby set aside;

33.3 The costs order made by the Court a quo is also set aside;

33.4 Each party should pay its own costs in as far as both the adjudication of the Special Plea before the Court a quo and the Appeal in this Court.

A M KGOELE

JUDGE OF THE HIGH COURT

I agree

SAMKELO GURA

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