
SOUTH AFRICA / JUDGMENT

Fourie v Geyer (MKP27/2018) [2019] ZANWHC 42; 2020 (6) SA 569 (NWM) (22 August 2019) [2019] ZANWHC 42

COURT

North West High Court, Mafikeng

BEFORE

Petersen

CASE / FILE NUMBER

MKP27/2018

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: MKP 27/2018

In the matter between

ROY GRAHAM FOURIE APPLICANT

and

PIETER ALBERT GEYER

RESPONDENT

(Identity number: 5[...])

JUDGMENT

PETERSEN AJ:

INTRODUCTION

- [1] The applicant launched an application for the payment of an amount of R1 303 120,05 (one million three hundred and three thousand one hundred and twenty rand and five cents) plus interest at a rate of 18% per annum calculated from 26 June 2018 to date of final payment. The underlying cause of the claim is an acknowledgment of debt (“AoD”), concluded in his favour by the respondent on 13 August 2015 at Potchefstroom in respect of three (3) amounts:
1. R461 000,00 for outstanding rentals;
 2. R270 000,00 in respect of the respondent’s indebtedness to ABSA bank for loans which was settled on his behalf; and
 3. R100 000,00 in respect of commission due to the applicant arising from the sale of an immovable property.
- [2] The applicant alleges that the aforementioned amounts, with the agreed rate of interest, calculated from 26 June 2018, amount to:
1. R742 559,82 for outstanding rentals;
 2. R399 484,35 in respect of the settled ABSA loan;
 3. R161 075,88 in respect of the commission.
- [3] In a point in limine raised by the respondent he contends that the AoD is tantamount to a credit agreement which renders it subject to the National Credit Act 34 of 2005 (“the NCA”). In the event of the Court not being with the respondent on the point in limine, the respondent takes issue with the correctness of the three amounts due in respect of outstanding rentals, the ABSA loan and the commission.

THE POINT IN LIMINE RAISED BY THE RESPONDENT: THE APPLICABILITY OF THE NATIONAL CREDIT ACT 34 OF 2005 (“THE NCA”)

THE ANSWERING AFFIDAVIT OF THE RESPONDENT

- [4] The respondent makes the following assertions in the answering affidavit in respect of the point in limine. The cause of action of the applicant is premised on an AoD in terms of which payment is deferred for 60 days from date of signature of the AoD as stipulated in clause 4 of the AoD with an interest rate of 18% per annum applicable to the relevant amounts. These terms of the AoD therefore render the agreement a credit agreement as contemplated in section 8(4) of the NCA. In previous transactions the applicant had “advanced credit” to the respondent where payments were deferred and the outstanding amounts were subject to interest at a rate of 10% per month. Whilst conceding that the previous loans were no longer outstanding, the respondent contends that this demonstrates that the applicant has advanced credit agreements in excess of R500 000,00 and that the applicant actively and regularly advances credit as contemplated in the NCA. The three

transactions which form the subject matter of the AoD together with interest amounts to R1 790 120,05. These amounts are not once off transactions. The applicant should therefore have been registered as a credit provider as contemplated in section 40 of the NCA.

- [5] Since the applicant is not registered as a credit provider, the respondent contends that the agreement or AoD is unlawful to the extent provided for in section 89 of the NCA. Further, because no assessment as contemplated in section 81 of the NCA was completed, the agreement is also unlawful in terms of section 89 of the NCA. The respondent accordingly seeks an order that the application be dismissed with costs on the basis of non-compliance with the NCA.

THE SUBMISSIONS ON THE POINT IN LIMINE

THE APPLICANT

- [6] The applicant submits that the financial assistance provided to the respondent does not fall within the ambit of the NCA as the AoD was not concluded at arm's length. The applicant emphasizes his 18 year relationship with the respondent with reference to the nature and terms of the AoD, as well as previous loans made to the respondent by himself, a previous loan by his wife to the respondent and a previous loan made by the applicant to the respondent's daughter. The applicant therefore contends that the agreement inherent in the AoD is not an arm's length transaction as contemplated in section 4(1) of the NCA.
- [7] The applicant submits that even if it were to be found that the AoD is subject to the NCA, under all the credit agreements in force at any time between the applicant and the respondent (there being no other, save for an R8000,00 loan to the respondent's daughter), the agreements did not exceed the threshold of R500 000,00 at any given time, as was applicable at the time in terms of Government Gazette 28893 of 1 June 2006. In terms of section 40(1) of the NCA, before its amendment and as applicable to the present matter, only credit providers with an aggregate number of credit agreements exceeding the threshold of R500 000,00 were required to register as such. The applicant submits that none of the capital amounts exceeded R500 000,00 at any given time and as such he was not required to register as a credit provider. The applicant therefore submits that the point in limine is a poorly taken technical point without merit which should be dismissed.

THE RESPONDENT

THE ARMS' LENGTH SUBMISSION IN TERMS OF SECTION 4 OF THE NCA

- [8] The respondent submits that the transactions relevant to the AoD were concluded at arm's length. The respondent highlights the relevant provisions of section 4(2)(b) of the NCA and relies on *Du Bruyn NO and Others v Karsten* 2019 (1) SA 403 (SCA), where the question of arm's length transactions was considered, to support this contention.

- [9] The respondent submits that the content of the AoD in the present application is indicative of the applicant striving to obtain the utmost advantage when regard is had to the formally drafted nature of the AoD which seeks to recover not only capital amounts but interest and costs of litigation on the punitive attorney-client scale.
- [10] The respondent further submits that the amounts referred to in the AoD relates to business transactions, each of which hold an advantage for the applicant, with its primary objective to secure contractual gains and to advance the applicants interests.

THE AoD AS A CREDIT AGREEMENT

- [11] The respondent relies on section 8(4)(f) of the NCA, in his submission that the AoD constitutes a credit agreement. The submission is essentially that payment of the amount agreed in the AoD through deferred payment with charges, fees and interest constitutes a credit agreement as defined.
- [12] The point is made that clause 1 to 4 of the AoD provides for the three respective payments which are deferred from date of signature, with the levying of interest and the payment of certain fees as stipulated in clause 10 for the recovery of all fees, expenses and disbursements charged by the attorneys instructed by the applicant, including collection commission. The submission is that this brings the AoD squarely within the ambit of sections 8(1) and 8(4) of the NCA as a credit agreement.
- [13] The respondent submits further that the amounts relevant to the AoD must be taken into account with previous loans advanced to the respondent by the applicant. The respondent refers to these amounts in his answering affidavit at PAG 1 (R143 000,00) and PAG 2 (R344 000,00), which were deferred and were interest bearing. The respondents submits, contrary to the submission of the applicant, that these amounts should be taken into account with the amounts under consideration, placing reliance on sections 40(1) and 40(2)(a) of the NCA which provides that the aggregate principal debt of credit agreements must be taken into account.
- [14] The respondent submits that even if the rental amount and the commission amount is excluded as amounts that constitute credit agreements, the ABSA bank loan amount of R270 000,00 with the previous amounts of R143 000,00 and R344 000,00 loaned and advanced to the respondent, exceeds the aggregate of R500 000,00, with the result that there was an obligation on the applicant to register as a credit provider.
- [15] The respondent ultimately submits that the agreements are unlawful in terms of the NCA and since the applicant

was not registered as a credit provider section 89(5) of the NCA is applicable.

DISCUSSION: THE POINT IN LIMINE

Section 4(1) and 4(2)(b) and section 8(4)(f) of the NCA

[16] The point in limine begs, inter alia, the question whether the relationship between the applicant and respondent was a mutually symbiotic relationship to the benefit of both parties, or premised on commensalism with only one party benefitting from the relationship through obtaining an unfair

advantage. Was there a familial relationship between the parties or was the agreement an arm's length transaction?

[17] Section 4(1) of the NCA applies to every credit agreement between parties dealing at arm's length. Section 4(2)(b)(iii) and (iv) of the NCA, in the context of the present application, refers to arrangements where parties are not dealing at arm's length:

“4(2)(b)

(iii) a credit agreement between natural person who are in a familial relationship and –

(aa) are co-dependant on each other; or

(bb) one is dependent on the other; and

(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; or

(bb) that is a type of transaction that has been held in law to between parties who are not dealing at arm's length.”

[18] It is common cause that the applicant and respondent have been friends for the past 18 years. The applicant has come to the financial rescue of the respondent and his family on a number of occasions. They engaged in formal business dealings

underpinned by rental agreements in respect of property owned by the applicant. The applicant on his version was entitled to commission on the sale an immovable property owned by the respondent. A common sense assessment of this relationship demonstrates that the mere fact that the parties were friends, who just happened to engage in business dealings, where one friend advanced loans to the other in times of need, does not, detract from the fact that in so doing they were transacting at arm's length.

[19] Section 8(4)(f) of the NCA provides as follows:

“8(4)(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.”

[20] From a legal perspective, adopting a pragmatic approach to the AoD, it is clear that the AoD as drafted has the salient features of a credit agreement at arm’s length. The agreement identifies a capital amount which attracts interest, payments are deferred, collection fees are levied and non-payment could trigger litigation accompanied by litigation costs on a punitive scale as between attorney-client. In a familial relationship in the ordinary sense, it would ordinarily be out of kilter that loans would be advanced to family members with the expectation of interest and the lurking notion of litigation with punitive cost orders.

[21] The relationship between the parties which underpins the AoD overwhelmingly demonstrates anything but a familial relationship. Save for the fact that the parties are friends, the agreements which gave rise to the AoD, are clear business transactions which are greatly to the benefit of or advantageous to the applicant and clearly concluded at arm’s length.

[22] On an interpretation of section 4(2)(b)(iii) and (iv), and 8(4)(f) of the NCA, it must be concluded that the nature of the business relationship between the parties was conducted at arm’s length similar to a financial institution and consumer seeking to engage in a credit agreement. The nature of the relationship does not fall within the ambit of any of the exclusions envisaged by section 4(2)(b)(iii) and (iv) of the NCA.

Section 40(1) of the NCA before Amendment (Registration as Credit Provider)

[23] Section 40(1) of the NCA as it applied at the time of the three transactions and conclusion of the AoD sets out the circumstances under which registration as credit provider is applicable:

“40(1) A person must apply as a credit provider if –

- (a) that person, alone or in conjunction with any associated persons, is the credit provider of at least 100 credit agreements, other than incidental credit agreements;
- (b) the total principal debt owed to that credit provider under all outstanding agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1).”

[24] Do the three transactions in the AoD exceed the amount of R500 000,00 prescribed by section 42(1) of the NCA, which was applicable at the time of the execution of the AoD which would have required the applicant to have registered as a credit provider? In my view, this question involves a threefold enquiry:

- (1) Does the three amounts set out in the AoD constitute credit agreements within the meaning ascribed in the NCA;
- (2) Does the two previous settled loan agreements, considered in conjunction with the three amounts in the AOD; or any of such amounts that may be found to constitute credit agreements, exceed the R500 000,00 threshold applicable at the time of the agreements; and

- (3) Does the AoD constitute a credit agreement within the ambit of the meaning of a credit agreement in the NCA?
- [25] In my view, the rental and commission amounts can safely be discounted as not being due as a result of credit agreements. The ABSA loan amount of R270 000,00 on the contrary falls squarely within the ambit of the meaning of a credit agreement. On its own, however, it does not meet the threshold of R500 000,00 requiring registration as a credit provider. The respondent submits that the two previous loans should be considered, which would suggest, that the threshold of R500 000,00 would be exceeded requiring registration as a credit provider.
- [26] It is common cause that the two previous loans have been settled by the respondent, meaning that the agreements relevant thereto cannot be considered having regard to section 40(1)(b) of the NCA. The two previous loan agreements do not constitute outstanding credit agreements. The only outstanding credit agreement is the ABSA loan account. In my view, the applicant was not required to register as a credit provider on a construction of the second question above.
- [27] Is the AoD, as the underlying cause of action, a credit agreement irrespective of the nature of the three amounts which gave rise to the AoD? The description of a credit agreement in section 8(4)(f) of the NCA is clear and unambiguous. No distinction or qualification is given to “any other agreement”. The only requirement is that it relates to the payment of an amount owed by one person to another which payment is deferred with charges, fees or interest being payable in respect of the agreement. The AoD would therefore constitute a credit agreement if the requisite threshold is met.
- [28] In *Du Bruyn*, the Supreme Court of Appeal settled the law on once-off transactions when regard is had to paragraph 18 and the ultimate finding at paragraph 28. Nicholls AJA said the following at paragraphs 18 and 28:

“18 The real issue in this appeal is whether the full court in Friend (fn 1 Friend v Sendal 2015

- (1) SA 395 (GP) was correct in finding that the NCA was directed only at those in the credit industry and did not apply to single transactions where credit was provided, irrespective of the amount involved. The court in *Friend* para 28 held that, notwithstanding the fact an agreement may be a credit agreement in terms of the NCA, this did not necessarily mean that the credit provider was obliged to register in terms of s 40(1)(b). For this interpretation the full court relied on the purpose of the NCA, set out in s 3, which is ‘to promote and advance the social and economic welfare of South Africans’ in order to achieve ‘a fair, transparent, competitive, sustainable,

responsible, efficient, effective and accessible credit market and industry, and to protect consumers’. Bearing this in mind the court found that the provisions of the NCA were meant to regulate those participating in the credit industry and persons who frequently provide credit, and was not applicable to once-off transactions.

28 In summary the only conclusion to be drawn is that the requirement to register as a credit provider is applicable to all credit agreements once the prescribed threshold is reached, irrespective of whether the credit provider is involved in the credit industry and irrespective of whether the credit agreement is a once-off transaction. That it is an imperfect solution is readily accepted, but it is for the legislature to remedy, rather than for the courts to attempt to accommodate deficient drafting by attributing a meaning to s40(1)(b) that is not justified by the wording of the statute.”

[29] The AoD executed in favour of the applicant by the respondent was for a capital amount of R831 000,00. On its own that amount exceeds the threshold of R500 000,00 applicable at the time the AoD was concluded. The applicant was therefore, in my view, required to register as a credit provider in terms of section 40(1) of the NCA.

CONCLUSION

[30] The point in limine must be answered in favour of the respondent. The Court accordingly accepts that the NCA applies in that the AoD was not entered into within the confines of a familial relationship or otherwise stated is not excluded in terms of section 4(2)(b) of the NCA, has the salient features of a credit agreement in terms of section 8(4)(f) of the NCA and the statutory threshold of R500 000,00 finds applicability to the AoD. It is common cause that the applicant was not registered as a credit provider. What is the effect on the credit agreement inherent in the AoD?

[31] Section 89(2)(d) and 89(5) of the NCA provides that:

“89(2) Subject to subsections (3) and (4), a credit agreement is unlawful if-

(d) at the time the agreement was made, the credit provider was unregistered and this Act requires that credit provider to be registered.

89(5) If a credit agreement is unlawful in terms of section, despite any other legislation or any provision of an agreement to the contrary, a court must make a just and equitable order but not limited to an order that –

(a) the credit agreement is void as from the date the agreement was entered into.”

[32] The credit agreement, the AoD, accordingly stands to be declared unlawful. The applicant would not, however, be left without a remedy as he retains his right to claim restitution based on unjustified enrichment. This was confirmed in *National Credit Regulator v Opperman and Others* 2013 (1) SA 1 (CC), where the Constitutional Court in declaring section 89(5)(c) of the NCA invalid found at paragraph 88:

“It follows that the High Court’s judgment and order cannot be faulted. Its interpretation of section 89(5)(c) is the most plausible of the interpretations advanced. The interpretation of the NCR cannot reasonably be applied to the provision. The alternative

interpretation proposed is futile. The provision is also capable of interpretation and is thus not unconstitutionally vague. It results in the deprivation of Mr Opperman's property because it extinguishes his right to claim restitution based on unjustified

enrichment, without leaving any discretion to a court to consider a just and equitable order under the circumstances. This deprivation is arbitrary because sufficient reasons have not been given for it. The infringement of the right not to be arbitrarily deprived of property is disproportionate to the purpose of the provision. There are less restrictive means available to achieve the purpose. Therefore it is not a constitutionally acceptable limitation of the right."

[33] In reference to the Opperman case, Nicholls AJA makes the point very succinctly at paragraph 22 of Du Bruyn:

"22 ...The issue in that case was the constitutionality of s 89(5)(c) of the NCA which at the time provided that the rights of a credit provider to recover the money paid in terms of an unlawful credit

agreement would be cancelled or, in terms of s 85(5)(c)(ii), be forfeited to the state. The Constitutional Court found that s 89(5)(c), by denying the credit provider the right to restitution, and denying the court the right to make an order that is just and equitable, amounted to the arbitrary deprivation of property. This lack of discretion of the court was a breach of s 25 of the Constitution, and could not be justified as a reasonable and justifiable limitation. The section was thus held to be invalid."

ORDER

[34] In the result:

1. The point in limine raised by the respondent is upheld.
2. The agreement attached to the founding affidavit as Annexure B is declared to be unlawful due to non-compliance with section 40(1) of the National Credit Act, Act 34 of 2005, before the amendment thereof by the National Credit Amendment Act, Act 19 of 2014.
3. The applicant's claim is dismissed with costs.

AH PETERSEN

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION

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