

SOUTH AFRICA / JUDGMENT

Jacobs v De Klerk and Another (984/2019) [2019] ZAFSHC 112 (4 July 2019)

[2019] ZAFSHC 112**COURT**

Free State High Court, Bloemfontein

BEFORE

S.G. Meintjes

CASE / FILE NUMBER

984/2019

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA,****FREE****STATE DIVISION, BLOEMFONTEIN****Case****number: 984/2019****In****the matter between:**

EMBRENTIA
JACOBS Plaintiff
and
BAREND
JACOBUS DE KLERK 1st
Defendant
LEJWE
CRUSHERS (PTY)
LTD 2nd
Defendant

CORAM:

MEINTJES, AJ

JUDGMENT**BY: MEINTJES, AJ****DELIVERED ON: 4 JULY 2019**

- [1] This is an application for summary judgment by the plaintiff against the first defendant for payment of the amount of R1 685 289.00, interest on the amount of R1685 289.00 a tempore morae, calculated in accordance with the Prescribed Rate of Interest Act, 55 of 1975 at the rate of 10% per year from 30 September 2018 to date of final payment and costs of the suit to be taxed.
- [2] The first defendant opposes the application for summary judgment.
- [3] Plaintiff's cause of action as set out in the particulars of claim, is based on: 1) a partly oral, partly written agreement (the resignation agreement - "POC1" attached), which was concluded between the plaintiff, the first defendant, the second defendant and the other directors on 12 April 2016, and 2) a written acknowledgement of debt ("POC2" attached), also concluded on 12 April 2016, in terms of which the first defendant acknowledged his indebtedness to the plaintiff in the amount of R 1 682 289.00, and undertook to pay the amount on or before 30 September 2018, as well as to pay to the plaintiff an amount of R 14 000.00 per month. The first payment was to be made on 13 May 2016 and thereafter monthly until 30 September 2018, until the final payment of the outstanding debt.

The first defendant failed to comply with his obligations in terms of the said resignation agreement and the acknowledgement of debt agreement, in that he failed to make punctual payments of the monthly amounts of R 14 000.00, and also failed to pay the amount of R 1 682 289.00 to plaintiff on or before 30 September 2018.

The first defendant however made payments to the plaintiff in the total amount of R 389 000.00 ("POC3" attached).

As a result, the first defendant is indebted to the plaintiff to the amount of R1 685 289.00, which amount is calculated as per the particulars of claim (p7, par 10).

The plaintiff also averred in the particulars of claim, that the resignation agreement and the acknowledgement of debt agreement, do not constitute credit agreements as contemplated in section 8 of the National Credit Act, 34 of 2005 (the Act) in that the loan agreement concluded between plaintiff and second defendant, is in terms of section 4(1)(b) of the Act exempted from the provisions of the Act as the loan agreement constitutes a large agreement, as described in section 9(4) of the Act.

Therefore, by virtue of the provisions of section 4(2)(c) of the Act, the Act is not applicable to both the resignation agreement and the acknowledgement of debt agreement, as they constitute agreements in terms of which the first defendant undertook and promised to satisfy the second defendant's obligation to the plaintiff, which obligation does not arise from any transaction to which the Act applies.

The plaintiff issued summons on 1 March 2019, which was served on first defendant on 8 March 2019.

The defendants delivered their notice of intention to defend on 8 April 2019. Whereafter the plaintiff delivered the application for summary judgment on 24 April 2019, within 15 days after the delivery of the notice of intention to defend.

Plaintiff, in her affidavit in support of the application for summary judgment, verified the cause of action as set out in the particulars of claim. She also stated that according to her, there is no bona fide defence to the action and that the notice of intention to defend, has been delivered solely for the purposes of delay.

3.1 The first defendant, in his answering affidavit, denied that he is indebted to the plaintiff for the amount claimed as per the summons. He also denied that he does not have a bona fide defence against plaintiff's claim or that the notice to defend was given solely for the purpose to delay plaintiff's claim.

First defendant specifically denied that he agreed to settle the obligations of the second defendant to the plaintiff by virtue of the resignation agreement and the acknowledgment of debt agreement. "Put differently, I deny that the resignation agreement and the acknowledge of debt agreement are credit guarantees as provided for

by the NCA". (the Act)

The reason for this, according to first defendant, being that the obligations of the original loan agreement and those of the resignation agreement and the acknowledge of debt agreement differ significantly, so much so (as set out in the affidavit), that it cannot be said that the last-mentioned agreements guarantee the second defendant's obligations under the loan agreement. They being new and separate rights and obligations "more onerous than those of the loan agreement"... "the loan agreement has been novated by the terms and conditions of the resignation agreement and the acknowledgement of debt agreement" they are accordingly not a credit guarantee of the loan agreement.

Both agreements therefor credit agreements within the ambit of section 8 of the Act. Plaintiff not a registered credit provider, the resignation agreement and the acknowledgement of debt agreement therefor unlawful credit agreements in terms of section 89(2)(d) read with 89(5) of the Act.

[4] The following seems to be common cause facts:

4.1 The second defendant is, in terms of a loan agreement, concluded with the plaintiff in February 2015, indebted to the plaintiff in the amount of R 1 6 82 289.00;

4.2 This loan agreement is in terms of section 4(1)(b) of the Act, exempted from the provisions of the Act;

4.3 The plaintiff and the first defendant concluded the resignation agreement and the acknowledgement of debt agreement on 12 April 2016 on the terms as set out;

4.4 The first defendant failed to make sufficient payments in terms of the said agreements;

4.5 Plaintiff is not a registered credit provider in terms of the Act.

[5] The issue to be decided is whether the resignation agreement and the acknowledgement of debt agreement are credit agreements as contemplated in section 8 of the Act.

5.1 In terms of the resignation agreement and the acknowledgement of debt agreement, the first defendant clearly agreed and undertook to pay the said amounts to the plaintiff. Plaintiff did not advance any money to the first defendant in terms of the resignation agreement or the acknowledgement of debt agreement. That was done to the second defendant in terms of the loan agreement, which is exempted from the Act.

5.2 Relevant to the issue to be determined is section 8(5) of the Act which provides:

“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”.

To be read with this, is section 4(2)(c) of the Act which provides:

“For greater certainty in applying subsection (1)-(c) 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; and”.

[6] In *Ratlou v Man Financial Services SA (Pty) Ltd* [2019] ZASCA 49 the central issue of the appeal was whether a settlement agreement is governed by the provisions of the Act, when the underlying contracts are not governed by the Act?

In finding that the settlement agreement did not fall within the ambit of the Act, the court inter alia held as follows in par 19:

“If the underlying causa did not fall within the parameters of the NCA, then its compromise in terms of the settlement agreement, cannot logically result in the agreement being converted to one that does”
And also in par 21 it was decided: “A purposive interpretation and not a literal interpretation of s 8(4)(f) of the NCA is required because it is quite clear that the NCA was not aimed at settlement agreements. Its application to them will have devastating effect on the efficacy and the willingness of parties to conclude settlement agreements and thereby curtail litigation”.

Section 8(4)(f) of the Act provides that:

“An agreement, irrespective of its form but not including an agreement contemplated I 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”.

In the Ratlou decision (supra) in par 26 it was in no unclear terms decided that:

“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”.

In *Ribeiro v Slip Knot Investments 777 (Pty) Ltd* [2010] ZASCA 174; 2011

- (1) SA 575 (SCA) it was found that the underlying causa remained extant despite settlement and that the two agreements were interdependent. On p 580 par C-D it was decided:

“...- does not detract from the fact that the parties explicitly intended not to extinguish, but rather to confirm, the obligations arising from the initial agreements. The obligations under the loan agreements and those under the new agreement were thus

interdependent. This can only mean that the agreement was, in substance, an agreement to guarantee RB Merit's obligations

under the initial loan agreements-and was therefore a credit guarantee to which the NCA did not apply”.

- [7] In casu, the resignation agreement and the acknowledgement of debt agreement relate to an underlying agreement which is exempted from the Act. Therefore, based on the dicta in Ratlou (supra) the resignation agreement and the acknowledgement of debt, do not constitute credit agreements as contemplated in the Act, but rather, based on the dicta in Ribeiro (supra), credit guarantees as contemplated in section 8(5) of the Act. In terms of section 4(2)(c) of the Act, it is however exempted from the Act, because the loan agreement is not subjected to the provisions of the Act.

It is clear that the first defendant was not granted any loan nor was any credit advanced to him by plaintiff. He was also not a party to the loan agreement between plaintiff and second defendant. His involvement arose when he undertook or promised to pay the admitted indebtedness of second defendant. That brings the obligations of the first defendant within the language of section 8(5) of the Act. However, section 4(2)(c) of the Act, provides that the Act applies to a credit guarantee only to the extent that this Act applies to a credit facility or credit transaction. The loan agreement here, not falling within the ambit of the provisions of the Act. The resignation

agreement and the acknowledgement of debt agreement thus falling outside of the scope of the Act, and plaintiff, not a credit provider in terms of section 40 of the Act, not obliged to register as a credit provider (see: Shaw v McIntosh 2019(1) SA 398 (SCA) and De Bruyn v Karsten 2019 (1) SA 403 (SCA).

[8] It is therefore found that the application for summary judgment is within the provisions of Rule 32(2), and that the first defendant

does not have a bona fide defence against the plaintiff's claim and that the plaintiff is therefore entitled to summary judgment as prayed for.

[9] Subsequently I make the following order:

Summary judgment is granted against the first defendant for:

9.1 Payment of the amount of R 1 685 289.00.

9.2 Payment of interest on the amount of R 1 685 289.00 a tempore morae, calculated in accordance with the Prescribed Rate of Interest Act, 55 of 1975 at the rate of 10% per year from 30 September 2018 to date of final payment.

9.3 Payment of the costs of the suit to be taxed.

S.G.MEINTJES, AJ

On behalf of plaintiff: Adv. C.D Pienaar

Instructed by: Du Rand & Louw

BLOEMFONTEIN

On behalf of defendants: Adv. PJJ Zietsman

Instructed by: Kramer Weihmann & Joubert Inc

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