

SOUTH AFRICA / JUDGMENT

Kruuse v Hillhouse (83/2015) [2015] ZAECHGC 96 (7 July 2015)

[2015] ZAECHGC 96

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Plasket

CASE / FILE NUMBER

83/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

Case

No. 83/2015

Date

Heard: 12/6//15

Date

Delivered: 7/7/15

Not

Reportable

In

the matter between:

ANDREW
DOUGLAS KRUUSE
APPLICANT
and
IAN
HILLHOUSE
RESPONDENT

JUDGMENT

PLASKET, J

- [1] This is an application for leave to appeal, brought by the defendant (Kruuse), against an order granting summary judgment against him and in favour of the plaintiff (Hillhouse).
- [2] The application for leave to appeal raises new issues. One, which was abandoned during the application for summary judgment, has been revived. I shall identify and deal with them once I have set out the

facts.

Background

- [3] Hillhouse sued Kruuse on an acknowledgement of debt, signed by both parties, that read:

‘ACKNOWLEDGEMENT OF DEBT

I, the undersigned,

ANDREW DOUGLAS KRUUSE

(Identity Number:)

(hereinafter referred to as “the Debtor”)

Acknowledge that I am indebted to:

IAN HILLHOUSE

(hereinafter referred to as “the Creditor”)

In the sum of R2 975 284.00 (Two Million Nine Hundred and Seventy Five Thousand Two Hundred and Eighty Four Rand)

in respect of money due owing and payable by me to the creditor arising out of:

1. The lease of cattle
 - R572 021.10 (VAT Incl.);
2. Monies lent and advanced
 - R1 007 903.14;
3. Sale of 144 cattle @ R8 500 each
 - R1 395 360.00 (VAT Incl.)

(hereinafter referred to as “the Principal Debt”)

And furthermore declare that I am bound by the conditions set out in the Annexure hereto, which document I have initialled for purposes of identification.’

[4] In the clause 6 of the annexure to the acknowledgment of debt, Kruuse expressly renounced various defences including *errore calculi*, *non numerate pecuniae* and *non causa debiti*.

[5] The defences raised by Kruuse, which I found to have no merit, were that he thought he was signing the acknowledgement of debt in a representative capacity and thus committed a unilateral mistake, and that the entire agreement was invalid because clause 6 of the annexure is in conflict with regulation 32 of the regulations made under the National Credit Act 34 of 2005 (the NCA) which provides that the defences of *errore calculi*, *non numerate pecuniae* and *non causa debiti* cannot be waived by a debtor.

[6] In my judgment, I dealt with these defences thus:

‘[10] The immediate problem confronting the defendant is that the acknowledgment of debt is an unconditional acknowledgment of his indebtedness personally to the plaintiff – he states that ‘I . . . acknowledge that I am indebted to IAN HILLHOUSE’ in respect of ‘money due, owing and payable by me to the creditor’. In construing the agreement the inevitable point of departure is the language of the document itself. It is not ambiguous in any way. Its terms are crystal clear. It is not capable of bearing any meaning other than that the defendant assumed personal liability for the debt.

[11] To the extent that the history of the matter as given by the defendant may be relevant and admissible, it does not assist him: it is to the effect that he had planned to create entities to conduct his farming business – a trust and a private company – but that these entities were never formed. The defendant’s averment that he signed the document because the plaintiff wanted some form of reassurance and that he stupidly did not believe that he was assuming personal liability for the debt only has to be stated to be rejected. As the entities referred to above did not exist, he was the only person who could have acknowledged the debt and who could have been liable for its repayment.

[12] It cannot, in my view, be accepted that the defendant could have laboured under any misapprehension as to the consequences of signing the acknowledgment of debt. Even were this totally improbable scenario to have been the case, he has not asserted that his misconception was induced by the plaintiff or anyone else. As was submitted by Ms Beard, it is trite that contracting parties are bound by their written agreements not wrongfully induced by another, and the caveat subscriptor rule binds a party to a contractual document which he or she has signed, whether he or she read it or not.

[13] The first defence raised by the defendant must therefore fail.

- [14] I turn now to the second defence raised. Mr Cole, who appeared for the defendant, argued that the entire agreement had to fall because of the conflict between clause 6 and regulation 32. I cannot see why that is so. Clause 6 is clearly severable from the rest of the agreement and the defendant does not rely on any of the three defences that, according to regulation 32, cannot be waived. The defendant's second defence also fails.'

The grounds

- [7] The grounds now relied upon are that: (a) I erred in 'failing to find that a de facto partnership existed between the parties' and that 'it is not legally competent for one partner to take a judgment against the other partner, without providing for a debatement of account, a computation of profit or loss, and an adjustment based on the agreed profit sharing ratios'; (b) I erred in concluding that the defence of unilateral mistake could not succeed; (c) I erred in concluding that Kruuse did not rely on the defences mentioned in clause 6 of the annexure to the acknowledgment of debt; and (d) I ought to have found the acknowledgment of debt to be unenforceable because Hillhouse was not registered as a credit provider in terms of the National Credit Act .
- [8] The purpose of the summary judgment procedure in rule 32 of the Uniform Rules is to 'prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights'. [1] The proper approach to a summary judgment application was set out thus by Corbett JA in *Maharaj v Barclays National Bank Ltd*: [2]

'Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word "fully",

as used in the context of the Rule (and its predecessors), has been the cause of some Judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence. . . . At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading.'

[9] The nature and grounds of the defences raised by Kruuse in his answering affidavit in the summary judgment application were:

‘I respectfully submit that I have a defence to the Acknowledgement of Debt as the liability reflected in the Acknowledgement of Debt is not my personal liability for the reasons set out above. Paragraph 6 of the Acknowledgement of Debt expressly renounces the benefit of non causa debiti, errore calculi and revision of accounts and no value received. I respectfully submit that these provisions are invalid according to the provisions of the Consumer Protection Act and the National Credit Act. Furthermore, I respectfully submit that in respect of the transactions relating to the monies lent and advanced and the lease of the cows, they constitute Credit Agreements in terms of the National Credit Act no. 34 of 2005. I furthermore, reasonably believe that the Applicant is not registered as a Credit Provider, nor has the Applicant applied to be registered as a Credit Provider in respect of the aforesaid transactions and the transactions and the amounts claimed in terms

hereof, are accordingly invalid and unenforceable against me personally, in terms of Section 40 of the National Credit Act. I respectfully submit further that the Acknowledgement of Debt itself annexed as Annexure “A” to the Plaintiff’s

Particulars of Claim constitutes a Credit Agreement, which requires compliance with the provisions of the National Credit Act, which has not been complied with.’

I turn now to a consideration of the grounds of appeal.

Partnership

- [10] The principal difficulty that confronts Kruuse is that nowhere in his affidavit did he allege the partnership defence. Neither it nor the grounds upon which it is based were disclosed at all, let alone ‘fully disclosed’.
- [11] Given this fundamental problem in relation to the partnership defence, I am of the view that there are no reasonable prospects of this ground succeeding on appeal.

Unilateral mistake

- [12] The second ground, that of unilateral mistake, was dealt with in the judgment but it now appears to have altered its form somewhat. While the argument was that Kruuse had signed the acknowledgement of debt while labouring under the mistaken belief that he was signing in a representative capacity, the argument is now that Hillhouse knew that Kruuse was mistakenly signing an acknowledgment of debt for the sale of cattle.
- [13] I have dealt fully with the first form of the mistake defence and have nothing to add to what I said in that regard. As for the second form of the defence, two difficulties confront Kruuse.

[14] First, he has not raised it squarely as a defence as he is required to do and nowhere in his affidavit does he say that Hillhouse either induced him to sign or was aware of his mistake. Instead, he attributes his mistake to his stupidity in signing in order to give Hillhouse 'some form of reassurance and confirmation of his investment'.

[15] Secondly, when Kruuse set out the nature and grounds of his defences he said in relation to the first defence:

'I respectfully submit that I have a defence to the Acknowledgement of Debt as the liability reflected in the Acknowledgement of Debt is not my personal liability for the reasons set out above.'

His defence, in other words, is no more and no less than that he believed that he was signing the acknowledgement of debt in a representative

capacity and not in his personal capacity. In this specific context, when he dealt with the sale of the cows, he said no more than that there was no sale of 'the cattle leased by the Applicant to the business venture, to me'.

[16] As the mistake defence in its current form was not raised in Kruuse's affidavit, I am of the view that there are no reasonable prospects of it succeeding on appeal.

The sale of the cows

[17] It was argued that I erred in finding that Kruuse did not rely on any of the defences that he purportedly waived in clause 6 of the annexure to the acknowledgement of debt. It was argued that the defence of non causa debiti was available to him in relation to the sale of the cows.

[18] Nowhere in his affidavit does he say this. This is how he sets out the nature and grounds of his defence in respect of clause 6:

'Paragraph 6 of the Acknowledgement of Debt expressly renounces the benefit of non causa debiti, errore calculi and revision of accounts and no value received. I respectfully submit that these provisions are invalid according to the provisions of the Consumer Protection Act and the National Credit Act.'

[19] The defence now being contended for has not been raised in the papers. There are, in my view, no reasonable prospects of success in respect of this ground of appeal.

Hillhouse's failure to register as a credit provider

[20] Because the issue of Hillhouse not being registered as a credit provider in terms of the NCA was raised but abandoned when the summary judgment application was argued, my judgment deals with it in scant detail. All I said about it was this:

‘A third defence, namely that as the plaintiff was not registered as a credit provider in terms of the National Credit Act, he could not enforce the acknowledgement of debt, was wisely abandoned, presumably in the light of the decision in *Friend v Sendal*.’

[21] The argument raised by Mr Cole is that *Friend v Sendal*[3] is distinguishable because it concerned a single credit transaction whereas in this case eight loans were made by Hillhouse over a period of almost a year. In these circumstances, he argued, Hillhouse had to be registered as a credit provider and his failure to register rendered the acknowledgement of debt unenforceable.

[22] I accept that the advances made by Hillhouse constituted credit agreements as defined in s 1 of the NCA. Section 40(1) deals with who is obliged to register as a credit provider. These requirements were changed by the National Credit Amendment Act 19 of 2014, which was brought into operation with effect from 13 March 2015. That means that, as all of the transactions and the acknowledgement of debt pre-date the amendment’s effective date, s 40(1) applies in its pre-amendment form. It provided:[4]

‘A person must apply to be registered as a credit provider if —

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

[23] Sections 40(3) and (4) provide:

‘(3) A person who is required in terms of subsection (1) to be registered as a credit provider, but who is not so registered, must not offer, make available or extend credit, enter into a credit agreement or agree to do any of those things.

- (4) A credit agreement entered into by a credit provider who is required to be registered in terms of subsection (1) but who is not so registered is an unlawful agreement and void to the extent provided for in section 89.’

[24] The facts in *Friend* are similar to the facts of this case. *Friend* signed an acknowledgement of debt in which he acknowledged that he owed *Sendal* R1 225 000 and undertook to repay it by a certain date. By that date, R620 000 remained outstanding and *Sendal* instituted proceedings for its payment. He succeeded in the court of first instance.

[25] It was argued on appeal to the full bench (as it had been in the court below) that Sendal was a credit provider but he had not registered as one in terms of s 40(1) of the NCA, with the result that he was, in terms of s 40(4), precluded from enforcing the acknowledgement of debt. The court held that while Sendal fell within the first requirement of s 40(1) – an issue to which I shall revert – he did not fall within the second requirement and so was not a credit provider who was required to register. The crux of the court’s reasoning is the following:[5]

‘[23] I think, for the argument raised on behalf of the appellant, the purpose or object of the Act is also an aspect that should not be overlooked. Its main purpose is in terms of s 3 to promote and advance the social and economic welfare of South Africans, to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers.

[24] Therefore ss (1)(b) of s 40 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. The respondent in this once-off transaction cannot be seen as participating in the credit market.

[25] Section 2 of the Act requires one to interpret the provisions of the Act in a manner that gives effect to the purposes set out in s 3, bearing in mind that a purpose of the Act is to protect consumers. In the circumstances of the case, I cannot therefore agree that the transaction is covered under ss (1)(b) of s 40.’

[26] While it is true that Friend dealt only with a single transaction, the reasoning is not necessarily restricted to a single transaction. What the court found

was that the focus of the NCA is on the regulation of the credit market and credit industry, and the protection of consumers in that context. In other words, the requirement of registration as a credit provider is aimed at those who provide credit as the principal function and purpose of their business and not at people who may enter into credit agreements in the course of conducting business other than providing credit. In my view, Hillhouse falls into the latter category and so was not required to register as a credit provider, with the result that his claim against Kruuse is enforceable.

[27] In Friend, the court interpreted s 40(1)(a) of the NCA to envisage ‘a situation where a person frequently provides credit or concludes

credit agreements as defined’ and stated that for ‘such a person to be obliged to register as a credit provider, the subsection must have contemplated a situation where he or she, either alone or in conjunction with any associated person, will conclude credit agreements of under at least 100 in number’.[6]

[28] With respect, I do not agree with this interpretation. Section 40(1)(a) does not, in my view, contemplate a requirement for

registration that the person concerned concludes less than 100 credit agreements. That would make no sense and serve no rational purpose because it would apply to everyone who ever entered into a credit agreement. And what of the people who entered into more than 100 credit agreements? I imagine that the very people that the Act requires to register are those who are granting credit on a large scale – the archetypal money-lender. The purpose of the section is to limit the class of credit provider who has to register. The word ‘under’ does not refer to or qualify the number of credit agreements as a limit for registration. It is intended instead, rather clumsily, to refer to a person who is a credit provider in terms of at least 100 credit agreements. In other words, if a person ‘was the credit provider in at least 100 credit agreements’, he or she was required, in terms of s 40(1)(a), to register as a credit provider.[7]

[29] In this case, Hillhouse is well short of the limit of 100 credit agreements and so was not required to register as a credit provider. For both of the reasons that I have given above, I am of the view that there are no reasonable prospects of this ground succeeding on appeal.

Conclusion

[30] I have found that none of the grounds raised in the application for leave to appeal have a reasonable prospect of success on appeal. All were new issues that were not before me when the application for summary judgment was heard. Apart from the last issue, none of the other issues were raised as defences and dealt with fully in the answering affidavit, so there is no way of determining whether they are bona fide defences. In effect then, Kruuse has sought to make a new case in his application for leave to appeal. That he is not entitled to do. As a result the application must fail.

[31] The application is dismissed with costs.

C Plasket

Judge of the High Court

APPEARANCES

For the applicant: S Cole instructed by Cloete and Co

For the respondent: M Beard instructed by Netteltons

[1] Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA) para 31. See too Majola v Nitro Securitization 1 (Pty) Ltd 2012 (1) SA 226 (SCA) para 25.

[2] Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 426 A-E.

[3] Friend v Sendal 2015 (1) SA 395 (GNP).

[4] Section 40(1) in its current form reads: ‘A person must apply to be registered as a credit provider if the total principal debt owed to that credit provider under all outstanding

credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1).'

[5] Paras 23-25.

[6] Para 17.

[7] Scholtz, Otto, Van Zyl, Van Heerden and Campbell Guide to the National Credit Act (Issue 6), para 5.2.2.1.

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