

SOUTH AFRICA / JUDGMENT

Rooplal N.O. v Pelesa (22424/2019) [2023] ZAGPPHC 1 (10 January 2023)

[2023] ZAGPPHC 1

COURT

North Gauteng High Court, Pretoria

BEFORE

N Davis

CASE / FILE NUMBER

22424/2019

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HEADNOTE: CREDIT

AND CONSENT OF SPOUSE

Credit

agreement – Consent of spouse – Consumer ticking box
for “single” in application –

Details in

personal affidavit that marital status unmarried – Bank
could not reasonably have known about consumer’s
marriage –

Consumer’s defence of lack of spousal consent failing
– National

Credit Act 34 of 2005 – Matrimonial

Property Act 88

of 1984, s

15(9)(a).

HIGH

COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 22424/2019

REPORTABLE:	NO. OF INTEREST TO OTHER JUDGES: NO REVISED 10 January 2023 In
the matter between:	ANOOSHKUMAR ROOPLAL N.O Applicant and MMUSO SOLOMON PELESA Respondent
Summary:	credit- liquidator of VBS Bank seeking to recover loans made to an individual - no real or bona fide disputes of fact - defence of having obtained credit without spousal consent rejected. ORDER Judgment
is granted against the respondent for the following:	1. Payment of an amount of R200 722.61 plus interest at the agreed rate of 11.5% calculated daily and compounded monthly in arrears from 29 February 2020 until date of full payment. 2. Payment of the amount of R6 247 582.31, plus agreed interest at the rate of 10.50%, calculated daily and compounded monthly in arrears from 29 February 2020

until date of full
payment
(both
dates inclusive).

3.

Payment of the costs
of this application, on the scale as between attorney and client.

JUDGMENT

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS,J

Introduction

- [1] Around 2017 VBS Mutual Bank (VBS) "fell prey to an elaborate, yet unsophisticated fraudulent scheme perpetrated on it by some members of its management and their related entities". These are the words of the applicant, who is the liquidator of VBS, appointed pursuant to a winding-up order of VBS, granted by this court on 13 November 2018.
- [2] The present application is one whereby the liquidator seeks to recover monies lent and advanced by VBS to the respondent in his personal capacity. The monies were used to buy an upmarket residential property and a Porche Cayenne. For purposes of recovery, the liquidator did not rely on any allegation of fraud and the respondent similarly sought to distance himself from the fraudulent scheme, yet he suggested that the scheme and subsequent recoveries of funds created factual disputes. The respondent also claimed that the loan agreements were invalid as he had obtained credit without spousal consent as required by the Matrimonial Property Act 88 of 1984 (the MPA).

The credit agreements

- [3] The first credit agreement in question, is one for the purchase of a luxury vehicle, a Porch Cayenne GTS. The agreement was entered into on 6 April 2017. The purchase price of the vehicle was R1 550 760.00. After some initial instalments had been paid by the respondent, the vehicle was "written off" in an accident, causing the insurance company to make payment of R1 319 000.00 to VBS on 4 October
2014. After this, the respondent paid only one further partial instalment. The liquidator is now claiming the balance outstanding of R200 722.61 (plus interest).
- [4] The second credit agreement is a Mortgage Credit Agreement dated 18 April 2017. In terms hereof, the respondent borrowed R5 055 240.00 for the purpose of purchasing an immovable property in Midstream Estate, Ekurhuleni and constructing a luxury dwelling thereon.

Initially the amounts would have been paid to Buildesigns (Pty) Ltd and to an attorneys firm, but in the end, the amounts were paid out as follows: R5 million to Wikus Strydom Attorneys, R49 540 to Munonde Attorneys and R5 700.00 as an "initiation fee". The respondent called this agreement "his" home loan and his (now estranged) wife lives in the property.

- [5] There can be no doubt that the agreements had been entered into and that the amounts mentioned therein had been advanced. This is not denied and in fact forms the basis of the respondent's counter-application based on alleged reckless credit and his resultant alleged over-indebtedness (with which I shall deal later).
- [6] The liquidator only relied on the terms of the agreements themselves, while the respondent, on the other hand, made extensive reference to the fraudulent schemes perpetrated on VBS bank by its directors and managers, public disclosures of these schemes in the media and a resultant report compiled by Adv Terry Motau SC regarding these wrongdoings and the beneficiaries thereof, entitled "The Great Bank Heist". After raising these issues himself, the respondent referred to his co-operation with criminal investigations conducted by the Hawks and concluded thereafter that he was blameless of any wrong-doing and that these were arm's length transactions. This was also the basis on which the liquidator framed his causes of action and that will then be the basis on which this court will approach the matter.

Defences

- [7] Having established that neither the agreements nor the amounts in question are in dispute, what are the defences raised by the respondent? In his answering affidavit, he listed five. These are 1) a dispute of fact, 2) reckless lending, 3) contravention of section 80 of the National Credit Act 34 of 2005 (the NCA) resulting in the respondent becoming over-indebted,
- 4) the fact that the agreements were entered into in contravention of section 15 (2) of the MPA and 5) a failure to make out a case.

Dispute of fact

- [8] In respect of the alleged dispute of fact, the respondent referenced a City Press Article of one Dewald van Rensburg dated 29 April 2018 claiming that the liquidator withdrew or withheld VBS' financial statements for 2017 "because they could not be trusted". He also referenced the report by Adv Motau SC and a book by Van Rensburg titled "VBS-a dream deferred".
- [9] Based on this, the respondent attacked the application lodged for the vehicle finance, alleging that some parts of it had not been completed by him, but by some other bank official. Significantly however, the respondent did not deny his signature on the application nor deny the subsequent agreement, in respect of which the parties had performed as already mentioned in paragraph 3 above.

- [10] The fact that VBS' financial statements may have been manipulated does not mean all individual agreements are automatically implicated. Insofar as the respondent claims that there is a factual dispute regarding "the authenticity" (as he calls it) of the agreements, I find that no real or bona fide dispute of fact has been established which cannot be resolved on the papers[1].

Reckless lending

- [11] In respect of the issue of reckless lending, the NCA provides that a court may set aside a credit agreement in circumstances where the credit provider has not conducted a proper assessment of the lender's ability to meet his prospective obligations under the proposed agreement[2]. Although the respondent has made submissions in this regard in his answering affidavit, his counsel, in my view correctly so, did not proceed with this point in argument. There is no merit in it, particularly when viewed against the respondent's contention that the credits were not extended to him in the same fashion as to other "related parties" to the VBS :fraudsters but on proper arm's length considerations. This was also confirmed by way of reference in the replying affidavit to the payslips the respondent had produced at the time as well as the credit assessments done by VBS.

Over-indebtedness

- [12] Regarding the issue of over-indebtedness, the respondent claims to have fallen on hard times now that the income stream on which he had relied from a company called Gorogo Projects (Pty) Ltd, which had done "good work" for the Venda King and VBS bank, had dried up. Based on this, he claimed in his counter-application, that his debt under these agreements should be restructured and payments postponed for three years. He also claims that a referral to a debt counsellor would be of no assistance. The respondent has however, prior to his counter-application, failed to react to the notices sent to him in terms of section 129 of the NCA which, inter alia provides for referral to a debt counsellor in order that an arrangement could be made to bring payments up to date. The respondent has also not made any proposals regarding the basis upon which his debt should be postponed and how repayments should be restructured. He had been reminded in prior correspondence that courts have found that a defaulting debtor, seeking relief by way of restructuring, should not seek to retain the purchased property while failing to make payment, but should consider avenues by which their debt could be liquidated. This would include the sale of the immovable property[3]. The respondent refused to even consider this option.
- [13] The respondent appears to simply throw himself at the mercy of the court claiming over-indebtedness and a postponement of his liability. This he does by relying on section 85(6) of the NCA. This section provides the court with a discretion to be judicially exercised, to declare a consumer over-indebted and to make an order 'to relieve the consumer's over-indebtedness'. Where the consumer, the respondent in this case, has elected not to avail himself of the services of a debt counsellor to report to and assist the court, as provided for in sections 85(a) or 86 and has not utilized the procedure provided for in section 87, dealing

with restructuring of his obligations by a Magistrates Court, the exercise of the discretion becomes more strained[4]. In *Standard Bank* (above at footnote 3, at par 81) the following finding has been made which is also apposite to this case: "The Purpose of the NCA is, inter alia, to provide for the debt re- organisation of a consumer who is over-indebted, thereby affording such consumer the opportunity to survive the immediate consequences of his financial distress and to achieve a manageable financial position". No evidence has been placed before the court indicating that the respondent's "financial position" would be "manageable" at any time in the future[5]. The respondent vaguely claims that this court should assist him by " ... reducing the amounts payable under the agreement payable after three (3) years from the date of the Court's order"[6]. This generalized approach is simply not good enough and understandably this part of the counter-application was not pursued with much vigour during argument. The conclusion is that respondent has failed to provide sufficient detail and particularity to enable this court to exercise its discretion to come to his assistance.

The MPA defence

- [14] By far the strongest point advanced on behalf of the respondent, was the issue of contravention of Section 15(2)(t) of the MPA. This section provides that a spouse " ... shall not, without the written consent of the other spouse, ... enter as a consumer, into a credit agreement ..." to which the NCA applies. An agreement entered into in contravention of this statutory prohibition is unlawful, void and unenforceable [7].
- [15] The required consent by the non-contracting spouse is deemed to have taken place when the other contracting party "... does not know and cannot reasonably know that the contract is being entered into contrary to these provisions ..." [8]. In such an event, the contract would be valid and enforceable. The onus is on such other contracting party to show that it has satisfied the duty placed on it by the MPA "... to make the enquiries that a reasonable person would make in the circumstances as to whether the other contracting party is married and, if so, in terms of which marriage regime" [9].
- [16] In his applications for credit, the respondent ticked the boxes 'single' in respect of his marital status. Apart from the respondent's say-so, VBS bank relied on a "Personal Affidavit" by the respondent wherein he confirmed, on oath, a number of facts. These related to his full names and identity number, that he was in possession of an identity document contemplated in Regulation 18(1) of the Deeds Registries Act 47 of 1937, that he is not insolvent and that his estate has never been sequestrated and that his marital status is unmarried. The extensive credit check done by VBS indicated some risk due to previous judgments or unpaid accounts (which had been old and which risk had been assessed and resolved) but did not indicate any "joint loan participants" in respect of any of the accounts or loans, including a previous vehicle finance agreement. The offer to purchase the immovable property in question, made to Buildesigns (Pty) Ltd (referred to in paragraph 4 above), was also only made by the respondent, again indicating himself to be single. The

only indication of a marriage is the handwritten certificate produced by the respondent in his answering affidavit, issued by a marriage officer, indicating a fairly recent marriage on 30 January 2017 (Some 10 days before the offer to purchase and some three months prior to the agreements). No indication is given in the certificate as to the marital property regime applicable. The extracts from the marriage register produced by the respondent are also incomplete, both in this regard and in regard to supporting

documents. No indication has been given whether this marriage has been registered at the Department of Home Affairs at the time of the agreements (or at all).

[17] Accepting that a credit provider is "put on enquiry" by section 15(9)(a) and cannot rely on the "bold assurance" of a consumer[10], no allegation has been made as to what exactly VBS should have done in this particular case. Apart from general submissions, no particularity has been furnished. To all intents and purposes all that has happened in this case, was that the respondent and his wife had gone and married at the offices of the Department of Home Affairs and only the respondent, his wife, the marriage officer and the two unidentified witnesses knew about this. It is difficult to fathom what enquiries made by VBS would have unearthed this fact in view of all the other contrary indicia available, listed in paragraph 16 above.

[18] In these premises, I find that VBS could not reasonable have known about the respondent's marriage and that it should be deemed that the agreements had been entered into with consent as contemplated in section 15(9)(a) of the MPA.

[19] It follows further that the contention that the liquidator had not made out a case, should fail.

Costs

[20] I find no reason why costs should not follow the event, on the scale as provided for in the agreements.

Order

[21] In the premises the following order is granted against the respondent:

1. Payment of an amount of R200 722.61 plus interest at the agreed rate of 11.5%, calculated daily and compounded monthly in arrears from 29 February 2020 until date of full payment.
2. Payment of the amount of R6 247 582.31, plus agreed interest at the rate of 10.50%, calculated daily and compounded monthly in arrears from 29 February 2020 until date of full payment (both dates inclusive).
3. Payment of the costs of this application, on the scale as between attorney and client.

N DAVIS

Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing: 8 November 2022

Judgment

delivered: 10 January 2023

APPEARANCES:

For the Applicants: Adv S Mohapi

Attorney for the Applicants:

Werksmans Attorneys, Johannesburg

c/o Cassim Inc Attorney, Pretoria

For the Respondent:

Adv E De Bruin

Attorney for the Respondent: Modise Matlou Thipe Inc, Johannesburg

c/o NP Mukwevho Attorneys, Pretoria

[1] Trust Bank of Africa v Western Bank Ltd 1978

(4) SA 281 (A) at 293H - 294E and Ripoll-Dausa v Middleton NO and Others [2005] ZAWCHC 6; 2005

(3) SA 141 (C) at 151A -153C.

[2] Section 80 of the NCA.

[3] Standard Bank of SA Ltd v Panayottis 2009

(3) SA 363 (W) at para 77. (Standard Bank)

[4] Section 87 of the NCA provides as follow: 87 Magistrates' Court may re-arrange consumer's obligations. (1) If a debt counsellor makes a proposal to the magistrates' court in terms of section 86(8)(b), or a consumer applies to the magistrates' court in terms of section 86(9), the magistrates' court must conduct a hearing and, having regard to the proposal and information before it and the consumer's financial means, prospect and obligations, may – (a) Reject the recommendation or application as the case may be or; (b) Make- (i) An order declaring any credit agreement to be reckless, and an order contemplated in section 83(2) Or 3, if the magistrates' court concludes that the agreement is reckless; (ii) An order re-arranging the consumer's obligations in any manner contemplated in section 86(7)(c)(ii); or (iii) Both orders contemplated In subparagraph (i) and (ii).

[4] Section 87 of the NCA provides as follow:

87 Magistrates' Court may re-arrange consumer's obligations.

- (1) If a debt counsellor makes a proposal to the magistrates' court in terms of section 86(8)(b), or a consumer applies to the magistrates' court in terms of section 86(9), the magistrates' court must conduct a hearing and, having regard to the proposal and information before it and the consumer's financial means, prospect and obligations, may –
 - (a) Reject the recommendation or application as the case may be or;
 - (b) Make-
 - (i) An order declaring any credit agreement to be reckless, and an order contemplated in section 83(2) Or 3, if the magistrates' court concludes that the agreement is reckless;
 - (ii) An order re-arranging the consumer's obligations in any manner contemplated in section 86(7)(c)(ii); or
 - (iii) Both orders contemplated In subparagraph (i) and (ii).

[5] See also FirstRand Bank Ltd v Olivier 2009

(3) SA 353 (SE) in this regard.

[6] Para 1.79 of the affidavit in support of the counter-application.

[7] Schierhout v Minister of Justice 1926 AD 99 at 109, Bopape v Moloto 2000 (1) SA 383 (T) at 386J - 387A and Marais v Maposa 2020 (5) SA 111 (SCA)-at para 26. (Marais)

[8] Section 15(9)(a) of the MPA.

[9] Marais at para 32.

[10] Visser v Hull 2010

(1) SA 521 (WCC) at para 8 and Sishaba v Skweyiya [2008] ZAECHC 25, referred to in Marais at para 31.

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