

SOUTH AFRICA / JUDGMENT

Titantrade 226 (Pty) Ltd v Coetzee & Nel Eiendomme CC (19441/2012)

[2013] ZAWCHC 34 (15 January 2013)

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COURT

Western Cape High Court, Cape Town

BEFORE

Rogers, AJ

CASE / FILE NUMBER

19441/2012

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JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 19441/2012

DATE: 15 JANUARY 2013

In the matter between:

TITANTRADE 226 (PTY) LTDApplicant

and

COETZEE & NEL EIENDOMME CCRespondent

ROGERS, AJ:

This is an application for summary judgment. Because I have reached a firm view, I propose to give my judgment immediately.

The defence raised by the defendant in its affidavit opposing summary judgment is that the National Credit Act 34 of 2005 applies to the agreement on which the plaintiff sues; that the plaintiff was required to be registered as a credit provider in terms of section 40 of the Act; that at the time the relevant agreement was concluded, the plaintiff was not so registered;

and that, accordingly, in terms of section 40(4) the credit agreement is unlawful and void to the extent provided in section 89.

When I say that the defendant argues that the National Credit Act applies to the agreement on which the plaintiff sues, I should perhaps qualify and explain that. The defendant in fact raises two arguments.

Its first argument is that this is indeed a transaction to which the Act applies. The defendant does however have an alternative argument to the effect that even if the agreement on which the plaintiff sues falls outside the application of the Act by virtue of the provisions of section 4(1), the agreement is nevertheless a credit transaction as defined in the Act and that section 40 on a proper interpretation still renders such agreement unlawful if the plaintiff was required to be registered as a credit provider.

As to the first point, the agreement on which the plaintiff sues is a loan agreement in terms whereof the plaintiff lent the defendant a capital sum of R800 000 repayable within three years. That loan agreement is attached to the summons as POC1.

The plaintiff goes on to allege that the obligations under the loan agreement was secured by a certain mortgage bond which is also annexed to the particulars of claim

The defendant is a close corporation. The plaintiff pleaded, perhaps somewhat unnecessarily, in its particulars of claim that the Act did not apply to the agreement. I say unnecessarily because if the plaintiff's view was that the Act did not apply it could simply have omitted all reference to the Act, leaving it to the defendant to raise the applicability of the Act and any defences arising therefrom.

Be that as it may, the reason why the plaintiff alleged the Act was inapplicable was that, so it was contended, the agreement was a mortgage agreement and that, because the defendant

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was and is a juristic person, the agreement thus falls outside the application of the Act by virtue of section 4(1)(b) of the Act read with section 9(4)(a) and with the thresholds established under section 7 of the Act.

Mr de Villiers, who appeared for the defendant, argued that the transaction on which the plaintiff sued was not a mortgage agreement

as defined in the Act His submission was that a mortgage agreement is defined in the Act as a credit agreement that is secured by a pledge of immovable property. He pointed out that the mortgage bond in this case was a covering bond which acknowledged an indebtedness in the sum of R800 000 plus an additional sum and was continuing cover for monies owed on various causes. He thus argued that the mortgage bond was essentially an act of hypothecation and did not itself embody a credit agreement.

I do not think I need decide that point. I am prepared to assume in favour of Mr de Villiers that a covering bond is not itself a mortgage agreement. However, his argument leads inevitably to the conclusion that the agreement on which the plaintiff sues is the underlying loan agreement. That underlying loan agreement is clearly a credit transaction as defined in the Act. It was a credit

transaction for a capital sum of R800 000 which, it is common cause, exceeds the higher threshold established in terms of section 7(1)(b). Since the defendant is a juristic person, it follow to my mind that the Act did not apply and does not apply to such agreement by virtue of the provisions of section 9(4)(b) of the Act read with section 4(1)(b).

[I am going to interrupt this judgment just to get clarity on a point. The submission was made that the plaintiff relied on section 9(4)(a). that this was a mortgage agreement.

UNKNOWN: Yes M'Lord.

COURT: I am reading paragraph 12 of the particulars of claim. It seems to me that the statement there is that the NCA is not applicable due to the agreement being, in terms of section 4(1)(b), a large agreement as described in section 9(4). It does not appear therefore that the plaintiff has irrevocably nailed its colours to the mast of section 9(4)(a) as opposed to (b).

ADV ENGELA: Yes M'Lord. Although out of argument that arose that that is where he was going.

UNKNOWN: Its only in the notes, in the short notes that that line was followed. As it pleases the Court.

COURT: I'll now resume the judgment.]

In fact, having now looked again at the summons, I should mention that the plaintiff did not in the particulars of claim specifically rely on section 9(4)(a) rather than section 9(4)(b) as the basis for the present agreement being a large agreement. However, even if the plaintiff had relied on section 9(4)(a), that would simply have been, on the defendant's argument, a legal misapprehension. The plaintiff was not obliged to allege the non-applicability of the Act. It is for the defendant in establishing its bona fide defence to establish that the Act does apply to this agreement.

And, for the reasons I have given, it appears to me clear that this is a large agreement either by virtue of section 9(4)(a) or (if Mr de Villiers' argument is correct) by virtue of section 9(4)(b). On either basis, and because the defendant is a juristic person whose asset vaieu and annual turnover is below the threshold determined by the Minister in terms of section 7(1), the exclusion of the application of the Act is brought about by section 4(1)(b) of the Act.

That disposes of Mr de Villiers' first argument. In short the Act is not applicable to the agreement on which the plaintiff sues. This leaves the second argument which is that the plaintiff was nevertheless required to register as a credit provider and that, because it had failed to do so, the effect of section 40(4) was that the agreement on which it sued in the present case was unlawful.

I must say that I have encountered some difficulty in following the argument. It may well be, I do not know, that by virtue of other

transactions which the plaintiff has concluded with other parties it is required to register as a credit provider. After all there is evidence that it has recently so registered. The plaintiff may well conclude other transactions which are governed by the Act and which are beyond the thresholds set out in section 40(1). However, that does not mean that section 40 applies to the credit agreement in this particular case. In my view the position is clear.

Section 4(1) says that the Act applies to every credit agreement between parties dealing at arm's length and made within or having an effect within the Republic except certain agreements which are then specified. The agreement in the present case falls within those

exceptions. The clear meaning therefore of section 4(1) is that the Act does not apply to this agreement. This means the whole Act and not only certain parts of it. Section 40 is part of the Act. The effect of this seems to me to be the following: If a credit provider concludes only transactions to which the Act does not apply by virtue of section 4(1), it is not required to register as a credit provider. The further effect of section 4(1) is that even if the credit provider does conclude transactions to which the Act applies and which have the effect that it is required to register under section 40, the Act still does not apply to any other credit agreements falling outside the scope of the Act (i.e. credit agreements to which the Act does not apply).

Accordingly, a credit provider who is in default with registering as a credit provider but who then proceeds to conclude a credit agreement to which the Act in any event does not apply, does not conclude an unlawful credit agreement as contemplated in section 40(4). Put differently, when section 40(4) says that a credit agreement entered into by a credit provider who is required to be registered, but who is not so registered, is an unlawful agreement, it means a credit agreement to which the Act applies. In other words, section 40(4) is one of those provisions which is rendered inapplicable to the agreement in the present case by virtue of the, by virtue of section 4(1)(b) of the Act.

The effect of the foregoing is that both prongs of the defendant's defence fail. Since no other defence on the merits is raised, SUMMARY JUDGMENT MUST BE GRANTED

[COURT: Mr Engela did you hand me your draft order?

MR ENGELA: M'Lord it's stapled along with the short notes of argument. It is at the end. Beg your pardon for having stapled all of them in one ...(indistinct) documents. I can perhaps extract mine and with the leave hand it up.]

COURT: IN THE RESULT I GRANT SUMMARY JUDGMENT, AS PRAYED, WHICH IS IN ACCORDANCE WITH A DRAFT ORDER WHICH HAS BEEN HANDED UP TO ME AND WHICH I HAVE MARKED X.

ROGERS, AJ

COURT: Mr de Villiers, particularly if there's going to be an application for leave to appeal, if you can try to have expedited the typing of the ex tempore

judgment.

MR DE VILLIERS: As you please ... (intervene)

COURT: I'll try to make it then look a bit better than it will probably look when it's typed exactly as I said it.

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