Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 12046/2010

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

ABSA BANK LIMITED	Plaintiff
And	
THE TRUSTEES FOR THE TIME BEING OF THE JOHAN RADEMAN FAMILY TRUST NO.1	First Defendant
JOHANNES GERHARDUS FREDERICK RADEMAN	Second Defendant
CATHERINA WILHELMINA RADEMAN	Third Defendant

JUDGMENT DELIVERED ON 28 OCTOBER 2014

BINNS-WARD J:

[1] The plaintiff is a commercial bank. It is also a registered credit provider in terms of the National Credit Act 34 of 2005 (the NCA). The trustees of the Johan Rademan Family Trust No. 1, cited collectively, are the first defendant. It is common ground that the trustees are the second and third defendants. They are husband and wife. They are sued in their personal capacities as the second and third defendants,

respectively, by reason of their having stood surety in favour of the plaintiff for the debts of the trust. The relevant deeds of suretyship, in terms of which the second and third defendants undertook unlimited liability as sureties and co-principal debtors *in solidum* in respect of any present or future liability by the trust to the plaintiff, were executed before the NCA was enacted. The plaintiff has sued for the recovery of R3 109 606,66, together with interest thereon from 17 November 2009, that is alleged to be due and payable to it by the trust, and thus also the sureties, in terms of two loan agreements. The trust's liability in terms of the loans is secured by a mortgage registered over certain fixed property owned by the trust. The plaintiff also seeks an order declaring the property directly executable.

[2] The loan agreements fall to be treated as one in the sense that there is a consolidated balance. The claim is therefore for a single amount. The contractual arrangement provides that a certificate signed by any manager of the plaintiff will serve as *prima facie* proof of the amount owed by the trust. A certificate of the nature contemplated by the contracts was annexed to the summons. It certifies that as at 16 November 2009, the first defendant was indebted to the plaintiff in the sum of R3 109 606,66. During the trial evidence was produced in terms of s 15(4) of the Electronic Communications and Transactions Act 25 of 2002, which confirmed the calculation of the aforementioned amount. The evidence concerning the computation of the claim was left unchallenged by the defendants.

[3] The second of the aforementioned loan agreements (in terms of which an additional credit facility of R2 600 712 was made available) was concluded during November 2007 after the commencement of the NCA. The original of the deed of the second agreement of loan was destroyed in a fire at the storage facility at which it had been deposited for safekeeping by the plaintiff. There was some dispute between the parties as to its form. The plaintiff amended its particulars of claim at the commencement of trial to rely on a document that included a pre-agreement statement and quotation of the nature required in terms of s 92(2) of the NCA. It was evident, however, from the evidence of the attorney who had been responsible for supervising the signature of the relevant contracts and attending to the registration of the mortgage bond that the executed deed of loan agreement was a version that bore his office stamp endorsement 'Kliënt Afskrif'. A copy of such document was contained from p. 34 of exhibit A. It did not incorporate a pre-agreement statement and quotation.

[4] The defendants' counsel argued that the plaintiff was not entitled to rely on the concluded second loan agreement because its amended pleading had been predicated on a different document. There was no merit in the contention. There is no difference in the terms of the contract, whichever of the two documents is considered. The plaintiff's cause of action is the agreement, not the document recording it. It was undisputed that the deed of contract had been destroyed. Oral evidence to prove its form and content was thus permissible; cf. e.g. *Absa Bank Ltd v Zalvest Twenty (Pty) Ltd and Another* 2014 (2) SA 119 (WCC). That evidence has identified the form of the deed of contract that was used to have been that of the document at p. 34 of exhibit A. The defendants have not been prejudiced by the conflict between the evidence and the plaintiff's pleading as to the form of the deed. The issue of the form of the deed was fully explored at the trial,[1] in the course of which the correctness of the defendants' allegation that there had not been a pre-agreement statement and quotation was established. That aspect was indeed the only relevance of the difference between the two unsigned deeds in contention because, as mentioned, there was no material difference in the terms of the agreement which both pro forma documents were drafted to record.

[5] The defendants contended that the absence of a pre-agreement statement and quotation rendered the loan agreement void. It was submitted that all the plaintiff might be entitled to was some form of unjust enrichment remedy that had not been claimed in the action. Those arguments were misplaced in my view.

[6] The NCA provides expressly in s 89 what makes for a credit agreement that is 'unlawful' and which a court must on that account find to be void. An agreement that is non-compliant with s92(2) or the prescribed requirements as to form in terms of s 93 of the Act read with regulation 31 of the National Credit Regulations, 2006, does not fall on that account within the category of agreements identified in s 89. The absence of a pre-agreement statement and quotation furthermore did not result in the agreement that was concluded containing any provision categorised as 'unlawful' in terms of s 90(2) of the Act. (In terms of s 90(4) of the Act, a court is obliged to declare an 'unlawful provision' as defined to be void and to sever it from the agreement or alter it to the extent necessary to render it lawful, alternatively to declare the whole agreement void as a consequence of the unlawful agreement. Presumably,

[1] Cf. e.g. *Shill v Milner* 1937 AD 101 at 105 and *F v Minister of Safety and Security and Others* 2013 (2) SACR 20 (CC) at para 128.

the whole agreement will be declared void only if the court is unable to save it by severing or altering the unlawful provision.) Section 164(1) of the NCA provides that 'Nothing in this Act renders void a credit agreement or a provision of a credit agreement that, in terms of this Act, is prohibited or may be declared unlawful unless a court declares that agreement or provision to be unlawful.'

[7] As I remarked recently in *Parow Motorhandelaars (Pty) Ltd v Parker* [2014] ZAWCHC 122 (18 August 2014) at para 13,[2] 'Section 164(1) appears to vest a discretion in the court whether to declare a non-compliant contract (other than one identified in s 89(2)) void or not'. My researches suggest that my judgment in *Parow Motorhandelaars* is the only judgment thus far in which a superior court appears to have discussed the import of s 164(1). I discussed at para 12-14 of that judgment the criteria by which the discretion vested in terms of the provision might be exercised. In short, a court would be inclined to declare an agreement void in terms of the provision if the alternative of allowing it to stand would materially subvert or frustrate the objects of the statute. Otherwise, a court would be inclined to adhere to the well established legal policy in favour of upholding the existence of a contract as far as possible.

[8] The defendants relied on the various instances of non-compliance by the plaintiff with the requirements of the NCA as matters of form. I heard no evidence as to how the defendants may have been prejudiced by the any of defects identified and am unable, by myself, to conceive how they could have been. The Act is in certain respects identifiably aspirational. There is express indication in s 57, for example, that technical non-compliance with the statute by a credit provider is likely to result in the credit providers deregistration only if the registrant 'repeatedly' contravenes the Act. The contract in issue in the current matter was concluded only a few months after the commencement of the Act and it is evident that the plaintiff's representatives were still using pro forma contract documentation of pre-statute vintage. Even then, it did not result in the concluded contract being 'unlawful' within the meaning of the Act or in any of its provisions being unlawful.[3] In the absence of demonstrable prejudice to defendants as a consequence of its non-compliant characteristics, there is

[2] The judgment is accessible on the SAFLII website

[3] Provisions which amounted to waivers of common law defences in conflict with the provisions of regulation 32 of the National Credit Regulations 2006 may be severed without any constraining effect on the plaintiff's claim.

no reason to declare the contract void, with the result that it is saved by s 164(1) of the Act.

[9] The defendants also pleaded that the second loan had constituted the reckless extension of credit by the plaintiff in the sense apprehended by the provisions of Part D of Chap. 6 of the NCA. Those provisions require, insofar as currently relevant, that a credit provider must not enter into a credit agreement without first taking reasonable steps to assess the proposed consumer's (i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement; (ii) debt re-payment history as a consumer under credit agreements; (iii) existing financial means, prospects and obligations and that a credit provider must not enter into a reckless credit agreement with a prospective consumer.[4] The extension of credit is 'reckless' if it would result in the consumer becoming 'over-indebted' within the meaning of the NCA. That state occurs if the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, having regard to that consumer's (a) financial means, prospects and obligations; and (b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment.[5]

[10] At the relevant time the NCA left it to the credit providers to determine for themselves 'the evaluative mechanisms or models and procedures to be used in meeting [their] assessment obligations …, provided that any such mechanism, model or procedure result[ed] in a fair and objective assessment'.[6] In the current case the evidence was that the ability of the second and third defendants to service the loan had been considered by an official of the plaintiff before the loan was approved. The official had regard to the disclosed disposable income of the defendants as well their credit history before approving the second loan. The official, Diederick Cloete, who testified at the trial, indicated that the plaintiff undertook affordability investigations before extending credit quite independently of the requirements of the NCA and in the ordinary course as part of its commercial risk assessment in respect of credit transactions. He was satisfied that the defendants would be able to service repayment

[4] Section 81 of the NCA.
[5] Section 79 of the NCA.
[6] See section 82 of the Act, which has since been substantially revised in terms of 24 (a) and (b) of the National Credit Amendment Act 19 of 2014, which is yet to be brought into operation.

instalments of about R33 000 a month out of their declared disposable after tax income of approximately R57 000 a month. He confirmed that the repayments were calculated on the basis of a consolidation of the two loans.

[11] The second and third defendants did not give evidence at the trial. Indeed, the defendants closed their case without adducing any evidence. It has not been shown how the assessment undertaken by the plaintiff was inadequate in any respect. It has also not been shown that at the time the agreement was entered into the plaintiff should reasonably have appreciated that concluding the contract would render any of the defendants over-indebted, as defined.

[12] The defendants' counsel argued, however, that the evidence showed that the trust did not generate any income and that it was evident on that account that it could not afford to borrow. In my view the contention is quite cynical. The argument is practically, commercially, and legally untenable. It should be remembered that notwithstanding the rather arbitrary and puzzling characterisation of a trust having three or more trustees as a 'juristic person' in terms of s 1 of the NCA, a trust in fact does not have a legal personality and in all its dealings is represented by and manifested in its trustees. Having regard to the apparent character of the trust in issue as a 'family trust',[7] it was entirely reasonable of the bank to assess its ability to service the loan with regard to the income of its trustees in the context of the willingness of the latter to stand as sureties and co-principal debtors. Were the position to be held to be otherwise, the widespread practice of natural persons to hold principal places of residence and holiday homes and the like through trusts would be unsustainable. Many such trusts have less than three trustees and do not generate income and would thus be unable - if the NCA were to be interpreted and applied as the defendants' counsel would have it - to obtain loans against the security of the property registered in their names, with the result that they would not be able to acquire the properties in the first place. Nothing in the declared objects of the NCA justifies interpreting the statute to have that practical or commercial effect.[8]

[13] The final defence that has to be considered is the contention that the deeds of suretyship executed by the second and third defendants in favour of the plaintiff for the debts of the trust did not apply to the second loan advanced after the

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[7] Cf. *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) ([2004] 4 All SA 261) at para 23-25.

[8] See s 2(1) read with s 3 of the NCA.

commencement of the NCA and had been intended only to apply in respect of the first loan. The plaintiff's counsel argued that the defence flew in the face of the plain wording of the deeds and could not be countenanced save in the context of a defence by the second and third defendants that the deeds fell to be rectified. The argument is well founded in my view. A second string to the defence was that if the suretyships held good they foundered on the basis of non-compliance with the NCA in respect of credit advanced to the principal debtor after the commencement of the Act. There is no merit in that contention either in my view. The relevant 'credit guarantees', to use the vocabulary of the statute, were in place before the commencement of the Act. There was no fresh conclusion of a credit agreement by the second and third defendants; the suretyships executed by them in 2001 were continuing covering suretyships. The only effect of the introduction of the Act on the existing credit guarantees was that they could be enforced only after compliance by the plaintiff with the requirements of chapter 6 of the Act. The defendants were also entitled at an earlier stage to have applied, should they have thought fit, for debt review in terms of Part D of chap. 4 of the Act. Insofar as the reckless credit provisions may, notwithstanding the finding just made, have applied to the suretyships, the defence that the second and third defendants sought to raise on that ground could not be sustained for the same reasons as those discussed in relation to the claim on the principal debt.

[14] In the result, judgment is granted in favour of the plaintiff against the defendants jointly and severally in terms of prayers (a), (b) and (d) of the particulars of claim, as amended. An order is granted in terms of prayer (c) declaring Erf 581 Outeniqua Strand in the Municipality of Mossel Bay held by deed of transfer T64374/2001 to be directly executable in satisfaction of the judgment. The plaintiff is ordered to pay the costs of the application to amend its particulars of claim on an unopposed basis as well as the wasted costs, if any, occasioned by the postponement of the trial on 20 October 2014. The costs awarded against the plaintiff shall be taxed on the party and party scale.

A.G. BINNS-WARD

Judge of the High Court