IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 34031/05
DATE: 28/11/2007

UNREPORTABLE
In the *ex parte* application of:

LINDA ELLISTON **APPLICANT**

In Re:

REGISTRAR OF THE USURY ACT **RESPONDENT**

JUDGMENT

WEBSTER J

1. The applicant seeks, by way of a "... stated case on a question of law ... the opinion of this... court in terms of section 18A of the Usury Act No. 73 of 1968.

2. Section 18A of the Usury Act provides:
"Statement of question of law for opinion of Supreme Court.
(1) If a question of law arises between the Registrar and any other person concerning the application of any pro9yision of this Act to any money lending transaction or credit transaction or leasing transaction to which such person is a party, the Registrar or such person who is a

party to the transaction may state such question of law in the form of a special case for the opinion of any division of the High Court of South Africa having jurisdiction, and shall transmit that special case to the registrar of that court.

[Sub-so (1) substituted by s. 4 (a) of Act No. 10 of 2003.]

(2) A question of law referred to in subsection (1) may be argued before the court in question and such court may call for such further information as it may deem necessary.

(3) Any person who is a party to the transaction in question and the Registrar shall be entitled to appear at the arguing of the question of law concerned.

(4) The court may give such opinion as it may deem fit in respect of the special case, as supplemented by the information referred to in subsection (2), if any, and may make such order as to the costs of the proceedings before it, as it may deem fit.

(5) The Registrar or any person who is a party to the transaction concerned, shall have a right of appeal to the Supreme Court of Appeal against an opinion referred to in subsection (4).

[So 18A inserted by s. 20 of Act No. 90 of 19~0. Sub-so (5) substituted by S. 4(b) of Act No. 10 of 2003.]"

For section 18A of the Act to be invoked

(1) the following requirements must be present, namely

(a) there must be an issue concerning the application of a provision of the Usury Act;

(b) that issue must relate to or concern

(i) a money lending transaction, or

(ii) credit transaction, or

(iii) a leasing transaction;

(c) the person relying on section 18A must be a party to the transaction/s mentioned in (b);

(d) the issue must relate to a question of law.

(2) the point of law must be decided on the basis of a special case.

3. For a point of law to be adjudicated upon by way of a special case (1) there must be "... a written statement of facts in the form of a special case ..."; (2) such statement [must] set forth the facts agreed upon, the questions of law in dispute between the parties and their contentions thereon [Rule 33(1) and (2) of the High Court Rules]: In Alii Sheik v Principal Immigration Officer (1930, TPD 603 WAAL JP stated:

"Now it is obvious that before an Appeal Court can function and do its duty, it must have the facts fully before it, and must also have fully placed before it the contentions and points of law which the appellant may wish to bring forward. In Ebrahim Mahomed v Immigrants' Appeal Board (1928 TPD 439, at p. 442), the Court gave directions as to what should be done in these stated cases, and said this: "The Court wishes to point out generally that, when questions of law are reserved for the consideration of the Court - not only in immigration cases, but under other statutes which entitle persons to come to Court on points reserved - it is very desirable that, firstly, the facts should be set out very clearly and shortly, then the contentions of the parties, and then the questions of law which are reserved for consideration of the Court, so that there can be no doubt as to what the facts, contentions and points of law are which the Court has to consider and decide.' That has not been done in this case. That being so, I think it is our duty to send the case back to the Board, with the request that it be redrafted, after consultation with the appellant." (Colman and Others v Johannesburg City Council 1948(1) SA 1258 (T) at 1261.)"

4. Before dealing with the issues it is important to note that the issues raised in this matter are of fundamental and far-reaching importance as it relates to and affects the greater percentage of the population of this country who lack the means of purchasing what they require on cash and are forced through economic circumstances, to resort to purchasing on credit. Those who are eligible to access credit facilities are more fortunate as the contracts they conclude are governed by various statutory provisions that protect them from unscrupulous traders. These are found, inter alia, in various statutes such as the Conventional Penalties Act No. 15 of 1962; Usury Act No. 73 of 1968; Limitation and Disclosure of Finance Charges Act No. 73 of 1968; the Credit Agreements Act No. 75 of 1980.

5. With the burgeoning members of semi-employed or low earning members of society who are economically disqualified from accessing conventional credit a new industry of micro-lenders has come into existence. They may lend money at unrestricted rates of interest because of exemption from the operation of the Usury Act. Retailers have been quick to establish in-house micro-lending facilities with inbuilt self-protection that eliminates the rights of debtors that exist in the Credit Agreements Act. The applicant, in this case, found herself 'financially disadvantaged' and accessed 'credit facilities' extended by Joshua Doore in making a purchase of a lounge suite in 2001. She avers that she believed at all material times that she was entering into a 'hire purchase' agreement with the furniture retailer.

6. In the course of time she realized that she was being debited with exorbitant interest. As their name suggests it appears from correspondence with the respondent that they are assisting or

attempting to assist victims of high or excessive interest charges. This appears from correspondence between themselves, Joshua Doore and the respondent which was annexed to a letter of complaint dated 27 June 2005 (Annexure "K" to the founding affidavit).

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7. In the letter, annexure "K" the respondent was requested to clarify whether the transaction the applicant had entered into with Joshua Doore was "a money lending transaction (loan agreement) as claimed by JD or a credit transaction (installment *(sic)* sale agreement) as per my interpretation". The only response in the papers in annexure "L", a faxed letter dated 18 July, 2005, in which CUAC was advised as follows by the Directorate of Consumer Credit Investigations: "I acknowledge receipt of your fax dated 11 July, 2005. The matter will be taken up in an urgent request for a legal opinion on a few issues around consumer credit. You will be informed of the outcome in due course." No such communication ever followed, according to the applicant.

8. The applicant then launched this application and also served copies thereof on MFRC as well as on JDG Trading (PTY) LTD: the latter joined issue with the applicant having decided to do so in accordance with the provisions of section 18A(3) of the Usury Act No. 73 of 1968.

9. The respondent, in his answering affidavit pertinently averred that the "facts" set out in the applicant's stated case were not common cause between the applicant and himself or his office, nor with Joshua Doore for that matter. It was pertinently submitted that the application was not competent under section 18A of the Usury Act.

10. JDG Trading (PTY) LTD, through its Director Johan Hendrik Christofel Kok filed a 63 page affidavit and two confirmatory affidavits from a Ms

Grobler, a former salesperson at Joshua Doore and Louisa Bangwa, a credit controller at the shop. Kok's affidavit raised two points *in limine.* The first was that the loan agreement referred to in the applicant's affidavit was exempted from the provisions of the Usury Act save for the provisions of sections 13, 14 and 17A. The second was that no question of law had arisen between the applicant and the respondent which could form the basis for a stated case in terms of section 18 A(1) of the Usury Act. He then dealt with the applicant's case, the various trading divisions and trading names of Joshua Doore, the types of transactions concluded by JD, the structure of cash sale and loan agreement transactions, the historical context of loan agreements within the retail trade industry, the features of JD's standard loan agreement that distinguishes it from credit transactionsjinstallment sale agreements, the agreement in the present matter. Under the last heading he extols the virtues of La. Grobler, Bangwa and comments on what is contained in their affidavits. He further comments on the annexures which are annexed to the applicant's papers and thereafter answers the founding affidavit paragraph by paragraph.

11. Grobler had no personal dealings with the applicant when she purchased the lounge suite from Joshua Doore but deposed to company policy whilst she was in the employ of Joshua Doore and the procedure that was followed. A third affidavit was deposed to by Louisa Bangwa who was a credit controller at the shop from which the applicant made the relevant purchase. She averred that she had an interview with the applicant "... and although ...[she had]... no independent recollection of the applicant... *ff* proceeded to repeat a great deal of what Grobler had deposed to and relating to how customers were informed of their options and challenging the facts deposed to by the applicant. Various annexures which already formed

part of the record having been annexed to the applicant's affidavit were annexed to her affidavit. This issue has a bearing on costs.

12. The applicant, in her replying affidavit averred that the respondent had already endorsed the view that the activities of JDG Trading (PTY) LTD were lawful and that that view raised a legal question of law between herself and the respondent. The further allegations are essentially point in argument.

13. I have set out evidence in greater detail that was strictly necessary. The reason for doing so is to highlight two issues, namely (i) whether there is indeed a dispute in law that has arisen between the applicant and the respondent and (ii) that the dispute on the papers is essentially one between the applicant and Joshua Doore.

14. All counsel who are of renown in this division submitted thorough written heads of argument. They were of great use to me. I do not intend to repeat their arguments, however. This, by no means, is intended to ignore their hard work but because the issue to be decided is crystal-clear.

15. The applicant openly admitted in her founding affidavit that the respondent had not responded to the lette~, annexure "K". The allegation that "... a question of law ...[has arisen]..." between the respondent and the applicant is accordingly factually incorrect for no decision whatsoever has been taken by the respondent.

16. There is therefore no question of law that has arisen between the applicant and the respondent. Mr Geach argued valiantly that the respondent's previous decision that the transactions of 'money-lending'

were not unlawful. That however, cannot assist the appellant. The provisions of section 18A clearly relate to a specific transaction – the question of law must arise between the registrar and a specific person. The dispute between the applicant and Joshua Doore to which a lengthy debate was devoted in the papers, whilst clearly relevant in determining what transpired when the applicant purchased the furniture, is not relevant in these proceedings. That dispute would have been relevant before the respondent.

17. Furthermore, the provisions of Rule 33 of the Uniform Rules of Court were clearly not complied with. A point of law cannot be decided *in vacuo*, the court must have the agreed facts before it (Ali Sheik's *supra*). In the circumstances no opinion may be issued from this court in accordance with the provisions of section 18A of the Act.

18. There remains the question of costs. The applicant approached the respondent by way of a letter, Annexure *"Kif,* written on 27 June 2005. Annexure "L", as pointed out earlier in this judgment, indicates that a further communication relating to the applicant's complaint was addressed to the respondent by the 28th of October 2005, when the application was launched, the respondent had still not responded to the complaint. What the reasons for this silence on the part of the respondent were, is not ascertainable from the papers. In fact, the respondent has chosen to remain silent on this issue. There is no question that the issue was one deserving of a speedy reply by the respondent.

19. What aggravates the situation is that the respondent had an opinion by his legal advisor and he had expressed the view in a previous similar complaint that the transaction was not illegal. His conduct

G. WEBSTERJUDGE IN THE HIGH COURT

20. In the course of the judgment I adverted to the unnecessarily prolix affidavits filed on behalf of Joshua Doore and the unnecessary duplication of annexures already filed by the applicant. It is the court's considered view that the applicant should not be mulcted with such costs.

21. **The following order is granted:**

1. The court declines to render an opinion in terms of section 18A of the Usury Act No. 73 of 1968;

2. The applicant is ordered to pay 75% of the taxed costs of application.

3. No order is granted regarding the respondent's costs.

therefore, in the absence of any explanation was a clear dereliction of duty or a wilful disregard for the rights of the applicant. The applicant was entitled to a ruling on the point raised and the respondent was obliged to execute his duties with the urgency the matter deserved. This court finds the conduct of a senior State official so unacceptable that it has to express its extreme displeasure by making a punitive costs order against the respondent.