IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

3/8/2012

Appeal Number: A973/2010

Case number: 24425/2009

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/~~NO~~	
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~	
(3) REVISED	
2012/08/03	
DATE	SIGNATURE

In the matter between:

ADRIAN SEAN FRIEND Appellant

and

KAY SENDAL Respondent

JUDGMENT

Handed down: 3/08/2012
Heard on 25 July 2012
Coram: Legodi J
Fabricius J
Kubushi JJ

LEGODI J

[1] This is an appeal against a judgment handed down by Kollapen AJ as he then was in terms which the appellant was ordered to pay the respondent the sum of R620 000.

[2] The appellant was a respondent in the court *a quo* and the respondent was the applicant. The appellant was also ordered to pay an interest accrued on the capital amount calculated on the applicable interest rate levied by the Standard Bank from time to time on unsecured overdraft facility from the 2 December 2008 to the 1 March 2009 in the sum of R30 515.89

[3] The appellant was further ordered to make payment to the respondent for interest accrued on the capital amount calculated on the applicable interest rate levied by Standard Bank from time to time on unsecured overdraft facility from 2 March 2009 to date of payment. Lastly, the appellant was ordered to pay the costs of the application.

[4] As a brief background leading to the application in the court *a quo* against the appellant, on or about the 10th December 2006, the appellant in writing acknowledged that he was indebted to the respondent in the amount of R1 225 000. He also undertook to pay the said amount of R1 225 000 in full on or before the 1st December 2007. Lastly, he undertook to pay interest on the aforesaid amount calculated at prime rate charged by Standard Bank from time to time on the unsecured overdraft facilities. The interest was to be paid monthly in full on or about the first day of every month commencing on the 1 December 2006.

[5] By the 1 December 2007, the appellant had paid portion of the capital amount, but failed to make payment of the remainder of the capital amount, leaving a capital amount outstanding of R620 000.

[6] The respondent subsequently, instituted motion proceedings against the appellant for the payment of R620 000 plus interest. The matter came before Kollapen AJ as he then was and on the 15 September 2010, he handed down judgment as indicated in paragraphs 1, 2 and 3 of this judgment.

[7] There were two defences that were raised by the appellant in the court *a quo. The first one was that* acknowledgement of debt in question was a credit agreement as envisaged in the National Credit Act. It was therefore contended on behalf of the appellant in the court *a quo* that the respondent was not entitled to institute the application against the appellant without having given a notice in terms of section 129 of the National Credit Act 34 of 2005. Secondly, it was argued that inasmuch as the acknowledgement of debt amounted to a credit agreement, the agreement was null and void as the respondent was not registered as a credit provider.

WAS THE RESPONDENT OBLIGED TO REGISTER AS A CREDIT PROVIDER?

[8] The court *a quo* found that the acknowledgment of debt in question, constituted a credit agreement as envisaged in section 8(4)(f) of the Act. The section provides that an agreement, irrespective of its form but not

including an agreement contemplated in subsection (2), constitutes a credit transaction, if it is any other agreement other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of –

(i) the agreement; or

(ii) the amount that has been deferred.

[9] The acknowledgement of debt referred to earlier in this judgment at all relevant times deferred payment of the sum of R1 225 000 to 1 December 2007, the acknowledgment of debt having been signed on the 9 November 2006. Secondly, the acknowledgment of debt provided for payment of an interest.

[10] The court *a quo* therefore correctly found that the acknowledgement of debt was a credit agreement as envisaged in section 8 (4)(f). The court *a quo* also found that the acknowledgement of debt was not a 'credit agreement between parties dealing at 'arm's length' to which the Act applies.

[11] Counsel for the appellant in his written heads of argument took the point as follows:

"It was never in dispute that the acknowledgement of debt was an agreement as contemplated in section 8(4)(f) of the National Credit Act 35 of 2005, the "NCA" and the court a quo indeed found accordingly in

consequence it carried with it an obligation on the part of the respondent to be registered as a credit provider in terms of section 40 of the NCA. It being common cause that the respondent had never been registered as a credit provider, the appellant contended that the acknowledgment of debt was void".

[12] The appellant did not seem to want to pursue the point that the respondent did not give a notice in terms of section 129 before the institution of the application against the appellant in the court *a quo*. I want to assume that this is so, because the respondent had in any event later given such a notice. The appellant took no step to resort to any remedy under section 129.

[13] The issue around section 40 prompts one to raise a question whether the respondent was obliged to register as a credit provider for the one transaction that he had concluded with the appellant? A credit provider in respect of a credit agreement is in terms of section 1 defined as:

"(a) the party who supplies goods or services under a discount transaction, incidental credit agreement or instalment agreement,

(b) the party who advances money or credit under a pawn transaction;

(c) the party who extends credit under a credit facility;

(d) the mortgagee under a mortgage agreement;

(e) the lender under a lease;

(f) the lessor under a lease;

(g) the party to whom an assurance or promise is made under a credit guarantee;

(h) the party who advances money or credit to another under any other credit agreement; or

(i) any other person who acquires the rights of a credit provider under a credit agreement after it has been entered into."

[14] It is clear from the definition that with the acknowledgment of debt concluded between the appellant and the respondent, the respondent does not fall within the categories as set out in the definition above.

[15] True, the acknowledgement of debt in question, is a credit agreement as envisaged in section 8 (4)(f). But, that did not automatically make the respondent to be a credit provider who was obliged to register in terms of section 40. Simply put, the respondent was not a credit provider as defined; and that makes sense as it would appear from the provisions of the Act discussed hereunder.

[16] Section 40 deals with registration of credit provider and of relevance provides as follows:

*"40. **Registration of credit providers.**-(1) 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).

(2) In determining whether a person is required to register as a credit provider-

(a) the provisions of subsection (1) apply to the total number and aggregate principal debt of credit agreements in respect of which that person, or any associated person, is the credit provider;

(b) each associated person that is a credit provider in its own name and falls within the requirements of subsection (1) must apply for registration in its own name;

(c) a credit provider that conducts business in its own name at or from more than one location or premises is required to register only once with respect to all of such locations or premises; and

(d) .....

(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 in terms of this section, may voluntarily apply to the National Credit Regulator at any time to be registered as a credit provider."

[17] It looks like subsection (1)(a) envisages a situation where a person frequently provides credit or concludes credit agreements as defined. 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.

[18] Further, subsection (2)(a) seems to make it even clearer. In determining whether a person is required to register as a credit provider, subsection 1 applies to a total number and aggregate principal debt of credit agreements in respect of which a person or any associated person is a credit provider. (Underlining is my own emphasis).

[19] Subsections 1(a) and (2)(a) of section 40 appear to contain the closest provisions relevant to the respondent in the present case; and I am satisfied that they do not support the notion that the respondent was under an obligation to register as a credit provider.

[20] Counsel for the appellant strongly argued for an obligation to register as a credit provider based on the provisions of section 40(1)(b) quoted earlier in paragraph 16 of this judgment. According to him, subsection (1)(b) envisages inclusion of a single credit transaction in respect of which the amount owed exceeds R500 000 referred to in section 42(1) of the Act. Remember, the amount in terms of the agreement concluded between the appellant and the respondent is R1 225 000. Based on all of this, we were urged to find that the court *a quo* should have found that the transaction was unlawful and void in terms of section 40(4) read with the provisions of section 89.

[21] I do not understand the provisions of section (1)(b) as referring to a single principal debt exceeding the threshold or to a single credit outstanding agreement in respect of which the amount exceeds the threshold as it was the case here.

[22] The provisions of subsection 40(1)(b) should be interpreted as they read. It is *"the total principal debt and under all outstanding credit agreements"* that bring in an obligation to register as a credit provider. It is the respondent's frequency of providing credits under subsection

40(1)(b) that is envisaged. If this was not so, the subsection could simply have been couched to read as follows:

"***Registration of credit providers.*** *– (1) a person must apply to be registered as a credit provider if-*

(a) ..... or

(b) ***the principal debt*** *owed to that credit provider under*

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

[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 section 3 to promote and advance the social economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry and to protect consumers. (The underlined words are my own emphasis).

[24] Therefore, subsection (1)(b) of section 40 must be seen as having been directed at those who are in 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 purpose set out in section 3, bearing in mind that the purpose of the Act is also to protect the consumers. In the

circumstances of the case, I cannot therefore agree that the transaction is covered under subsection (1)(b) of section 40.

[26] The suggestion that section 89(4) read with subsection 2(d) makes it clear that there was an obligation on the part of the respondent to register as a credit provider despite the fact that it was a single transaction, ought to be rejected. For subsection (4) to be applicable, there must have been an obligation to register as a credit provider. The respondent was unregistered and was not required to register in terms of the Act for the reasons already set out above.

[27] There is another provision that has been raised by the respondent's counsel in his written heads of argument. In terms of subsection (4) of section 40, 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 in section 89. Section 89 deals with unlawful credit agreements. Remember, the issue of unlawful agreement, is the contention by the appellant, although he did not initially specifically refer to section 89. Counsel for the respondent referred us to the provisions of section 89(5) which of relevance, provide as follows:

"89. ***Unlawful credit agreements*** *–(1)* .....

(2) .....

(3) .....

(4) .....

(5) If a credit agreement is unlawful in terms of this section, despite any provision of common law, any other legislation, or any provision of an agreement to the contrary, a court must order that-

(a) the credit agreement is void as form the date the agreement was entered into;

(b) the credit provider must refund to the consumer any money paid by the consumer under that agreement to the credit provider, with interest calculated-

(i) at the rate set out in that agreement; and

(ii) for the period from the date on which the consumer paid the money to the credit provider, until the date the money is refunded to the consumer; and

(c) all the purported rights of the credit provider under that credit agreement to recover any money paid or goods delivered to, or on behalf of, the consumer in terms of that agreement are either

(i) cancelled, unless the court concludes that doing so in the circumstances would unjustly enrich the consumer; or

(ii) forfeit to the State, if the court concludes that cancelling those rights in the circumstances would unjustly enrich the consumer".

[28] I did not find it necessary to deal with the provisions of subsections (2) and (3) of section 89. It suffices to mention that the appellant could not be seen as a consumer referred to in these subsections including subsection (4) . I am therefore satisfied that section 89 is not applicable in the present case. Whilst the agreement between the appellant and respondent is a credit agreement as envisaged in section 8(4) (f) of the Act, the respondent was not obliged to register as a credit provider in terms of section 40 for a once off transaction. I do not think it could ever have been the intention of the law makers. I now turn to deal with the other issue that was raised and strenuously argued before us by counsel on behalf of the appellant.

WHETHER THE APPELLANT AND THE RESPONDENT WERE DEALING AT AN ARM'S LENGTH?

[29] The issue was raised with regard to the applicability or otherwise of the National Credit Act to the acknowledgement of debt in question. Section 4 of the Act deals with the application of the Act to credit agreements. Of relevance to the issue raised in the present case, it reads as follows:

> *"4. **Application of Act** – (1) Subject to the provisions of sections 5 and 6, this Act applies to every credit agreement between parties at arm's length and made within or having an effect within, the Republic except –*
>
> *(a) ....*
>
> *(i) ....*
>
> *(ii) ....*
>
> *(iii) ....*
>
> *(b) ....*
>
> *(c) ....*
>
> *(d) ....*
>
> *(2) For greater certainty in applying subsection (1) –*
>
> *(a) ....*
>
> *(b) In any of the following arrangements, the parties are not dealing at arm's length:*
>
> *(i) ....*
>
> *(ii) ....*
>
> *(iii) a credit agreement between natural persons who are in a familial relationship and –*
>
> *(aa) are co-dependent on each other; or*
>
> *(bb) one is dependent upon the other; and*
>
> *(iv) any other arrangement-*
>
> *(aa) in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction; or*
>
> *(bb) that is of a type that has been held in law to be between parties who are not dealing at arm's length;"*

[30] I had difficulties in understanding the dispute around this issue. I am saying this because if the acknowledgment of debt in question amounts to

a credit agreement as the court *a quo* had found that the provisions of section (8), (4)(f) were applicable to the acknowledgment of debt, the Act should therefore be found to be applicable. For example, provisions of section 129, although I am not making a definite finding in this regard for the reason that the appellant ultimately gave notice in terms of section 129. The provisions of section 40 are however not applicable to the agreement for the reasons stated earlier in this judgment.

[31] It does not matter whether or not the parties were dealing at arm's length. It would still not have been necessary to register as a credit provider in terms of section 40. It looks like the issue was intended to advance the argument that the acknowledgement of debt should have been seen in the context of the alleged oral agreement.

[32] However, for the purpose of the issue under discussion, it suffices to mention that the Act is in any event applicable by virtue of the acknowledgment of debt having been found to be a credit agreement in terms of section 8(4)(f). In other words, it is a credit agreement for the purpose of the Act. But as I said, it did not mean the respondent was under an obligation to register as credit provider. In any event, I am satisfied that the court a quo correctly found that the parties were not dealing at arm's length with each other.

[33] In as much as counsel for the appellant sought to persist with the argument in this regard during his oral argument, it might be necessary to

take it a step further. For this purpose, the provisions of subsections (2)(b)(iv)(aa) and (bb) are important.

[34] One can say the respondent and the appellant were in a familial relationship with each other. The acknowledgement of debt instead of being entered into between the respondent and Celtic Group, was on the appellant's version, concluded between the two of them allegedly 'hastily' so.

[35] Judging by what the appellant said in his e-mails to the respondent, it was almost like saying to the respondent, "I am dependent on you". For example, in the e-mail that was sent on the 12 November 2008, to the respondent, the appellant expressed himself as follows: "*I am now stuck in more trouble than before, as not only have I stuffed up my personal finances with building that stupid house. I have ended up with this entire bill on my own shoulders ...*

I can get my hands on some money now, but it means I would have to cash in my policies ... pensions and such, which as you aware currently have greatly reduced values .. but im(sic) kind of in a situation now where if I could somehow get this whole tacky back door deal rid of it would be worth it ... so let me pay you the 1/3 portion that I owe and be done with this thing? Being 200 000

I am after all be the guy that worked out a deal that you could sell your shares with bargaining power and not as a dismissed director.. Kay ... I have done enough now and you are kicking a guy that is down .. so this

doesn't tally up with the meeting you and I had where we agreed that we should walk out of this as gentlemen and not spend the rest of our lives bickering..."

[36] The respondent made several concessions to accommodate the appellant throughout in the payment of the outstanding amount. He did not appear to be waiting to strive to obtain the utmost possible advantage out of the transaction at the expense of the appellant. The language or choice of words in the e-mails that form part of the record of the proceedings, in my view, suggests parties who were not dealing at arm's length. I do not find it necessary to go into the details of the e-mails. If they were not dealing at arm's length, the provisions of the Act were not applicable to them irrespective whether or not the transaction amounted to credit agreement as envisaged in section 8(4)(f) of the Act.

WHETHER THE APPELLANT WAS ENTITLED TO PLEAD FACTS OUTSIDE THE ACKNOWLEDGMENT OF DEBT?

[38] Counsel for the respondent in his written heads of argument raises the issue as follows:

"Whether Friend's contentions pertaining to the alleged underlying agreement and the alleged breach thereof, and his contention that the AOD did not reflect the true contention of the parties constituted a defence?"

[39] "AOD" quoted above refers to acknowledgement of debt. I could not have raised the issue much better. As correctly pointed out by counsel on behalf of the respondent, the intention of the parties is clearly and unambiguously contained in the acknowledgement of debt. For example, clauses 1.10, 2 , 3 and 4 read as follows:

"1.10 Acknowledge that I am indebted to KAY SENDEL (the Creditor) in the sum of R1 225 000,00 (One million two hundred and twenty five thousand rand only).

2. I will pay the aforesaid amount as follows:

2.1 The full amount of R1 225 000,00 will be settled on or before 1 December 2007;

2.2 I will pay interest on the aforesaid amount, calculated at the prime rate charged by Standard Bank from time to time, on unsecured overdraft facilities. The interest will be paid monthly, in full, on or before the first day of every month commencing on 1 December 2006.

3. If anyone interest payment is not paid on due date, the full balance outstanding will immediately become due and payable and the Creditor will be entitled to proceed against me without notice for recovery thereof.

4. I FUTHER agree that, should I fail to make payments in terms of this offer the Creditor may at its option and without notice to me apply for:

4.1 Judgment in the Magistrate's Court for the amount of the outstanding balance of the debt in terms of this acknowledgment together with costs and the costs of a Request for Judgment and

4 An Order in the said Magistrate's Court for payment thereof in accordance with this offer"

[40] The appellant sought to suggest that the acknowledgement of debt was linked to an oral agreement in terms of which the respondent is alleged to have made an undertaking to this effect:

"14.1 The Applicant would leave Celtic on a "clean break" basis, without further ado, and that the sale of shares transaction would follow smoothly.

14.2 The Applicant would return all the documents removed from Celtic's Durban office which I have referred to in paragraph 9 above.

14.3 The Applicant would return the laptop belonging to Celtic.

14.4 The Applicant would not disturb or approach any of Celtic's staff members.

14.5 The Applicant would not interfere with, or approach any of Celtic's customers or suppliers.

14.6 The Applicant would not conduct any business similar to that of Celtic in Zambia."

[41] The respondent is said to have breached one or more of these undertakings. Based on the breach, it was suggested that the appellant was not obliged to pay the respondent.

[42] As a brief background set out by the appellant in his answering affidavit, the respondent was one of the shareholders in Celtic Group of Companies. The appellant was also one of them. The respondent sold

his shares in the Celtic Group to a third party. It is alleged that Celtic Group intended to give the respondent an ex gratia payment following the sale of his shares to a third party. It is alleged that the ex gratia payment was hastily embodied in the form of an acknowledgement of debt in the appellant's name. (The underlining is my own emphasis).

[43] Remember, the aim and effect of the parole evidence rule is to prevent a party to a contract which has been integrated into a single and complete written agreement from seeking to contradict, add to or modify the written agreement by reference to extrinsic evidence and in that way to redefine the terms of the contract. (See Johnson v Leal 1980 (3) SA 927 (A) at 943B).

[44] It is exactly what the appellant sought to do which is prohibited by the rule. For example, he sought to suggest in the court *a quo* that it was actually not him who was liable to the respondent in terms of the acknowledgment of debt, but rather the Celtic Group. On the other hand he suggested that it was not only him who was liable to the respondent, but that other two shareholders were also liable and that he was only liable to the one third of the amount thereof.

[45] Whatever circumstances under which he had signed the acknowledgment of debt, whether 'hastily' so or not, he had made himself liable to the respondent in terms thereof. Whatever arrangements he might have made with Celtic Group and or with other shareholders thereof, it had nothing to do with the respondent. There is nothing in the

acknowledgment of debt which suggests any connection between the signing thereof by the appellant and the fact that it was conditional on certain undertakings been fulfilled or complied with.

[46] I am satisfied that the court *a quo* correctly refused to consider the appellant's defence beyond the acknowledgement of debt. Therefore, the other defence relating to dispute of facts ought to be rejected on the basis that there was just no defence in law to exonerate the appellant based on the alleged oral agreement.

47. Consequently, the appeal is hereby dismissed with costs.

M F LEGODI
JUDGE OF THE HIGH COURT

I, AGREE

H J FABRICIUS
JUDGE OF THE HIGH COURT

I, AGREE

E M KUBUSHI

JUDGE OF THE HIGH COURT

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