REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG DIVISION, PRETORIA

16/10/2014

CASE NUMBER : 15456/2011

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE ~~YES~~ / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES ~~YES~~ / ~~NO~~
(3) REVISED

16.X.14
DATE

SIGNATURE

In the matter between

JAN ANDRIES POTGIETER Plaintiff

and

JOHANNES JOSEP CORNELIUS OLIVIER First Defendant

GERTHA JACOBA OLIVIER Second Defendant

JUDGMENT

D.N. Unterhalter AJ

ACTING JUDGE OF THE HIGH COURT

Date of hearing	:	13 October 2014
Date of judgment	:	16 October 2014
Counsel for the plaintiff	:	Mr J.E. Ferreira
Instructed by	:	Van Renen & Heyns
Counsel for the defendants	:	Mr G.F. Heyns
Instructed by	:	Day Inc.

INTRODUCTION

1. The Plaintiff, Mr Potgieter, on or about 25 September 2008 sold his property to the Defendants in terms of a written agreement. The purchase price agreed upon was R1 million. The purchase price was payable either in cash or by way of payments of R10 000 per month, commencing 1 November 2008 until final payment. In the event that the purchasers elected to pay the purchase price by way of instalments, then interest accrued on the purchase price at the rate of R100 000 for every completed period of three years.

2. Among the claims made by Mr Potgieter in his action is a declaratory order that the agreement of sale is void.

3. At the commencement of the trial, and by agreement between the parties, I

ordered a separation of the first claim, and that the Plaintiff's second and third claims as well as the Defendants' counter claim be postponed, pending the adjudication of the first claim.

4. Thus, the sole issue before me is whether the agreement of sale is void. The basis of this claim is that the agreement of sale is a credit transaction in terms of section 8(4)(f) of the National Credit Act 34 of 2005 ("the Credit Act") and that Mr Potgieter was obliged, as a credit provider, to register in terms of section 40(1)(b) of the Credit Act. Mr Potgieter failed to register as a credit provider, and in consequence, so it is alleged, the sale agreement is unlawful and in terms of section 89(5)(a) of the Credit Act, a declaration should issue declaring the agreement void.

5. The defendants had originally admitted that Mr Potgieter was obliged to register as a credit provider in terms of section 40(1)(b) of the Act. But that admission was made in error and has, with my leave, been withdrawn. The defendants, while admitting that Mr Potgieter failed to register as a credit provider, now challenge the claim that he was under any obligation to do so. As a result, the defendants deny that such failure resulted in any unlawfulness attaching to the agreement of sale.

6. At the trial on the separated issue, Mr Potgieter gave brief testimony. He testified that he had concluded the agreement of sale, as appears from the attachment to the pleadings. He stated that he was not aware of the provisions of the Credit Act at the time that he concluded the agreement in

September 2008; nor was he aware of any obligation to register as a credit provider. The agreement of sale was an arm's length transaction with the defendants, after which he had emigrated to Australia. Mr Potgieter confirmed that he was not a provider of credit in the credit industry.

THE OBLIGATION TO APPLY TO BE REGISTERED AS A CREDIT PROVIDER

7. A credit agreement is defined in section 1 of the Credit Act to mean an agreement that meets all the criteria set out in section 8 of the Credit Act. It is common ground between the parties that the agreement of sale concluded between Mr Potgieter and the defendants qualifies as a credit agreement in terms of section 8(4)(f).

8. A credit provider is defined in section 1 of the Credit Act, in relevant part, as follows:

" 'Credit provider' in respect of a creditor agreement to which this Act applies means – ...

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

9. There is some measure of circulatory between the definition of a credit agreement in section 8(4)(f) and a credit provider as stipulated for in part (h) of the definition of a credit provider, ~~under the terms of the agreement of sale, the seller permits the buyers to defer payment of the purchase price by way~~

of monthly instalments. Credit is defined in section 1 of the Credit Act to mean a deferral of payment of money owed to a person.

10. The question that arises is whether a seller who agrees to the payment of the purchase price by way of monthly instalments is deferring payment of money owed. On one construction, the seller under the terms of the agreement of sale does not extend credit as defined in section 1 of the Credit Act because there is no deferral of payment of money owed. Rather the obligation to pay each instalment arises every month and no money is owed until the monthly instalment becomes due. In this sense, there is no deferral of payment of money owed, but rather a requirement that payment is made when it falls due, month by month.

11. However, it seems to me that, on a proper construction of clause 2.1 of the agreement of sale, there is indeed a deferral of payment. The relevant provision of clause 2.1 reads as follows:

> "Die koopprys sal deur die Kopers afbetaal word teen R10 000 (Tien Duisend Rand alleen) 'n maand beginnende vanaf 1 November 2008 tot volle en finale betaling."

The agreement is one that permits the purchasers to discharge the purchase price by way of monthly instalments over a lengthy period, as an alternative to the payment of cash on registration of title. This constitutes a deferral of the payment of the purchase price. It is this deferral of payment that then

attracts the concomitant obligation to pay interest. These seem to me to be the hallmarks of the grant of credit, as defined in the Credit Act.

12. I conclude therefore that the agreement of sale is indeed a credit agreement and the seller is a credit provider in that he has advanced credit to the buyers under a credit agreement.

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14. This then leads to the question that divided the parties to the action. *Mr Ferreira*, who appeared for the plaintiff, Mr Potgieter, submitted that Mr Potgieter was required to apply to be registered as a credit provider in terms of section 40(1)(b) of the Credit Act, it being common cause that the threshold prescribed in section 40(1) was at the relevant time R500 000. The consequence of such failure is set out in section 89(2) and (5) of the Credit Act. There it is provided that a credit agreement is unlawful if, at the time the agreement was made, the credit provider was unregistered and the Act required that the credit provider be registered. If a credit agreement is unlawful then, so it was contended, a court must order that a credit agreement is void from the date the agreement was entered into.

15. *Mr Ferreira* however recognised that reliance upon section 40(1)(b) of the Credit Act required that he overcome the decision of the full bench in this

division of *Friend v Sendal* Case No 973/2010, an unreported decision dated 3 August 2012. In *Friend*, the court reasoned, by recourse to the purposes of the Credit Act, that section 40(1)(b) does not refer to a single credit agreement, but is rather directed to those who participate in the credit market. A once-off transaction cannot be seen to be participation in the credit market. Confronted with these dicta, *Mr Ferreira* offered two answers. First, he submitted that the dicta are, on a proper interpretation of the case, *obiter.* Second, he submitted that even if the dicta are not *obiter*, this interpretation has been overruled by the Constitutional Court in *National Credit Regulator v Opperman & Others* [2013](2)SA1(CC).

16. *Mr Ferreira* also pointed out that the decision in *Friend* did not refer to the decision in the Western Cape High Court of *Opperman v Boonzaaier & Others* [2012] ZAWCHC27 (17 April 2012). This was the decision of the court below that was referred to the Constitutional Court which rendered its decision in *National Credit Regulator v Opperman.* Nor did the full bench in *Friend* refer to the decision of the Free State High Court in *Cherangani Trade & Investment 107 (Edms) Beperk v Mason* [2009]ZAFSHC30 (12 March 2009), nor the refusal by the Constitutional Court of leave to appeal in the *Cherangani* case (see *Cherangani Trade & Investment 107 (Edms) Beperk v Mason* [2011]ZACC12 (8 April 2011). So too, in *Evans v Smith* [2011] (4)SA472(WCC), the Cape High Court concluded that registration was necessary in a once-off transaction.

17. Mr Potgieter also stressed that in a judgment of Murphy J in *van Heerden vs Nolte* [2014](4)SA584(GP) (a decision rendered after *Friend*), Murphy J opined that policy considerations did not permit of a strained meaning being given to section 40(1)(b). Murphy J reasoned that the reference in section 40(1)(b) to "all outstanding agreements" does not evince an intention to exclude a single agreement in excess of R500 000.

18. This body of case law, it was submitted, should incline me to find that the reasoning in *Friend* is not correct and should not be perpetuated.

19. *Mr Heyns*, who appeared for the second defendant (the first defendant having indicated that he abides the decision of the court) adopted a straight-forward approach. He submitted that the decision in *Friend* is clear authority for the proposition that section 40(1)(b) is not of application to a single transaction and that I am bound by such authority. Furthermore, nothing about the decision of the Constitutional Court in *National Credit Regulator vs Opperman* overturns the decision of the full bench of this division. While there are decisions that differ from the holding in *Friend*, those decisions do not alter the authoritative value of *Friend* as binding precedent in this division.

19. What did *Friend* decide?

In *Friend,* the Respondent had claimed payment of capital and interest on a written acknowledgement of debt. The Appellant met this claim on the basis that the acknowledgement of debt was a credit agreement rendered void by

reason of the fact that the Respondent was not a registered credit provider in terms of the Credit Act. The Appellant pressed this defence on appeal (see paragraph [11], and the Court considered the question before it to be the following: "...whether the respondent was obliged to register as a credit provider for the one transaction that he had concluded with the appellant? " (paragraph [13]).

20. In answering this question, the Court in *Friend* found that although the acknowledgement of debt was a credit agreement as defined in section 8(4)(f) of the Credit Act, this did not mean that the Respondent was a credit provider who was obliged to register in terms of section 40 of the Credit Act. In its key finding the Court went on to say this: "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" (paragraph [15]. What follows is an interpretation of Section 40(1)(b) that declines to read the provision to be of application to a single principal debt on the basis that such an interpretation would be at odds with the purpose of the Credit Act. (See paragraphs [16] – [26].

21. *Mr Ferreira* submitted that the interpretation of Section 40(1)(b) was *obiter* because the Court had already found at paragraph [15] that the Respondent was not a credit provider as defined in the Credit Act. And so, the argument ran,

the interpretation of Section 40(1)(b) by the Court was not necessary for the decision, and was a subsidiary line of reasoning. [1]

22. I do not agree. In paragraph [15] of the judgment in *Friend*, a finding is made that the Respondent is not a credit provider as defined in the Credit Act. But no reasons are provided for this finding. As the concluding sentence of paragraph [15] makes plain, those reasons are to be found in what follows. And what follows is the Court's interpretation of Section 40(1)(b) and the application of that interpretation to the position of the Respondent. This reasoning is necessary to explain the conclusion reached by the Court in paragraph [15] and thus cannot be considered as *obiter dicta.* It follows that the interpretation of Section 40(1)(b) constitutes the *ratio* of the decision, and is binding upon me.

23. *Mr Ferreira* submitted that if I should come to this conclusion, I am in any event not bound by *Friend* because the Constitutional Court has overruled this judgment. This submission relied upon paragraphs [7] and [8] of judgment of the Constitutional Court in *National Credit Regulator v Opperman and others* 2013(2)SA 1 (CC).

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[1] See Pretoria City Council v Levinson 1949 (3) SA 305 AD at 317 stating the criteria determining what constitutes the *ratio decidendi of a decision.*

24. The issue before the Constitutional Court in *Opperman* was whether section 89(5)(c) of the Credit Act is consistent with the right not to be arbitrarily deprived of property. The Western Cape High Court declared the provision to be invalid, and the matter came to the Constitutional Court to determine whether this declaration should be confirmed.

25. The predicate for the consideration of the constitutional issue in *Opperman* was the recognition by the court below that the lender, who had lent a friend R7 million pursuant to three written agreements, was nevertheless required to apply for registration as a credit provider.[2] These findings of the High Court are recited, without comment, by the Constitutional Court in paragraphs [7] and [8] of the judgment.

26. I cannot conclude that this recitation amounts to an implied overruling of the decision in *Friend.* Section 40(1)(b) was not the issue before the Constitutional Court. That the High Court had found that the lender had a duty to apply for registration was not the matter appealed. Nor was there any interpretation offered by the Constitutional Court concerning Section 40(1)(b), nor any reference to the decision in *Friend.* For these reasons, *Opperman* is not

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[2] Opperman v Boonzaaier and others [2012] ZAWCHC 27

authority that assists the Plaintiff in this matter.

27. Residually, it was argued by *Mr Ferreira*, that I might nevertheless escape the binding authority of *Friend* on the basis that it is fundamentally flawed, and in any event, it is not a case that has yet been reported in the law reports. I do not consider myself to enjoy such liberty. The Constitutional Court has recently affirmed the fundamental importance of adherence to precedent as an attribute of the rule of law.[3] A binding decision, even if judged wrong, must be followed.

CONCLUSION

28. It follows that I am bound by the holding in *Friend* and must apply it in this case. Here too, there is a single credit transaction. Mr Potgieter is not engaged upon the business of providing credit in the credit market. Section 40(1)(b) is not directed to transactions of the kind concluded between Mr Potgieter and the Defendants. Thus, Mr Potgieter is not burdened by an obligation to apply to be registered as a credit provider. And his acknowledged failure to do so gives rise to no unlawfulness that unravels the agreement of sale.

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[3] *Turnbull-Jackson v Hibiscus Municipality and others* [2014] JOL 32282 (CC)

29. The declaratory sought must accordingly be declined.

30. I should nevertheless add that, if *Friend* were not binding upon me, I should be disinclined to follow it. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), the Supreme Court of Appeal has provided an exposition of the principles of interpretation. It is a unitary exercise that requires the consideration of text, context and purpose.

31. In *Friend,* the Court found that the purpose of the Credit Act was to regulate the credit market in the interests of consumers and consequently Section 40(1)(b) requires a restrictive interpretation to avoid regulatory burdens that reach beyond the objects of the Credit Act. There is much good sense in this. But it is not clear how the Court's regard for the purpose of the Credit Act permits of a reconciliation with the text of Section 40(1) and its context. Section 40 (1) imposes an obligation to apply to be registered as a credit provider where a person is a credit provider under at least 100 credit agreements or where the total principal debt owed to the credit provider under all outstanding credit agreements exceeds a prescribed amount. The legislature has thus set thresholds that trigger the obligation to register: first by reference to the number of agreements and secondly by reference to the quantum of the total principal debt.

32. That the principal debt is expressed by reference to "outstanding credit agreements" is not an indication that a single credit agreement is not implicated in the legislative language. Section 6 (b) of the Interpretation Act 33 of 1957 states that in every law, unless the contrary intention appears, the plural number includes the singular. But in any event, the stress in Section 40(1)(b) is upon the quantum of the outstanding principal debt and not the origin of that debt in more than one agreement. I am in agreement with *Murphy J's* reasoning in *Van Heerden vs Nolte* 2014 (4) SA 584 (GD) at 587 that the reference to "all outstanding agreements" does not evince an intention to exclude a single agreement in excess of R500 000.

33. The interpretation in *Friend* also gives rise to a problem of limits. Parliament had to lay down a threshold. But if that threshold is now subject to a further limitation by reference to the mischief the Credit Act was intended to prevent, where is the line now to be drawn? What hypothesized number of agreements giving rise to the principal debt will suffice? And what is the basis in the statutory language to mark out credit providers who engage in the credit market from those who do not? These distinctions give rise to indeterminate outcomes that stray some way from what the legislature laid down. The entailment of the reasoning in *Friend* is that the Court is required to reach judgments and draw boundaries that Parliament has not stipulated for. In sum, there is a judicial overreach to correct what is justifiably seen to be a regulatory overreach by the

legislature. In this situation, absent a constitutional challenge, the courts must defer to the legislature.

34. In the result :

a) The declaratory relief sought in prayer 1 of Claim 1 is dismissed with costs.

b) The Plaintiff's remaining claims and the second defendant's counterclaim are postponed *sine die.*

J. Lunn

16.X.14