13/02/2018

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 35263/2017

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

13-February-2018 .....

DATE SIGNATURE

In the matter between:

PREDYNAMIC (PTY) LTD Applicant

and

FREDERICK JOSEPHUS SAAYMAN Respondent

Date of Hearing	:	08 December 2017
Date of Heads of Argument	:	13 December 2017
Date of Judgment	:	13 February 2018

JUDGMENT

MANAMELA, AJ

Introduction

[1] This is a summary judgment application premised on Rule 32 of the Uniform Rules of this Court.[1] The applicant's claim is located in an acknowledgement of debt signed by the defendant on 2 October 2015 (the AOD). The AOD is said to be for "a claim arising from various business ventures between the debtor [i.e. the respondent] and the creditor [i.e. the applicant] ".[2] The respondent undertook to pay the applicant a capital amount of R1 million in two or three instalments over a period of two years, together with an amount of R1 250.00, as legal costs. The respondent opposes the application on the basis of alleged non-compliance with the provisions of section 129 of the National Credit Act 34 of 2005 (the NCA).[3] It is contended by the respondent that the deferral of payment and charge for legal costs qualify the AOD as a credit transaction as envisaged in section 8(1)(b), read with section 8(4)(f), both of the NCA.[4]

---

[1] See Uniform Rule 32 which reads as follows in the material part: "(1) Where the defendant has delivered notice of intention to defend, the plaintiff may apply to court for summary judgment on each of such claims in the summons as is only - *(a)* on a liquid document; *(b)* for a liquidated amount in money; *(c)* for delivery of specified movable property; or *(d)* for ejectment; together with any claim for interest and costs. (2) The plaintiff shall ...deliver notice of application for summary judgment, together with an affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount...(3) Upon the hearing of an application for summary judgment the defendant may - *(a)* give security to the plaintiff to the satisfaction of the registrar for any judgment including costs which may be given, or *(b)* satisfy the court by affidavit ... or with the leave of the court by oral evidence of himself or of any other person who can swear positively to the fact that he has a *bona fide* defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor. (4) No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in subrule (2), nor may either party cross-examine any person who gives evidence *viva voce* or on affidavit: Provided that the court may put to any person who gives oral evidence such questions as it considers may elucidate the matter."

[2] See annexure "POC1" on indexed p16.

[3] Section 129 reads as follows in the material part: "(1) If the consumer is in default under a credit agreement, the credit provider-*(a)* may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and *(b)* subject to section 130(2), may not commence any legal proceedings to enforce the agreement before-(i) first providing notice to the consumer, as contemplated in paragraph *(a)*..."

[4] See section 8 of the National Credit Act 34 of 2005 which reads as follows in the material part: "(1) Subject to subsection (2), an agreement constitutes a credit agreement for the purposes of this Act if it is - *(a)* a credit facility... (3); *(b)* a credit transaction ... (4) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is- *(a)* ... *(f)* 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."

[2] The applicant's claim or AOD originates from a lease agreement concluded between the parties or their associates. The lease agreement is said to be independent or separate from the AOD and appears to serve as security for or guarantee of performance by the respondent in terms of the lease. Two motor vehicles and two trailers were leased to the respondent by the applicant. The respondent was to become owner of the vehicles or to receive transfer of ownership of the vehicles upon full payment of the capital amount and legal costs, mentioned above, with the concomitant cancellation of the lease agreement. But, the respondent, on the other hand, alleges existence of other relationships between the parties. These other relationships are not necessarily relevant for current purposes, as the terms and conditions of the AOD are not in dispute.

[3] This matter came before me as an opposed summary judgment in the unopposed motion court on 08 December 2017. After hearing argument by Mr A Loubser, on behalf of the applicant, and Mr JF Winnertz, for the respondent, I reserved this judgment. Mr Winnertz had raised from the bar the fact that the applicant failed to comply with the provisions of section 129 of the NCA to which Mr Loubser reacted by handing up to the Court a letter purportedly sent to the respondent, together with proof of postage. Other peripheral issues arose as a result and I consequently directed that heads of argument be filed on or before 13 December 2017 dealing with the following issues or questions:

[3.1] do provisions of the NCA find application?

[3.2] can the point in *limine* be properly raised from the bar and can, in response, the applicant hand up to the Court documents not forming part of the filed papers?

[3.3] must compliance with the provision of the NCA be pleaded in the particulars of claim?

[4] Counsel for the respondent had mentioned that the respondent was abandoning a point in *limine* raised in the affidavit resisting summary judgment. The respondent had argued that the applicant's summons and particulars of claim did not comply with Rule 17(3)(c) of the Uniform Rules of this Court as the summons was not signed by the registrar of this Court. I consider this abandonment to have been well advised, as the original summons in the Court file is clearly signed by both the registrar and an attorney with right of appearance in the High Court in terms of section 4(2) of Act 62 of 1995. Therefore, thenceforth, the respondent steadfastly relied, for existence of *bona fide* defence, on the submission made from the bar regarding the alleged non-compliance with section 129 of the NCA. I deal next with the questions stated under paragraph [3] above and do so under self-titled subheadings.

Can a point in limine be raised properly from the bar?

[5] As stated above, the defence or contention that the applicant did not comply with the prescripts of section 129 of the NCA before launching the action, which precipitated the summary judgment application, was not raised in the opposing affidavit, but by counsel for the respondent from the bar. It was argued by counsel for the applicant that this was not permissible in terms of the Rules and the law, and that the respondent ought to have included the particular point or averment in his written opposing papers. Due to its potentially decisive nature, I directed that this be dealt with, in full, in written heads of argument which were to be filed after adjournment of the proceedings. In my view the interests of justice dictated that the applicant

be afforded sufficient opportunity to consider and address the issues raised, without notice, from the bar by counsel on behalf of the respondent.

[6] The following submissions were made, in this regard, on behalf of the applicant in the filed heads of argument. The respondent ought to have included the purported defence in the affidavit delivered in resistance to summary judgment or to have, with leave of the court, led oral evidence of an appropriate person on the issue, which measures would have amounted to the reopening of the respondent's case.[5] Or the respondent ought to have requested a postponement in order to get an opportunity to file a supplementary affidavit stating the defence. However, the applicant argues that to be granted an opportunity to file further affidavit, the respondent ought to have explained to the court as to why the evidence was not timeously produced in his filed opposing papers.[6]

[7] On the other hand, the respondent in his written argument made the following submissions. Argument may be advanced, as a point in *limine*, without having included same in the opposing affidavit. No notice was required in this regard. It is further contended that, although a letter was handed up to the Court at the hearing to prove compliance with the requirements of section 129 of the NCA, such letter ought to have been included in the particulars of claim. Rule 32(4) of the Uniform Rules of this Court proscribes a plaintiff to adduce evidence, other than that what is stated in Rule 32(2),[7] the contention continues.

---

[5] See *Juntgen t/a Paul Juntgen Real Estate v Nottbusch* 1989 (4) SA 490 (W).
[6] See *Juntgen v Nottbusch*.
[7] See footnote 1 for a reading of the material part of Uniform Rule 32 above.

[8] Be that as it may, due to the ultimate view I am taking in this matter, I find it unnecessary to make any finding on this issue. I will nevertheless proceed to deal with the other questions or aspects I requested counsel to address in the heads of argument.

Does the National Credit Act 34 of 2005 apply?

[9] The respondent argues that the fact that the AOD provided for payment of the debt or outstanding amount in two or three instalments and a charge of legal costs in respect of the AOD (i.e. the agreement) qualifies the AOD as a credit agreement, as contemplated by the provisions of section 8 of the NCA. Therefore, as a credit agreement the provisions of section 4[8] of the NCA makes the AOD subject to the provisions of the NCA, the contention or argument continues.

[10] On the other hand, the applicant submits that the AOD is not a credit agreement as envisaged in section 8(4)(f)(i). The applicant does not dispute that the AOD provides for deferral of payment or for payment in instalments. However, the applicant disputes that the inclusion of the amount of R 1250.00 payable as legal costs, which it says it is for the drafting of the AOD [a fact which the applicant concedes is not clear *ex facie* the document], renders the AOD a credit agreement. It says the legal fees are excluded from the instalments due and payable by the respondent to the applicant in terms of the AOD. There was, even a belated attempt by counsel for the applicant to abandon recovery of the charge for legal costs, in order

[8] Section 4(1) of the NCA reads in the material part: "Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic..."

to obviate the respondent's challenge based on the alleged non-compliance with the NCA.

[11] Therefore, this matter potentially turns on the determination of whether legal costs payable in terms of the AOD constituted a fee, as contemplated by the provisions of section 8 of the NCA. The NCA, itself, does not define what is meant by a fee or charge and therefore reliance is to be had on interpretation given by the courts to this provision. The respondent relied heavily on the decision of *Carter Trading (Pty) Ltd v Blignaut*[9]. The facts in *Carter Trading* were briefly as follows: the defendant/respondent signed acknowledgement of debt in respect of goods sold and delivered to it on 23 December 2008 in terms of which payment an amount of R107 082.30 was to be paid by 16h00 on 24 December 2008; interest at the rate of 15.5% per annum, cost of negotiating and preparing the acknowledgement of debt were payable, and the respondent was also liable for payment of all legal fees on attorney and client scale, including collection commission incurred by the creditor in enforcement of compliance with obligations in terms of the acknowledgement of debt. The court held in *Carter Trading* that it considered the acknowledgement of debt in that matter to be clearly falling within the ambit of the provisions of section 8 of the NCA and therefore constituting a credit agreement, as envisaged in the NCA, as "the payment of the amount owing was deferred to 24 December 2008 and that the defendant undertook to pay, in addition to the amount owing, at least the cost of preparing the acknowledgement of debt and, in the event of a failure to pay the sum of, also collection commission and legal fees"[10] and that the terms of the AOD acknowledgement of debt appears to be the very terms exactly envisaged in terms of section 8(4)(f) of the NCA to be a credit agreement.[11] Although, the respondent relied on the aforementioned *dicta* from the decision of *Carter Trading*, in my view, the respondent did not consider what the court in that

[9] 2010 (2) SA 46 (ECP).
[10] See *Carter Trading* at par [16].
[11] See *Carter Trading* at par [17].

matter went on to say: "even more persuasive considerations on which the acknowledgement of debt in question must be judged as being a credit agreement envisaged" in the NCA was the fact that the goods sold and delivered were on credit with the obvious intention that the amount owing in respect thereof ought to be paid the following day.[12] Further, there were charges for insurance, fees and interest payable to the credit provider in respect of any amount so deferred, which bolstered the view that the acknowledgement of debt ought to be regarded as credit facility and, therefore, a credit agreement. In my view, the further comments by the court suggest that the court in *Carter Trading* did not exclusively decide the matter on the basis of the legal fees payable in terms of the acknowledgement of debt, but considered the other aspects, mentioned above, which existed in that matter. Be that as it may, whether the Court in *Carter Trading* decided the matter solely on the basis of deferral of payment and the charging of legal fees, does not, with respect, persuade me to agree that the AOD in this matter constitutes a credit agreement.

[12] In my view, the agreement clearly states that as the amount of R 1250.00 is in respect of legal costs.[13] Again, in my view, the reference in the NCA to a fee or charge payable to the provider in respect of the credit agreement or the amount that has been deferred, does not include legal costs which has to do with either the drafting of the instrument containing the agreement or the enforcement of rights arising from the agreement. In this matter, it is indeed correct that the payment of the outstanding amount was deferred but, in my view, the other leg of section 8(4)(f) was not met, in that the charge of the of R1 250.00 did not relate to the agreement between the parties, but the conveyance or recordal of the agreement. It was clearly a limited amount for the legal costs. The amount does not relate to the substance, but the form

[12] See *Carter Trading* at pars [19]-[20].
[13] See annexure "POC1" on indexed p16.

of the agreement. It is precisely on the basis of this logic that I respectfully differ with the decision in *Carter Trading* on the view that the legal costs for the drafting of the acknowledgement of debt qualified the documents or agreement to be a credit agreement.

Compliance with the National Credit Act in the pleadings

[13] Although, I have already held that the AOD does not constitute a credit agreement as envisaged in the provisions of the NCA, I deal with whether or not compliance with the provisions of the NCA ought to be stated in the pleadings for it to gain prominence or entertainment by the Court, at the hearing.

[14] In my view, this question depends on the nature and extent of the circumstances of the dispute between the parties. For example, in this matter, the applicant did not consider the provisions of the NCA to be applicable to the AOD. The applicant, therefore, omitted allegations regarding the NCA from the particulars of claim to the summons. However, when raised by the respondent, at the time that it was raised, the applicant had proof that the applicable requirements were met. This was precipitated by the timing of the respondent's point in *limine* in this regard. Therefore, in my view, under the particular circumstances of this matter, it does not matter whether or not proof of compliance with the provisions of section 129 of the NCA was contained in the pleadings. The alleged existence of *bona fide* defence on the part of the respondent is sufficiently and effectively disproved. There is no point in further deferring the determination of this matter solely on the basis of this technical point, as the applicant would be in a position to bring into its case this aspect through an amendment at a later stage.

Conclusion and Costs

[15] Therefore, it is for the above-mentioned reasons that, I find that the summary judgment application brought by the applicant was indeed proper and ought to be granted under the circumstances. The respondent clearly does not possess of *bona fide* defence under the circumstances and his attempt at technical defences fails to pass the muster. Deciphering the further contents of the respondent's affidavit resisting summary judgment, which clearly did not get forceful mention by counsel for the respondent at the hearing, I am fortified by the fact that the AOD is acknowledged by the respondent. This is so, despite the presence of murmurings regarding the absence of a date and the applicant's signature from the document. I am satisfied that the respondent does not possess of *bona fide* defence to the applicant's claim as fully elaborated in the particulars of claim to the summons. The fact that the respondent may possess of a counterclaim, which currently has unspecified nature and extent, does not qualify as a *bona fide* defence to resist the summary judgment. Therefore, the summary judgment as sought by the applicant will be granted. Interest at the applicable rate will be added to the capital amount from the date of service of summons on the respondent on 29 May 2017.

[16] The applicant prayed for costs on the unusual scale of attorney and client, based on a provision in the AOD allowing it to recover costs on that particular scale. I do not see any reason why costs granted in this matter ought to be on any other scale than the one agreed upon by the parties, particularly considering the findings I arrived at, above. Therefore, the application for summary judgment will be granted with costs on attorney and client scale.

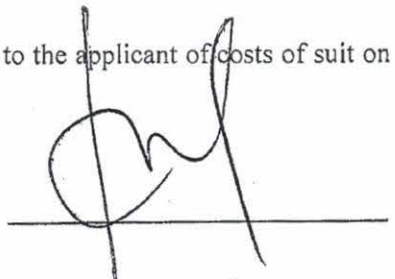
Order

[17] In the circumstances, the summary judgment application is granted with the order being in the following terms:

(a) the respondent is liable for payment to the applicant in an amount of R1 001 250.00;

(b) the respondent is also liable for payment to the applicant of interest on the amount of R1 001 250.00 at the rate of 10.5% per annum from 29 May 2017 to date of full payment;

(c) the respondent is further liable for payment to the applicant of costs of suit on attorney and client scale.



K. La M. Manamela

Acting Judge of the High Court

13 February 2018

Appearances:

For the Applicant	:	A Loubser
Instructed by	:	Couzyn, Hertzog and Horak Inc, Brooklyn, Pretoria
For the Respondent	:	JF Winnertz
Instructed by	:	Jay Attorneys, Brooklyn, Pretoria