IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 26332-2016

DATE: 2017-02-01

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

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DATE SIGNATURE

In the matter between

MAN FINANCIAL SERVICES SA (PTY) LIMITED Applicant

and

PHAPHOAKANE TRANSPORT First Respondent

PHASWANA STEPHEN RATLOU Second Respondent

Coram: Wepener J

Heard: 1 February 2017

Delivered: 2 February 2017

Summary: Credit – National Credit Act 34 of 2005 – When parties by transactio conclude a new agreement, such new agreement may require compliance with the provisions of National Credit Act despite the fact that the prior agreement fell outside of the provisions of the Act

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J U D G M E N T

WEPENER J:

[1] The applicant seeks payment of amounts due to it by two respondents. The applicant and the first respondent entered into several written rental agreements, and the second respondent bound himself as surety and co-principal debtor with the first respondent in favour of the applicant for payment of any amounts which the first respondent may owe the applicant. Although there are a number of issues raised by the defendants in their affidavits and heads of argument, counsel for the respondent 'without abandoning' other issues, only made submissions on one issue. I am of the view that the remaining issues were not persisted with and need not be dealt with.

[2] At the outset of the hearing it became apparent that the sole director of the first respondent, being the second respondent, caused its liquidation recently and no relief can now be granted against it until a liquidator is appointed and joined in these proceedings.

[3] The first respondent was in breach of the rental agreements and they were all cancelled and the trucks which formed the subject matter of the rental agreements, were returned to the applicant. Despite this, an amount of just less than R5 million remained outstanding and payable to the applicant. The applicant and the two respondents entered into negotiations for payment of the outstanding amount. The negotiations resulted in a settlement agreement being entered into and the second respondent, the sole director of the first respondent, also representing the first respondent, signed the agreement. The agreement stipulated payment in several monthly instalments and, if calculated, the amount exceeds the capital

amount of R5 million. It was therefore common cause that the agreement to repay includes additional fees or interest on the capital amount.

[4] The relevance thereof is the following. When the original agreements were entered into, the transactions did not fall under the provisions of the National Credit Act, Act 34 of 2005 (the NCA), due to the fact that the 1st respondent was a juristic person as defined in s 4(1)(a)(1) of the NCA, and it was a large agreement as defined in s 4(1)(b) of the NCA. Although there is a general denial of this averment by the respondents, the denial is of no significance as it fails to set out any facts in support of the denial.

[5] In *Wightman t/a JW Construction vs Headfour (Pty) Limited & Another* 2008 (3) SA 371 (SCA) Heher, JA said as follows at para 13 and 23:

> '13. A real and genuine bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and ambiguously addressed the fact said to be disputed . . . A litigant may not necessarily recognise or understand the nuances of a bare or genuine denial as against a real attempt to grapple with the relevant factual allegations made by the other party. But when he signs the answering affidavit he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal advisor who settles an answering affidavit to ascertain and engage with the facts which his

> client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.'
>
> And:
>
> '23. The conclusion is thus that the court a quo should have approached the application upon the foundation that the respondents had failed to raise a real genuine and bona fide dispute of fact in relation to the events from 3 – 12 July and that the case had to be decided upon the assumption that the appellant's account of these events were substantially true and correct.'

[6] In the circumstances the allegation that the rental agreements fell outside of the provisions of the NCA is to be accepted. Indeed counsel for the second respondent did not argue differently.

[7] The issue which the second respondent persisted with was that the applicant failed to comply with the provisions of s 129 of the NCA in that it failed to give notice to the respondents as required and which notice is a prerequisite for claiming payment from a defaulting party under a credit agreement.

[8] The settlement agreement entered into by the parties provides that the first and second respondents are liable jointly and severally for the debt therein described. The second respondent is no longer described or bound as surety. Under the original agreements the second respondent, as surety, would not have been able to rely on the protection of the NCA due to the fact

that the agreements did not fall under the NCA as such and a surety was also not afforded that protection. See *FirstRand Bank Limited vs Carl Beck Estates (Pty) Ltd & Another* 2009 (3) SA 384 (T) paras 18 – 23. But, so argued the second respondent's counsel, the new agreement falls within the provisions of the NCA, at least as far as the second respondent is concerned, as the exclusions contained in s 4 of the NCA regarding a juristic person are not applicable to the second respondent and the applicant had failed to comply with the provisions of the NCA as far as the second respondent is concerned. The issue that was argued before me was whether the provisions of the NCA and specifically s 129 apply to the settlement agreement not describing the second respondent as surety, and who, in that capacity, would not have been able to rely on the protection of the NCA, but that he would be able to rely thereon as a principal debtor.

[9] The settlement agreement, in my view, ended the relationship between the parties as far as the rental agreements and suretyships were concerned and a new relationship commenced. The agreement reads that it is in full and final settlement of the applicant's claims against the first and second respondents with regard to the rental agreements in question. The agreement was consequently a transaction in the legal sense. In *Gollach & Gomperts (1967) (Pty) Limited vs Universal Mills & Produce Co (Pty) Limited & Others* 1978 (1) SA 914 (A) Miller, JA said at 921 as follows:

> 'It is necessary to consider whether the agreement concluded at the end of the meeting on 20 July 1972 when appellant agreed to pay, and the Group to accept, R10 000 "in full and final settlement . . .", was a transactio in the

sense of that word as used in the Roman-Dutch law and applied in South Africa. In *Cachalia vs Harberer & Co*.,1905 T.S. 457 at p. 462 Solomon, J., accepted the definition of transactio given by Grotius, Introduction 3.4.2., as

"an agreement between litigants for the settlement of a matter in dispute".

Voet, 2.15.1., gives a somewhat wider definition which includes settlement of matters in dispute between parties who are not litigants and later, at 2.15.10., he includes within the scope of transactio, agreements on doubtful matters arising from uncertainty of pending conditions "even though no suit is then in being or apprehended". (Gane's trans.,vol. 1, p. 452.) The purpose of a transactio is not only to put an end to existing litigation but also to prevent or avoid litigation. This is very clearly stated by Domat, Civil Law vol. 1, para. 1078, in the passage quoted in *Estate Erasmus vs Church,* 1927 (T.P.D. 20 at p. 24 . . . .'

[10] It is also settled law that a transaction can be entered extra judicially as have been held in *Gollach* at p 922. The general principle in our law is that such a transaction or compromise terminates the parties' original rights and obligations and gives rise to new rights and obligations under the new agreement. See *Road Accident Fund vs Ngubani* 2008 (1) SA 432 (SCA). 'Unless reserved in the compromise, parties thereto are precluded from

enforcing the rights and obligations arising from the compromised claim,' per Jafta, JA in *Ngubani* at para 12.

The learned judge continued and said:

'In *Hamilton vs Van Zyl* 1983 (4) SA 379 (E) the court said at 383 (E – H):

> "A compromise need not necessary however follow upon a disputed contractual claim. Any kind of doubtful right can be subject of a compromise . . . Delictual claims are, for example, frequently the subject of a compromise. Nor need the claim be even *prima facie* actionable in law. A valid compromise may be entered into to avoid even a clearly spurious claim and defendants frequently, for various reasons, settle claims which they know or believe the plaintiff will not succeed in enforcing by action.
>
> An agreement of compromise in the absence of an express or implied reservation of the right to proceed on the original cause of action, bars the bringing of proceedings based on such original cause of action . . . Not only can the original cause of action no longer be relied upon, but a defendant is not entitled to go behind the compromise and raise defences to the original cause of action when sued on the compromise.'

[11] It is thus the second respondent's case that the law of suretyship does not apply as the second respondent's obligation arises as a principal in the settlement agreement. In *Carter Trading (Pty) Limited vs Blignaut* 2010 (2) SA 46 (ECP) Van Der Bijl, AJ held that an acknowledgment of debt

entered into between parties, satisfied the requirements of s 8 of the NCA and that this was a credit agreement for purposes of the NCA and that compliance with the provisions of the NCA was necessary. Relying on *GrainCo (Pty) Limited vs Broodryk NO & Andere* 2012 (4) SA 517 (FB) counsel for the applicant argued that the NCA would not be applicable because the underlying causa of the acknowledgment or settlement agreement was not money lending but a damages claim.

The court held that it could not have been the intention of the legislature that a settlement agreement based on a damages claim, which allowed for extended payment with interest, to fall under the provisions of the NCA.

The learned judge referred to the heading of the NCA where it was made apparent that the Act was intended for money lending and credit granting in the ordinary sense of the word and not for extended payment of damages.

This matter is distinguishable from the matter before me. The matter before me does not concern the payment of damages. It concerns the ordinary granting of credit, albeit by way of transactio.

[12] The penultimate authority relied upon by the applicant is *Ribeiro & Another vs Slip Knot Investments 777 (Pty) Limited* 2011 (1) SA 575 (SCA) where it was held at para 13 that the obligations of the sureties under a former agreement and those under a later agreement were interdependent, and that a later agreement was in substance an agreement to guarantee the principal debtor's obligation under the initial loan agreements and did therefore not fall under the NCA.

[13] The *Ribeiro* principles cannot be applied in this matter. Firstly, the question of transactio did not arise in *Ribeiro*. Indeed the court found that

regard must be had to the intention of the parties when entering into the later agreement. In *Ribeiro* it was specifically recorded that a later agreement 'does not constitute a novation of the initial loan agreements'. See *Ribeiro* at para 10.

It was also agreed and accepted that the obligations as accepted by the sureties in terms of the new agreement have as the origin the initial undertakings and obligations attributable to the sureties in the initial loan agreements. It also referred to the outstanding loan amount under the initial agreement. These are strong indications that the relationship as guarantors of a debt falling outside the provision of the NCA was to be inferred. The court held at para 13 that:

> 'To this I wish to add that the parties "specifically recorded" that the agreement "does not constitute a novation of the initial loan agreements" and that "the obligations and undertakings as accepted by the sureties in terms of the agreement have as their origin the initial undertakings and obligations attributable to the sureties in the initial loan agreements." The fact that the parties also recorded that "the agreement shall be the sole record of subject matter contained in it", - a point that the respondents relied upon to avoid the consequences of the initial agreements - does not detract from the fact that the parties explicitly intended not to extinguish, but rather confirm the obligations arising from the initial agreements. The obligations under the loan agreements and those under

the new agreement were thus interdependent.'

But these specific facts are absent in the present matter. In this matter there was indeed a transactio without reservation of the terms of the original agreement and the principles expounded in *Ribeiro* do not find application.

[14] The final authority relied upon by counsel for the applicant is *Hattingh vs Hattingh* 2014 (3) SA 162 (FB). There two brothers entered into an agreement, which ended their long business relationship. One brother remained indebted to the other and undertook to pay off the debt in instalments. Ordinarily the agreement would have fallen within the ambit of the NCA. But Van Zyl, J found that the agreement was not covered by the provisions of the NCA. The learned judge found that the purpose of the NCA, being to cover ordinary commercial transactions, which are to be governed and which on the facts of that matter, was not the case with the two brothers who ended a long business relationship. He found that it could not have been intended for it to fall under the provisions of the NCA. The factual finding in *Hattingh* cannot apply in this matter.

[15] Having come to this conclusion, I am of the view that a settlement agreement constitutes a new credit agreement within the meaning of the NCA. The applicant was consequently obliged to comply with the provisions of s 129 of the NCA and give prior notice to the respondents before instituting action.

[16] There was one other issue. The applicants sought to have the agreement made an order of court. The agreement itself provides that it may be made an order of court. The second respondent did not make submissions to the contrary.

[17] The second respondent was entitled to oppose these proceedings because the plaintiff failed to comply with the provisions of s 129 of the NCA.

For these reasons the following order is made:

1. Against the first respondent (in liquidation): the application is postponed *sine die*.

2. Against the second respondent:

2.1 The settlement agreement annexed as annexure JN13 to the founding affidavit is made an order of court;

2.2 The application is postponed *sine die*.

3. The applicant may not set this matter down until:

3.1 It has complied with the provisions of s 129(1)(a) as read with s 130 of the National Credit Act 2005; and

3.2 It has upon completion of the remedies referred to in s 129(1)(a) of the NCA, if resorted to or otherwise, become entitled to resume its application.

4. The applicant is to pay the second respondent's costs incurred in opposing this application.

Counsel for the Applicant: C van der Merwe

Attorneys for the Applicant: Marianne Pretorius Attorneys

Counsel for the Respondent: D.D. Swart

Attorneys for the Respondent: Salome le Roux Attorneys

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WEPENER J
JUDGE OF THE HIGH COURT
DATE: ……..