

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – PORT ELIZABETH**

Case No.: 1819/2017

In the matter between:

SEDWIN INVESTMENTS (PTY) LTD

Applicant/Plaintiff

and

NATHAN ALEC DATNOW

First Respondent/Defendant

MARIA JOHANNA DATNOW

Second Respondent/Defendant

JUDGMENT

REVELAS J:

[1] This is an application for summary judgment against the two defendants. The plaintiff claims repayment of two loans advanced by it to the first defendant during January 2014, and to both defendants during February 2014, claims interest on the aforesaid amounts. There are also two claims for alternative relief.

[2] The defendants apply for condonation of the late filing of their opposing affidavits wherein they rely on two defences: *Lis alibi pendens* and the plaintiff's alleged non-compliance with section 40 of the National Credit Act, 34 of 2005 (*"the Act"*). The defendants were

previously married to each other but were divorced a few years ago.

[3] The parties herein concluded two separate, verbal loan agreements in January and February 2017. These agreements and their terms were recorded in two written acknowledgments of debt, the first of which was signed by the first defendant on 20 January 2014, and the second by both defendants on 10 February 2014.

[4] In terms of the first loan agreement the plaintiff lent and advanced to the first defendant the sum of R3,000,000.00. The interest agreed upon the capital amount loaned was R750,000.00. Both the capital amount and the interest were to be fully paid up by 31 January 2015. The interest on the capital loan had to be paid in 12 monthly installments of R62,500.00 each. In terms of the second loan agreement, the plaintiff lent and advanced R1,200,000.00 to the first and second defendants. The interest on this amount was agreed between them to be the sum of R300,000.00, also payable in 12 monthly installments of R125,000.00. Both the capital sum and all the interest on it due within a year, by 28 February 2015.

[5] The plaintiff alleges that the first defendant had only made payment of the sum of R500,000.00 by the due date in respect of the

first loan agreement. In respect of the second loan agreement, the defendants had only paid back R175,000.00 by the due date (28 February 2015).

[6] The plaintiff pleaded that despite demand the defendants have failed to make any further payments in terms of the two respective loan agreements.

[7] Clauses 7.1 to 7.3 of the two acknowledgements of debt, which are identical, read as follows:

“7.1 In the event of my failing or neglecting to pay any sum or sums due and payable hereunder promptly on due date, or to carry out any of the other conditions and stipulations of this Acknowledgement of Debt, or in the event of my insolvency or application for voluntary surrender of my estate, or the transfer of my estate for the benefit of the creditor, the capital and collection commission together with all other monies owing hereunder, shall immediately become due and recoverable without notice.

7.2 The creditor has signed a sale of property agreement that will come into operation and be effective should any sums due hereunder not be payable and upon transfer of the property into the name of the Creditor or his nominee this document shall be cancelled, provided that the property referred to in such sale

agreement is valued by an independent valuator at an amount equal to or higher than the debt referred to herein.

- 7.3 The creditor may at any time elect to register a mortgage bond over the property for the full amount, including any and all costs associated therewith or incurred by the creditor to date of registration, and I undertake and agree to sign and execute all necessary documents and to supply any documents required for the registration of such mortgage bond.”

[8] In reliance on clause 7.1 in both acknowledgements of debt, the plaintiff claims payment against the first defendant in the amount of R3,000,000.00 (the first claim), and against both defendants for payment in the amount of R1,325,000.00 (the second claim) plus interest on both amounts at the rate of 15,5% per annum, from 31 January 2015 and 28 February 2015, respectively. The two claims referred to are claims A and C. Claims B and D are alternative claims that came about in the circumstances set out below.

[9] The plaintiff is not a registered credit provider under the Act¹, but contends that it was not obliged to register as a credit provider under the Act, which therefore finds no application. It pleaded however, in the alternative to the two main claims (A and C), that in

¹ Section 40 of the Act sets out the circumstances in which a creditor must be registered as a credit provider.

the event of it being found that the Act indeed applies to both loan agreements, and the agreements were accordingly illegal and void, (none of which the plaintiff concedes), it must be found that the defendants were unjustifiably enriched at the expense of the plaintiff. The plaintiff contends that it transferred the amounts of R3,000,000.00 and R1,200,000.00 to the defendants in terms of the two respective loan agreements in the *bona fide*, but mistaken belief that the agreements were valid and enforceable, and that it was obliged to perform under them. The extent to which the defendants were enriched (according to the plaintiff), was the amount of the sums transferred to the first defendant under each of the two loans, less the sum of the payments already made by the defendants in terms of the loan agreements. Therefore, the two enrichment claims (B and D) amount to R2,500,000.00 and R1,025,000.00 respectively.

[10] When the defendants noted their intention to defend the plaintiff's action, the plaintiff brought the present application in terms of Uniform Court Rule 32(1)(b), on the basis that the defendants had no *bona fide* defence. The defendants, in their affidavit resisting summary judgment against them, contend that they have the two *bona fide* defenses referred to above, and discussed below.

(a) Lis Alibi Pendens

In support of this defense the defendants rely on the fact that the plaintiff had brought an application under, case number 2873/2014 in this court, for orders to compel transfer of the defendants' two immovable properties into the plaintiff's name. The defendants had offered the properties as collateral for the two loans in question and when the parties signed the two acknowledgements of debt, they also concluded agreements of sale of the two properties (as foreseen in clauses 7.1 and 7.2 of the loan agreements, cited above). The agreements of sale would become operative in the event of the defendants defaulting in repaying the loans. The plaintiff has premised its application to compel transfer of the properties on these sales transactions.

(b) Non-compliance with the National Credit Act

The defendants contend under this heading, that the plaintiff ought to have registered as a credit provider, since the loan agreements were credit agreements as foreseen in section 8(4)(f) of the Act. The defendants argue that the plaintiff had formulated the two loan agreements in a manner specifically designed to circumvent certain peremptory requirements and provisions in the Act. In particular, the defendants point out, that had the plaintiff performed an affordability

assessment, as it would have been obliged to do under the Act, then at the very least, the second credit agreement would have been regarded as reckless credit and would not have been concluded.

[11] The defendants also challenge the plaintiff's entitlement to introduce alternative claims in a summary judgment application. They submit that the claims are mutually exclusive. They submit that the two claims for enrichment (Claims B and D) are essentially claims for damages and therefore parties and the agreements themselves must be tested by leading and testing evidence at a trial.

Condonation

[12] The plaintiff opposes the defendants' application for condonation on the grounds that there is no proper explanation for the delay in filing the opposing affidavits and that the defendants have no prospects of success in defending the claims against them.

[13] In general, when litigants deliver affidavits out of time in motion and summary judgment proceedings, they must satisfy the requirements of Uniform Court Rule 27(3), in order to be indulged by way of condonation. Firstly, an explanation must be proffered for the late delivery of the affidavits why such conduct ought to be condoned

by the court. In addition, it must be demonstrate “*good cause*” which is comprised of a reasonable explanation for the neglect; the application for condonation must be *bona fide* and not dilatory; and there must be an absence of willfulness on the part of the party seeking condonation. A *bona fide* defense must also be disclosed. They must also show reasonable prospects of success in defending the claim. That much is trite.

[14] The defendants’ explanation for the delay in resisting the application for summary judgment, is a very important consideration in determining the question of condonation. The defendants filed their opposing affidavits the day before the matter was argued and the application for condonation was only filed on the morning of the day of the hearing. The defendants were required to file their opposing affidavits by no later than noon on the court day, but one preceding the day on which the applications is to be heard². Neither party was prejudiced by the defendants’ tardiness. By virtue of the expeditious nature of summary judgment application, the delays can seldom be for more than a day as was the case in this application, The defendants’ attorney explained that he misconstrued Rule 32(3)(b). The explanation was unconvincing but I did not understand it to be the

² Uniform Court Rule 32(3)(b)

defendants themselves who were at fault. I took this factor into account since I have concluded that, as will emerge more fully below, the defendants have demonstrated prospects of success in defending the claims against them. In my view, the application for condonation should be granted.

Discussion

Lis Alibi Pendens

[15] A defendant who wishes to raise the defense of *lis pendens* must demonstrate that there is pending litigation between the same parties (or their privies)³ based on the same cause of action⁴ in respect of the same subject matter⁵. The plaintiff argues that the defendants are precluded from raising the defence of *lis pendens* since the relief sought in its application to compel transfer of the defendants' two immovable properties (under case number 2873/2014) is entirely different from the present matter, and accordingly the subject matter is not the same.

[16] The defences of *lis pendens* and *res judicata* are both governed

³ *Ceasarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others* 2013 (6) SA 499 (SCA)

⁴ *Nestlé (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA)

⁵ *Williams v Shub* 1976 (4) SA 567 (C)

by the principle that there should be finality in litigation.

“By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (*res judicata*). The same suit, between the same parties, should be brought only once and finally... There is room for the application of that principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of those elements there is no potential for a duplication of actions.”⁶

[17] Should the plaintiff succeed (as applicant) in the matter under case number 2873/2014, the defence of *res judicata* could possibly be raised by the defendants during a trial wherein the loan agreement claims are adjudicated. However, if the plaintiff were to obtain summary judgment in its favour in these proceedings, the defence of *res judicata* if raised in the other application, would probably not succeed, since the plaintiff would pursue it on the basis that the loans were secured by the sale of the properties. It appears to me that the agreement of sale was concluded with the specific purpose of avoiding the inconvenience and costs associated with excussion of orders sounding in money in its favour, in the event of the defendants not complying with the judgment or only complying with part thereof. In my view, the issue of *lis pendens* is not capable of being definitively

⁶ *Nestlé*, paragraphs [16] and [17] at 549 B – C.

decided in these proceedings and are best suited for determination during a trial.

The National Credit Act

[18] Section 40 of the National Credit Act, prior to its amendment⁷ applied at the time when the acknowledgements of debt were concluded, i.e. January and February 2014. The relevant point of the section reads as follows:

“40(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 agreements.”

[19] The plaintiff's complaint against this second defense is that there is no averment by the defendants that the plaintiff is a credit provider under at least 100 credit agreements, other than incidental agreements. This complaint is misplaced, if not a bit rich, in circumstances where the plaintiff itself does not state anywhere in its particulars of claim that the two loans were single loans, and neither does the plaintiff give details in support of its assertion that section 40(1) of the Act is not applicable. The plaintiff also did not, as is the

⁷ By section 39 of the National Credit Amendment Act, 19 of 2014 which came into effect from 13 March 2015.

general practice in drafting particulars of claim, give any particulars of the nature of its business. In addition, it anticipated a possible finding that it ought to have registered a credit provider. Hence the alternative claims. In addition, the plaintiff delivered a notice to the first defendant as contemplated in sections 129(1) and 130 of the Act even though it is not a registered credit provider. This aspect is clearly a triable issue and if proved, would constitute a *bona fide* defence, in which case the alternative claims would be considered

[20] In *National Credit Regulator v Opperman*⁸ the court with reference to the author Visser⁹ restated the legal position regarding unlawful agreements, namely that the party seeking restitution of money paid in pursuance of an unlawful agreement, must make use of the condition *ob turpem vel iniustam causa* since he is precluded from doing so under the unlawful agreement itself. The *condictio* in question is an action based on unjustified enrichment and aimed at restoring economic benefits to the plaintiff, at whose expense they were obtained, and for the retention of which a defendant has no legal justification. The requirements of the *condictio* are generally that ownership must have passed with the transfer; the transfer must have taken place in terms of an unlawful agreement; and the claimant must

⁸ 2013 (2) SA 1 (CC) at paragraph [15].

⁹ Unjustified Enrichment (Juta & Co Cape Town 2008) in General.

tender the return of what he received.

[21] The Constitutional Court in *National Credit Regulator* considered the question whether section 89(5)(c) of the Act was inconsistent with section 25(1) of the Constitution, and therefore invalid. Section 89(5)(a), stated that an agreement which was unlawful (for want of compliance of the Act) was to be declared void since its inception¹⁰. Section 89(5)(c) provided that the rights of the credit provider under the agreement to recover money paid or goods delivered to the consumer, must be either cancelled or forfeited to the state if the consumer would be “*unjustly enriched, regardless of turpitude or other factors relevant in a fairness or public interest enquiry*”. Harsh words indeed, since they negated the credit provider’s common-law right to restitution a without any judicial discretion to be exercised in the matter. Fortunately the legislature amended the Act (as Cameron J suggested it should) in his minority judgment in the *National Credit Regulator* case).

[22] Section 189 (5) now reads plainly that:

“If a credit agreement is unlawful in terms of this section, despite any

¹⁰ This corresponds with the common-law position. See: *Schierhout v Minister of Justice* 1926 AD 99 at 109.

other legislation or any provision of an agreement to the contrary, a court must make a just and equitable order including but not limited to an order that –

- (a) the agreement is void from the date the agreement was entered into.”

[23] The amendment therefore restored the common-law right to restitution. The plaintiff submits that if no restitution order is made against the defendants, it would be unjust to the plaintiff and should it not succeed in obtaining default judgment on the loan agreements, it should at least succeed with its alternative claims based on unjustifiable enrichment.

[24] It is not in dispute on the papers that the two acknowledgement of debts were signed by the defendants, or that the amounts of R3,000,000.00 and R1,200,000.00 were indeed transferred to the defendants and that they actually had received the amounts. None of the *facta probanda* have been placed in dispute.

[25] In *De Bruyn v du Toit*¹¹, the plaintiff also applied for summary judgment under an unlawful credit agreement and argued that he ought to obtain summary judgment at least for the capital amount. Rogers J identified two obstacles in the way of such an order. The first

¹¹ Unreported Case No. 1162/2015 (Western Cape) dated 27 February 2015.

was that the plaintiff (unlike the plaintiff in the present matter) did not plead an alternative claim based on enrichment. The second obstacle, substantive in nature, was that a common law enrichment action in certain circumstances (similar to the present case) does not allow recovery of money as of right. The learned judge held that¹²:

“It would be entirely inappropriate, at the stage of summary judgment, to assume that an unpleaded enrichment action for recovery would succeed. The court would need to be informed of the circumstances in which the loans were made, the relationship between the parties, whether the loans formed part of a large scheme of business and the like.”

[26] In the event, his Lordship declined to grant summary judgment.

[27] In the present matter the alternative claims based on enrichment were pleaded. The amounts in question are not in dispute and are based on liquid documents. The first defendant had actually requested rectification of the first acknowledgement of debt which reflects the amount owed as R3,062,500.00, whereas the amount actually advanced was only R3,000,000.00. The plaintiff has tendered such rectification. There can therefore be little doubt that the latter sum was lent and advanced to the plaintiff.

¹² At paragraph [13].

[28] However, my concern lies in the pending application to compel transfer of the defendants' properties. If the plaintiff is granted the enrichment claims B and D, but pursues the claims for interest on the capital amounts, granting leave to defend only in respect of claims A and C, would be cold comfort for the defendants when the applicant succeeds later, in compelling transfer of their properties into its name. With the spectre of *lis pendens* not disposed of, the issues are rendered more complex and indeed arguable. As such they are triable issues that may be determined with more accuracy if evidence is led. It would, in my view, be inappropriate to grant alternative relief, in the form of orders for restitution (claims B and D) in these summary judgment proceedings. Accordingly the following order is made:

- a. The late filing of the defendants' answering affidavits is condoned;
- b. The application for summary judgment is dismissed with costs;
- c. The defendants are granted leave to defend the action instituted against them by the plaintiff.

E REVELAS
Judge of the High Court

Appearances:

For the applicant/plaintiff: Adv R Stelzner SC and Adv N Garces instructed by Davidson England Attorneys, Cape Town c/o Kaplan Blumberg Attorneys, Port Elizabeth

For the respondents/defendants: Adv K Williams instructed by Biccari Bollo & Mariano Attorneys, c/o Strömbeck Pieterse Attorneys, Port Elizabeth

Date heard: 08 August 2017

Date delivered: 24 August 2017