IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

31 \ 03 \ 2017.

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

31 / 03 / 2017
DATE

SIGNATURE

CASE NUMBER: 82602 / 14

In the matter between:

ANDREAS STEFANUS JACOBUS KARSTEN — APPLICANT

AND

M.DU BRYUN N. O.

(ID Number: 380711 5022 084)

[In his capacity as co-trustee of the DBF TRUST] — 1ST REPONDENT

S.J.C. DU BRYUN N. O.

(ID Number: 4102120053087) — 2nd REPONDENT

MATHYS DU BRYUN — 3RD RESPONDENT

S.J.C. DU BRYUN — 4TH RESPONDENT

M. DU BRYUN N. O.

([In his capacity as co-trustee of the VAAL TRUST]

SUPPLIES BLACK EMPOWERMENT — 5TH REPONDENT

S.J.C. DU BRUYN N. O.

[In his capacity as co-trustee of the VAAL TRUST] 6th REPONDENT

MARIUS JOHANNES FOUCHE 7TH RESPONDENT

JUDGMENT

MAVUNDLA, J.

[1] The applicant brought an application, seeking an order against the first to the fourth respondents jointly and severally for:

1.1 Payment of an amount of R1 133 169. 39;

1.2 Interest on the above amount calculated at 10% per annum

Alternatively 9% per annum from 1 September 2014 to date of payment;

1.3 Cots of suit;

1.4 Further or alternative relief.

[2] The applicant avers in his papers that the purpose of the application is to enforce specific performance of three contracts entered into between the parties. He avers that the respondents failed to comply with their obligations in terms of the agreements and therefore applicant is in the premises entitled in terms of the provisions of the agreements to claim the balance of the purchase price payable in terms of the agreements. The applicant seeks an order compelling the first to fourth respondents to make payment of the balance of the purchase price.

[3] The first and second respondents are married to each other in community of property and are sued in their capacity as co-trustees of DBF Trust. The third, fourth and seventh respondents are sued in their personal capacities, while the fifth and

sixth respondents are sued in their respective capacity as co-trustees of Vaal Steam Supplies Black Empowerments Trust.

[4] In opposing the application, the respondents, raised a point *in limine, inter alia,* contending that Ms Sibongile Selinah Tshabalala, an adult businesswoman, is a co-trustee of the Vaal Steam Suppliers Black Empowerment Trust, who has not been cited and joined in these proceedings as such; the application should be dismissed for non-joinder.

[5] The applicant in its replying affidavit contended, *inter alia*, that the aforesaid Ms Tshabalala resigned as a trustee of Vaal Steam Supplies Black Empowerment Trust on the 20 July 2014. In this regard a confirmatory affidavit of Ms Tshabalala was attached as annexure "R1".

[6] It would seem that this application was launched on the 12 November 2014 and the founding affidavit was deposed to on the 10 November 2014. That being the position, it would seem that Tshabalala was no longer a co-trustee as at the date the application was launched and therefore there was no need to have Ms Tshabalala joined in these proceedings. Accordingly the point *in limine* must fail.

[7] The respondents further contended, *inter alia*, that the applicant was not registered as a credit provider in terms of NCA and consequently is not entitled to the relief sought.

[8] It is common cause that there were three corporative entities involved namely two companies and one close corporation, which are:

(a) Vaal Steam Supplies (Pty) Ltd (hereinafter referred to as "Vaal Steam";

(b) The close corporation NIASA Trading CC (hereinafter referred to as "NIASA"), and

(c) The company Lekoa Steam & Environment (Pty) Ltd (hereinafter referred to as "Lekoa Steam").

[9] It is common cause that the applicant held shares in both the companies and 50% of the members' interest in the close corporation. The genesis of the acquisitions of the applicant's shares and member's interest is consequential to an agreement concluded on the 12 February 2013[1]. In terms of this agreement De Bruyn, the third respondent, offered the applicant an option to purchase his interest in Vaal Steam, Lekoa Steam and member's interest in NIASA for the purchase amount of R2, 500 000. 00 (two million and five hundred thousand rand).

[10] It is common cause that the purchase price was payable on the effective date of 1 March 2013. The applicant was unable to raise the aforesaid purchase amount on the agreed date, thus resulting in the payment date being extended to the 16 April 2013, as per annexure "JK-2". However, the applicant was still unable to raise funds to pay the purchase price. This resulted in Du Bruyn on the 20 March 2013 making an offer to purchase the applicant's interest in all three entities for an amount of R2 000 000. 00 (two million rand), per annexure JK-3, which offer was accepted by the applicant.

[11] According to the applicant, the third respondent subsequently reneged on the second offer and made a cash offer to purchase the applicant's interest in all the

[1]A copy of which was attached as annexure "JK-1".

entities for an amount of R1, 500 000. 00 (one million, and five hundred rand). The applicant did not accept this third offer.

[12] The third respondent subsequently reverted to his offer of purchase price for the amount of R2 000 000. 00 (two million rand) and offered to have this amount payable in instalments;[2] This final offer culminated in the three agreements set out herein below, identified as annexure "JK-5", "JK-6" and "JK-7" being concluded. The three agreements were supplemented with corresponding addendum attached to annexure "JK-5", "JK-6" and "JK-7". It is common cause that these three agreements were concluded on the 26 April 2013. It is on the basis of these three agreements it is alleged by the applicant that the respondents breached the terms of the agreements accordingly entitling the plaintiff to claim payment of the outstanding amount.

[13] According to the applicant, the third and fourth respondents resolved with each other to have their repurchased interest in the three entities vested in the DBF Trust:

13.1 A sale agreement of the applicant's shares and loan account in respect of Vaal Steam was entered into with the DBF Trust. The obligations of the DBF Trust as well as the third and fourth respondents personally were specifically recorded in the agreement attached as annexure "JK-5";

13.2 Similarly a sale agreement of member's interest in respect of NIASA was concluded with the DBF Trust. The obligations of the DBF Trust as well as the third and fourth respondents personally were specifically recorded in the agreement attached as annexure "JK-6";

13.3. In respect of Lekoa Steam the DBF Trust conjointly with Vaal Steam Supplies Black Empowerment Trust (of which the applicant and the third respondent are the current trustees- fifth and sixth respondents) and Marius Johannes Fouche (seventh respondent) purchased the applicant's shares and loan

[2] Vide annexure "JK-4".

account in Lekoa Steam. The obligations of DBF Trust as well as the third and fourth respondents' personally were specifically recorded in the agreement attached as annexure "JK-7".

[14] It is common cause that;

14. 1 the third and fourth respondents bound themselves as sureties and co-principal debtors to fulfil the obligations of the purchasers to the seller (the applicant) in respect of each of the agreements as per clause 16 of annexure 'JK-5" clause 16 of annexure "JK-7" read with clause 1.9 of each annexure "JK-5" and "JK-7". In terms of clause 1.9 of annexure "JK-6" the third and fourth respondents are also defined as sureties;

14.2 In terms of clause 8 of each of the addendum to annexure JK-5; JK-6 and JK-7, the respondents undertook to register a covering bond over the immovable property of the third and fourth respondents in favour of the applicant, as sureties for the due fulfilment of the respondents' obligations in terms of the agreements.

14.3 The third and fourth respondents have initially failed to register the said covering bond, but eventually effected registration thereof in early in 2014.

[15] it is not disputed by the fourth and fifth respondents, that the purchase price payable by the DBF (as represented by the first and second respondents) and warranted by the third and fourth respondents as sureties and co-principal debtors, as indicated in annexure "JK-5" was R1.100 000.00 (one million one hundred thousand rand); in annexure "JK-6" as R350 000. 00 (three hundred and fifty thousand rand), and in annexure "JK-7" as R550 000. 00 (five hundred and fifty thousand rand), thus totalling an amount of R2 000 000.00 (two million rand).

[16] The respondents contended that the covering bond which was registered against the third's and fourth's respondents primary residence during 2014 was either void as a result of non-compliance with the NCA, alternatively, if not, which is denied, then the underlying indebtedness never materialised as a result whereof the mortgage bond served no purpose and or is without any force or effect.

[17] The respondents further contend that, even if it is decided by the Court that none of the three agreements are void for the reasons submitted herein above, then:

17.1 the agreements (annexures "JK5", "JK6" and "JK7") are credit agreements in terms of the NCA;

17.2 the applicant is a credit provider in terms of NCA;

17.3 the applicant failed to conduct an assessment in terms of s80(1)(a) of the NCA and for that reason the three agreements are all reckless credit agreements;

17.4 the applicant was aware of the fact that the DBF Trust's only income at all times was an amount of R12 000. 00 that it derived from a lease agreement and that it could never have afforded the monthly instalments payable in terms of the three agreements;

17.5 the agreements cannot in the premises be enforced against the first to fourth respondents.

[18] It is common cause that the purchase price of R2 million was payable as follows: a deposit of R500 000. 00 payable on signing of the agreements, and the remaining balance of R1 500 000. 00 (one million, five hundred thousand rand) was payable in instalments of R30 000. 00 (thirty thousand rand) per month plus interest calculated at 2% on current prime rate, as per the schedule attached to the papers; vide paginated 43, 53, *et* 63, 64.

[19] According to the applicant, which is not denied by the respondents, as at the 1 September 2014, the respondents made payment in respect of the purchase price (excluding interest) in an amount of R866 830. 61 (eight hundred and sixty-six thousand, eight hundred and thirty rand and sixty-one cent). According the applicant the outstanding balance is an amount of R1 133 169. 39 (one million one hundred and thirty thousand rand and thirty nine cent). This is also not disputed by the respondents.

[20] The issue to be determined is whether the agreements are contrary to the provisions of the *National Credit Act* and should be declared null and void and unenforceable, as contended for by the respondents.

[21] The *National Credit Act* in section 1 defines:

"credit" to mean, *inter alia*, "(a) deferral of payment of money owed to a person or a promise to defer such payment";

"credit facility" to mean an agreement that meets all the criteria set out in section 8(3) ; and

a "credit guarantee" to mean an agreement that meets all the criteria set out in section 8(5). "

[22] Section 8 provides as follows:

"(1) Subject to subsection (2), an agreement constitutes a credit agreement for the purposes of this Act if it is-

(a) A credit facility, as described in subsection (3);

(b) A credit transaction, as described in subsection (4);

(c) A credit guarantee, as described in subsection (5); or

(d) Any combination of the above.

(2) ....

(3) "An agreement, irrespective of its form but not including an agreement contemplated in subsection (2) of section 4 (6) (b), constitutes a credit facility if, in terms of that agreement-

(a) A credit provider undertakes-

(i) ...

(ii) either to

(aa) defer the consumer's obligation to pay any part of the costs of goods or services, or to repay to the credit provider any part of an amount contemplated in subparagraph (i); or".

[23] In my view, the parties, agreed to have the obligation of the respondents, to pay the outstanding balance of the purchase price, deferred and paid in instalments, including interest. This therefore brings the three agreements within the ambit of the NCA; *vide Potgieter v Olivier* 2016 (6) SA 272 (GP) at 274 paras [11] –[12].

[24] The NCA further provides, *inter alia*, that:

"s8(5) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit guarantee if, in terms of that agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which this Act applies."

[25] It is common cause that the fourth and fifth respondent stood surety and caused a bond to be registered, albeit belatedly, to stand as a collateral security. In my view, this also brings the three agreements within the purview of the NCA.

[26] Section s40 of the Act provides, *inter alia*, that:

"1" A person must apply to be registered as a credit provider if—

(b) the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceed the threshold prescribed in terms of section 42(1)." The prescribed threshold is R500 000. 00

[27] In my view, the three agreements must be seen not in isolation and independent from each other, but as a collective. After the deposit in the amount of R500. 000. 00 was paid, the composite outstanding amount was the amount of R1 500 000. 00 (one million, five hundred thousand rand). The composite outstanding amount was therefore more than the threshold of R500. 000. 00 referred to in s42(1) of the Act.

[28] I am in agreement with the view expressed in the matter *Van Heerden v Nolte* 2014 (4) SA 584 (GP) at 587G, a view also shared by the Court in *Potgieter v Olivier* 2016 (6)SA 272 (GP) at 274 at 278E, that if the total principal debt exceeds R500 00, the Act requires the credit provider to register.

[29] It is common cause that the applicant failed to register as a credit provider, at the conclusion of the three agreements on 26 April 2013, but only applied to be so registered on 23 October 2013, and was eventually so registered on 27 November 2013; vide annexure JK11.

[30] Section 40(4) provides that: "A credit agreement entered into by a credit provider who is required to be registered as a credit provider In terms of subsection (1) but who is not so registered is an unlawful agreement and void to the extent provided for in section

89." It is common cause that the three (3) agreements were entered into on 26 April 2013, approximately seven (7) months before the applicant's registration as credit provider, and approximately six(6) months before he applied to be registered as such.

[31] In terms of s89 "(2) Subject to subsection (3) and (4), a credit agreement is unlawful if—

"(d) at the time the agreement was made, the credit provider was unregistered and this Act requires that credit provider to be registered." *In casu*, there was a belated registration as a credit provider, by the applicant, which registration is well beyond the prescribed period, thus making the agreements open to be declared *void ab initio. (Section 89(5) reads:*

'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 from the date the agreement was entered into;

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

(i) At the arte set out in that agree net; 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 circumstance's 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.")

[32] Whether the National Credit Act is applicable to an agreement, would depend on the circumstances of that particular case, inclusive of the manner the parties conducted themselves to each other; *vide Voltex (Pty) Ltd v Chenleza CC And Others* 2010 (5) SA 267 (KZP) at 271C-D and the author therein cited *Bridgeway Ltd v Markam* 2008(6) SA 123 (W).

[33] In deciding whether in the circumstances of a particular case the NCA applies, the court must take into account the fact that the purposes of the Act is to protect the consumer *Voltex (Pty) Ltd v Chenleza CC And Others (supra)* at 271 B-C, however, without losing sight of the fact that it needs to balance the interest of both the consumer as well as that of the credit provider; *Desert Star Trading v No 11 Flamboyant Edleen* 2011 (2) ALL SA 471 (SCA) at 474 e-h.

[34] As pointed out herein above, the parties entered into three agreements. However, these must be read together as one composite agreement. This can be gleaned from the addendum attached to the respective agreements. It is only one addendum setting out the manner of payment of the total outstanding amount of R1 500 000. 00. Therefore, in my view, the credit agreement between the parties was a once off transaction.

[35] But for the full bench judgment to which I am beholden, I would have found that the applicant was obliged to register as a credit provider, and having failed to do so in time, the agreements were unlawful and void in terms of s89(2). The full court in this division, held in the matter of *Friend v Sendal* 2015 (1) SA 395 (GP) that s40

(1)(b) must be seen as having been directed at those who are in credit market and or industry or at those who intended to participate in the credit market industry and not in once-off transaction.

[36] Consequently, on the strength of the binding authority of the *Friend* full bench decision *(supra)* over this Court, I am obliged to therefore find that the applicant, notwithstanding the fact that it thought otherwise, was not obliged to register as a credit provider. That being the position, I conclude that section 89 does not apply and therefore the agreements are not tainted by any illegality or voidness and find that the agreements were valid and lawful. The counter application of the respondents therefore stands to be dismissed.

[37] The respondent has raised a further defence of reckless credit, as an alternative, in the event this court decides that the agreements are not void, that the applicant is a credit provider in terms of the NCA, but failed to conduct an assessment in terms of s80(1)(a) of the NCA and the three agreements were therefore reckless credit agreements.

[38] The respondents further averred in their papers that the applicant was aware that the DBF Trust's income at all relevant times was an amount of R12 00. 00 that it derived from a lease agreement, and that it could never have afforded the monthly instalments payable in terms of the three agreements annexures "JK5", "JK6" and "KJ7".

[39] With regard to the defence of reckless credit, it is apposite to cite in detail from the matter of *SA Taxi Securitisation v Mbatha* 2011 (1) SA 310 (GSJ) at 318 where the Court held as follows:

"VI The defence of 'reckless credit'

The provisions of the NCA concerning reckless credit

"39" Section 80 of the NCA provides:

'(1) A credit agreement is reckless if, at the time that agreement was made, or at the time when the amount approved in terms of the agreement is increased...--

(a) The credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time; or

(b) The credit provider, having conducted an assessment as required by section 81(2), entered into credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider, indicated that—

(i) The consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement; or

(ii) Entering into the credit agreement would make the consumer over-indebted.'

[40] Section 80(2) provides that a determination of recklessness must be made based upon the circumstances that prevailed at the time that the credit agreement was entered into, and not at the time when the determination is made."

[41] When regard to the genesis of the relationship between the parties is had, the credit agreement concluded between the parties, was in effect a buy back by the respondents of their shares and interest initially sold to the applicant, vide paras [9] et [10] *supra*. The relevant businesses were never effectively transferred to the applicant. The respondents were dully legally represented, and were at all relevant times aware of the financial wellness of the respective business entities, of which the third respondent was its alter ego. It was

therefore imperative, in my view, for the respondents to have made a full disclosure of their financial capacity without the applicant having to conduct an assessment as required by s81.

[42] In the result, in my view, the alternative defence of reckless credit must fail.

[43] In the premises the following order is made against the first to the fourth respondents jointly and severally, the one paying the other to be absolved for:

1.1 Payment of an amount of R1 133 169. 39;

1.2 Interest on the above amount calculated at 9% per annum from 1 September 2014 to date of payment;

1.3 Costs of suit, including the costs occasioned by the counter application, which is dismissed.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT	:	31/3/2017
APPLICANT`S ADV	:	MR. C.M. RIP with MR. J. DE BEER
INSTRUCTED BY	:	FOUCHE ATTORNEYS .
1ST to 4TH RESPONDENTS' ADV:		ADV: P. NEL
INSTRUCTED BY	:	MEISE NKAISENG INC