THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 475/04
REPORTABLE

In the matter between:

BAFANA FINANCE MABOPANE **APPELLANT**

and

MOSHE SIMON MAKWAKWA **FIRST RESPONDENT**
MINAH MAKWAKWA **SECOND RESPONDENT**

Coram: Harms, Conradie, Cloete, Van Heerden JJA et Cachalia AJA

Heard: 16 March 2006

Delivered: 30 March 2006

Summary: A clause in a micro-lending agreement which prevents a debtor (borrower) from applying for his estate to be placed under administration in terms of s 74 of the Magistrates' Court Act 32 of 1944 is contrary to public policy.

Neutral citation: This judgment may be referred to as *Bafana Finance Mabopane v Makwakwa* [2006] SCA 49 (RSA)

JUDGMENT

CACHALIA AJA

[1] This appeal raises the question of the enforceability of a clause in a money-lending agreement in terms of which the borrower (debtor) purported to waive his statutory right to apply to a magistrate's court for an order placing his estate under administration. This right is conferred on a debtor, in terms of section 74(1) of the Magistrates' Courts Act 32 of 1944, if he is unable immediately to pay the amount of a judgment obtained against him or to meet his financial obligations and has insufficient assets capable of attachment to satisfy the debt.[1] It is also available to a judgment debtor who is summoned to a court enquiry into his financial position.[2] In these circumstances the court may grant an order placing the debtor's estate under administration and for the payment of his debts in instalments or otherwise.[3] The effect of the order is to reschedule payment of the debtor's debts under the direction of an administrator, thus granting temporary respite from the predations of creditors.[4] In this sense an administration order is aptly described as a 'debt relief measure'.[5]

[2] The appellant conducts business as a micro-lender. The business operates in a rapidly growing industry[6] that grants relatively small short-term loans to generally low-income earners. The loan is usually intended to tide the borrower over until the next pay day. Such loans are extended to borrowers at high interest rates, justified on the basis of the high risk that borrowers may default. They are exempt from the limitations imposed by the Usury Act 73 of

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[1] Section 74(1)(a).
[2] Section 65I(1).
[3] Section 74(1)(b).
[4] *African Bank Ltd v Weiner and Others* 2004 (6) SA 570 (C) para 10.
[5] André Boraine 'Some thoughts on the reform of administration orders and related issues' 2003 (36) *De Jure* 217.
[6] See *Micro Finance Regulatory Council v AAA Investment (Pty) Ltd* 2006 (1) SA 27 (SCA) para 1 fn 3. 'According to the research of Professor PG Du Plessis of the University of Stellenbosch – *The Micro-lending Industry in South Africa, July 1998* – it was estimated that 80% of South Africa's adult population were denied access to retail credit within the mainstream financial services industry. The research indicated the size of the cash loan industry to be approximately R10,1bn-R15bn and that it increased by 280% over the past two years. It also showed that there are over 3 500 formal lending agencies and over 27 000 informal lending outlets with a large geographic dispersion. Statistics indicate a current, and near future, individual market of approximately 3 million borrowers.'

1968.[7]

[3] On 23 May 2003 the appellant lent R1 700 to the first respondent. In terms of the 'Acknowledgment of Debt and Repayment Agreement' that was concluded between the parties at the time, he undertook to repay the loan on 25 June 2003 with interest calculated at the rate of 30% computed over a repayment period of 1 month. The total amount that he was thus obliged to repay was R2 210, the finance charge component being R510.

[4] Clause 14 of the agreement, the subject of this dispute, reads as follows:

'I will not apply for an administration order as envisaged in s 74 of Act 32 of 1944, and this debt will not form part of an administration order, which I might have applied for.'

In its clear terms the clause seeks to deprive the debtor of resorting to the protection afforded by s 74 of the Act and to insulate the debt from the machinery provided for in that section.

[5] On 25 June 2003, the day the repayment of the loan was due, the first respondent applied to place his estate under administration. The information gleaned from the application reveals that the first respondent's gross income is R4 819,33 per month. After deductions and monthly living expenses are taken into account, he is left with a monthly amount of R450 available for the payment of creditors. He has five creditors to whom the administration order would apply, one of whom is the appellant. The total amount of the debt due and payable to these creditors is R13 250,90. His wife, the second respondent, to whom he is married in community of property, has no income. The first respondent, to whom I shall hereafter refer as 'the respondent' for

[7] *De Beer v Keyser & Others* 2002 (1) SA 827 (SCA) para 2. Section 15A of the Usury Act permits the responsible Minister to exempt categories of money-lending transactions from its provisions. It provides: 'The Minister may from time to time by notice in the *Gazette* exempt the categories of money lending transactions, credit transactions or leasing transactions which he may deem fit, from any or all of the provisions of this Act on such conditions and to such extent as he may deem fit, and may at any time in like manner revoke or amend any such exemption.'

convenience, is uncontestably unable to meet his financial obligations as envisaged in s 74(1)(a) of the Act.

[6] The respondent's application was heard in the Soshanguve Magistrates' Court on 7 August 2003. The appellant opposed the application, basing its opposition on the terms of clause 14. Despite such opposition the magistrate granted the order placing the respondent's estate under administration and included the respondent's debt of R2 210 that he owes to the appellant in the administration order.

[7] The appellant appealed to the Pretoria High Court. That court (per Du Plessis J, Legodi AJ concurring) also rejected the appellant's reliance on clause 14. It did so on the basis that the proper administration of a debtor's estate is not in the interests of debtors only. It held that the public interest, particularly the interests of creditors, is also served thereby. The respondent was thus not able to waive his right to apply for an administration order. It accordingly dismissed the appeal but granted leave to this court on condition that the appellant pay the costs of the appeal.

[8] In this court the appellant made the following submissions:

(a) Section 74 confers the right to apply for an administration order on a debtor only. This is because the debtor is its intended beneficiary. On a proper interpretation of the section, the public and creditors have no distinct interest in the application for an administration order. Whatever benefit may accrue to creditors while the debtor's estate is under administration is merely incidental.[8]

(b) Clause 14 is not inimical to the public interest because it prevents the debtor from applying for an administration order for a limited period only, ie while the loan agreement is extant. The respondent may apply for an order, if

[8] Relying on *Ex Parte August* 2004 (3) SA 268 (W) para 16.

he so wishes, after settling his debt, which he was obliged to do within 30 days.

(c) The waiver of the right to apply for an administration order is not on the face of it so unreasonable that it implicates any public policy concerns. No evidence was led by the respondent to suggest that he was in an unequal bargaining position at the time he contracted with the appellant.

[9] The legal principles applicable to this dispute are easy to state. The general rule is expressed by the Latin maxim: *quilibet potest renuntiare juri pro se introducto* – a person may renounce a right introduced for his own benefit. In the words of Innes ACJ in *Ritch and Bhyat v Union Government (Minister of Justice)*:[9]

'The maxim of the Civil Law (C.2, 3, 29), that every man is able to renounce a right conferred by law for his own benefit was fully recognised by the law of Holland. But it was subject to certain exceptions, of which one was that no one could renounce a right contrary to law, or a right introduced not only for his own benefit but in the interests of the public as well. (*Grot*., 3, 24, 6; n. 16; *Schorer*, n. 423; *Schrassert*, 1, c. 1, n. 3, etc.). And the English law on this point is precisely to the same effect.'[10]

Thus, a party to a contract may waive the benefits conferred upon him by an Act of Parliament unless the statute expressly or by necessary implication prohibits waiver.[11]

[10] An agreement whereby a party purports to waive the benefits conferred upon him or her by statute will be *contra bonos mores*, and therefore not enforceable, if it can be shown that such agreement would deprive the party of protection which the legislature considered should, as a matter of policy, be

[9] 1912 AD 719 at 734-735.
[10] See also *SA Co-Op Citrus Exchange v Director-General: Trade and Industry* 1997 (3) SA 236 (SCA) at 242G-243D.
[11] *McDonald v Enslin* 1960 (2) SA 314 (O); D Hutchinson, B van Heerden, DP Visser and CG van der Merwe *Wille's Principles of South African Law* 8ed p 429-430.

afforded by law. An agreement is contrary to public policy, according to Wille:[12]

'. . . if it is opposed to the interests of the state, or of justice, or of the public.'

This description was adopted by this court in the well-known case of *Sasfin (Pty) Ltd v Beukes.*[13] In addition Wille goes on to state the following:

'The interests of the community or public are of paramount importance in relation to the concept of public policy; accordingly, agreements which are clearly inimical to the public interest, whether they are contrary to law or morality will not be enforced*. Furthermore, it is the tendency of the proposed transaction, rather than its proved result, which determines whether or not it is contrary to public policy.*
The chief classes of agreements contrary to public policy are those which tend to: (i) injure the state or the public service; (ii) defeat or obstruct the administration of justice; or (iii) interfere with the free exercise by persons of their rights. . ..' (My emphasis.)

[11] That a court may not enforce an agreement because the objective it seeks to achieve is contrary to public policy is firmly part of our law.[14] And in this determination 'public policy' is anchored in the founding constitutional values which include human dignity, the achievement of equality and the advancement of human rights and freedoms.[15]

[12] Whether, in the circumstances of this case, the respondent was permitted to waive his right to apply to a magistrate's court for his estate to be placed under administration thus depends in the main on the overall purpose of the section. It is that analysis which I now turn to.

[13] This court[16] has recently approved an earlier description[17] of administration under the Act as a 'modified form of insolvency' because of its

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[12] *Wille's Principles of South African Law* (supra) p 431 and authorities there cited.
[13] 1989 (1) SA 1 (AD) at 8.
[14] See generally Christie *The Law of Contract* 4ed p 398-404.
[15] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 91; *Napier v Barkhuizen* Unreported SCA Case No 569/04 para 7.
[16] In *Weiner NO v Broekhuysen* 2003 (4) SA 301 (SCA) para 3.
[17] In *Madari v Cassim* 1950 (2) SA 35 (D) at 38.

utility in dealing with small uncomplicated estates[18] where sequestration proceedings would 'swallow the debtor's assets'.[19] Although the existence of an administration order is no bar to the sequestration of the debtor's estate,[20] sequestration has the disadvantages that it is not only more expensive, but is also not usually viable because of the requirement that a financial advantage to creditors must be proved before a court will grant a sequestration order.[21] With small estates of the size of the respondent's such proof would, more often than not, be elusive.

[14] In practice, therefore, administration is the only viable statutory protection available to debtors with small estates whose finances have fallen on difficult times. It is a form of protection which may, in certain circumstances, be forced upon the debtor for his or her own good. Thus, under the provisions of subsections 65I(2) and (3), a court enquiring into the financial affairs of a debtor against whom a judgment sounding in money has been granted, may *mero motu* place his or her estate under administration.[22] What a court is in effect doing when it grants an order in such circumstances is imposing a 'debt relief measure'[23] upon the debtor for his or her own good. Counsel for the appellant pointed out that the respondent's waiver of his right to apply for an administration order in terms of s 74(1) did not affect the court's power to place his estate under administration in terms of subsections 65I(2) and (3). According to counsel, this supported the contention that a debtor's right to apply for an administration order in terms of s 74(1) must be regarded as a benefit conferred primarily on the debtor and in the debtor's interest. This argument does not hold water. On the contrary, the court's power *mero motu* to 'impose' an administration order on the debtor in terms of s 65I simply strengthens the view that, while an administration order (whether

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[18] Section 74(1)(b) states that the total amount of debt due should not exceed the amount that the Minister has determined in the *Gazette*. That amount has been determined in terms of GN 53441, 31 December 1992 as R50 000.
[19] *Weiner v Broekhuysen* above.
[20] Section 74R.
[21] Sections 10(c), 12(1)(c) of the Insolvency Act 24 of 1936; *Ex Parte Van Den Berg* 1950 (1) SA 816 (W) at 817.
[22] Jones and Buckle *The Civil Practice of the Magistrates' Courts in South Africa* Volume 1: The Act 9ed p 305.
[23] Para 1 above.

made in terms of s 74 or s 65I) is indeed a form of protection for the debtor, designed 'to ward off legal action and execution proceedings' by creditors,[24] it is also designed to benefit creditors and serve the public interest, as illustrated further below.

[15] Although the remedies of creditors are restricted when a debtor's estate is placed under administration, they do have certain rights. The immediate effect of an administration order is something akin to the institution of a *concursus creditorum.*[25] By this is meant that:

['T]he hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration . . .. The claim of each creditor must be dealt with as it existed at the issue of the order.'[26]

The Act creates the machinery for the lodging and proof of claims, the adjudication of contentious claims, objections to the inclusion of debts in the list of creditors and the right to object to the manner in which payments must be made in terms of the order.[27] The conflicting interests of the creditors are thus managed by the administrator for the benefit of the general body in a manner that seeks to achieve a fair distribution of the debtor's income.[28]

[16] A creditor may not circumvent an administration order. Thus any payment in respect of a debt due at the time of the granting of the order, if not done in terms thereof, is invalid and may be recovered from the creditor by the administrator unless the payment was made without the creditor's knowledge of the administration order.[29] In addition the creditor forfeits his claim against the debtor's estate if payment was made at his request whilst he had knowledge of the order.[30]

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[24] See *African Bank v Weiner* above n 4.
[25] Jones and Buckle above n 3 p 306 para ; *Madari v Cassim* above n 17 at 38 as quoted with approval by this court in *Weiner NO v Broekhuysen* above n 16; *Fortuin v Various Creditors* 2004 (2) SA 570 (C) para 11.
[26] Per Innes JA in *Walker v Syfret NO* 1911 AD 141 at 146.
[27] LTC Harms *Civil Procedure in Magistrates' Courts* p 37-11.
[28] *Prima Slaghuis (Carletonville) v Roux* 1973 (1) SA 108 (T) at 110D-E.
[29] Section 74J(14).
[30] Section 74J(14).

[17] In summary it is apparent that the main purpose of s 74 is to protect debtors with small estates, 'usually . . . those who are poor and either illiterate or uninformed about the law or both.'[31] It has a second, but also important purpose, which is to ensure that creditors to whom money is owed and due for payment by the debtor, are able to recover as much as the administrator permits. There can be no doubt, therefore, that s 74 was enacted in the public interest. It is with this in mind that the efficacy of clause 14 must be determined.

[18] The clause (see para 4 above) seeks to achieve two objectives: first, to prevent the debtor from applying for an administration order so that the debt is not included in it and secondly, to exclude the debt from any existing order. The second part of the clause, viz the purported exclusion of the debt from an existing order is plainly unenforceable as it constitutes an attempt to circumvent an administration order which, as I have pointed out, is not permissible.

[19] As I mentioned earlier, the clause seeks to insulate the appellant from the effects of an administration order. In so doing its effect is to prevent the debtor from resorting to the only statutory protection he has, ie to apply to court for an administration order. Indeed this was the very basis of the appellant's opposition to the respondent's application for the administration order. The implication is that, despite being 'unable to meet his financial obligations',[32] he cannot approach a court for relief under s 74.

[20] By way of comparison our courts have had no difficulty in declaring contracts contrary to public policy where their *tendency* (see para 10 above) is to restrict or prevent a person from vindicating his or her rights in the courts. Thus in *Schierhout v Minister of Justice*[33] Kotze JA stated:

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[31] *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) para 8. The description in this case refers to ss 65A-65M, but is equally applicable to s 74.
[32] Section 74(1)(a).
[33] 1925 AD 417 at 424.

'If the terms of an agreement are such as to deprive a party of his legal rights generally, or to prevent him from seeking redress at any time in the Courts of Justice for any future injury or wrong committed against him, there would be good ground for holding that such an undertaking is against the public law of the land.'

In *Standard Bank v Essop of SA Ltd*,[34] the court, relying on *Schierhout*, declared contrary to public policy a clause in an agreement which provided that, if the respondent failed to pay any amount on the due date, the applicant would be entitled to reinstate an application for the respondent's sequestration on an unopposed motion roll, and to utilise the affidavit deposed to by the respondent consenting to a provisional and final order of sequestration. In declaring this clause to be contrary to public policy the court said the following:

'In my opinion, the applicant's conduct in having purported to stipulate for these rights was, and remains, unconscionable. It has purported to empower itself, in the event of any relevant default by the respondent, to deprive him of his status as a solvent person, and inevitably to subject him to all the onerous obligations and extensive restrictions which bind an insolvent in terms of the Act . . . without his being in any event able to defend himself. This conduct offends my, and in my opinion would offend any reasonable person's, sense of . . . justice.'[35]

[21] There can be no doubt that the *tendency* of the clause is to deprive the respondent of his right to approach the court for redress from his parlous financial position. To deprive or restrict anyone's right to seek redress in court, as the cases cited above make clear, is offensive to one's sense of justice and is inimical to the public interest. When this is done to a poor person in the circumstances of the respondent, as the appellant attempted to do in the present matter, it is even more so. It is hardly a defence, as counsel for the appellant sought to contend, that the restriction is for a limited duration (see para 8 (b) above). In fact, the clause, in express terms, disentitles the respondent from applying for an administration order until the debt is paid, which the respondent is unable to do.

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[34] 1997 (4) SA 569 (D).
[35] *Standard Bank v Essop* above at 575E-G.

[22] A further difficulty I have with the clause is that the insulation of the debt from an administration order, in effect, constitutes an undue preference for the appellant. This is not only highly prejudicial to the respondent, but potentially to the rights of his other creditors. Our courts have, for this very reason, set themselves against pre-sequestration or pre-liquidation contractual stipulations intended to be operative in the event of, or after, the institution of the *concursus*.[36] Because the clause is potentially prejudicial to the general body of creditors, its operation, to use Wille's characterisation, referred to above in para 10, interferes with the free exercise, not only of the respondent's rights, but also the creditors'. It follows that the magistrate was correct to include the respondent's debt of R2 210 in the administration order.

[23] In this country, and elsewhere, courts have struck down bargains whose tendency is inimical to the policy objectives of statutory provisions enacted for the protection of certain classes of persons. Thus, in *Vrystaatse Lewendehawe Koöperasie Bpk v Pretorius en 'n ander*,[37] where a debtor, in a contract with a creditor waived all benefits and protection provided by the Agricultural Credit Act 28 of 1966, and the debtor nevertheless applied for assistance under the Act, it was held that the creditor could not execute against the debtor as such assistance that the debtor applied for was provided not only for the benefit of the debtor, but also for creditors. Similarly, in *Johnson v Moreton*[38] the House of Lords held that a tenant could not contract out of the protection afforded by s 24 of the Agricultural Holdings Act 1948 as this would frustrate the purpose of the Act in promoting efficient farming in the national interest. Lord Salmon said:

'The security of tenure which tenant farmers were accorded by the Act . . . was not only for their own protection as an important section of the public, nor for the protection of the weak against the strong; it was for the protection of the nation itself . . . If any clause such as clause 27 was valid landlords might well insist upon a similar clause being introduced into every

[36] See Meskin *Insolvency Law* p 5-51 and the cases cited at n 11 thereof.
[37] 1978 (1) SA 651 (O). See also *Santam Bank Bpk v Du Toit* 1968 (3) SA 520 (C) at 521. Cf *De Wet v Dauth* 1966 (4) SA 57 (O) at 59 where it was held that a benefit conferred on a farmer under s 7 (1) of the Farmers' Assistance Act 48 of 1935 could be waived as it was for the farmers sole benefit. It is doubtful whether this case was correctly decided.
[38] [1980] AC 37.

lease; and prospective tenants with no money to buy the land they wanted to farm, would, in reality have very little choice but to agree. Accordingly if clause 27 is enforceable the security of tenure which Parliament clearly intended to confer, and did confer upon farmers for the public good would have become a dead letter.'[39]

[24] As I mentioned earlier, s 74 was enacted as a form of debt relief and protection for low-income debtors who have fallen on difficult times. The public interest requires not only that this class of people be protected, but that creditors are able to recover their debts in the orderly manner that the administrator permits. If, in a similar vein to what Lord Salmon said in the passage above, every credit-provider introduced similar clauses into their contracts with vulnerable debtors who have little choice but to agree, s 74 would become a 'dead letter' and the clear intentions of the legislature would be thwarted. This cannot be countenanced.

[25] Counsel for the parties did not deal with whether in the determination of public policy, the impugned clause constituted an infringement of the respondent's constitutional rights. As I mentioned earlier, public policy is now anchored in the Constitution. However, in view of the conclusion I have reached it is not necessary to consider this aspect.

[26] In the result, the appeal is dismissed with costs, such costs to include those of two counsel.

[39] See above p 52G-53A.

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A CACHALIA

ACTING JUDGE OF APPEAL

CONCUR:

HARMS JA

CONRADIE JA

CLOETE JA

VAN HEERDEN JA