



IN THE NORTH GAUTENG HIGH COURT, PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO .	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED.	
DATE 12/03/2013.	SIGNATURE 

CASE NO: 4549/2011

DATE: 14/3/2013

IN THE MATTER BETWEEN

FIRST NATIONAL BANK – A DIVISION OF
FIRSTRAND BANK LIMITED

PLAINTIFF

AND

CLEAR CREEK TRADING 12 (PTY) LTD

1ST DEFENDANT

LUCKY SOLOMON SELEMELA

2ND DEFENDANT

JUDGMENT

KOLLAPEN, J

[1] Plaintiff issued summons against the first and second defendants in which it sought payment of the sum of R740 901,78 as well as ancillary relief arising out of a home loan agreement entered into between the plaintiff and the first

defendant and in respect of which the second defendant bound himself as surety and co-principal debtor for the obligations of the first defendant.

[2] Defendant defended the action and has filed a plea herein to which reference will be made later.

[3] In the summons and declaration, the plaintiff based its action on a home loan agreement entered into between itself and the first defendant in respect of which certain monies were advanced to the first defendant and attached a copy of the home loan agreement to its summons and requested that the contents thereof "be read as if specifically pleaded and incorporated herein by reference".

[4] The home loan agreement provides in clause 1 thereof as follows:

"This agreement is governed by the National Credit Act 34 of 2005 ('the Act')."

In addition page 13 of the written agreement entered into between the plaintiff and the first defendant provides as follows:

"The bank shall be bound by the terms and conditions of this agreement on receipt by the bank of this agreement duly initialed and signed by the customer."

There appears to be no dispute that the reference to 'the bank' is in fact a reference to the plaintiff and that the reference to the customer is a reference to

the first defendant and that indeed the first defendant initialed and signed the agreement as contemplated.

[5] The defendants in resisting the action of the plaintiff and in their plea to the plaintiff's declaration alleged that the agreement upon which the plaintiff sought to rely and to which reference has already been made was unlawful in terms of section 90(2)(a)(ii) of the National Credit Act 34 of 2005 ('the Act'). In addition the defendant pleaded that the plaintiff failed to act in terms of section 81(2) and 81(3) of the National Credit Act as it failed *inter alia* to properly assess the consumers' (defendants) general understanding and appreciation of the risks and costs of the proposed credit, and of rights and obligations of the defendants under the agreement. The defences raised by the defendants are located exclusively within the Act.

[6] At the commencement of the trial the parties agreed that the preliminary question for determination was whether the National Credit Act was applicable to the agreement entered into between the parties. In addition the parties agreed to argue the matter of the applicability or otherwise of the National Credit Act on the pleadings and on the following common cause facts:-

Common cause facts for the purposes of the argument regarding the applicability or otherwise of the National Credit Act:

[7] (a) The plaintiff and the first defendant entered into a home loan agreement

on 13 February 2008.

- (b) It was a provision of the home loan agreement that the National Credit Act would apply to it.
- (c) The second defendant signed a suretyship binding himself to the plaintiff for the due and punctual performance of the obligations of the first defendant to the plaintiff.
- (d) A loan was granted by the plaintiff to the first defendant in the sum of R750 000,00 which was to be advanced to the first defendant upon registration of a bond in favour of the plaintiff and in respect of the property known as Erf 11 Wonderkrate Vakansiedorp Township, Registration Division KR Limpopo Province and over which a mortgage bond has been registered in favour of the plaintiff. The property is a vacant erf.
- (e) The value of the aforementioned property at the time of the loan was R100 000,00.
- (f) The property was the only asset of the first defendant and it had no other business or no other income apart from its ownership of the property aforementioned.
- (g) Attorneys for the plaintiff dispatched a letter in terms of section 129 read with section 130 of the National Credit Act on 29 November 2010 to the first defendant.

- [8] The plaintiff contended that the National Credit Act, notwithstanding the reference to it in the home loan agreement, was not applicable to the agreement entered into between the parties by virtue of the provisions of section 4(1)(b) read together with section 9(4) of the National Credit Act.

Section 4 of the Act, which deals with the application of the Act, provides that the Act is applicable to every credit agreement. A number of exceptions are provided and one of them as provided in Section 4(1)(b) relates to:

"A large agreement, as described in section 9(4), in terms of which the consumer is a juristic person whose asset value or annual turnover is at the time the agreement is made below the threshold value determined by the Minister in terms of section 7(1)."

It was not disputed that the first defendant was a juristic person as described in section 4(1)(b). Section 9(4) of the Act describes a large agreement as including a mortgage agreement. Accordingly if one has regard exclusively to the provisions of Section (4)(1)(b) read with Section 9(4), then the agreement entered into between the plaintiff and the first defendant is of the kind excluded from the scope of the Act.

- [9] It was accordingly contended on behalf of the plaintiff that notwithstanding the reference in the agreement to the applicability of the Act and notwithstanding that the plaintiff elected to write to the first defendant in terms of section 129 read

with section 130 of the Act, that the Act was simply not applicable on the basis that the provisions of the Act excluded this particular agreement. Counsel for the plaintiff in response to questions by the court suggested that the reference in the agreement to the applicability of the Act as well as the dispatch of the letter in terms of section 129 was probably a mistake and should be ignored by the court.

[10] In this regard, and it is not in dispute, that there was no application brought by the plaintiff for the rectification of the written agreement nor was a replication filed on its behalf in response to the plea filed by the defendants to which reference has already been made and which the defendants placed reliance exclusively on the provisions of the Act.

[11] Counsel for the defendants took the stance that notwithstanding the provisions of the Act, in particular section 4(1)(b) and section 9 thereof, parties to a private contract enjoyed contractual freedom and as a general principle courts were obliged to uphold the agreements entered into between such parties. It was argued that notwithstanding that the Act may not have been applicable if regard be had objectively to the provisions of the Act, where the parties by their specific agreement made the Act applicable to their contract then ordinarily speaking a court should uphold such an agreement unless there were compelling reasons not to do so.

Discussion

[12] The author Christie *Law of Contract in South Africa* 6th edition says that "the law of contract is of fundamental importance in the modern world because it is woven into and inseparable from every form of economic activity". One may argue that its relevance extends beyond economic activity and that it has acquired a centrality in the manner in which society functions and in the manner in which people go about conducting their business. It is essential to the orderly functioning of society to the extent that it contributes to an environment that is conducive to predictability and certainty.

[13] Our courts have over time recognized the sanctity of agreements entered into voluntarily and in *Rood v Wallach* 1904 TS 187 at 201 INNES, CJ concluded as follows:

"From the authorities I have quoted, and there are many others, the rule of the Roman Dutch law seems clear – every agreement, not manifestly impossible, made deliberately and seriously, by persons capable of contracting, and having a ground or reason which is not immoral or forbidden by law, may be enforced by action, subject of course to any special legal defences which may arise in particular cases."

[14] While this case was decided long before the advent of a constitutional democracy in South Africa, our courts post the 1994 Constitution have also had to apply their mind to this principle of contractual freedom and in *Barkhuizen v Napier* 2007 (5)

SA 323 (CC) the court expressed the following at paragraph 57 in the context of determining the fairness of a contractual provision:

"The first question involves the weighing up of two considerations. On the one hand public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda*, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity."

Further at paragraph 87 the court said that:

"*Pacta sunt servanda* is a profoundly moral principle, on which the coherence of any society relies. It is also a universally recognized legal principle."

- [15] Accordingly and if one has regard to both the philosophy underpinning contractual freedom as well as the *dicta* by our courts over more than a hundred years, then there can be little argument that in the absence of any weighty considerations that would suggest otherwise, contracting parties should be bound to the agreements they enter into freely and voluntarily.

- [16] *In casu* and in the absence of any serious argument that the inclusion in the home loan agreement of a clause making the Credit Act applicable was a mistake, the court should accordingly hold the parties to the agreement that they voluntarily concluded.
- [17] It would have been abundantly clear to the plaintiff upon receipt of the defendant's plea that the latter relied on and based their defences on the provisions of the National Credit Act. Such reliance thereon could hardly have been said to be misplaced having regard to the fact that the home loan agreement provided for the applicability of the Act, that the plaintiff's declaration contained an allegation that the provisions of the National Credit Act had been complied with and that it was common cause the plaintiff had dispatched letters to the first defendant in terms of section 129 read with section 130 of the Act. In this regard these actions of the plaintiff were consistent with the Act being applicable to the home loan agreement. If the plaintiff held a different view it would have been open to the plaintiff if its stance was that the reference to the National Credit Act was a mistake, to have applied for rectification of the agreement. It elected not to do so and one must be extremely cautious to attach any weight to the oral submissions made by plaintiff's counsel that reference to the applicability of the Act and the dispatch of a letter in terms of Section 129 by the plaintiff was a mistake.
- [18] If the plaintiff's stance was that the written agreement did not correctly reflect the prior agreement entered into between the parties or indeed the common intention

of the parties then the proper course for the plaintiff would have been to seek rectification. It is also trite that while the written contract stands unrectified it must exclude evidence to prove the true version by the combined effect of the parol evidence rule and the rule that no evidence may be given to alter the clear and unambiguous meaning of a written contract. (See *Christie* at page 344). Accordingly on this leg of the argument it can hardly be suggested with any degree of persuasion that the court should ignore the written agreement entered into between the parties simply because there is a generalized suggestion that it may have been a mistake. In my view and subject to what is contained below, the general principles of our law of contract indeed enjoin a court under such circumstances to uphold and enforce the agreement.

- [19] Arising from the above is the issue of whether the parties may by their agreement, contract to have their agreement covered by the provisions of a legislative enactment under circumstances where the legislative enactment itself excludes that kind of agreement from its scope.
- [20] It is not in dispute that if one has regard to the provisions of section 4(1)(b) read with section 9(4) of the Act, it is clear that the Legislature specifically defined the scope and extent of the Act's applicability. In addition the architecture of our constitutional order vests with the Legislature the law-making function and no other organ of State or a private entity can intrude upon the legislative competency of Parliament.

[21] In my view and absent any principle in law that would stand in opposition to the ordinary right of contracting parties to reach agreement on the terms and conditions of their contract and to invoke for their mutual benefit the protection of a statute, any agreement so concluded should be binding. Of course in doing so the parties should not be permitted to intrude upon the legislative authority of Parliament or to undermine the letter and spirit of legislation. To determine the question of whether such an agreement intrudes upon the authority of Parliament, or in deciding whether there are compelling reasons not to uphold the agreement, a number of factors would require consideration. The starting point however in any such exercise must be the recognition of the right to freedom of contract of the parties, which is a wide and generous right.

Some of the factors that are relevant and that require consideration include:

- (a) the nature, purpose and objectives of the act of Parliament in question that the parties seek to incorporate and make applicable to their agreement;
- (b) the question of whether the agreement between the parties seeks to advance the objectives of the act of Parliament or whether such agreement has the effect of detracting from or undermining the objectives of the act of Parliament;
- (c) whether the agreement entered into between the parties purports to create obligations for other entities who are not parties to the agreement but who may have obligations provided by the Legislature in terms of the Act of Parliament that the parties wish to make applicable to the agreement;

- (d) whether the imperatives of public policy make such an agreement offensive or whether it could be argued that the dictates of public policy require that such an agreement be enforced;
- (e) whether giving effect to the agreement is likely to offend the principle of separation of powers and / or undermine the legislative authority of Parliament; and
- (e) the facts and circumstances of the particular matter on hand

[22] The purpose of the National Credit Act is described in Section 3 of the Act. The purpose is to:

“promote and advance the social and economic welfare of South Africans, to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers”.

The Act accordingly seeks to bring within the credit marketplace fair and non-discriminatory provisions and broadly speaking seeks to advance the values of fairness, equality and freedom within the credit industry. In addition the Act contains a number of provisions specifically designed for the protection of the consumer. The Constitutional Court in *Sebola v Standard Bank* 2012 (5) SA 142 CC, in determining the jurisdictional issue before it and examining the goals of the Act and the means by which they are to be pursued, concluded that the goals

of the Act and the means by which they are to be pursued are “intimately connected to the Constitution’s commitment to achieving equality”. The Act accordingly in seeking to protect consumers, advances the constitutional imperative of equality. *In casu* the agreement between the parties simply seeks to extend this protection by mutual agreement and in doing so it must be eminently arguable that even if it was not their stated intention of doing so, the parties were by their agreement seeking to advance an objective of the Constitution. That in itself can hardly be objectionable. On the contrary, such conduct to the extent that it is consistent with the values of the Constitution, should be welcomed and recognized, in particular when it is the product of the voluntary conduct of contracting parties. I can find no persuasion in the argument that if the stated intention of the Act is to protect consumers, then a consumer who falls outside of the Act (as the first defendant does in this matter), is precluded by some principle from mutually agreeing to have the protection of the Act extended to it.

- [23] From the above it must necessarily follow that the agreement entered into between the plaintiff and the first defendant to the extent that it purports to incorporate the provisions of the Act, advances the objectives of the Act to which reference has already been made, by extending the mutual and reciprocal protections the Act contains both for consumers and credit-givers to the specific agreement between the parties. Again there can hardly be any principled objection to the parties seeking to regulate their private agreement by benchmarking it to the Act and agreeing to make the Act applicable to their agreement.

[24] The next consideration is whether the agreement entered into between the plaintiff and the first defendant making the Act applicable may have the unintended result that it creates obligations for third parties or other regulatory bodies that have general duties in terms of the Act. That is an important consideration as it could hardly be argued that contracting parties can bind third parties who are not parties to their agreement simply because they choose to do so. Such a stance would militate against the dictates of fairness but would also potentially undermine the very objective of the act of Parliament in question if regulatory bodies whose scope, authority and obligations are clearly defined were tasked with additional obligations hardly contemplated by Parliament. When one considers the matter on hand then the agreement by the plaintiff and the first defendant to have the Act applicable to the home loan agreement entered into has very limited consequences for third parties, if any at all. Certainly in the context of the dispute that has arisen, no third party or regulatory body has been called upon to perform any function outside of its mandated scope. The main thrust of the defence raised is that credit was granted recklessly, and the adjudication of this vests with the Court. Of course this may not be so in every instance. In this regard and to avoid unintended consequences for third parties or agencies, each case would have to be considered on its merits in the determination of whether or not to uphold such agreement. However it does not necessarily follow that even if such unintended consequences arise, the result will always be not to uphold the agreement. It must be arguable in such instances that at the very least the reciprocal obligations and duties that the Act creates between the parties can under those circumstances still

exist independently and be incorporated into any agreement that parties may enter. The issue does not arise here, and there is accordingly no need to consider it any further.

[25] From a public policy perspective and for the reasons already alluded to there can be no compelling argument that considerations of public policy militate against such an agreement being honoured simply because one of its objectives seeks to extend the scope of a statute as between two contracting parties. On the contrary it may be eminently arguable that the dictates of public policy to the extent that it recognizes a wide and generous approach to contractual freedom, may require such agreements to be given effect to in accordance with the intention of the contracting parties in particular where the effect thereof is consistent with the scope and spirit of the lawmaker.

[26] If regard is had to the common cause facts then clearly the circumstances under which this agreement was concluded, including the fact that the plaintiff advanced a loan of R750 000,00 to the first defendant to purchase a property that was worth no more than R100 000,00 as well as the very nominal difference between the first and the second defendants who by all accounts were substantially the same entity at the time of contracting, then this is precisely the kind of context and underlying factual matrix for which the Act was intended. It is hardly the case of a juristic person with an independent identity and presence of its own seeking to benefit from the Act. Given the position of the first defendant and the value of the property, in reality it was always and still is the second defendant who faces the

greatest risk and exposure from the agreement. Those factors must also weigh considerably in favour of upholding the agreement.

[27] Finally there is nothing to suggest that the principle of the separation of powers or Parliament's legislative authority will be undermined by upholding the agreement. In this regard Parliament in creating a list of exceptions to the application of the Act did not go so far as to create prohibitions with regard to any extended scope of the Act. The exceptions may have been motivated by common sense and a general sense of fairness which is not undermined by the agreement in question. To the extent that an exception is distinguishable from a prohibition, it can hardly be said that the language of the Act, which is couched in non-prohibitory terms, can represent an insurmountable obstacle to the right of the contracting parties as the plaintiff contends. If anything the agreement is consistent with the spirit of the Act.

[28] I accordingly can find no substantive reason why the agreement entered into between the parties to the effect that the Credit Act would be applicable should not be enforced. On the contrary, considerations of contractual freedom, the *pacta sunt servanda* principle and indeed to the extent that it is relevant, considerations of public policy point strongly in the direction that compellingly suggest that the agreement should be enforced as agreed to by the parties. In all the circumstances I am satisfied that the National Credit Act should be applicable to the agreement entered into between the parties as provided for in clause 1 thereof.

In the result I make the following order:

1. The provisions of the National Credit Act 34 of 2005 are applicable in respect of the home loan agreement entered into between the plaintiff and the first defendant on 13 February 2008.
2. The plaintiff is directed to pay the costs of the first and second defendant in respect of the argument relevant to the applicability of the National Credit Act.

N KOLLAPEN
JUDGE OF THE NORTH GAUTENG HIGH COURT

4549-2011

HEARD ON: 07 FEBRUARY 2013
FOR THE PLAINTIFF: ADV A J VENTER
INSTRUCTED BY: STRAUSS DALY INCORPORATED
FOR THE DEFENDANTS: B LESOMO
INSTRUCTED BY: B LESOMO INCORPORATED ATTORNEYS