FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 2857/2009

In the matter between:

TUM INVESTMENTS (PTY) LTD	Applicant
versus	
XALINDRI BOERDERY (PTY) LTD	First Respondent
DIRK LOUIS VISAGIE	Second Respondent
BELINDA CORNELIA VISAGIE	Third Respondent
DIRK LOUIS VISAGIE N.O. (In his capacity as trustee of the **DIRK LOUIS VISAGIE TESTAMENTARY TRUST**	Fourth Respondent

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HEARD ON:	25 APRIL 2013
JUDGMENT BY:	LEKALE, J
DELIVERED ON:	9 MAY 2013

INTRODUCTION AND BACKGROUND:

[1] On 21July 2008 the applicant and the first respondent concluded a loan agreement in terms of which the applicant advanced an amount of R500 000,00 to the first respondent, while the second and third respondents bound themselves as sureties and co-principal debtors in respect of the loan.

[2] The fourth respondent, on his part, passed a mortgage bond, as continuing covering security in favour of the applicant,over a property belonging to a testamentary trust of which he is the sole trustee.

[3] The first respondent failed to perform in terms of the agreement, whereupon, the applicant launched the present proceedings for, *inter alia*, recovery of the loan amount plus interest.

[4] The applicant, further, sought an order declaring the trust property specially executable but abandoned this prayer in the heads of argument filed on its behalf and at the commencement of the hearing.

[5] The respondents oppose the claim and raise a number of points *in limine* to, *inter alia*, the effect that it is not apparent from the papers before the court that the applicant was registered as a credit provider as required by the National Credit Act 34 of 2005 (the NCA) when the loan agreement was concluded.

[6] On its part, the applicant submits that there exist disputes of fact which cannot be resolved on papers and that the relevant issues should, as such, be referred for oral evidence. It is, further, submitted for the applicant that, if the court is disinclined to refer the issues for oral evidence, the claim should be reduced on the basis of unjust enrichment.

ISSUES IN DISPUTE:

[7] In the light of the view I have taken of the matter, this judgment is confined to the question whether or not it is apparent, *ex facie* the launching affidavits, that the applicant is either registered or exempt from registration as a credit provider and, if not, whether or not, in the circumstances of the instant matter, it is entitled to a reduced payment on the basis of unjust enrichment.

APPLICANT'S CONTENTIONS

[8] Mr Grobler submits, on behalf of the applicant, that the contention that the applicant is not registered as a credit provider in terms of the NCA is based on inadmissible hearsay insofar as the third respondent deposes that her attorney established from the National Creditor Regulator that the applicant is not registered as a credit provider.

[9] It is, further, submitted for the applicant that in the event of the court accepting such hearsay evidence, then and only in such an event, there exists a factual dispute as to whether or not the applicant is registered, which should be referred to oral evidence.

[10] In the alternative Mr Grobler submits that if the court is not inclined to refer the issue to oral evidence, then the applicant's claim should be reduced to R349 537,74 on the

basis of unjust enrichment as set out in the draft order and as a default relief.

RESPONDENTS' CONTENTIONS

[11] On behalf of the respondents Mr Louw contends that the question as to whether or not the applicant is a registered credit provider in terms of the NCA does not require the leading of oral evidence.

[12] It is, further, submitted for the respondents that the applicant was required, as a credit provider desirous toenforce a loan agreement, to aver in the launching affidavits, either that it is registered in accordance with section 40 of the NCA or that it is exempt from such registration.

[13] The applicant has not made out a cause of action for the relief claimed insofar as its founding papers are silent on the issue of registration, so the argument goes on behalf of the respondents.

[14] Mr Louw, furthermore, submits that there exists no factual dispute on papers regard being had to the fact that the applicant made no allegations regarding registration in its founding papers.

[15] It is further contended for the respondents that the applicant seeks to remedy its defective papers by way of referral to oral evidence in the hope that it would be able to tender

evidence on the grounds upon which it alleges that it is exempt from registration.

[16] In conclusion Mr Louw, effectively, submits that the respondents have no issue with the applicant's calculations, as set out in the draft order, but that no case has been made out on the papers to entitle it to restitution.

APPLICABLE LEGAL PRINCIPLES

[17] The parties are correctly in agreement that the NCA obliges certain credit providers to register as such while, at the same time, it exempts certain credit agreements from its provisions. (**See section 4(1) and section 40 of the NCA**.)

[18] It is, further, common cause between the parties that failure to register as a credit provider, where the lender was obliged to register,renders any credit agreement concluded by such a credit provider unlawful and void *ab initio*. (**See section 40 read with section 89(5) of the NCA.)**

[19] A credit provider wishing to enforce a loan agreement in court needs to allege in his pleadings either that he is registered in accordance with section 40 of the NCA or that he is exempt from registration. (See **Guide to National Credit Act** – Lexis Nexis paragraph 5.2.2.1.)

[20] Where a credit agreement cannot be enforced because it is unlawful and, as such, void from the outset, the aggrieved

credit provider is still entitled to claim restitution on the basis of unjustified enrichment. (See **National Credit Regulator v Opperman** 2013 (2) SA 1 (CC).)

[21] As correctly submitted by Mr Louw, in order for a credit agreement to be exempt on the basis that the consumer is a juristic person, the asset value of that consumer or its annual turnover must be more than R1 million or the agreement in question should be a large agreement *viz* agreement for R1 million or more. (**See section 4(1) (a) and (b) of NCA.)**

APPLICATION OF LEGAL PRINCIPLES AND FINDINGS

[22] The parties are, effectively, *ad idem* that it is not expressly apparent, *ex facie* the founding affidavits, that the applicant is either registered as a credit provider or exempt from such statutory registration.

[23] In my view, the fact that the applicant does not expressly or specifically disclose, in the launching papers, that it is either registered or not required to register,does not *per se* dispose of the matter. The enquiry, in my judgment, is whether or not it is apparent, *ex facie* the founding papers looked at as a whole, that the applicant is registered or exempt from registration as a credit provider so as to be able, in law, to enforce the relevant credit agreement.

[24] I am persuaded, as effectively opined by the learned authors of the **Guide to National Credit Act** (*supra*),that the scheme

of the NCA is such that a credit provider, in the position of the applicant in the instant matter, bears the onus of showing, in the launching papers, that the agreement it seeks to enforce is lawful and enforceable on the ground that it, as a lender, is either registered as a credit provider or exempt from such registration.

[25] A perusal of the founding affidavit and its annexures only reveals that the applicant is a juristic person which concluded a credit transaction involving R500 000,00 with another juristic person and that the parties, in the agreement, expressly excluded certain provisions of the NCA. Nothing indicative of registration or exemption is evident from such launching papers.

[26] The statutory obligation to register as a credit provider, where the factors set out in section 40 of NCA exist, cannot be contracted away. The obligation in question, where applicable, is the corner stone of the business of the credit provider and does not arise *ex contractu*.

[27] It is, thus, not apparent, from the material properly before the court, that the applicant is either registered or exempt from registration as a credit provider. It has, as such, not been shown that the agreement is legally enforceable on that basis.

[28] As correctly submitted for the respondents, there exists no basis for referral of the matter to oral evidence insofar as the

applicant does not assert, in its papers, that it is either registered or not obliged to register. Such a basis may, in my view, also be laid in the replying papers in an appropriate case. I do not even have to consider any evidence or contentions on behalf of the respondent to the effect that the applicant is not registered as a credit provider in order to saddle the applicant with the duty to establish that the relevant agreement is legally enforceable. Such a duty arises *ex lege* on the part of the applicant regard being had to the provisions of section 40 read with section 89(5) of the NCA.

[29] There, further, exists nothing before me to show that the relevant agreement is exempt from the provisions of the NCA. The facts *in casu*, on the contrary, are suggestive of the possibility that the applicant is required to register, as Mr Louw submits for the respondents, regard being had to the principal debt outstanding.

[30] There is no claim for restitution before me and, as such, such a claim has not been ventilated on the papers in order for a proper and informed decision to be made on, *inter alia*, the degree of turpitude of the respective parties.

ORDER

[31] In the result the application is dismissed with costs.

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L.J. LEKALE, J

On behalf of applicant:	Adv S. Grobler Instructed by: Stander and Partners BLOEMFONTEIN
On behalf of respondents:	Adv M.C. Louw Instructed by: Symington & De Kok BLOEMFONTEIN

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