

In the KwaZulu-Natal High Court, Pietermaritzburg

Republic of South Africa

Case No : 8960/12

In the matter between :

Dean Ashley Black

Applicant

and

Collin Stroberg

Respondent

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Judgment

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Lopes J

[1] The applicant in this matter sold his member's interest and loan account in a close corporation to the respondent in terms of an agreement ('the sale agreement') concluded between the parties on or about the 28<sup>th</sup> October 2011. The respondent evidently could not pay for the member's interest, and the applicant 'loaned and advanced' to the respondent the sum of R1 087 025 for that purpose in terms of an agreement ('the loan

agreement') concluded between the parties on the 27<sup>th</sup> January 2012. In terms of the loan agreement :

- (a) The respondent undertook to repay the loan by way of monthly repayments of R50 000 with the first instalment to be paid on the 1<sup>st</sup> February 2012;
- (b) the respondent undertook to pay interest on the outstanding amount at the prime lending rate charged by Investec Bank, which was then 9% per annum;
- (c) in the event of the respondent being in breach of the repayments, and continuing to be so after receiving written notice from the applicant, the applicant was entitled to claim the full balance of the loan outstanding.

[2] I have placed the words 'loaned and advanced' in inverted commas because that is the way the applicant has described what he did (see paragraph 4.1 of his founding affidavit). Save for contending that the loan agreement was unlawful, the respondent admits the remaining allegations in that paragraph.

[3] However, it appears from a closer scrutiny of the papers that money was not 'loaned and advanced' pursuant to the loan agreement. The following emerges from the application papers :

- (a) the loan agreement has the following preamble :

'WHEREAS the Lender, the Borrower and another entered into a sale and purchase agreement in relation to the sale of a member's interest in Wild Wind Investments 106 CC on or about 28 October 2011 ("the Sale Agreement").

AND WHEREAS the Borrower is due to pay an amount of R1 087 025 ("the Capital Sum") to the Lender in terms of the Sale Agreement.

AND WHEREAS the Lender has agreed that the Borrower may pay the Capital Amount in instalments,

NOW, therefore, the parties agree as follows :

1. The loan

The Lender hereby lends to the Borrower who hereby borrows the Capital Amount.'

(b) The repayment terms are then set out in the loan agreement, including the provision that interest is payable on 'all outstanding balances in addition to and together with the instalment'.

(c) Annexure E2 to the applicant's founding affidavit is a copy of an e-mail addressed by the applicant's attorneys to the respondent's attorney recording the following :

'Pursuant to an agreement as to the amount that was to be paid for the sale of Dean's member's interest and loan account in Wild Wind Investments CC, Collin asked for an indulgence to pay the purchase price in instalments in terms of a contract prepared by your office.'

(Dean and Collin are the applicant and respondent respectively.)

[4] What the above extracts demonstrate is that despite the applicant's allegation that money was 'loaned and advanced' to the respondent, what actually happened was :

(a) the applicant sold his member's interest and loan account to, inter alia, the respondent;

- (b) after the conclusion of the sale agreement the respondent sought an indulgence to pay off the purchase price;
- (c) that indulgence was granted, and the loan agreement was a consequence.

No money actually changed hands. Had it done so it would have been a very odd way of doing things because the respondent would then have owed the applicant two identical amounts – one for the shares and one for the money. The applicant, however, has only sued for one amount representing the purchase price of his member's interest and the loan account.

[5] The respondent complied with his contractual obligations in terms of the loan agreement until the end of June 2012. Thereafter payments were made in response to breach letters sent to him by the applicant's attorney. In response to a breach letter recording the respondent's non-payment of the September instalment, the respondent's attorney notified the applicant's attorney that because the applicant was not registered as a credit provider in terms of ss 40(1)(b) of the National Credit Act, 2005 ('the Act'), the loan agreement was, in terms of ss 40(4), regarded as an unlawful agreement, and void to the extent provided for in s 89 of the Act.

[6] Subsec 89(5)(a) of the Act provides that an unlawful credit agreement in terms of s 89 is void from the date the agreement was concluded.

[7] The applicant then brought this application for payment of the outstanding balance of the loan in the sum of R787 714,41 together with interest thereon and costs.

S 40 of the Act provides :

- '40. **Registration of credit providers.** – (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 credit agreements; or
  - (b) the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1).
- (2) In determining whether a person is required to register as a credit provider –
- (a) the provisions of subsection (1) apply to the total number and aggregate principal debt of credit agreements in respect of which that person, or any associated person, is the credit provider;
  - ...
- (3) a person who is required in terms of subsection (1) to be registered as a credit provider, but who is not so registered, must not offer, make available, or extend credit, enter into a credit agreement or agree to do any of those things.
- (4) a credit agreement entered into by a credit provider who is required to be registered 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.
- ...'

[8] In argument before me the parties were agreed that :

- (a) the applicant falls within the definition of a credit provider as defined in s 1 of the Act;
- (b) the respondent falls within the definition of a 'consumer' as defined in s 1 of the Act;
- (c) the loan agreement falls within the definition of a credit agreement as defined in s1 of the Act;
- (d) the loan amount exceeded the limit referred to in ss 40(1)(b);
- (e) the issue which I am required to determine in this application is whether the applicant was required to be registered as a credit provider in terms of ss 40(1)(b) of the Act.

[9] The applicant conceded in his founding affidavits that the loan agreement is a 'credit agreement' as defined in the Act. That concession was clearly made on the basis of legal advice given to him. He records at sub-paragraph 2.2 of his founding affidavit that :

'Where I make allegations of law I do so on the advice of my legal representatives.' I assume that the applicant intended to refer to 'conclusions of law' rather than 'allegations of law', but the meaning is clear.

[10] If the concession that the loan agreement was a 'credit agreement' was made on the basis of incorrect legal advice I do not believe that it binds the applicant – a court is not obliged to accept an incorrect conclusion of law merely because a legal practitioner submits that it should!

[11] If the loan agreement is not a credit agreement, but is classified as an 'incidental credit agreement' then, in terms of s 40 the applicant was not obliged to register as a credit provider. An incidental credit agreement is defined in s 1 of the Act as follows :

**“incidental credit agreement”** means an agreement, irrespective of its form, in terms of which an account was tendered for goods or services that have been provided to the consumer, or goods or services that are to be provided to the consumer over a period of time and either or both of the following conditions apply :

- (a) a fee, charge or interest became payable when payment of an amount charged in terms of that account was not made on or before a determined period or date; or
- (b) two prices were quoted for settlement of the account, the lower price being applicable if the account is paid on or before a determined date, and the higher price being applicable due to the account not having been paid by that date.’

[12] A close analysis of what constitutes an incidental credit agreement is set out by Wallis J in *JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC and others* 2010 (6) SA 173 (KZD).

[13] In the sale agreement the respondent was to have paid the purchase price, but did not do so. The loan agreement came about solely as a result of the respondent’s default in making payment. The interest charged in the loan agreement clearly seeks to compensate the applicant for his non-receipt of the purchase price. That this is so is evident from the loan agreement which fixes the interest rate on the outstanding amount as ‘the prime lending rate charged by Investec (currently 9% per annum compounded monthly in arrears ...’

See *JMV Textiles*, para 17

[14] There is no evidence that the focus of the loan agreement was that the applicant would provide credit and secure a profit, but rather that he would be paid the purchase price of the sale agreement. There was also no evidence that the applicant was in the business of loaning money for reward.

[15] Accordingly, the loan agreement falls into the category of an incidental credit agreement rather than a credit agreement. That being so the applicant was not required to register as a credit provider in terms of s 40 of the Act, and is entitled to his judgment. (I should stress that the above interpretation was not argued before me by counsel.)

[16] Mr *Crampton* who appeared for the respondent, contended that the applicant was obliged to have registered as a credit provider by virtue of the provisions of ss 40(1)(b). To this end he relied on the unreported judgment of Binns-Ward J in *Filippus Albertus Opperman and Jacobus Boonzaaier and three others* (WCC Case No 24887/10). In terms of three written agreements, Opperman loaned his friend, the first respondent, the sum of R7 000 000. When he sought to recover the money, the first respondent took the point that Opperman had not registered as a credit provider in terms of ss 40(1)(b) of the Act, and accordingly the loan was unenforceable and the forfeiture provisions contained in s 89 of the Act were applicable.

[17] While the judgment principally dealt with the constitutional challenge to the forfeiture provisions in s 89, Binns-Ward stated the following at paragraph 3 of the judgment :

‘Having regard to the amount advanced by him to the first respondent, it follows that the applicant was required by the statutory provisions to have applied for registration as a credit provider.’

Although ss 40(1)(b) was not considered in any detail by Binns-Ward J in arriving at this conclusion, in considering the forfeiture provisions he dealt extensively with the nature and purpose of the Act, and the requirement that service providers be registered. He points out



(at paragraph 24) that the information which a registered credit provider is obliged to furnish to the National Credit Regulator is of the sort which would only be meaningful to enable the Regulator to collect and analyse information from persons who are in the business of providing credit, and not from persons who provide credit on an isolated occasion. At paragraph 26 of his judgment he continued :

‘In my view there are a number of indications in s 40 that the legislature conceived of the credit provider who requires to be registered as such in terms of the Act to be a person, who either alone or in association with others, is engaged in *the business* of providing credit to consumers.’

(the emphasis is contained in the judgment of Binns-Ward J.)

[18] With regard to ss 40(1)(b) he records at para 26 that the reference to ‘the total principal debt owed to that credit provider under all outstanding agreements’ implies a contemplation of a number of credit agreements, and not just one or two. He states that this is notwithstanding that the language used must encompass within its embrace any person who provides credit in terms of even a single transaction and that that single transaction may qualify as a credit agreement if the principal debt exceeds the threshold requirement (of R500 000).

[19] In paragraph 27 Binns-Ward J refers to other provisions in the Act which create the impression that the legislature had in mind that only persons who carry on business as credit providers should be required to register as such. In this regard he referred to ss 50(2) of the Act which provides the National Credit Regulator may enter any premises at which a registered credit provider conducts his registered activities during normal business hours, and may conduct reasonable enquiries for compliance purposes. Similarly s 52 caters for

the issue of a certificate of registration, and requires that a duplicate copy thereof be kept in each registered location from the time that the registered credit provider conducts his registered activities.

[20] The learned judge recorded at paragraph 28 that :

‘It is also not evident from the provisions of the statute why a person like the applicant intending to provide credit on an ad hoc basis to a personal friend should, in order to be able to do so in an amount exceeding R500 000, have to provide information to the fourth respondent to enable the latter to consider matters such as the commitments, if any, made by him or any associated persons in terms of black economic empowerment considering the purpose, objects and provisions of the Broad Based Black Economic Empowerment Act 2003 (Act No 53 of 2003), or in connection with combatting over-indebtedness (s 48(1)(a) and (b)). Indeed the “Memorandum on the Objects of the National Credit Bill 2005” that accompanied the proposal to Parliament for the adoption of the NCA suggested that the Act would not apply to or regulate “loans between family members, partners and friends on an informal basis”.

...

The content of the prescribed application form for registration as a credit provider is also consistent with that which someone carrying on business as a credit provider might be expected to complete, rather than a person intending to make just one, or even two or three *ad hoc* loans to someone in their ken, even in a large sum.’

[21] Although Binns-Ward J stated that he had made these observations to record his impression that the forfeiture provisions being visited on such a person would be an entirely incidental effect of the provisions of the Act rather than serving the Act’s central objectives, they apply with equal force to the interpretation of ss 40(1)(b).

[22] *Opperman* was approved by a majority of the Constitutional Court in *National Credit Regulator v Filippus Albertus Opperman and three others* 2013 (2) SA 1 (CC). That court

accepted as a basis for its decision that the applicant in the court a quo was a credit provider who was required to register because the principal debt exceeded the sum of R500 000. The court dealt in the main with the forfeiture provisions in ss 89(5)(c) of the Act and held that they were inconsistent with s 25(1) of the Constitution and accordingly invalid. The result of the Constitutional Court decision would appear to be that a person in the position of the applicant in this application, who was held to have been obliged to have registered and who did not do so, will still be able to invoke the provisions of the common law relating to an enrichment action in order to recover the debt owed pursuant to a contract declared to be void by virtue of the non-registration of the applicant.

[23] In *Bester and others v Coral Lagoon Investments 232 (Pty) Ltd* [2013] ZAWCHC 27 (20 February 2013) the Cape High Court found that as a credit provider (in that case a proprietary limited company) had advanced a shareholder's loan exceeding R500 000 in circumstances where it had not been registered in terms of the Act, the loan agreement was accordingly void and unenforceable. Although Henney J in that case found that the facts were distinguishable from *Opperman*, he nevertheless regarded the loan agreement as void. It is not, however, clear from the judgment in *Bester* whether the credit provider was in the business of providing credit.

[24] Mr *Crampton* also relied on the decision in *Evans v Smith* 2011 (4) 472 (C), another decision of Binns-Ward J in which the applicant had advanced various sums to the first respondent which, in total, exceeded the R500 000 limit. The learned judge held that the agreement was void because of the non-registration of the applicant as a credit provider. There was, however, no debate recorded in the judgment (other than the question of the

quantum of the loans) as to whether the credit provider was obliged to register because of the nature of its business. It was apparently accepted by the applicant's counsel that the contracts would be affected by the provisions of s 89 of the Act to the extent that they related to credit agreements concluded by an unregistered credit provider.

[25] Mr *Callum* SC, who appeared for the applicant, submitted that it was not necessary for the applicant to have registered as a credit provider, notwithstanding that the loan in question exceeded the limit of R500 000. Mr *Callum* submitted that I should follow the full bench decision of the North Gauteng High Court in the matter of *Friend v Sendal* [2012] ZAGPPHC 162 (3 August 2012).

[26] In that matter Friend had acknowledged in writing that he was indebted to Sendal, who had lent Friend the sum of R1 225 000 which he undertook to repay in full on or before the 1<sup>st</sup> December 2007. He also undertook to pay interest on the amount calculated at the prime rate charged by Standard Bank from time to time on unsecured overdraft facilities. The interest was to be paid monthly in full on the first of every month. Having paid a portion of the capital amount Friend owed Sendal the sum of R620 000 which he was ordered to pay by the North Gauteng High Court.

[27] The defence was raised that as Sendal was not a registered credit provider in terms of the Act, the loan agreement was void. After analysing the provisions of s 40 of the Act, Legodi J came to the conclusion that Sendal did not have to register as a credit provider, and the defence of invalidity of the agreement pursuant to the non-registration of the credit provider in terms of the Act was rejected.

[28] One of the reasons for the decision of that court was that it is the frequency of the credit provider's activities which is relevant to an interpretation of the provisions of ss 40(1)(b). In my respectful view, the frequency of lending transactions on the part of the credit provider is dealt with in ss 40(1)(a). Ss 40(1)(b) deals with a credit provider who has lent, in the aggregate of all the deals which he has concluded, whether they be one or more, a sum in excess of the limit of R500 000.

[29] The argument which is perhaps more persuasive is that the nature and purpose of the Act contemplates that persons who are required to be registered are those who are part and parcel of what may be referred to as the credit providing industry. In this regard I refer to the observations of Binns-Ward J in *Opperman* with regard to the purpose underlying the requirement of registration by credit providers, indicated by the obligations in terms of the Act placed upon those who are registered as credit providers.

[30] I agree with the submission that it could not have been the intention of the Act to insist that an individual who makes a loan to another at arm's length (albeit one for more than R500 000), is required to register as a credit provider in terms of the Act. In my view the logic of this is not affected by the fact that such an individual may have made more than one loan.

[31] The provisions of ss 40(1)(a) suggest that what the legislature intended was that persons who make it their business to provide finance at a cost to the consumer should be required to be registered. That such persons should be properly regulated and required to

give to the National Credit Regulator an account of their activities from time to time, would be in accordance with the aim of the Act to protect consumers, particularly those who are vulnerable to exploitation by unscrupulous lenders. That however, is not the situation here.

[32] It is not difficult to understand the indignation which must have been felt by the applicant in this case when :

- (a) he sold his member's interest and loan account in a close corporation to the respondent;
- (b) the respondent could not pay for the shares;
- (c) the applicant thereafter agreed to assist the respondent in paying for the shares by postponing the date of payment;
- (d) having received the shares in terms of one agreement, and the ability to delay payment in terms of another, the respondent then defaulted after repaying less than a third of the capital. Having done so, the respondent then suggested that the applicant could not sue for the balance he owed on the basis that the agreement was void because the applicant was not a registered credit provider.

[33] Mr *Crompton* has submitted that the wording of ss 40(1)(b) is unambiguous, and the applicant was accordingly required to be registered. In those circumstances the applicant would not be without remedy if the agreement was declared to be void because, in terms of the Constitutional Court judgment in *Opperman*, the applicant would still have the right to pursue his remedies in terms of a common law enrichment action.

[34] Even if I am wrong about the classification of the loan agreement as an incidental credit agreement, taking into account the nature and the purpose of the requirement that credit providers be registered in terms of the Act, and given the basis upon which the requirements for registration are set out in s 40, I remain unpersuaded that they were intended to apply to an individual where there is no suggestion that the individual is involved in the business of providing credit agreements. The conclusion at which I have arrived conforms, in my view, with the fairness and justice of the matter. The respondent was assisted by the applicant in terms of two agreements in respect of which the respondent had his bargain. The applicant should be entitled to have his.

[35] I accordingly make the following order :

- (a) the respondent is directed to pay to the applicant the sum of R787 714,41 together with interest thereon calculated at the rate of 8,5% per annum from the 9<sup>th</sup> August 2012 to date of payment; and
- (b) the respondent is directed to pay the applicant's costs, including those costs consequent upon the employment of two counsel.

Date of hearing : 13<sup>th</sup> March 2013

Date of judgment :15<sup>th</sup> April 2013

Counsel for the Applicant : R J A Callum SC (instructed by Larson Falconer Hassan  
Parsee Inc)

Counsel for the Respondent : D Crampton (instructed by Tomlinson Mnguni James)