In the KwaZulu-Natal High Court, Durban

Republic of South Africa

Case No : 6010/11

In the matter between :

Metmar Trading (Pty) Ltd t/a West African Group	Plaintiff
and	
Summer Sun Trading 99 (Pty) Ltd t/a Plasti-Pak	First Defendant
Prakash Bissoon	Second Defendant
Nolan Daniel	Third Defendant
Prakash Nirmal	Fourth Defendant

Judgment

Lopes J

[1] The plaintiff seeks summary judgment against the defendants jointly and severally, the one paying the others to be absolved, for payment of the sum of R301 139,18 together with interest thereon and costs.

[2] The plaintiff's cause of action against the first defendant is based upon an

acknowledgement of debt and its cause of action against the second, third and fourth defendants is based upon suretyship agreements signed by these parties. The defendants have delivered opposing affidavits resisting the grant of summary judgment, in which they have raised a number of defences. Included in those defences is that the second, third and fourth defendants (who signed as sureties for, and co-principal debtors with, the first defendant for its indebtedness to the plaintiff) were all married in community of property and that their spouses -:

(a) did not consent to the suretyship obligations as required by s 15(2)(h) of the Matrimonial Property Act, 1984; and

(b) were not joined in the action when they should have been.

The plaintiff's counsel, Ms *Oliver* conceded that the usual order refusing summary judgment should be granted in respect of the second, third and fourth defendants.

[3] The sole defence raised by Mr *Oberholzer,* the attorney for the first defendant, is that the acknowledgement of debt upon which the plaintiff's claim is founded, is subject to the provisions of the National Credit Act, 2005. ('the Act'). That being so, the plaintiff was obliged to have given the first defendant proper notice in terms of ss 129 and 130 of the Act which it failed to do. It also failed to register as a credit provider in terms of the Act. The plaintiff's claim is accordingly unenforceable.

[4] Ms *Oliver* submitted that the acknowledgement of debt, whilst constituting

a credit transaction as defined in subsec 8(4)(f) of the Act, was nonetheless a 'large agreement' as defined in terms of subsec 9(4)(b) of the Act, and accordingly excluded from the operation of the Act by virtue of the provisions of subsec 4(1)(b).

[5] S 4(1) of the Act provides that :-

'(1) Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except –

a) a credit agreement in terms of which the consumer is –

(i) a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7(1);

...

b) 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);

...'

[6] No evidence was put before me indicating the asset value of the plaintiff or

its annual turnover, and I accordingly assume that subsec 4(1)(a) is not applicable to this application. It was not suggested to me, and I do not believe that it is so, that sections 5 and 6 of the Act are relevant to this application. It is common cause that the threshold referred to in subsec 7(1)(b) of the Act has been set at R250 000 (see Government Notice 713 of 2006 in Government Gazette 28893 of 1st June 2006).

[7] S 8(1) of the Act provides that :-

‘(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) ...;

d) any combination of the above.’

[8] S 8(4) provides that :-

‘An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is –

...

(f) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of –

(i) the agreement; or

(ii) the amount that has been deferred.'

[9] It is common cause that the provisions of subsec 8(2) are of no consequence in this application. In addition, the acknowledgement of debt does not fall within the definition of a 'credit guarantee' as defined in the Act.

[10] S 9(4) provides that :-

'A credit agreement is a large agreement if it is –

a) ...;

b) any other credit transaction except a pawn transaction or credit guarantee, and the principal debt under that transaction or guarantee falls at or above the higher of the thresholds established in terms of section 7(1)(b).'

[11] Mr *Oberholzer* submitted that because the acknowledgement of debt constituted both a credit facility and a credit transaction, the provisions of subsec 8(3) of the Act are applicable to the acknowledgement of debt. That sub-section provides :-

'(3) An agreement ... constitutes a credit facility if, in terms of that agreement –

a) a credit provider undertakes –

(i) to supply goods ... to the consumer ...; and

(ii) either to –

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

(bb) ...; and

b) any charge, fee or interest is payable to the credit provider in respect of -

(i) any amount deferred as contemplated in paragraph (a)(ii)(aa);

...'

[12] In this regard Mr *Oberholzer* placed reliance *Carter Trading (Pty) Ltd v Blignaut* 2010 (2) SA 46 (ECP) at paragraphs 19 to 22.

[13] The facts in *Carter Trading* are similar to the present matter inasmuch as goods were supplied, and an acknowledgement of debt for the amount outstanding was proffered by the defendant. The question which had to be answered in that case was whether the acknowledgement of debt was a credit agreement as described in s 8 of the Act. After considering the provisions of that section, the court held that the acknowledgement of debt was in fact a 'credit agreement'. This was on the basis that the interest payable to the credit provider in terms of the acknowledgement of debt rendered it a credit facility, and therefore it was to be considered a credit agreement in terms of subsec 8(1)(a).

[14] What did not have to be considered in *Carter Trading* was whether the transaction constituted a 'large agreement' in terms of the Act which, in terms of subsec 4(1)(b) read with subsec 9(4)(b), would be excluded from the operation of the Act.

[15] The question to be answered then is whether an agreement, which is both a credit facility and a credit transaction, may constitute a 'large agreement' and be excluded from the operation of the Act, or whether, the fact that the acknowledgement of debt is a credit facility renders the provisions of the Act applicable irrespective of whether it is a 'large agreement'?

[16] Whether the instalment sale agreement is viewed as a 'credit facility' as defined in subsec 8(3) and/or a 'credit transaction' in terms of subsec 8(4), it is defined as a 'credit agreement' for the purpose of the Act in terms of subsec 8(1)(a) or 8(1)(b) and/or 8(1)(d).

[17] Subsec 8(6) deals with the situation envisaged in subsec 8(1)(d) and provides :-

'(6) If, as contemplated in subsection (1)(d), a particular credit agreement constitutes both a credit facility as described in subsection (3) and a credit transaction in terms of subsection (4)(d) –

(a) subject to paragraph (b), that agreement is equally subject to any provision of this Act that applies specifically or exclusively to either

–

(i) credit facilities; or

(ii) mortgage agreements or secured loans, as the case may be, and

(b) for the purpose of applying –

(i) section 108, that agreement must be regarded as a credit facility; or

(ii) section 4(1)(b) read with section 9(4), that agreement must be regarded as a large agreement if it is a mortgage agreement.'

[18] The fact that subsection 8(6)(b)(ii) ensures that subsections 4(1)(b) and 9(4)(b) read together will have the result that a mortgage bond is treated as a 'large agreement' does not mean that other agreements falling within the ambit of s 8(1)(d) are excluded from being regarded as 'large agreements'. Were that the intention of the legislature, it would merely have provided in subsec 9(4)(b) that mortgage bonds were excluded, and dispensed with the concept of 'large agreements'.

[19] In my view, because of the specific inclusion of both credit facilities and credit transactions in subsec 8(1), the acknowledgement of debt remains a 'large agreement' as defined in subsec 9(4)(b).

[20] That being so, the provisions of the Act do not apply to the acknowledgement of debt.

[21] I accordingly make the following order :-

(1) summary judgment is granted in favour of the plaintiff against the first defendant for :-

(a) payment of the sum of R301 139,18;

(b) interest on the sum of R293 257,15 calculated at the rate of 9% per annum from the 1st December 2010 to date of payment;

(c) costs of suit.

(2) (a) Summary judgment against the second, third and fourth defendants is refused;

(b) the second, third and fourth defendants are given leave to defend the action;

(c) the costs occasioned by the application for summary judgment against the second, third and fourth defendants are reserved for decision of the trial court.

Date of hearing : 20th February 2012

Date of judgment : 24th February 2012

For the Plaintiff : Z Oliver (instructed by Rina Rheeders Attorneys)

For the First Defendant : J Oberholzer (instructed by Johan Oberholzer & Co)