IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable/Not reportable

Case number: 3759/2023

In the matter between:

MAHOMED FAROOK BANA **APPLICANT**

and

MICHAEL GEORGIOU **RESPONDENT**

Coram: Loubser J

Heard: 18 October 2024

Delivered: 21 October 2024

Summary: Application for leave to appeal – novel issue of extensive scope raised in the application

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ORDER

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1. The application for leave to appeal is dismissed with costs, including the costs of two counsel on scale C

JUDGMENT

LOUBSER J

[1] This is an application for leave to appeal against the order of Buys, AJ dismissing the Applicant's application for the provisional sequestration of the Respondent with costs. Since the learned Acting Judge is no longer available to hear the application for leave, it came before this Court for adjudication.

[2] In the Court *a quo*, the Applicant firstly relied on an Acknowledgement of Debt ("AOD") in terms of which the Respondent undertook to pay the capital amount of R41 500.00 to the Applicant. This was to show that he has a liquidated claim against the Respondent for not less that R100.00 in terms of the requirements of Section 9(1) of the Insolvency Act.[1] The Applicant further relied on an oral agreement for this purpose, in which agreement the Respondent allegedly undertook to pay to the Applicant a sum of R50 000.00 monthly until his indebtedness to the Applicant arising from a certain transaction has been paid in full. The Respondent failed to make all the monthly payments in terms of this agreement, it was alleged by the Applicant.

[3] In its judgement, the Court *a quo* found that the AOD constituted a regulated credit agreement under Section 8(1)(b) and 8(1)(f) of the National Credit Act ("NCA").[2] This was so, the Court found, because the AOD provided for the deferred payment of the amount owed, and further provided for the payment of interest thereon. Since the Applicant was not a registered credit provider, the AOD was unlawful and void in terms of Section 40(4), 89(2)(d) and 89(5)(a) of the NCA, the Court found. As for the indebtedness in terms of the oral agreement, the Court found that the defence raised by the Respondent was based on a dispute of fact on *bona fide* and reasonable grounds. In the premises, the Applicant has failed to satisfy the Court that he had a liquid claim against the Respondent, the Court concluded. The application for provisional sequestration of the Respondent was consequently dismissed with costs.

[4] Before this Court the Applicant mainly challenged the finding of the Court *a quo* that the AOD constituted a regulated credit agreement in terms of the NCA. In finding as such, the Court erred by adopting a literal interpretation to Section 8 of the NCA, instead of employing a purposive approach to the interpretation of the section, it was contended. Counsel for the Applicant relied on the cases of Grainco (Pty) Ltd v Broodryk 2011 N.O.

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[1] Act 24 of 1936
[2] Act 34 of 2005

and Others,[3] Hattingh v Hattingh[4] Ribeiro and Another v Slip Knot Investments 777 (Pty) Ltd[5] and Ratlou v Man Financial Services SA (Pty) Ltd[6] in this respect. In these cases, so it was submitted, the purposive approach was applied to the effect that Acknowledgements of Debt and similar instruments should not be construed as constituting credit agreements for purposes of Section 8 of the NCA, unless the underlying debt was a money lending (or similar) transaction. In the present case, the underlying transaction giving rise to the AOD was a property transaction where the monies had to be refunded. It was not a money lending or similar transaction, it was submitted for the Applicant.

[5] The underlying cause of the AOD in Grainco was a claim for damages, not envisaged by the NCA. In Hattingh the underlying cause of the written agreement was to settle the end of a business relationship between two brothers. In Ribeiro and Ratlou the underlying cause were also settlement agreements. In the present case, the Court *a quo* relied on the matter of Carter Trading (Pty) Ltd v Blignaut[7] where it was stated that the terms of the AOD in that case appeared to be exactly what is envisaged in the NCA to be a credit agreement, namely an agreement in terms of which payment is deferred and at least a fee or charge is payable in respect of the AOD and interest is payable in the event of a failure to pay. Here, the situation is the same. The words of Section 8(4)(f) of the NCA leaves no doubt that all agreements where payment is deferred, and a charge or interest is payable, constitute a credit agreement on terms of the Act.

[6] As for the alleged oral agreement referred to above, the Respondent denied that he concluded such an agreement with the Applicant. He explained on the basis of documentation that the payments which were already made to the Applicant, were made by third parties. It follows that the most probable inference is that the oral agreement was concluded between the Applicant and the said third parties. It is an accepted principle in our law that winding up proceedings are not to be used to enforce payments of a debt that has been disputed on a *bona fide* and reasonable grounds. The finding of the Court *a quo* on this score appears to have been correctly made.

[7] It needs mentioning that the application for leave also lies against the decision of the Court *a quo* to refuse condonation for the late filing of the Applicant's replying affidavit. This affidavit was filed some fifty days late. Again, there appears to be no basis for an

[3] JDR 0172 (FB)
[4] 2014(3) SA 162 (FB)
[5] 2011(1) SA 575 (SCA)
[6] 2019 (5) SA 117 (SCA)
[7] 2010(2) SA 46 (ECP)

appeal court to interfere with the exercise of its true dissection by the Court *a quo* in this regard. In any event, it is difficult to envisage the effect of the replying affidavit on the final outcome of the proceedings, had condonation in fact been granted.

[8] This leaves only the issue of the AOD and the argument for a purposive interpretation versus a literal interpretation to be decided for purposes of leave to appeal. As we have seen, there appear to be persuasive arguments on both sides of the spectrum. The problem is that this issue of a literal or a purposive approach is in the present case a new matter raised in this Court for the first time on appeal. It did not form part of the case in the Court *a quo*. Generally speaking, a Court's appellate jurisdiction exists not to determine novel issues raised for the first time before it.[8] It rather exits to intervene and correct determinations made by lower Courts on cases as they were presented in the Court.

[9] Should leave to appeal be granted in the circumstances, the Court of Appeal will have to sit as a Court of first instance on a novel issue of extensive scope. I do not view this as desirable.

[10] In the premises, the following order is made:

1. The application for leave to appeal is dismissed with costs, including the costs of two counsel on scale C

[redacted]

P.J. LOUBSER, J

For the Applicant: Adv. L. M. Spiller
Instructed by: Hajibey Bhyat Mayet and Stein Inc, Johannesburg
c/o Van der Merwe & Sorour, Bloemfontein

For the First Respondent: Adv. S. Symon SC, with adv. D. Sive
Instructed by: Fluxmans Attorneys, Johannesburg
c/o EGCM Attorneys, Bloemfontein

[8] Tiekiedraai Eiendomme (Pty) Ltd v Shell SA Marketing (Pty) Ltd 2019 (7) BCLR 850 (CC)