IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

REPORTABLE

Case No.: **AR188/2023**

Court *a quo*: **30823/2019**

In the matter between:

MOMENTUM METROPOLITAN LIFE LIMITED Appellant

and

AROON LAKHOO Respondent

ORDER

On appeal from: the District Magistrates Court, Durban (Mr H M Msweli) sitting as court of first instance:

1. The appeal is upheld with costs, such costs to include the costs of the application for condonation.
2. Paragraph 2 of the Magistrate's order is substituted with the following:

   '[2] Judgment is granted in favour of the plaintiff:

   (2.1) in the amount of R124 914.69;

   (2.2) together with interest subject to *in duplum* and limited to the amount of R25 714.69 such that the total recoverable shall not exceed R159 629.38;

   (2.3) costs of suit on an attorney-client scale'.

JUDGMENT

Harrison AJ and Keshav AJ

[1] This is an appeal against the second paragraph of the order of the magistrate, Mr H M Msweli, in respect of his judgment dated 30 January 2023. The second paragraph grants absolution from the instance with no order as to costs.[1]

[2] The appeal in the present matter is hardly surprising given that an order of absolution has the effect of a final order and no further action can be instituted on a cause of action, which would now have prescribed. The order of absolution was granted against, as will become apparent below, against the only real issue, namely whether the National Credit Act 34 of 2005 ('the NCA') is applicable to the acknowledgement of debt, which formed the basis of the appellant/plaintiff's cause of action.

[3] The appellant has also raised the issue as to whether the magistrate could *mero motu* raise the issue of non registration of the plaintiff and no assessment of over indebtedness in terms of the NCA in circumstances where these defences had not been specifically pleaded, however, if the appeal court agrees with the appellant on the issue, that the NCA does not apply to the acknowledgement of debt, then this issue of whether the magistrate raised certain points relating to the NCA the point *mero motu* becomes moot, and it will then accordingly be unnecessary to decide these issues.

[4] Before dealing with the merits of this matter, it was necessary to note that there were certain defects in the record which came on appeal. Those defects were pertinently addressed in an application for condonation. A substantive application for condonation was made, and it clearly sets out the nature and manner in which the

[1] The first order sought dismissed certain special pleas. There is no counter appeal in respect of that order and, hence, it is only the issue of the absolution which is before the appeal court.

appellant's attorneys sought to recreate the record in compliance with the rules of court, and, at the outset of the hearing of this appeal, that condonation was granted and it is accordingly unnecessary to address the matter any further, save and except to record in this judgment that such condonation was granted pursuant to a substantive application which clearly sets out the nature and manner in which the appellant's attorneys sought to comply with the rules of court. The attorneys are to be complimented on the manner in which they approached the condonation and, from a reading of the supporting affidavit, it is clear that it is not through any fault of the appellant or the appellant's attorneys that the record was incomplete.

[5] There was no opposition from the respondent and that condonation having been granted, it follows that the costs of the condonation should form part of the costs of this appeal.

[6] The background to this appeal is that the respondent was a financial advisor with an entity named Plan Smart Trade (Pty) Ltd trading as Tescon Financial Advisors ('Tescon'). Tescon was a financial advisor which sold insurance products from the Momentum Group Ltd ('Momentum'), and the respondent was one of the financial advisors in the employ of Tescon.

[7] During or about 2012, Tescon stopped selling Momentum insurance products and became a franchise within Discovery Ltd.

[8] The acknowledgement of debt, which forms the subject matter of this appeal, was subsequently signed by the respondent (I have dealt with the dispute relating to the signature and how the document came to be signed, hereunder), arising out of a clawback of commission advances, which had been paid to Tescon and the respondent in respect of Momentum policies which had been sold by him to the clients of Tescon.

[9] During the course of the trial this was referred to as 'the clawback of upfront commissions'.

[10] In effect, the respondent had received greater commissions than that which ultimately proved to have been earned and, by virtue of them having been paid upfront, he was obliged to reimburse these amounts to Momentum. These amounts were calculated and then formed the subject matter of the acknowledgement of debt, which was signed by the respondent on 18 May 2010.

[11] That acknowledgement of debt provided for periodic payments and when the respondent ceased making payments in March 2018, the appellant instituted action in the magistrates court for payment of the sum of R124 914.69.

[12] It is necessary to record that the acknowledgement of debt was for R75 314.69, and the appellant has correctly acknowledged that interest *in duplum* would apply to the matter. This is dealt with hereunder.

[13] The respondent defended the magistrates' court action and raised no less than six special pleas ranging from challenging the authority of the named plaintiff to institute the action, prescription, *locus standi*, to non-compliance with section 129 of the NCA. It is unnecessary to consider these special pleas as they were all dealt with in the magistrates' court, and dismissed.

[14] Additionally, the respondent sought to suggest that he had signed the acknowledgement of debt under duress and that he did not sign the document in front of the witnesses in question. The contradictory nature of these defences is self-evident as the contention of duress defeated any suggestion that he did not sign the document; furthermore, the document is not one which requires to be witnessed and the respondent's signature is all that is necessary to have a binding acknowledgment of debt.

[15] Additionally, the respondent challenged the use of copies of the acknowledgement of debt.

[16] The magistrate correctly found that the acknowledgement of debt was valid and binding on the respondent, and that there was no duress in signing the

document. This only left the issue of the applicability of the NCA and the issue of its compliance.

[17] All other issues of fact and law were determined in favour of the appellant, and it was only during the course of judgment that the magistrate raised, *mero motu*, that the acknowledgement of debt was a document which was subject to the NCA, and in this regard, the magistrate stated as follows in her judgment—

'[76] The Plaintiff in this matter pleaded compliance with Section 129 as well as 130 of the Act without pleading registration as a financial service provider with the Regulator and no evidence of such registration was ever discovered or placed on file.'

[18] The learned magistrate went on to find as follows—

'[79] The NCA was promulgated against the background of a history of inequality in bargaining power which often resulted in large credit providers imposing their will, unreasonably, upon vulnerable credit consumers. The purpose of the NCA, broadly speaking, is therefore to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry. It provides for the protection of credit consumers against the historical abuses by credit providers in a manner articulated in ss 3(a)-(i). For purposes of the present inquiry three of these protections are of particular significance. Section 3(d) is directed at promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers. Sections 3(g) and (i) are directed pertinently at the protection of over-indebted consumers. Section 3(g) seeks to protect over-indebted consumers by providing mechanisms for resolving their over-indebtedness 'based on the principle of satisfaction by the consumer of all responsible financial obligations'. In similar vein s 3(i) seeks to protect consumers by 'providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under the credit agreement'.

[80] The Defendant has complied with such agreement even though [it] fell shot on compliance with the act as mentioned above it follows that this court cannot enforce the agreement that is clearly evident that is not fully compliant with the act and the decree of absolution will be appropriate in the given circumstances.' [Sic.] (Footnotes omitted.)

[19] What then followed was the order for absolution from the instance.

[20] What is not clear from the magistrate's judgment is whether the order for absolution followed as a consequence of it being alleged that it was not proved that Momentum was a registered credit provider, or whether it was because there was no proper investigation as to whether the respondent was overindebted or not.

[21] These issues were raised *mero motu* by the magistrate in the judgment alone.

[22] In *Ratlou v Man Financial Services (Pt) Ltd*,[2] the Supreme Court of Appeal found that even if a settlement agreement met with the definition of a credit transaction, on a purposive interpretation, the NCA was not to apply to settlement agreements where the underlying agreements fell outside the ambit of the NCA. The NCA is concerned with the advancing of money on the granting of credit.

[23] In *Grainco (Pty) Ltd v Broodryk NO en andere*,[3] it was held that an acknowledgement of debt arising out of damages and not a money lending transaction, did not fall within the ambit of the NCA.

[24] In *Ribeiro and another v Slip Knot Investments 777 (Pty) Ltd*,[4] the court concluded that the NCA was not designed to regulate settlement agreements where the underlying agreement or cause was not one which fell within the NCA.

[25] In the present case, the acknowledgement of debt is for the clawback of commissions earned by the respondent. That commission agreement was not an agreement in terms of the NCA, and the underlying *causa* for the acknowledgement of debt, being such commissions, does not attract the application of the NCA. The commissions were not advances or credit. It was payments for work done. These policies were cancelled and gave rise to the clawback on the commissions already paid.

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[2] *Ratlou v Man Financial Services (Pty) Ltd* [2019] ZASCA 49; 2019 (5) SA 117 (SCA) paras 21, 22, and 26.

[3] *Grainco (Pty) Ltd v Broodryk No en andere* 2012 (4) SA 517 (FB).

[4] *Ribeiro and another v Slip Knot 777 Investments (Pty) Ltd* [2010] ZASCA 174; 2011 (1) SA 575 (SCA).

[26] As has been correctly argued by Ms Scallan, for the appellant, before us, the NCA does not apply to the acknowledgement of debt and the magistrate's finding that it did apply, and, hence, there should be absolution, is misdirected. The misdirection also applies to the requirements raised by the magistrate. On the issue of non-registration, the defendant had been selling the plaintiff's products and accordingly had to have known of its registration lest he be acting unlawfully. On the issue of an assessment, the payments prior to the institution of action prove that the defendant could and did pay the amounts. In light of the facts of the case the defendant could not and did not plead the issues raised by the Magistrate. They were non-issues.

[27] In light of the clear authorities referred to above, it is clear that the acknowledgement of debt was not an agreement, which was subject to the NCA, but was a repayment due in terms of advances on commissions, which fell outside the NCA.

[28] In such circumstances, the only basis upon which the magistrate found that there should be absolution from the instance is flawed.

[29] Accordingly, the magistrate, having found in favour of the appellant on all other aspects, should have granted judgment.

[30] In light of the aforegoing findings, it is unnecessary to go into whether the magistrate was entitled to *mero motu* raise the issue of the NCA in his judgment. This is not something which this appeal has to concern itself as by virtue of the finding that the Magistrate misdirected on the issue of the absolution, the appeal can be decided on that point alone.

[31] As the appeal is successful, it also follows that the costs of the application for condonation should form costs of the appeal and, hence, the following order is granted.

1. The appeal is upheld with costs, such costs to include the costs of the application for condonation.
2. Paragraph 2 of the Magistrate's order is substituted with the following:

‘[2] Judgment is granted in favour of the plaintiff:

(2.1) in the amount of R124 914.69;

(2.1) together with interest subject to *in duplum* and limited to the amount of R25 714.69 such that the total recoverable shall not exceed R 59 629.38;

(2.2) costs of suit on an attorney-client scale’.

G M HARRISON AJ

I agree.

KESHAV AJ

Appearances

For the Appellant:	Adv J Scallan
Instructed by:	GERINGS ATTORNEYS
Address:	79 HAMLIN STREET
	HIGHLANDS NORTH EXTENTION
	JOHANNESBURG
Ref:	M ZIETSMAN/MO1252
Tel:	011 440 1282
Email:	madeleine@gerings.co.za

For the Respondent:	Mr A Lakhoo (In person: No appearance)
Address:	37 DUIKER ROAD
	ISIPINGO BEACH
Email:	lakhooa@gmail.com

Date reserved:

Date of delivery: