THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: ***NO***
(2)	OF INTEREST TO OTHER JUDGES: ***Yes***
(3)	REVISED:

Date: ***2022*** Signature:

CASE NO: 15066/2020

In the matter between:

COOKS, HENDRIENA JOHANNA Applicant

NEL, MATTHYS JOHANNES Respondent

JUDGMENT

1. On 11 October 2022 I issued an order in which provisional sentence was refused and the Defendant was required to file a plea. These are my reasons for that decision.

2. Plaintiff brought an application for provisional sentence based on an acknowledgement of debt ('AoD').

3. Plaintiff had sold her property known as the Farmhouse to the Defendant for R5 500 000.00 (five million five hundred thousand rands). At that time the property was run as a guesthouse.

4. The parties agreed that Defendant would pay the Plaintiff an amount of R1 000 000.00 (one million rand) as a deposit and obtain a home loan for the balance. Defendant was able to secure a loan of R4 500 000.00 (four million five hundred thousand rands) but could not afford to pay the deposit as agreed between the parties.

5. Plaintiff then agreed to allow Defendant to pay this amount over time. She also sold several movables to him for an amount of R1 000 000.00 (one million rand) which was added to the total amount owed by him. Defendant was thus indebted to the Plaintiff in the amount of R2 000 000. 00 (two million rand).

6. An agreement of sale was signed on 27 August 2019. On the advice of Plaintiff's attorney, the debt was reduced to writing in the form of an AoD which was duly signed by the Defendant on 27 August 2019.

7. The relevant terms and conditions of the AoD are as follows:

    7.1. Defendant acknowledged his indebtedness to the Plaintiff in the amount of R2 000 000.00 (two million rand),
    7.2. The capital amount due and payable by the Defendant to the Plaintiff is for the agreed balance owing in respect of the immovable property and movable assets sold,
    7.3. Defendant agreed to repay the capital amount through monthly instalments of R25 000.00 (twenty-five thousand rand) each together with interest thereon of 6.75% *a tempora morae*,

7.4. The first instalment was payable on the last of the month in which the immovable property was transferred to the Defendant,

7.5. The Defendant would make payment of the instalments on or before the last day of every succeeding month until the capital amount and interest thereon had been paid in full, and

7.6. If the Defendant defaults on any payment by the due date the full balance outstanding will immediately become due and payable together with interest thereon and the Plaintiff may proceed immediately to recover the total balance outstanding.

8. The immovable property was registered in the Defendant's name on 9 January 2020. Accordingly, the first instalment became due on 31 January 2020. Defendant failed to make the payment on the due date.

9. Plaintiff sent him a letter of demand on 3 March 2020 in which she demanded the full outstanding amount within five (5) days of receipt thereof. Defendant failed to make the payment.

10. Plaintiff then issued provisional sentence summons on 30 June 2020 for the total amount of R2 000 000.00 together with interest *a tempora morae* of 6,75% per annum calculated from 1 June 2020.

11. An AoD is a liquid document and provisional sentence summons could ordinarily be issued on that basis.[1]

12. However, the Defendant entered a notice of intention to defend, and it is at this point that the matter took an unusual turn.

13. The Defendant represented himself. Apparently, Defendant was previously represented but could no longer afford legal services.[2] He then took it upon himself to research the law, with some obvious assistance and to appear in court himself.[3]

14. In his answering affidavit Defendant takes issue with aspects of the sale agreement, claims that two conditions therein had not been met, one of which required the Plaintiff to do some repairs to the property.

---

[1] Uniform Rule 8. See also Harms *Civil Procedure in the Superior Courts*

[2] 13-1

[3] Oral submissions by the defendant

On this basis he alleges that he has a counterclaim. He also alleges that he is unable to satisfy the judgment debt.

15. Notably the Defendant does not deny that he signed the AoD or that the signature on the document was not his.

16. Plaintiff in her replying affidavit denies that the AoD is conditional on the conditions being met in the sale agreement and deals with all the matters raised by the Defendant. She also takes issue with his credibility.[4]

17. The Defendant filed a supplementary affidavit of 6 June 2022[5] in which he raises the possibility that the provisions of the National Credit Act (NCA)[6] apply to the AoD. In his view he ought to have received a notice under section 129 of the NCA. However more importantly he points to the fact that because the AoD constitutes a credit agreement as contemplated in s 40 of the NCA, the Plaintiff should have registered as a credit provider at the time the AoD was concluded unless the relationship between the parties was one that is not at arm's length as contemplated in the NCA. He avers that because the Plaintiff was not registered as a credit provider at the time of signing of the AoD the agreement would be null and void but Plaintiff could still pursue the debt but through a claim for unjustified enrichment.

18. The Defendant asks that the matter be referred to trial because in his view this would allow a full ventilation of the commercial relationship between the parties.

19. The relevant sections in the NCA are section 4(2)(b)(iii) and (iv), s40 and s42(1).

20. Section 40 provides that a person must apply to be registered as a credit provider if the total principal debt owed to the credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1).

---

[4] 10-1
[5] 09-87
[6] No 34 of 2005

21. Section 42(1) requires the Minister every five years, by notice in the Gazette, determine a threshold for the purpose of determining whether a credit provider is required to be registered in terms of section 40(1).

22. As of 1 June 2006, this threshold was R500 000 (five hundred thousand rand).[7] The threshold of R500 000 was amended in 2016 to "nil". [8]

23. Section 4 (2)(b)(iii) of the NCA provides that the Act applies to every credit agreement between parties dealing at arm's length except between natural persons who are in a familial relationship and are co-dependent on each other,[9] or one is dependent on the other.[10] Section 4 (2)(b)(iv) excludes any other arrangement in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction or that is a type that has been held in law between parties who are not dealing at arm's length.

24. In his heads of argument, the Defendant referred this court and the Plaintiff's representatives to a landmark decision of the SCA in ***Du Bruyn NO and Others v Karsten*** [2018] ZASCA 143 (28 September 2018).

25. The Defendant relies on the facts in *Du Bruyn* as support for his contention that notwithstanding the duration of their friendship, Plaintiff and Defendant also enjoyed a commercial relationship where he provided her with occasional services for which she paid and the AoD complied with all the features of a credit agreement as contemplated in the NCA.

26. I summarise *Du Bruyn* at length here because of its significance to this case.

27. The facts in *Du Bruyn* were as follows. Mr Du Bruyn and his wife owned several companies and were involved in the business of sealing industrial leaks. The respondent Karsten was like a son to them.

---

[7] GG 28893 1 June 2006
[8] GN513 11 May 2016, item 2
[9] Section 4 (2)(b)(iii)(aa)
[10] Section 4 (2)(b)(iii)(bb)

Karsten had been brought into the business by Du Bruyn with a view to him eventually taking over the business. Karsten was appointed as the technical director by Du Bruyn in 2008 and eventually ended up holding a substantial number of shares in both companies and 50% member's interest in the close corporation, Naisa.

28. In 2012 there was a falling out between Du Bruyn and Karsten over operational issues in the business. The parties decided to separate and during this process, Karsten eventually sold all his interest in the various entities to Du Bruyn. Pursuant to that, separate sale agreements in respect of three entities were drawn up.

29. All three sale agreements were identical for all intents and purposes. They were all signed on 26 April 2013. The amount payable for the shares in the different entities differed but in total they amounted to R2 000 000.00. The same terms of payment were applicable to all three agreements: a deposit of R500 000 was to be paid by 1 May 2013, thereafter instalments of R30 000 to be paid monthly and interest to be levied on the deferred amount. In all three agreements Mr and Mrs Du Bruyn bound themselves as sureties and co-principal debtors. They also undertook to register a covering bond over their immovable property.

30. It was common cause that Karsten was not registered as a credit provider in accordance with s40 of the NCA at the date of conclusion of the agreements namely 26 April 2013. He accepted though that he had to be registered as a credit provider to facilitate the registration of the covering bond. His registration occurred on 27 November 2013.

31. Du Bruyn defaulted on the instalment payments. In November 2014 Karsten instituted proceedings for the balance of the purchase price. The Du Bruyns' defence was that the agreements were null and void due to non-compliance with the NCA. [11]

32. The SCA then dealt squarely with the two questions raised in these proceedings: did the agreements of sale fall within the definition of credit agreements under the NCA and did they constitute arms-length

[11] *Du Bruyn* paras 6-11.

transactions between the parties as contemplated in section 4(2)(b) of the NCA ? This enquiry involved the evaluation of the evidence.

33. In that case Karsten argued that because of the almost familial relationship between Karsten and Du Bruyn there was no attempt by Karsten to get the utmost advantage out of the transaction, that the sale was not on the open market but within the context of a family business. The special relationship between the parties was further demonstrated by the agreement to pay by instalments at a nominal rate of 5%.[12]

34. The SCA rejected these arguments based on other evidence in the matter, namely that when it became apparent that Karsten was unable to procure the necessary finance to buy Du Bruyn out, Mr Du Bruyn then undertook a valuation of the business in order to determine a fair price which could not be said to be a family price. Both parties instructed their respective attorneys through whom negotiations were conducted. Things soured further and the breakdown of trust was evidenced by Karsten threatening to sell the shares on the open market if Du Bruyn would not buy them failing which he would liquidate the business. The SCA found that these were actions of someone who was acting independently and "*that the evidence emphatically shows that the sale agreements were arms-length transactions, thus falling within the ambit of the NCA*".[13]

35. At para 18 of that judgment the court states:

    35.1. "*The real issue in this appeal is whether the full court in Friend v Sendal*[14] *was correct in finding that the NCA was directed only at those in the credit industry and did not apply to single transactions where credit was provided.*"

36. The Court then found that the basis upon which the full court in *Friend* had decided that the NCA did not apply to single transactions was not aligned to decisions in the same division and was inconsistent with the approach taken by the Constitutional Court in *National Credit Regulator*

---

[12] Supra para 14-15

[13] Para 17

[14] [2012] ZAGPPHC 162; 2015 (1) SA 395 (GP) (3 August 2012)

v Opperman & others.[15] The Court analysed a few decisions which dealt with this issue which for current purposes I do not traverse. But see paras 20 – 25 and para 27 where the SCA finds that the approach in *Friend* is difficult to reconcile with the interpretation of the language of section 40.

37. The SCA found that the only conclusion to draw was that the requirement to register as a credit provider is applicable to all credit agreements once the prescribed threshold[16] is reached irrespective of whether the credit provider is involved in the credit industry and irrespective of whether the credit agreement is a once-off transaction. It notes that this is an imperfect solution, but it is one for the legislature to remedy.[17] The court found that the appeal succeeded.

38. In her supplementary replying affidavit, the Plaintiff sets out in some detail the history and nature of her relationship with the Defendant. According to her she was friends with the ex-wife of the Defendant, and they were social friends.[18] Her friend and the Defendant became entangled in a divorce, and she lost contact with him for a while. Defendant reached out to her sometime later and they resumed their social interactions with drinks and dinners together. The Defendant confided in her about personal matters, and she relied on him when her son tragically passed away. Because she knew him well, she agreed to sell the property to him subject to him signing the AoD.

39. She admits that she included an interest component but that this is far less than what a financial institution would charge.

40. She then attaches a few WhatsApp messages and email communications which demonstrate that in her view the relations between the parties was not an arm's length one. A cursory review of these confirm that they did address each other as 'Matt' and 'Drienie', used caring words in their communications, asking after their health and praying for each other.

---

[15] See paras 18, 19 and 20 for a full discussion of these cases.

[16] In *Du Bruyn* there was no dispute that R500 000.00 was the applicable threshold at the time of conclusion of the sale agreements.

[17] Para 28

[18] 10-31 onwards. Para 4 -

41. In response to the Defendant's arguments Mr Geyer on behalf of the Plaintiff relied on the decision of *Friend*[19] a decision of the full bench of Gauteng division. In relying on *Friend*, Mr Geyer argued that the parties knew each other for almost 18 years, that the interest component was a special low price and that the relationship as evidenced by the WhatsApp and emails shows that they were not at arm's length but close friends. He did not engage with the facts and the ratio in *Du Bruyn* and the recent amendments of the NCA.

42. The difficulty for the Plaintiff in this matter is that *Friend* has been expressly dealt with and overturned by the SCA in *Du Bruyn*.

43. Furthermore, when regard is had to the facts in *Du Bruyn*, the parties in that transaction could be said to be much closer than the parties in this one – they were not mere friends but shareholders invested in a relatively small business, in which they shared common objectives of running it profitably. They also knew each other for a long period of time. The Appellants had taken Karsten under their wing and Du Bruyn had hopes of him taking over the business.

44. Yet even on those facts the SCA found on the basis of the other evidence – namely that the parties in their separation process behaved like independent parties – that the transaction was at arm's length.

45. In my view if the Plaintiff wishes to distinguish this case from the facts in *Du Bruyn* to make her case that this transaction was not an arm's length one, or was in some other way excluded from the provisions of the NCA, then she needs to establish a more detailed factual sub-stratum than the limited WhatsApp messages and emails put up in these proceedings.

46. Likewise, if the Defendant wishes to show that the transaction was an arm's length one and falls within the NCA then he should also be given an opportunity to bring evidence in support of this. Defendant was of

[19] [2012] ZAGPPHC 162; 2015 (1) SA 395 (GP) (3 August 2012)

the view that the balance might tip in his favour if the matter was referred to trial.[20]

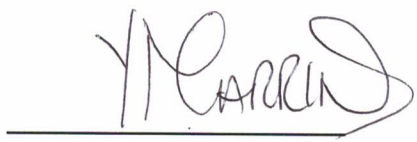
47. In deciding to refer the matter to trial I did consider whether the filing of additional papers in the matter would be of assistance. However, in my view the matter could only be properly decided with a full ventilation of the issues, where evidence can be led and tested by cross examination by both parties, and with the benefit of full argument, and not in attenuated proceedings such as these.

48. Accordingly, I refused to grant provisional sentence and referred the matter to trial where the summons should serve as summons in the action and the Defendant should file his plea.

49. Because I had made my decision on this basis I elected to reserve the issue of costs.

50. I note that in my order of 11 October 2022 I do not expressly state that the matter is referred to trial and that Plaintiff's summons could serve as summons in the action, although requiring the defendant to file a plea is an obvious referral to trial.

51. If there were any doubt about my order, then I clarify it here. Provisional sentence is refused. Plaintiff's summons can serve as summons in the action. Defendant is required to file his plea within 15days of date of the order. Costs are reserved.



CARRIM AJ

[20] See *Twee Jonge Gezellen (Pty) Ltd and Another v Land and Agricultural Development Bank of South Africa t/a The Land Bank and Another* (CCT 68/10) [2011] ZACC 2; 2011 (5) BCLR 505 (CC) ; 2011 (3) SA 1 (CC) (22 February 2011)

Appearances:

For the Plaintiff:	**ADV H F GEYER**
Instructed by:	DF Oosthuizen Inc.
For the Defendant:	**Self-represented, M J Nel**
Date of hearing:	10 October 2022
Date of judgment:	27 October 2022