THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case no: 1054/2013

In the matter between:

FIRST NATIONAL BANK ─ A DIVISION OF FIRSTRAND BANK LIMITED **APPELLANT**

and

CLEAR CREEK TRADING 12 (PTY) LTD **FIRST RESPONDENT**
LUCKY SOLOMON SELEMELA **SECOND RESPONDENT**

Neutral citation: *Firstrand Bank v Clear Creek Trading* (1054/2013) **[**2015] ZASCA 6 (9 March 2015)

Coram: Lewis, Willis and Mbha JJA and Van der Merwe and Gorven AJJA

Heard: **16 February 2015**

Delivered: **9 March 2015**

Summary: High Court dealing with separated issue in terms of Rule 33(4) ─ no order made separating the issues ─ issue to be determined not stated at all, let alone with clarity and precision ─ no factual basis laid on issue sought to be determined ─ factual matrix relevant to interpretation of contract ─ not appropriate or possible to determine the issue.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Kollapen J sitting as court of first instance)

1 The appeal is upheld.

2 The order of the court below is set aside and substituted by the following: 'No order is made on the separated issue save that the costs arising from the separated issue shall be costs in the cause.'

3 Each party shall pay its own costs of the appeal.

JUDGMENT

Gorven AJA (Lewis, Willis, Mbha JJA and Van der Merwe AJA concurring):

[1] This matter concerns an issue dealt with in the North Gauteng High Court before Kollapen J under rule 33(4) of the Uniform Rules. The issue related to whether the provisions of the National Credit Act 34 of 2005 applied to an agreement. This arose as follows. The appellant, First National Bank (FNB) loaned money to the first respondent, Clear Creek Trading 12 (Pty) Ltd (Clear Creek) against the security of a mortgage bond. The second respondent stood surety for the due performance of the agreement by Clear Creek. FNB sued Clear Creek for breach of the agreement and sought to foreclose on the mortgage bond. It also sued the second respondent under a deed of suretyship. The only defence raised in the plea was that the agreement was unlawful for two reasons. First, certain provisions in the agreement were said to have had the general purpose and effect of deceiving Clear Creek and so contravened

s 90(2)(a)(ii) of the Act. Secondly, it was claimed that FNB had failed to comply with s 81(2) and (3) of the Act. The latter subsections required FNB to properly assess Clear Creek's general understanding and appreciation of the risks and costs of the proposed credit, and of its rights and obligations under the agreement. The nett effect of the plea was that, because the agreement was unlawful for one or both of the above reasons, Clear Creek was relieved of any obligation to perform.

[2] The Act would ordinarily not apply to the agreement. This is made clear in s 4(1) of the Act. The relevant parts of s 4(1) read as follows:

'(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 . . . 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)'.

Section 9(4) says that a mortgage agreement is a large agreement. It was submitted before us that, because no evidence was led that Clear Creek had any income at all, the agreement was not hit by s 4(1) of the Act. Clear Creek was a juristic person. If Clear Creek had an asset value or annual turnover greater than the threshold set by the Minister under the Act, it was excluded in terms of s 4(1)(a)(i). If it had an asset value or annual turnover below that threshold, s 4(1)(b) made s 9(4) applicable and mortgage bonds were excluded. So, regardless of the asset value or annual turnover of Clear Creek, the Act did not, by law, apply to the agreement.

[3] In clause 1 of the agreement, which is headed 'Introduction', the following phrase is found:

'This agreement is governed by the National Credit Act 34 of 2005 ("the Act").'

There are also various references to provisions of the Act in other clauses. For example, there is a provision for administration charges to be imposed if letters are written in terms of Part C of Chapter 6 of the Act.[1] Also, collection charges are limited to those allowed in Part C of Chapter 6. It also provides that if the agreement is being reviewed in terms of s 86 of the Act, FNB can give notice to terminate the review in the prescribed manner. Any increases in fees or charges prescribed by the Act are binding and FNB is authorised to transmit to or obtain from the credit bureau all data relating to Clear Creek's credit profile as permitted in terms of the Act. If Clear Creek furnished FNB with incorrect information, Clear Creek may be denied the protection afforded by the Act. The agreement is clearly generated by FNB in a standard form.

[4] At the commencement of the trial, the parties agreed to deal with whether the Act was applicable to the agreement as a separate issue in terms of rule 33(4). This appears to have been an informal agreement because the only indication in the record to this effect appears in the judgment of the court below. After the issue was dealt with, the following order was granted:

'The provisions of the National Credit Act 34 of 2005 are applicable in respect of the home loan agreement entered into between the plaintiff and the first defendant on 13 February 2008.'[2]

It is this order which is appealed against, with leave of the court below.

[5] The law has long been settled that parties may incorporate legislation into their agreement in certain circumstances. This court held as much in *Tuckers Land and Development Corporation (Pty) Ltd v Kruger*,[3] where it said –

[1] This refers to s 129 of the Act where the consumer is in breach.
[2] FNB was also ordered to pay the costs relating to the issue.

'There is no doubt that parties to a contract may by reference incorporate appropriate statutory provisions therein so as to make them binding upon them as terms of the contract.'

The important qualification in this dictum is introduced by the word 'appropriate'. This necessarily implies that some statutory provisions cannot be incorporated by way of agreement between the parties. Although there is no list of those provisions, it seems that those that attempt to bind non-consenting third parties would not be competent. In addition, those provisions that seek to bind third parties whose powers are derived from the legislation itself cannot be made applicable.[4] The reason for this is obvious; obligations may not be imposed on others without their consent and the machinery of the State cannot be burdened by matters to which it is not intended to apply.

[6] As regards the Act, two examples suffice. Section 129 envisages that a matter can be referred, inter alia, to a consumer court. This is defined in the Act to include a tribunal which is, in turn, a body established by s 26 of the Act. Section 86(10) provides for the involvement of the National Credit Regulator which is established by s 12 of the Act. It would seem clear that entities established by the Act and empowered to give effect to it, are not capable of dealing with an agreement to which the Act would otherwise not apply. If they were to do so, they would be acting *ultra vires* the powers conferred on them by the Act. This would, in turn, mean that those parts of the Act which involve such bodies cannot be made applicable by agreement.

[7] The law is not settled as to the effect of attempting to make legislation as a whole applicable to an agreement if certain parts of the legislation cannot be

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[3] *Tuckers Land and Development Corporation (Pty) Ltd v Kruger* 1973 (4) SA 741 (A) at 745F-G.

[4] H C J Flemming *Krediettransaksies* (1982) at 31, says that parties cannot change the jurisdiction of the courts, create offences, bind third parties or suspend or amend the provisions of other legislation by agreeing to incorporate legislation in their agreement. My summary of the following passage:
'Die partye kan nie die jurisdiksie van die howe wysig nie en kan nie misdade skep nie. Artikel 23 van die Kreditooreenkomstewet geld dus nie as die wet by ooreenkoms van toepassing gemaak is nie. Die partye kan nie derde partye bind of die bepalings van ander wetgewing opskort of wysig nie.'

invoked. If the whole of an Act cannot be made to apply to an agreement, it may be necessary for parties to specify which provisions are to apply. Because of the view that I take of the matter, however, it is not necessary to decide this point and I specifically decline to do so.

[8] I turn now to consider the rule under which the matter was dealt with. Rule 33(4) reads as follows:

'If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.'

What is clear from a straightforward reading of the rule is at least the following. The court may of its own volition consider whether an issue may conveniently be decided separately from other issues in the action. If this is the case, the court may make an order. The order must direct the disposal of that issue in a manner deemed appropriate by the court. The court should also make a corresponding order staying further proceedings until the issue in question has been resolved. If the issue can conveniently be decided separately and one or both parties make an application, the court must make the orders referred to in the last two sentences.

[9] The process of dealing with a matter under rule 33(4) was clarified in *Denel (Edms) Bpk v Vorster*:[5]

'Rule 33(4) of the Uniform Rules - which entitles a Court to try issues separately in appropriate circumstances - is aimed at facilitating the convenient and expeditious disposal of litigation. It should not be assumed that that result is always achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably

[5] *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) para 3.

linked, even though, at first sight, they might appear to be discrete. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately. But, where the trial Court is satisfied that it is proper to make such an order - and, in all cases, it must be so satisfied before it does so - it is the duty of that Court to ensure that the issues to be tried are clearly circumscribed in its order so as to avoid confusion.'

Another helpful guideline is found in *ABSA Bank Ltd v Bernert*:[6]

'It is imperative at the start of a trial that there should be clarity on the questions that the court is being called upon to answer. Where issues are to be separated rule 33(4) requires the court to make an order to that effect. If for no reason but to clarify matters for itself a court that is asked to separate issues must necessarily apply its mind to whether it is indeed convenient that they be separated, and if so, the questions to be determined must be expressed in its order with clarity and precision.'

[10] These principles did not inform the approach adopted in the court below. Rule 33(4) refers to a 'question of fact or a question of law' in a pending action. This must surely mean an issue which arises on the pleadings. If an issue not dealt with in the pleadings is specified for decision under rule 33(4), it amounts to a request that a court give an opinion on a matter not in issue on the pleadings and which cannot dispose of an aspect in issue between the parties. This cannot be what is intended by the rule. In the present matter, the issue placed before the court for decision was not raised on the pleadings by either party. FNB pleaded what it averred were the material terms of the agreement. It did not plead that the Act was applicable. The only tangential reference was in the term concerning interest which, it was pleaded, 'may be varied in the discretion of the plaintiff, subject to the provisions of the applicable Act'. The plea simply

[6] *ABSA Bank Ltd v Bernert* 2011 (3) SA 74 (SCA) para 21.

'noted' the contents of the paragraph which pleaded the terms. This amounts to an admission that those are the material terms. No additional terms were pleaded as being material to the dispute between the parties. In particular, it was not averred that it was a term of the agreement that the Act applied to it. It must have been considered that, because Clear Creek relied on provisions in the Act to found defences to the claim, there was an implicit averment to that effect. Whilst this problem is not, in and of itself, fatal to the procedure adopted, it is indicative of a failure to properly apply the rule.

[11] A further departure from the rule is that no order was made at all. The court below simply allowed the matter to proceed on the basis that the issues had been separated. On my reading of the rule, unless an order is made, the court is required to deal with the action as a whole. Apart from being a requirement in the rule, the fashioning of an order would sharpen the focus of the enquiry as to whether the issue specified can conveniently be decided separately. It also assists in defining the precise ambit of the enquiry to be undertaken.

[12] The simple issue placed before the court below was whether the provisions of the Act applied to the agreement. This formulation gave rise to a number of difficulties, only one of which needs mention. A corollary of invoking s 81(2) and (3) of the Act in defence to the claim is that sections 6(a) and 78(1) cannot apply to the agreement. Section 6(a) provides that part D of Chapter 4 of the Act, under which s 81 falls, does not apply where the consumer under a credit agreement is a juristic person. Section 78(1) echoes this exclusion. A simple order that the Act applies to the agreement then leads to an anomaly where one has to pass over those sections and, therefore, apply the Act selectively. This gives no clarity to the question of whether the respondents are entitled to rely on a defence based on s 81 of the Act.

[13] In my view, the procedure adopted in the court below was not competent under rule 33(4). The failure to make any order and the failure to specify an issue with clarity combined to render the approach incompetent. I do not say that in every case procedural shortcomings will have this result. At a certain point, however, procedural shortcomings cross the line and result in a procedure not being competent under the rule. It is not possible to specify in general terms where that line will be crossed. Each case must be judged on its own merits.

[14] This may be considered to be an unduly formalistic approach to adopt. In this case, however, the failure to address the matter properly under rule 33(4) led to an even more substantial difficulty. This impacted on the ability of the court to arrive at a proper conclusion on the issue.

[15] I refer in this regard to the manner in which the issue was ventilated in the court below. In doing so, the parties failed to place agreed facts before the court by way of rule 33(1) or to lead any evidence. This was clearly felt keenly by the court below which, in its judgment, set out supposed common cause facts. Some of these were challenged by FNB in its heads of argument on appeal. There is no indication in the record that any facts were accepted as being common cause. The facts set out by the court below appear to have been gleaned from parts of the pleadings and, principally, from the plea. The failure to present the court with agreed facts or with evidence means that no facts were placed before the court which bore on the issue. FNB submitted before us that this was not necessary because the issue involved the interpretation of an agreement and that accordingly no evidence was necessary.

[16] This court recently dealt with the approach to take in interpreting documents in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*,[7] in these words:

'Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise".'

Harms DP had paved the way for this approach in *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para 39:

'First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (*Johnson v Leal* 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) *Phipson on Evidence* (16 ed 2005) paras 33 - 64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (*Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corporation and Kimberly-Clark of South Africa (Pty) Ltd* 1985 BP 126 (A) ([1985] ZASCA 132 (at www.saflii.org.za)). Fourth, to the extent that evidence may be admissible to contextualise the document (since "context is everything") to establish its factual matrix or purpose or for purposes of identification, "one must use it as conservatively as possible" (*Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 455B - C). The time has arrived for us to accept that there is no merit in trying to distinguish between "background circumstances" and "surrounding circumstances". The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms "context" or "factual matrix" ought to suffice. (See *Van der Westhuizen v Arnold* 2002

[7] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12.

(6) SA 453 (SCA) ([2002] 4 All SA 331) paras 22 and 23, and *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd and Another* 2008 (6) SA 654 (SCA) para 7.)'

[17] In the present matter, evidence of 'relevant and admissible context, including the circumstances in which the document came into being' seems to me to be crucial. This is particularly so because of the anomaly I have pointed out above. The anomaly places a question mark over whether any consideration at all was given by either party to those parts of the document which refer to the Act. The circumstances as to how the document came to take the form it did seem to me to be highly relevant, particularly since what was signed by Clear Creek appears to be a standard form document.

[18] In addition to the serious procedural shortcomings, therefore, it is my opinion that the issue could not have been properly decided on the basis on which it was dealt with in the court below. In the circumstances, the court below should have declined to grant any order on the issue placed before it and made the costs relating to the ventilation of that issue costs in the cause. All of this means that the appeal should succeed.

[19] As regards the costs of the appeal, both parties argued the matter as if the court below could deal with the issue despite the lack of factual material placed before it. Neither FNB nor the respondents raised the procedural lacunae mentioned above. No party sought to lead evidence or agree a stated set of facts under rule 33(1). Only counsel appointed as *amicus curiae* by the court expressed any reservations as to whether a finding could properly have been arrived at in the circumstances. We are grateful to him for the contribution made to the hearing in this and the substantive areas argued before us.

[20] In the result, the following order issues:

1 The appeal is upheld.

2 The order of the court below is set aside and substituted by the following: 'No order is made on the separated issue save that the costs arising from the separated issue shall be costs in the cause.'

3 Each party shall pay its own costs of the appeal.

T R Gorven

Acting Judge of Appeal

Appearances

For Appellant:	A Gautschi SC (with him M Reineke) Instructed by: Strauss Daly Incorporated, Sandton and Bloemfontein
For Respondent:	B Lesomo of Seokane Lesomo Incorporated, Sandton c/o Ramothello Raynard & Tsotetsi Incorporated, Bloemfontein
Amicus Curiae:	N Snellenburg