THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

REPORTABLE
Case No: 38/2013

In the matter between:

ASMAL AHMED
Appellant

and

ESSA MAHAMED HAROON NOOR **Respondent**

Neutral citation: *Asmal v Essa* (38/2013) [2013] ZASCA 62 (14 May 2014)

Coram: MPATI P, LEWIS, MAYA, SHONGWE JJA and MATHOPO AJA

Heard: 14 March 2014

Delivered: 14 May 2014

Summary: National Credit Act 34 of 2005 – whether loan agreements are credit agreements in terms of the Act – unregistered lender given undated blank cheques for repayment which included participating profit shares to be stipulated by borrower – cheques dishonoured upon presentment – loan agreements not credit agreements and profit shares not 'charges' under ss 1 and 8 of the Act respectively – cheques constituted distinct contracts in writing and provisional sentence competent – holder for value of cheques not obliged when suing the borrower for provisional sentence to comply with s 40(1) and s 129 read with s 130 of the Act.

ORDER

On appeal from: KwaZulu-Natal High Court, Pietermaritzburg (Seegobin J sitting as a court of first instance):

The appeal is dismissed with costs including the costs of two counsel where employed.

JUDGMENT

MAYA JA: (MPATI P, LEWIS JA, SHONGWE JA, MATHOPO AJA concurring)

[1] The central issue in this appeal is whether the respondent was obliged to comply with the provisions of ss 40(1), 129 and 130 of the National Credit Act 34 of 2005 (the Act) before instituting provisional sentence proceedings based on cheques drawn in his favour in respect of loans he advanced to the appellant. The cheques were dishonoured when presented for payment because the appellant had countermanded payment. The KwaZulu-Natal High Court (Seegobin J) answered the question in the respondent's favour. It decided that the Act did not apply to the parties' loan agreements mainly because they were not secured loans as defined in the Act. Consequently, the court below granted provisional sentence against the appellant in respect of the money claims[1] based on the cheques. The appeal against that judgment is with the leave of this court.

[1] R470 000 (less R350 000 subsequently paid) under Case No 7317/10, R1 875 000 under Case No 7785/10 and R1 290 000 under Case No 7786/10, together with interest and costs.

[2] The parties’ contractual relationship and the circumstances surrounding the

exchange of the cheques were matters of strenuous dispute in the court below. According to the respondent, the appellant gave him the cheques as payment for the loans he advanced to him for the purchase and resale of medical equipment to hospitals and a sectional title unit. The amounts and dates on the cheques, which would be inserted by the respondent when so instructed by the appellant, would each include a 'participating share of the profit' made by the appellant on these transactions. The profit share amounts would be determined by the appellant at his discretion. The appellant, on the other hand, contended that the loans were advanced not to him but to Yashen Satyendra Persadh for whom he stood surety. Because Persadh did not have a cheque account, repayments to the respondent would be effected by an electronic funds transfer or a cheque provided by the appellant. The undated cheques were not meant to be deposited and served merely as proof of the loans. When the loan amounts requested and advanced increased in time, the respondent required acknowledgements of debt from Persadh and deeds of suretyship from the appellant in respect of loans above R1 million, which were duly executed. Signed copies were not, however, furnished by the appellant as attachments to his answering affidavit.

[3] The following facts were not disputed. The respondent was not registered as a credit provider in terms of the Act.[2] The appellant inserted the respondent's name, signed and crossed each cheque. He then marked two of the cheques 'not transferable' and one 'not negotiable'. The amounts and dates thereon were, however, inserted by the respondent and the dates represented the time when payment of each of the

[2] The definition of 'credit provider' is set out in s 1 of the Act which reads in relevant part
'"credit provider", in respect of a credit agreement to which th[e] Act applies, means–
…
(*e*) the lender under a secured loan;
…
(*h*) the party who advances money or credit to another under any other agreement ….'

relevant amounts was due. The respondent held the cheques for value and drew them on his First National Bank banking account. Each of the cheques was presented for payment in accordance with its tenor. The cheques were, however, dishonoured because the appellant had countermanded payment. As the bank had no obligation to honour them, notice of dishonour as regards the appellant was accordingly dispensed with under s 48(2)(*c*)(*v*) of the Bills of Exchange Act 34 of 1964.

[4] The appellant defended the proceedings on the basis that the cheques were given as security for the repayment of underlying loans which, on a proper interpretation of s 8(4)(*d*) of the Act, amounted to 'secured loans' as envisaged therein. As s 4(5)(*a*) expressly excludes the use of cheques as a means to pay for goods and services rendered from the operation of the Act, but says nothing about cheques as a method for repayment for secured loans, it had to be presumed that there was no intention to exclude the latter. Alternatively, continued the argument, the loans fell within the ambit of s 8(4)(*f*) of the Act because the portion of the profits from the transactions in respect of which the loans were advanced, which the respondent was to receive, constituted 'a charge' as envisaged in that section. Because of the respondent's failure to comply with the relevant provisions of the Act, provisional sentence could, therefore, not be granted. It was also argued that to exclude dishonoured cheques from the ambit of the Act would allow unscrupulous creditors to avoid the measures built into the Act to protect consumers.

[5] As indicated above, the court below was not persuaded by the appellant's contentions. It found that the Act did not apply to the transactions because the respondent did not retain the cheques as contemplated in the Act's definition of a

'secured loan'. This was so, held the court, because when the appellant delivered the cheques to the respondent, he did not pledge or cede the cheques but promised that they would be honoured. In the court's opinion, to hold that the cheques could be pledged as security under the Act would mean that cheques in respect of loans were subject to the Act. This, in turn, would materially alter the common law applicable to provisional sentence which treats transactions based on cheques as totally distinct from those based on underlying agreements and entitles the creditor to elect which cause of action to pursue. And the legislature could not have intended such a result, at least not impliedly, and would have expressly said so if it did. The court below further held that a 'charge' under the Act had to be known to both parties before they concluded the agreement; an element missing in this case. The court below concluded that as the respondent, who was not obliged to register as a credit grantor under the Act, elected to proceed on the cheques which were not subject to the Act, he was entitled to seek provisional sentence without complying with the notice requirements of ss 129 and 130 thereof.

[6] The issues narrowed significantly on appeal before us. The appellant wholly conceded the respondent's version of the facts, wisely so, in my view, having regard to the manifestly poor quality of his own account. The essence of the case now argued on his behalf was the following. The moneys advanced were loans and the profit share amounts upon which the parties agreed constituted 'a use consideration' for the said loans. In light of s 4(5)(*a*) of the Act, the loan transactions constituted credit agreements. A credit agreement, as defined in the Act, entails credit being granted and the imposition of a 'fee, charge or interest' in respect of the deferred repayment, for the use of the credit. The profit shares qualified as a 'charge', one of the three wide terms used in s 8(4)(*f*) of the Act to describe payment for the use of money owed.

Therefore the loans, of which the cheques were part and parcel, constituted credit agreements and were subject to the provisions of the Act. And because the respondent was not registered as a credit provider, in breach of s 40(1)(*b*) of the Act, the credit agreements were unlawful and thus void in terms of s 89(2)(*d*). The cheques could not found provisional sentence in the circumstances.

[7] It is well-recognized that a cheque that has been properly drawn and issued constitutes a contract in writing, which enjoys the characteristic of negotiability, and must be founded on a *justa causa debendi*, or reasonable cause in order to be valid and enforceable.[3] The obligation to pay, represented by the cheque, which generally arises from some transaction (contractual or otherwise), is dependent upon the validity of that underlying transaction.[4] Thus if, for example, the underlying transaction is voidable, illegal or there has been a failure to perform, a claim by the payee for enforcement of the contract will not succeed.[5] The validity of the underlying loan agreements concluded by the parties here therefore bears some relevance for the enforcement of the obligations arising from the cheques and the competence of the provisional sentence relief in that exercise.

[8] The Act defines a 'credit agreement' widely. In s 1 it describes it as an 'agreement that meets all the criteria set out in section 8'. The relevant parts of s 8, in turn, provide:

'(1) Subject to subsection (2), an agreement constitutes a credit agreement for the purposes of this Act if it is–

[3] *Froman v Robertson* 1971 (1) SA 115 (A) at 120F-G; *Lutzkie & another NNO v Zenith Concessions Ltd* 2003 (6) SA 643 (SCA) para 6.
[4] *Ibid*.

(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.

(2) …

(3) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2) or section 4(6)(b), constitutes a credit facility if, in terms of that agreement–

(*a*) a credit provider undertakes–

(i) to … pay an amount or amounts, as determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and

(ii) either to–

(*aa*) defer the consumer's obligation 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*); or

…

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

…

(d) … a secured loan

(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] Common to all the forms of a credit agreement, including credit facilities and credit transactions, is the requirement of payment of a 'charge', 'fee' or 'interest' as

[5] Above, fn 3.

envisaged in ss 8(3)(*a*)(ii) and 8(4)(*f*)(ii), respectively. The terms 'charge', 'fee' and 'interest' are, however, not defined in the Act. Bearing in mind that the statutory context of s 8 (and indeed all the provisions of the Act) is important in the interpretation of its provisions, it is clear from their ordinary meaning and the context in which the terms are used that they were meant to cover any consideration or payment to be made by a credit borrower to a credit provider for the use of credit under the auspices of the Act. Regard must also be had and effect given to the objects and purposes of the Act, set out in s 3, in interpreting its provisions.[6] Among these purposes is the promotion of 'a fair, transparent, competitive, sustainable, responsible, efficient, effective … credit market and industry and the [protection of] consumers by … promoting responsibility in the credit market by … encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers … promoting equity in the credit market by balancing respective rights and responsibility of credit providers and consumers … addressing and correcting imbalances in negotiating power between consumers and credit providers by … providing consumers with adequate disclosure of standardised information in order to make informed choices'.

[10] Apart from these objectives, the general tenor of the whole Act makes clear that one of its overarching objectives is to ensure that the parties to a credit agreement, especially the consumer, are fully aware of the actual risks and liabilities involved in the proposed undertaking. For example, ss 100 to 106 of Part C of the Act deal with 'Consumer's liability, interest, charges and fees'. The sections make provision for 'cost of credit' which entails the specific types of fees, interest, credit insurance and default administration charges that a credit provider may impose. They also prescribe

[6] In s 2(1) of the Act.

the maximum amounts and the methods by which such amounts must be computed, which the credit provider may not change unilaterally. The painstaking detail of these provisions leaves no doubt that certainty regarding the cost of the proposed credit is imperative. Sections 80(1) and 81 of the Act, which deal with reckless credit, are similarly couched. They require the credit provider to conduct an assessment to ensure that the consumer 'understands or appreciates' the risks, costs or obligations under the proposed credit agreement.

[11] These measures are obviously intended to protect the consumer from any hidden costs that may arise from the credit agreement and to ensure that he or she has an opportunity to consider the precise risk and cost involved before binding himself or herself. In that case, the parties must quantify the charge, fee or interest and specify the manner in which it is to be paid when they determine their contractual terms and conclude the credit agreement. It must follow that the indeterminate profit shares agreed upon by the appellant and the respondent, for which no date of repayment was fixed, which were not guaranteed and could well not even have eventuated, and whose value, if any, was to be determined by the appellant at his sole discretion, cannot qualify as 'a charge' under the Act. The submission made on the appellant's behalf that whether a loan is a credit agreement within the meaning of the Act depends not on its outcome but on its nature – ie what makes the loans credit agreements is the fact that 'extra money was asked for their use' regardless of whether that 'extra money' in the form of profit shares was not specified or ultimately paid, as it was put – simply has no merit. Thus, the loans were not credit agreements as envisaged by the Act if no charges attached to them.

[12] In the light of this finding, the court below correctly rejected the submission that the loan agreements concluded by the parties were secured loans. A 'secured loan' is defined in s 1 of the Act as 'an agreement, irrespective of its form but not including an instalment agreement, in terms of which a person … advances money or grants credit to another, and … retains, or receives a pledge or cession of the title to any movable property or other thing of value as security for all amounts due under that agreement'. It is clear from the facts (and it was wisely not contended otherwise in argument before us) that the cheques were not pledged or ceded to the respondent, a finding made also by the court below. They were issued by the appellant with the intention that they would be honoured on due presentment and, if they were dishonoured, that the appellant would compensate the respondent as holder.[7]

[13] The appellant's reliance on the respondent's non-compliance with the provisions of s 40(1) of the Act is yet another non-starter. According to the section, a person must apply to be registered as a credit provider if he or she 'alone or in conjunction with any associated person, is the credit provider under at least 100 credit agreements … or the total principal debt owed to that credit provider under all outstanding credit agreements … exceeds the threshold [of R500 000] prescribed in terms of s 42(1)'. These provisions require the existence of credit agreements to kick in. As pointed out, there were none here. The respondent, therefore, had no obligation to register as a credit provider in the circumstances.

[14] He similarly had no duty to comply with ss 129 and 130 of the Act before commencing litigation against the appellant. The general import of these provisions is

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[7] *Froman v Robertson* above at 121 F.

that the credit provider is proscribed from commencing any legal proceedings against a consumer, who is in default under a credit agreement, to enforce it, before first giving the consumer written notice thereof and before the lapse of time during which the consumer has failed to respond thereto or has rejected the credit provider's proposals. These provisions also presuppose the existence of a credit agreement and cannot apply if there is none.

[15] The appellant's case can find no support from s 4(5)(*a*) either. In terms of these provisions '[i]f a person sells any goods or services and accepts, as full payment for those goods or services … a cheque or similar instrument upon which payment is subsequently refused for any reason … the resulting debt owed to the seller by the issuer of that cheque or charge does not constitute a credit agreement for any purpose of th[e] Act'. I agree with the court below that it makes no sense at all that the provisions would distinguish between a cheque in terms of which payment for goods or services is to be effected and one in terms of which repayment of a loan is intended by exempting only the former from the operation of the Act. Simple logic dictates that both classes of cheques should similarly be excluded from the ambit of the Act. Suffice it to point out the notorious fact that the Act is not a model of clarity and that a significant number of its provisions are fraught with ambiguity and vagueness as attested by the scores of court decisions interpreting its various provisions.

[16] All the indications are that the parties had no intention whatsoever of concluding credit agreements and bringing their dealings within the scope of the Act. The respondent was fully entitled to invoke the provisional sentence procedure to enforce his claims, which are disputed merely on technical grounds. And the reasoning of the

court below and the conclusion it reached cannot be faulted. The appeal must accordingly fail.

[17] In the result, the appeal is dismissed with costs including the costs of two counsel where employed.

MML Maya
Judge of Appeal

APPEARANCES

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