THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case no: 1120/2022

In the matter between:

ALLIED STEELRODE (PROPRIETARY) LIMITED **APPELLANT**

and

PAUL DREYER **FIRST RESPONDENT**

ALETIA YVETTE DREYER **SECOND RESPONDENT**

Neutral citation: *Allied Steelrode (Pty) Ltd v Dreyer and Another* (1120/2022) [2023] ZASCA 181 (21 December 2023)

Coram: MOCUMIE, CARELSE, GOOSEN JJA and MASIPA and TOKOTA AJJA

Heard: 8 November 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website, and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 21 December 2023.

Summary: National Credit Act 34 of 2005 – whether agreement subject to the Act – loan and acknowledgment of debt not at arm's length – interest only payable upon default of repayment – no requirement for registration.

Civil Procedure – Rule 33 separation of issues – when appropriate – expeditious resolution of disputes and convenience.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Siwendu J, sitting as a court of first instance):

1 The appeal succeeds with costs.

2 The order of the high court is set aside and replaced with the following:

'1 The loan giving rise to the acknowledgment of debt (the AOD) upon which the plaintiff's cause of action is based is not subject to the National Credit Act 34 of 2005.

2 The AOD is not a credit agreement subject to the National Credit Act 34 of 2005.

3 The costs of determining the separated issue are to be paid by the defendant.'

JUDGMENT

Masipa AJA (Mocumie, Carelse, Goosen JJA and Tokota AJA concurring):

[1] This is an appeal against the decision of the Gauteng Division of the High Court, Johannesburg (the trial court) where Siwendu J granted an order declaring that a loan and an acknowledgment of debt (the AOD) was subject to the National Credit Act 34 of 2005 (the NCA). The appeal is with the leave of this Court.

[2] The appellant is a company registered in accordance with the company laws of South Africa. It operates the business of processing and distributing hot steel plates. The first respondent, Mr Paul Dreyer is a businessman and a co-owner of a company called Lasercraft, which was a customer of the appellant.

The second respondent is cited in her capacity as the wife of the first respondent and as a signatory to the AOD. When reference is made to the appellant and the respondents jointly in the judgment, they are referred to as the parties.

[3] I set out the factual matrix in this matter in so far as is necessary for the determination of the appeal. It is undisputed that during the trial only the appellant's witnesses testified namely, Mr W V Rippon and Mr A Chadha. Mr Rippon knew the first respondent for approximately two decades and described a relationship that extended beyond mere business dealings. They shared social outings including a biking rally and visited each other.

[4] During October/November 2013, the first respondent's son suffered a work-related injury, ultimately leading to his demise. It surprised Mr Rippon that the first respondent requested him to accompany him to identify his son's body, on an intimate family matter. This tragic event caused tension between the first respondent and his co-shareholder Mr Tony Cimato, the owner of the premises where the accident occurred, whom he held responsible for his son's fate. Desiring to sever his ties with Mr Cimato, the first respondent decided to purchase Mr Cimato's 50% shares in Lasercraft.

[5] According to Mr Rippon, the first respondent's display of signs of instability prompted a discussion with Mr Chadha on how to assist him. The first respondent required R 28 million to purchase Mr Cimato's shares and only had R 13 million. Mr Chadha offered to loan him R15 million to bridge the gap. Although Mr Rippon initially disagreed he acknowledged their emotional decision to assist.

[6] Mr Chadha highlighted a change in his relationship with the first respondent following the death of his son. The first respondent sought both

business advice and emotional support from him and they formed a close bond. The loan was informal in nature which was sealed with a handshake, with no interest charged. The terms of the loan agreement were later formalised in the AOD at the first respondent's instance which included *inter alia* a grace period of six months before interest would accrue on *mora*.

[7] The appellant claims repayment of R15 million from the respondents. The foundation of the appellant's claim as pleaded, arises from the AOD signed by the parties on 1 October 2014. In their plea, the respondents admitted the existence of the AOD. As part of their defence, they invoked the applicability of the NCA and clause 16 of the AOD. Clause 16 stipulates:

'16 THE DEBTORS will from date of signature hereof, enter into negotiations with THE CREDITOR to pay this PRINCIPAL SUM either partly or full by providing THE CREDITOR with shares in the business that THE DEBTOR have an interest in, namely LASECRAFT (PROPRIETARY) LIMITED. If such negotiations do not come to fruition, clause 1 above shall still apply.'

[8] The appellant pleaded two alternative claims one being that if the AOD was not compliant with the formalities of the NCA, rendering it unlawful and/or void, then the respondents would be unjustly enriched in the amount of R15 million.

[9] At the close of pleadings, the respondents sought the separation of issues in accordance with rule 33(4) of the Uniform Rules of Court. This was opposed, and after hearing argument, Matshitse AJ issued the following order:

'1. It is directed that the following issues ("the separated issues") be separated in terms of Rule 33(4) of the Uniform Rules:

1.1 Whether the loan that constitutes the plaintiff's cause of action (pleaded in paragraph 4, 6 and 7 of the particulars of claim, read with annexure "A" thereto):

1.1.1 is subject to the National Credit Act No. 34 of 2005 ("the NCA"),

1.1.2 was at arms' length (or not) as contemplated in section 4 of the NCA; and

1.1.3 accordingly, whether the loan constitutes an unlawful agreement in section 40(4) of the NCA; and

1.1.4 is for those reasons, void ("the separated issues").

2. It is directed that the separated issues be determined first, with the remaining issues to stand over for determination in due course, if required.

3. Directing the plaintiff/respondent to pay the costs of this application.'

[10] The terms of the order were outlined in a draft order prepared by the respondents, and much hinges on the wording of the separation order. The respondents' contention was that the transaction which is the subject matter in the action, falls under the ambit of the NCA and accordingly, that the appellant should have been registered as a credit provider under s 40[1]. The separation application, involved a dispute over whether the underlying loan or the AOD was subject to

[1] **40 Registration of credit providers**
(1) A person must apply to be registered as a credit provider if the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42 (1).
(2) In determining whether a person is required to register as a credit provider-
(a) the provisions of subsection (1) apply to the total number and aggregate principal debt of credit agreements in respect of which that person, or any associated person, is the credit provider;
(b) each associated person that is a credit provider in its own name and falls within the requirements of subsection (1) must apply for registration in its own name;
(c) a credit provider that conducts business in its own name at or from more than one location or premises is required to register only once with respect to all of such locations or premises; and
(d) **'associated person'**-
(i) with respect to a credit provider who is a natural person, includes the credit provider's spouse or business partners; and
(ii) with respect to a credit provider that is a juristic person, includes-
(aa) any person that directly or indirectly has a controlling interest in the credit provider, or is directly or indirectly controlled by the credit provider;
(bb) any person that has a direct or indirect controlling interest in, or is directly or indirectly controlled by, a person contemplated in clause *(aa)*; or
(cc) any credit provider that is a joint venture partner of a person contemplated in this subparagraph.
(3) A person who is required in terms of subsection (1) to be registered as a credit provider, but who is not so registered, must not offer, make available or extend credit, enter into a credit agreement or agree to do any of those things.
(4) A credit agreement entered into by a credit provider who is required to be registered in terms of subsection (1) but who is not so registered is an unlawful agreement and void to the extent provided for in section 89.
(5) A person to whom this section does not apply in terms of section 39, or who is not required to be registered as a credit provider in terms of this section, may voluntarily apply to the National Credit Regulator at any time to be registered as a credit provider.
(6) When determining whether, in terms of subsection (1), a credit provider is required to register-
(a) the value of any credit facility issued by that credit provider is the credit limit under that credit facility; and
(b) any credit guarantee to which a credit provider is a party is to be disregarded.

the NCA. No evidence was led by the respondents, however, they submitted that the dispute related to the loan rather than the AOD.

[11] In addressing the issue, the trial court, per Siwendu J, initially considered whether the loan was subject to the NCA. In this regard, it considered s 4(1) of the NCA.[2] The nub of the appellant's complaint is that the trial court conflated the issue of the loan and that of the AOD. The trial court considered *Shabangu v Land and Agricultural Development Bank of South Africa*[3] and concluded that it was implausible to draw a distinction between the AOD and the underlying loan. It found that an invalidity of the underlying loan would implicitly taint the AOD as the AOD explicitly identified the loan as its foundation. The trial court found the appellant's argument drawing a distinction between the loan and the AOD, unsustainable.

[12] The trial court, then turned its attention to determining whether the AOD constituted a credit agreement under the NCA, relying on the provisions of s 8

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[2] **4 Application of Act**
(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, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7 (1);
(ii) the state; or
(iii) an organ of state;
(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);
(c) a credit agreement in terms of which the credit provider is the Reserve Bank of South Africa; or
(d) a credit agreement in respect of which the credit provider is located outside the Republic, approved by the Minister on application by the consumer in the prescribed manner and form.

[3] *Shabangu v Land and Agricultural Development Bank of South Africa* [2019] ZACC 42; 2020 (1) SA 305 (CC); 2020 (1) BCLR 110 (CC).

(4)(*f*)[4] and *Fourie v Geyer* (*Fourie*).[5] It concluded that the AOD fell within the scope of the NCA. It further examined whether the loan met the criteria of being at arm's length, as contemplated in s 4 of the NCA. It found that the terms of the AOD included interest payable, payment deferred, and that the appellant was extracting maximum benefit. It concluded that these were consistent with an arms'-length relationship as contemplated in s 4 of the NCA.

[13] On the question of whether the loan constitutes an unlawful agreement under s 40 (4) of the NCA, and is, for those reasons void, the trial court relied on *Du Bruyn v Karstens (Du Bruyn)*.[6] Having considered the appellant's argument regarding an amendment to s 40 (4) in March 2015, the trial court found that the requirement to register as a credit provider existed even prior to the amendment. It found the appellant's argument of retrospective application of the pre-amendment provision unsustainable. Consequently, the trial court found that non-compliance with s 40 (1) rendered the credit agreement unlawful and void under s 40 (4) of the NCA. It ordered the appellant to bear the costs associated with determining the separated issue.

[14] There are two issues which arise in this appeal. The first concerns whether the order granted by the trial court is appealable. The second concerns the application of the NCA. This latter question relates to whether the transaction was concluded at arm's length and whether it constitutes a credit agreement as defined by the NCA.

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[4] 8(4) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is-

. . .

(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.

[5] *Fourie v Geyer* [2019] ZANWHC 42; 2020 (6) SA 569 (NWM) (*Fourie*).

[6] *Du Bruyn v Karstens* [2018] ZASCA 143; 2019 (1) SA 403 (SCA) (*Du Bruyn*).

[15] Shortly before the commencement of arguments, counsel was invited to first make submissions on the issue of appealability. Prior to the hearing, their attention was drawn to *TWK Agricultural Holdings (Pty) Ltd v Hoogveld Boerderybelegings (Pty) Ltd and Others (TWK Agricultural Holdings).*[7] Second whether the timing of the referral of the matter on appeal might not be considered premature. Both counsel submitted that the separated issue is final in nature on the basis that even though the overall dispute between the parties remained unresolved, the trial court's judgment brought finality to the separated issue as set out in *Zweni v Minister of Law and Order of the Republic of South Africa*[8] recently confirmed in *TWK Agricultural Holdings*.[9]

[16] Leave to appeal has been granted in cases where a decision made on an issue reserved for determination under rule 33(4) was definitive of the right of the parties and had the effect of disposing of a portion of the relief claimed in the main action.[10] Where a trial court under rule 33(4) or a similar competent procedure issues an order which has the effect of being a final decision, definitive of the rights of the parties and has the effect of disposing of a substantial portion of the relief claimed in the main action, the order is appealable even if the main action is not yet concluded.[11]

[17] In my view, the judgment appealed against in this matter is definitive of the rights of the parties, disposes of a substantial part of the appellant's main claim

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[7] *TWK Agricultural Holdings (Pty) Ltd v Hoogveld Boerderybelegings (Pty) Ltd and Others* [2023] ZASCA 63; 2023 (5) SA 163 (SCA).
[8] *Zweni v Minister of Law and Order of the Republic of South Africa* [1992] ZASCA 197; [1993] 1 All SA 365 (A); 1993 (1) SA 523 (A) at 532I-533A.
[9] *TWK* fn 7 above, para 21; see also *DRDGOLD Limited and Another v Nkala and Others* [2023] ZASCA 9; 2023 (3) SA 461 (SCA) paras 13, 15 and 31-33.
[10] Van Loggerenberg *Erasmus Superior Court Practice: Volume 2* 2 ed (2021) at D1-440; see also *Erasmus Volume 1* at A2-40.
[11] *Van Streepen and Germs (Pty) Ltd v Transvaal Provincial Division* 1987 (4) SA 569 (A).

and, is final in effect. The issue can no longer be revisited by the high court if and when it considers the alternative claims.

[18] Having said this, I nevertheless believe it necessary to highlight an aspect of concern about the manner in which this matter came before this Court. The purpose of rule 33 is to facilitate the expeditious disposal of litigation. As outlined in *Denel (Edms) Bpk v Vorster*,[12] it was held that where issues are inextricably linked or where they are discreet but the expeditious disposal of litigation is best served by ventilating all issues at one hearing, then the separation should not be granted. The court must therefore thoroughly consider the entire matter to determine the appropriateness and convenience of separating the issues.

[19] As stated in *Copperzone 108 (Pty) Ltd and Another v Gold Port Estate (Pty) Ltd*,[13] an important consideration is whether separation will have the effect of shortening proceedings. In this case the separation of issues has resulted in substantial delays in the finalisation of the matter. This matter exemplifies the importance of courts to carefully consider whether to grant a separation order. The decision resulting from the separated issue did not shorten the proceedings, particularly since alternative claims still required determination. This appeal contributed to a further delay. Given the interlink in the evidence, it may now necessitate another judge to hear the same evidence to determine the remaining claims.

[20] In *Absa Bank v Bernert*[14], this Court stated as follows:

'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 … If for no reason but to clarify matters for itself, a court that is asked to separate

[12] *Denel (Edms) Bpk v Vorster* [2004] ZASCA 4; [2005] 4 BLLR 313 (SCA); 2004 (4) SA 481 (SCA) at 485A-B, see also *First Rand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd and Another* [2015] ZASCA 6 2018 (5) SA 300 (SCA) at 404G-405C.
[13] *Copperzone 108 (Pty) Ltd and Another v Gold Port Estate (Pty) Ltd and Another* [2019] ZAWCHC 34 para 25.
[14] *Absa Bank v Bernert* [2010] ZASCA 36; 2011 (3) SA 74 (SCA) para 21.

issues must necessarily apply its mind 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.' Failure of the court to specify an issue with clarity would impact on its ability to arrive at a proper decision.[15]

[21] Evident from this case is the insufficient consideration given by the trial court in granting the separation order. This is also apparent from the wording of the order. It does not explicitly indicate whether the separated issue to be decided pertained to the loan or the AOD. The issue for determination was not adequately spelled out. Had this been done, it would have been evident that separation was not appropriate. The result was a costly, piecemeal determination of the issues and an unwarranted delay in the finalisation of the matter. This Court increasingly encounters matters where issues are inappropriately separated necessitating remittals to the court of first instance. For this reason, litigants should be cautioned that pursuing piecemeal litigation may result in punitive costs orders, if circumstances warrant. Courts of first instance are urged to meticulously apply the rules regulating the separation of issues to ensure that the objectives of rule 33 (4) are effectively met.

[22] On the merits, it is evident that the trial court conflated the issue of the loan with that of the AOD. The manner in which the separated issue was formulated and addressed, led to the mischaracterisation of the issue to be determined. As a result hereof, the trial court misdirected itself. Although the respondents argued the term loan and AOD were used interchangeably in the judgment, it was undisputed that the loan was orally agreed upon before the AOD. It was also not disputed that terms of the loan differed from those in the AOD – to the extent that the loan was accepted by the first respondent and with no interest was charged. It

[15]Op cit fn 9 above.

was, therefore, necessary to properly define the issue to be determined in order for the court to reach a proper decision. The invalidity of the loan would undoubtedly render the AOD null and void.

[23] Section 4(1), dealing with the application of the NCA, states:

'(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 . . .'

The appellant correctly submitted that where it is found that the transaction was not at arm's length, the court should conclude that it is not subject to the NCA.

[24] Section 4(2)*(b)* outlines instances where the parties are not dealing at arm's length and includes:

'(i) . . .

(ii) . . .

(iii) a credit agreement between natural persons who are in familial relationship and-

(aa) are co-dependent on each other; or

(bb) one is dependent upon the other; and

(iv) any other arrangement-

(aa) 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

(bb) that is of a type that has been held in law to be between parties who are not dealing at arm's length.'

[25] What is apparent from the evidence is that the first respondent, Mr Rippon and Mr Chadha had developed a friendship. They formed a close bond in personal matters outside the realms of business. The loan was offered as a gesture of friendship. It was not customary for the appellant to lend money and this was a

one-time occurrence. No interest was levied on the loan at all and the AOD, save in the event of mora. Given these facts, in my view, the parties were not dealing at arm's length, as provided for in s 4(2)(*b*)(iii). The AOD gave expression to that. There was no evidence that the appellant sought to obtain the utmost advantage from the transaction. The agreement lacked the character of a credit agreement.

[26] In terms of s 4(2)(*b*)(iv) of the NCA, where parties are not independent of one another and where they do not strive to obtain the utmost advantage from the transaction, the transaction is not at arm's length. In my view, the evidence shows that the first respondent was dependant on Messrs Rippon and Chadha and ultimately on the appellant.

[27] The facts in *Fourie* are distinguishable. While in *Fourie* the parties were friends, they engaged in occasional business transactions separate from their personal relationship. The court found that they were transacting at arm's length. The facts in in this matter are also distinguished from *Du Bruyn* since, in that judgment, the court found that the parties' relationship had soured, and Mr du Bruyn was clearly attempting to gain the utmost advantage from the transaction. In the current case, the loan agreement giving rise to the AOD was clearly not at arm's length.

[28] In *Forsyth v Heydenrych*,[16] where a loan agreement originated from a familial relationship, and the plaintiff did not strive to maximise the return on the loan, it was found that the NCA was not applicable. This was confirmed on appeal.[17]

[16] *Forsyth v Heydenrych* (2018) JDR 1937 (GJ).
[17] *Heydenrych v Forsyth* 2022 JDR 1655 (GJ)); see also *Cloete v Van der Heever N O* 2013 JDR 1075 (GP).

[29] In *Hicklin v Secretary of Inland Revenue*,[18] the court articulated that:

'. . . "dealing at arm's length" is a useful and often easily determinable premise from which to start the inquiry. It connotes that each party should be independent and seek the utmost possible advantage out of the transaction. In an arm's length agreement, the rights and obligations created are more likely to be regarded as normal than abnormal. When considering the normality of the rights or obligations so created due regard has to be paid to the surrounding circumstances. What may be normal in one case, may be abnormal in another because of different circumstances. The determination of normality or abnormality is a factual one.'

[30] According to the appellant, interest would only accrue in case of a default, (*mora* interest) with the principal debt due after six months. Interest was agreed at the prescribed rate of 15.5 percent, providing significant benefit to the respondents. This was abnormal and not characteristic of a business transaction where maximum advantage is pursued.[19] In a notional arm's length transaction, interest is typically insisted upon, and the borrower has to pay that interest. In this instance, interest was payable only in the event of default, indicating that this was not a commercial arm's length transaction. Consequently, the trial court's conclusion that the parties transacted at arm's length is flawed and a misdirection unsupported by the evidence.

[31] Section 8(4)(*f*)[20] deems an agreement a credit agreement if it defers payment, and any charge, fee or interest are payable to the credit provider. Section 8(5) defines a credit agreement guarantee where a person undertakes to satisfy another consumer's obligation in terms of a credit facility or transaction. The appellant's uncontested evidence was that only *mora* interest was payable under the AOD. Thus, the provision of s 8(4)(*f*) is not applicable. The trial court's reliance on *Fourie* was misplaced since, in *Fourie*, provision was made in the

[18] *Hicklin v Secretary of Inland Revenue* 1980 (1) SA 481 A at 495A-D.
[19] *Commissioner for South African Revenue Service v Woulidge* [2001] ZASCA 94; [2002] 2 All SA 199 (A) 2002 (1) SA 68 (SCA) para 12.
[20] Fn 4 above.

AOD for deferred payments with interest levied, payment of all fees, expenses disbursements and collection commission. The trial court placed no reliance on s 8(5).

[32] The trial court also relied on s 40 of the NCA to determine whether the loan constituted an unlawful agreement as contemplated by s 40(4) and was therefore void. The same analysis would apply to the AOD. Section 40(1) stipulates that a person must apply for registration as a credit provider if the total principal debt exceeds the threshold prescribed. Section 40(4) renders a credit agreement entered into by an unregistered credit provider an unlawful agreement and void to the extent provided for in s 89.

[33] Relying on *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission and Others, Transnet Ltd (Autonet Division) v Chairman, National Transport Commission and Others*,[21] the appellant argued that amendments to statutes cannot be applied retrospectively.[22] The appellant argued that as of October 2014, the NCA did not mandate its registration as a credit provider. The provision of s 40(1), as it currently stands, came into effect on 13 March 2015. Accordingly, when the agreement was concluded, the registration requirement was different. It read as follows:

'(1) A person must apply as a credit provider if-

(a) that person, have or in conjunction with any associate person, is the credit provider of at least 100 credit agreements, other than incidental credit agreements;

(b) the total principal debt owed to that credit provider under all the outstanding agreements, other than the incidental agreements exceeds the threshold prescribed in terms of section 42(1).'

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[21] *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission and Others, Transnet Ltd (Autonet Division) v Chairman, National Transport Commission and Others* [1999] ZASCA 40; [1999] 3 All SA 365 (A) 1999 (4) SA 1 (SCA).

[22] See also *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another* [2015] ZACC 12; 2015 (5) SA 370 (CC); 2015 (7) BCLR 761 (CC).

[34] A final issue raised by counsel for the respondent, relying upon *De Bruyn*, concerns the retrospective application of a legislative amendment. Although the issue does not arise in the light of what is set out above, there is in any event no merit to the contention. That is so because, in it, this Court concluded that prior to the amendment, the NCA registration was required where the credit provider or in conjunction with an associate, provided at least 100 credit agreements or where the agreement exceeded the prescribed threshold. It is common cause that the agreement between the parties herein exceeded the threshold. Notably, the application of s 40 only comes into effect once it is established that the transactions falls within the purview of by the NCA.

[35] In *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd*,[23] the Constitutional Court found it illogical and unnecessary to require registration by a person who provides loans solely to her friends which stated that in order to determine the validity of the agreement, s 40(4) must be read with s 89(2)*(d)*. Section 89 of the NCA[24] can only be understood to refer to those credit

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[23] *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) para 38.

[24] **89 Unlawful credit agreements**

(1) This section does not apply to a pawn transaction.

(2) Subject to subsections (3) and (4), a credit agreement is unlawful if-

(a) at the time the agreement was made the consumer was an unemancipated minor unassisted by a guardian, or was subject to-

(i) an order of a competent court holding that person to be mentally unfit; or

(ii) an administration order referred to in section 74 (1) of the Magistrates' Courts Act, and the administrator concerned did not consent to the agreement,

and the credit provider knew, or could reasonably have determined, that the consumer was the subject of such an order;

(b) the agreement results from an offer prohibited in terms of section 74 (1);

(c) it is a supplementary agreement or document prohibited by section 91 *(a)*;

(d) at the time the agreement was made, the credit provider was unregistered and this Act requires that credit provider to be registered; or

(e) the credit provider was subject to a notice by the National Credit Regulator or a provincial credit regulator requiring the credit provider-

(i) to stop offering, making available or extending credit under any credit agreement, or agreeing to do any of those things; or

(ii) to stop offering, making available or extending credit under the particular form of credit agreement used by the credit provider,

whether or not this Act requires that credit provider to be registered, and no further appeal or review is available in respect of that notice.

agreements which are subject to the NCA.[25] The AOD, despite not falling under the ambit of the NCA, remains a credit agreement. The finding by the trial court that the agreement is unlawful and void as provided for in s 89 constitutes a misdirection. Based on the evidence, the loan originated from an oral agreement, with no interest charged between parties who had a familial relationship, which was conducted outside the scope of arm's length dealings. On the facts of this case, it is evident that neither the loan nor the AOD were subject to the NCA. The trial court was therefore in error and its order must be set aside.

[36] Although initially proposed by the appellant that this Court could grant a monetary judgment if the agreement did not fall within the scope of the NCA, it was later conceded that this was not feasible due to outstanding issues, including the applicability of clause 16 of the AOD outlined in para 2 above. Accordingly, the trial in this matter should proceed to finality in respect of all outstanding issues.

[37] Regarding costs, the trial court ordered that the appellant bears the costs of the separated issue. In *Baptista v Stadsraad van Welkom,*[26] it was stated that where an order in terms of rule 33(4) is final and decisive in the litigation between the parties, the successful party is entitled to its costs. Therefore, the successful party

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(3) Subsection (2) *(a)* does not apply to a credit agreement if the consumer, or any person acting on behalf of the consumer, directly or indirectly, by an act or omission-
(a) induced the credit provider to believe that the consumer had the legal capacity to contract; or
(b) attempted to obscure or suppress the fact that the consumer was subject to an order contemplated in that paragraph.
(4) Subsection (2) *(d)* does not apply to a credit provider if-
(a) at the time the credit agreement was made, or within 30 days after that time, the credit provider had applied for registration in terms of section 40, and was awaiting a determination of that application; or
(b) at the time the credit agreement was made, the credit provider held a valid clearance certificate issued by the National Credit Regulator in terms of section 42 (3) *(b)*.
(5) If a credit agreement is unlawful in terms of this section, despite any other legislation or any provision of an agreement to the contrary, a court must make a just and equitable order including but not limited to an order that-
(a) the credit agreement is void as from the date the agreement was entered into.
(b) and *(c)* .....

[25] *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* [2014] ZASCA 16; 2014 (4) SA 253 (SCA); [2014] 2 All SA 527 paras 9-13.

[26] *Baptista v Stadsraad van Welkom* 1996 (3) SA 517 (O) at 520A-521B.

is entitled to costs unless circumstances warranting a deviation are present. The same would apply to the costs of this appeal.

[38] In the result, the following order is made:

1 The appeal succeeds with costs.

2 The order of the high court is set aside and replaced with the following:

‘1 The loan giving rise to the acknowledgment of debt (the AOD) upon which the plaintiff’s cause of action is based is not subject to the National Credit Act 34 of 2005.

2 The AOD is not a credit agreement subject to the National Credit Act 34 of 2005.

3 The costs of determining the separated issue are to be paid by the defendant.’

M B S MASIPA

ACTING JUDGE OF APPEAL

Appearances

For the appellant:	C D Roux
Instructed by:	RC Christie Incorporated, Edenvale
	Webbers Attorneys, Bloemfontein
For the respondent:	A J Daniels SC with C de Villiers-Golding
Instructed by:	Richters Attorneys, Johannesburg
	Pieter Skein Attorneys, Bloemfontein