IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE No. A5040/2011

DATE:22/03/2011

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

REPORTABLE

In the matter between:

RENIER NEL INC 1st Appellant
RENIER ERHARDT NEL 2nd Appellant
and

CASH ON DEMAND (KZN) (PTY) LTD Respondent

JUDGMENT

WILLIS J:

[1] This is a so-called "Full Bench Appeal" from the judgment of Heaton-Nicholls J delivered in the South Gauteng High Court on 2nd February, 2010. The appeal is heard with the leave of the court below. The appellants were the respondents in motion proceedings in the court below. The applicant, who is the respondent in this appeal, relied on a contractual undertaking to seek specific performance in the payment of certain sums of money. The learned judge granted the applicant the relief which it sought. It may facilitate the reading of this judgment if one hereinafter refers to the parties as they were in the court below.

[2] The applicant carries on the business of providing short–term bridging finance. The four transactions in question each relate to the provision of such finance by the applicant to the sellers of certain immovable property owned under a sectional title scheme as provided for in the Sectional Titles Act, No.95 of 1986. The sectional title scheme, in each instance, was known as Will-O-

Sue, Portion 3 Erf 658, Hibberdene in Kwazulu-Natal. Two of the transactions relate to section 1 of the scheme and the other two to section 2 thereof. In respect of both section 1 and section 2, the initial agreement was varied but nothing turns of this. The challenged transactions took place between January and February 2009 in Durban. In terms of the order of the court below the respondents were made jointly and severally liable, the one paying the other to be absolved, to pay the applicant a total sum of approximately R820 000 together with interest at the rate of 15,5 % to date of payment and costs.

[3] Typically, the applicant would provide short-term providing finance in the following manner. It would advance a cash payment to a seller of immovable property and take as security a cession of the seller's rights, title and interest in the property. The respondent would immediately acquire ownership of the seller's claim but would only receive payment on respect of the claim, upon the registration of transfer of the fee.

[4] The claim would be defined as being the right to receive payment of a surplus after transfer. The surplus, in turn, was defined as the net amount that would otherwise have been payable to the seller after all specified deductions (e.g. payments in terms of a mortgage bond registered over the property) had been made. The applicant would charge a "discounting fee".

[5] The applicant would nominate the conveyancing attorneys attending to the registration of the transfer. The conveyancing attorneys would, after deduction of their fees and disbursements, pay over to the applicant an amount which would include the claim for the surplus which would otherwise have been due to the respondent and, in addition, the discounting fee.

[6] In each instance in this particular case, the seller in the Will-O-Sue scheme was the Watchword Two Trust duly represented by Zhaun Pete Swart and the conveyancer was the first respondent, represented by the second respondent, the sole director of the first respondent.

[7] Copies of the so-called "Master Discounting Agreement" entered into between entered into between the applicant and the seller in each instance appear to have been mislaid.

[8] The applicant has relied on a specimen copy of the agreement, the terms of which appear to be common cause because the respondents have claimed that this Master Discounting Agreement was an unlawful agreement on the grounds that it fell foul of the National Credit Act, No. 34 of 2005 ("the NCA") by reason of the following:

(i) the applicant was not a registered credit provider in terms of the NCA;

(ii) the agreement between the applicant and the seller of the sections was a credit agreement in terms of section 8 of the NCA; and

(iii) the applicant had failed to give the respondents proper notice in terms of section 129 of the NCA;

(iv) the interest charged by the applicant was such that the transactions should be considered to amount to the reckless granted of credit in terms of the NCA.

[9] The respondents deny that they are in any way bound by the provisions of the alleged Master Discounting Agreement or that they received any mandate from either the applicant or the seller of the sections in question.

[10] It is, however, common cause that the respondents were appointed to act as conveyancers in respect of the challenged transactions, that the transfers arising from the sales in question have indeed been registered at the office of the Registrar of Deeds in Pietermaritzburg and that the respondents have not paid over any money to the applicant arising from these challenged transactions.

[11] In the event that the respondents' defence that the underlying, challenged transactions fall foul of the NCA should fail, they have the further defence that they received insufficient funds from the

purchasers of the sections in question to pay any money over to the applicant.

[12] It is common cause that there has been no credit agreement (as defined in the NCA) between the applicant and the respondents. The defence of the respondents (apart from the fact that the monies which they received from the purchaser was insufficient to permit any payment over to the applicant) is that to enforce payment by them to the applicant will amount to enforcement of an illegal agreement as between the applicant and the seller of the sections in question.

[13] There has been no direct or overt illegality in the agreements between the applicant and the respondents. As these agreements are subsidiary or accessory to the agreements concluded between the applicant and the seller of sections in question, I shall assume, without deciding the matter, that if the latter agreements are illegal, then the former may not be enforced because to do so would serve to sanction an illegality.

[14] In the case of *Shooters' Fisheries v Incorporated General Insurances Ltd*[1] it seems to have been recognised that there may, in certain circumstances, be a "piggy-backing" effect with the illegality in one transaction impacting upon the enforceability of another, related, transaction.

[1] 1984 (4) SA 269 (D&DCLD)

[15] It has become a notorious fact that cases requiring the interpretation of the NCA result in a scarcely muffled cry of exasperation resounding from the leathered benches of the judiciary.

[16] In my opinion, the learned judge in the court below correctly considered that one should have regard to the definitions of "credit", "credit agreement", "credit provider" and "incidental credit agreement" in the definitions section of the NCA and the provisions of section 8 thereof to try to determine whether, as between the applicant and the seller, the applicant has been a credit provider.

[16] One can go round and round in loops, through subsection after subsection of the NCA, trying to determine whether or not the agreement between the applicant and the seller of the sections in question constitutes an agreement to which the NCA applies. As Professor JM Otto said in *Verkoop van Regte teen 'n Diskonto en die Toepaslikheid van die National Credit Act,* "Mens hoef nie wyle Siener Van Rensburg se gene in jou te hê om te voorspel dat dié wet nog tot baie litigasie gaan lei nie". (One need not have the genes of the Soothsayer Van Rensburg of the past to predict that this statute will result in much more litigation.)[2]

[2] 2009 TSAR 198

[17] In each instance in the present case this much, however, is clear:

(i) The applicant discounted commercial paper in the property market;

(ii) The applicant did not supply goods or services to the seller;

(iii) There is no agreement of mortgage or lease as between the applicant and the seller;

(iv) The applicant takes a well-calculated risk in parting with its money to the seller but looks to the conveyancer (and no one else) for the recovery of the money with which it has parted as well as the "discounting fee".

[18] As Kotze J said in *De Villiers v Roux*[3] "discounting" amounts in effect to or resembles more closely an agreement of purchase and sale than one of lending. Our brother Mathopo referred to this judgment with approval in *Bridgeway Ltd v Markam.*[4] The learned judge in the court below, in turn, referred to the *Bridgeway* judgment with approval. The *Bridgeway* case was also approved by Madondo J in *Voltex v Chenzela.*[5] In general terms, the judgment in *Bridgeway* has been supported by Professor Otto

[3] 1916 CPD 295 at 298
[4] 2008 (6) SA 123 (W) at paragraph [17].
[5] 2010 (5) SA 267 (KZP) at paragraph [26]

in *Verkoop van Regte teen 'n Diskonto en die Toepaslikheid van die National Credit Act.*[6]

[19] I fully accept, as did Mathopo J and the learned judge in the court below that, in determining whether the agreements upon which the applicant relies fall foul of the Act, one must, as Trollip J (as he then was) said in *Tucker v Ginsberg*,[7] look at the nature of the transactions and have regard mainly to their substance rather than their form, as well as the whole course of the parties dealings.

[20] Under (a) in the definition of a "credit provider" in the NCA, it is provided that this means a "party who supplies goods or services under a discount transaction". A "discount transaction" is also defined in the NCA. Mr *Sieberhagen*, who appeared for the respondent, accepted that the transactions in question could not be regarded as the supply of either goods or services by the applicant. Under (b) a "credit provider" is also defined as meaning a "party who advances money or credit under a pawn transaction". Even if it can be said that, in the present case, the applicant advanced money, it did not do so under a pawn

[6] (2009) *TSAR 198*
[7] 1962 (2) SA 58 (W) at 62G

transaction. It is useful also to refer to Professor JM Otto's *The National Credit Act Explained*,[8] *Guide to the National Credit Act*,[9] P. Stoop's *Disclosure as an Indirect Measure Aimed at Preventing Overindebtedness*[10] and the title *Consumer Credit* in part 1 of volume 5 of *LAWSA* by M. Kelly-Louw.[11] In general terms the case of *JMV Textiles (Pty) Ltd v De Chalan Spareinvest 14 CC and Others*[12] by Wallis J is also helpful to assisting one understand why a reluctance to rush to find persons guilty of infractions of the NCA on a technical basis is the correct approach for a court to adopt.

[21] No matter how rigorous an interpretation one may seek to apply to the definitions relating to "credit" in the NCA, it cannot be said that the challenged transactions fall foul of it. A plain reading of the relevant provisions of the NCA makes this clear enough. It is unnecessary and indeed would be unhelpful in this judgment to attempt to enter into the labyrinth of complex, interlinking definitions in the NCA in an attempt to justify this conclusion.

[22] As the learned judge in the court below recognised, it has long been a well recognised principle of our law that it is legitimate deliberately to arrange one's transactions so as to remain outside of the provisions of a statute even though that statute

[8] 2006. Durban: LexisNexis, p17
[9] By *JW Scholtz, JM Otto, E Van Zyl, CM Van Heerden and N. Campbell.* 2008. Durban: LexisNexis, paragraphs 8.2.3.3 and 8.2.4.3 in particular.
[10] (2008) 41 *De Jure* 352 at 357-8.
[11] 2010. Durban: LexisNexis at pargraph 14, in particular.
[12] 2010 (6) SA 173

may seem, in general terms, to have been far-fetching in its purview.[13] As Boshoff J (as he then was) said in *Western Bank Ltd v Registrar of Financial Institutions*:[14]

> When it comes to the interpretation of the transaction in question it is necessary to bear in mind that the parties may generally arrange their transactions so as to remain outside the provisions of the Act. Such a procedure is in the nature of things perfectly legitimate. There is nothing in the authorities to forbid it. Nor can it be rendered illegitimate by the mere fact that the parties intend to avoid the operation of the law and that the selected course is as convenient in its result as another which would have brought them with it.

[23] Even if one is wrong in concluding that the challenged transactions do not fall foul of the NCA, there remain other considerations why the respondents should not be able to evade payment of the debt. It is clear from a long line of cases that, ultimately, policy considerations lie behind the courts' unwillingness to condone illegal agreements.[15]

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[13] See, for example, *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 548; *Commissioner of Customs and Excise v Randles Bros & Hudson Ltd* 1941 AD 369 at 395-6; *Western Bank Ltd v Registrar of Financial Institutions* 1975 (4) SA 37 (T) at 44H-45A.

[14] 1975 (4) SA 37 (T) at 44H

[15] See, for example, *Kennedy v Steenkamp* 1936 CPD 113 at 116; *Mahomed Abdullah v Levy* 1916 CPD 302 at 308; *Lion Match Co Ltd v Wessels* 1946 CPD 376.

[24] Nevertheless, as Kotze J said in *Burger v SA Mutual Life Insurance Society*[16] the doctrine of public policy "ought not to be stretched beyond what is necessary for the protection of the public". There would be no apparent advantage to the public if the applicant were to be denied a right of recourse against the respondents in this case.

[25] In the aforesaid case of *Shooters' Fisheries v Incorporated General Insurances Ltd*[17] Friedman J (as he then was) referred approvingly to this principle in *Burger's* case to hold that an insured should not be deprived of a claim merely because the insured's vessel had been confiscated on account of the fact that it had been fishing illegally in Mozambique. The contravention of Mozambican law was obscure.

[26] In the case of *S v De Blom*[18] five judges of the Appellate Division unanimously cautioned against facile findings of "wederegtelikheidsbewussyn"[19] when it comes statutory contraventions in a modern state. Although the *De Blom* case dealt with a criminal matter, the principle is relevant because the unenforceability of a contract due to illegality has punitive consequences. In the case of *First National Bank v Seyffert and Another and Similar Cases*[20] I referred to the widespread lack of

[16] 20 SC 538 at 545
[17] 1984 (4) SA 269 (D&DCLD). See paragraph [7] above.
[18] 1977 (3) 513 (A) at 529A-533F
[19] This may, somewhat crudely, be translated as "as awareness that what you were doing was wrong in terms of the law" .
[20] 2010 (6) SA 429 (GSJ)

clarity and certainty which various judicial colleagues around the country had experienced when trying to interpret the NCA. If judges have such difficulty, how much more so must this be the case among the men and women of business? If the provisions of the NCA are obscure, they should not interpreted to allow what would, in effect, be an unjust enrichment of one party at the expense of another.

[27] To enforce the challenged transactions would not offend against the plain wording of a statute, the prevailing moral norms in our society as a whole or any principle of our constitutional law. In view of the general lack of clarity concerning the manifold definitions of a credit agreement in the NCA, the discounting of commercial paper without being a registered credit provider in terms of that Act cannot be regarded as something heinous. For policy reasons, even if the challenged transactions contravene the NCA, the applicant should not, in all the circumstances, be deprived of the right to recover from the respondents its claims which derive from these transactions. The same reasoning must apply to the respondents' protest that they did not receive proper notice of the claim in terms on section 129 of the NCA. Besides, it is clear on their own version of events, that the respondents have been well aware since at least 30 July 2009 of the applicant's claim and have had no intention whatsoever of meeting it.

[28] As for the respondents' submissions regarding the "recklessness" and the "usurious rates of interest" of the challenged transactions, these are irrelevant for the simple reason that the applicant did not lend so much money (or provide credit) as it bought debt.

[29] The respondents' defence that no money whatsoever is due to the applicant because the purchasers of the sections did not pay enough for this to occur or is so palpably implausible, so far-fetched and so clearly untenable in the circumstances that the court below was justified in rejecting that version on the papers. In this regard the principles are clear and well-known. See, *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*,[21] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[22] and *National Director of Public Prosecutions v Zuma*.[23]

[30] It is inconceivable that the "hard men of business" representing each of the *dramatis personae* in this case would have transacted on the basis that the applicant would be left entirely empty handed if registration of the respective transfer of the immovable properties did, as in this case, take place as envisaged. That was the very risk on which the applicant gambled. If transfer took place as envisaged, the applicant stood to gain handsomely. If transfer did not, the applicant lost.

[21] 1957 (4) SA 234 (C).

[22] 1984 (3) SA 623 (A).

[23] 2009 (2) SA 277 (SCA).

[31] Besides, the defence is so baldly set out as to be incredible. If true, it could easily have been supported by the rendering of an account with independent verification. There would have been a paper trail in this case. Crumpled pieces of paper would have lain in a basket at the feet of the respondents. It would have been simple enough for the respondents to have picked up these pieces of paper, opened them and made them available for all to see. When the respondents have not done so the inference to be drawn is obvious.

[8] Accordingly, I propose that the appeal be dismissed with costs.

DATED AT JOHANNESBURG ON THIS 22nd DAY OF MARCH 2011.

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N.P. WILLIS

JUDGE OF THE HIGH COURT

I agree. The appeal is dismissed with costs.

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K. M. SATCHWELL

I agree.

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R. MONAMA

JUDGE OF THE HIGH COURT

Counsel for the Plaintiff: Adv. *P.Sieberhagen*
Counsel for the Defendant: Adv. *G.M.E. Lotz* SC

Attorneys for the Appellants: Klinkenberg Inc.
Attorneys for the Defendant: Lynn and Main Inc.

Date of hearing: 14th March, 2011
Date of judgment: 22nd March, 2011