REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 16752/2007

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

30/05/2014
DATE

SIGNATURE

In the matter between:

THE LAND & AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA LTD Applicant

and

THOMAS GEORGE BOSCH Respondent

J U D G M E N T

MASHILE, J:

[1] This is an application in terms of which the Applicant seeks an order directing:

1.1 The Respondent to make payment of an amount of R12 000 000.00 plus interest thereon at the prime rate of Absa Bank plus 3% per annum calculated from 26 April 2006 capitalized monthly until date of payment to the Applicant;

1.2 That all the immovable properties mentioned in the Notice of Motion be declared specially executable;

1.3 The Respondent to pay the costs of this application.

[2] The background facts are that the parties concluded a written loan agreement on 26 February 2006 in terms of which the Applicant agreed to:

2.1 Lend and advance an amount of R12 000 000.00 to the Respondent with the object of assisting him to acquire Pretoria Abattoirs from Nedbank Ltd, which would subsequently be operated and run under the name of Pyramid Abattoirs;

2.2 The Respondent would repay the loan in 60 equal monthly instalments of R200 000.00;

2.3 Interest would be at prime rate plus 3% calculated on the outstanding daily balance and raised and/or capitalised on the last day of each month;

2.4 The Respondent would register a covering mortgage and a notarial collateral bonds, each in the amount of R12 000 000.00, over the immovable and all movable Properties respectively.

In addition, there were certain conditions precedents, the most pertinent, for purposes of this judgment, being the cession of the insurance policy in respect of the assets. (Clause 9.1.4 of the loan agreement).

[3] Both parties initially honoured their obligations arising from the loan agreement. A year or so later, however, the Respondent experienced financial difficulties and failed to meet his monthly financial obligations that he had undertaken under the loan agreement.

[4] Following the Respondent's violation of the loan agreement the Applicant instituted an action against the Respondent to which 16752/2007 was allocated as the case number claiming an amount of R12 000 000.00. The particulars of claim were subsequently amended resulting in the Applicant demanding:

4.1 Payment of an amount of R14 285 653.00;

4.2 Interest on the aforesaid amount at the rate of 16% per annum *a tempore morae*;

4.3 An order declaring the immovable properties specially executable; and

4.4 Costs on the party and party scale.

[5] In reply, the Respondent delivered his plea, which he later amended in consequence of the Applicant's amendment of its particulars of claim. The service and filing of the amended plea by the Respondent elicited a replication from the Applicant.

[6] In defending the action against him, the Respondent contended that as a result of the non-fulfilment of one or more of the conditions precedent of the Loan Agreement by 25 April 2006 *alternatively* within a reasonable time after its conclusion, the Loan Agreement lapsed and was null and void *ab initio*.

[7] Accordingly, asserted the Respondent, since there was a non-fulfilment of the conditions precedent, the Loan Agreement was not binding upon him and the mortgage and notarial bonds therefore stood to be cancelled.

[8] When the matter went on trial on 30 November 2009, the parties had agreed that the court would make a pronouncement on two issues only and these were:

8.1 Whether or not the Loan Agreement had lapsed due to the non-fulfilment of a suspensive condition of the Loan Agreement by the Respondent; and

8.2 If the Loan Agreement is found not to have lapsed, whether or not the Applicant ought to have complied with the provisions of section 129 of the National Credit Act No. 34 of 2005 (NCA) before it could institute the Main Action.

[9] The commencement of the trial on 30 November 2009 was preceded by an agreement between the parties in terms of which the Respondent admitted liability to the Applicant in the amount of R12 000 000.00 together with interest payable in terms of the Loan Agreement in the event of the Court finding in favour of the Applicant in respect of the issues mentioned in paragraphs 8.1 and 8.2 above.

[10] On 1 December 2009, Horn J ruled that:

10.1 The conduct of the Applicant was read and construed to mean that it had waived its right to have the insurance policy in respect of the assets ceded to it by the Respondent. This was so because all the conditions precedent in the loan agreement were inserted for the benefit of the Applicant. That being the case, the relevant condition precedent was deemed to have been fulfilled and the agreement binding and of full force and effect;

10.2 The Loan Agreement represented a pre-existing credit

agreement as contemplated in schedule 3 of the NCA. The Applicant should therefore have complied with the provisions of section 129 of the NCA prior to the institution of the action. Accordingly, the Applicant was granted an opportunity to comply with the provisions of Section 129(1)(a);

10.3 The court made no order as to costs and postponed the trial *sine die*, the idea being to enable the Applicant to comply with the provisions of Section 129 of the NCA.

[11] The issues to be determined are:

11.1 What is the effect of the Respondent's admission of liability after the order of Horn J on 1 December 2009?

11.2 What is the effect of the Applicant's subsequent compliance with Section 129 of the NCA?

[12] The Respondent argues in the first place that the Applicant has failed to comply with the provisions of the court order that directed that the matter be postponed sine die to allow it to observe the provisions of Section 129 of the NCA. The Applicant's counter to this contention is that the sending of the 129 notice in September 2009 constituted a discharge of its obligations imposed by Section 129 of the NCA and is therefore entitled to proceed in any manner it desires, action or application.

[13] In the second instance, the Respondent asserts that:

13.1 The Applicant changed the credit agreement after the effective date of the Act, by its written waiver in terms of clause 2.4 of the credit agreement on 6 November 2009;

13.2 "As a result, in terms of the provisions of item 4(5) of Schedule 3 of the Act, the change to the pre-existing credit agreement in the manner and at the time referred to above, has the effect that it henceforth constituted a new agreement, to which the provisions of Section 80(1)(a) read with Section 81(3), 83(1)(2), 84 and 164(1) apply";

13.3 The new credit agreement amounts to a reckless credit agreement as envisaged in terms of Section 80(1)(a) of the Act, in that the Applicant, at the time when the credit agreement was concluded and the amount was approved, as credit provider had

failed to conduct any assessment of the Respondent as consumer;

13.4 As a result, the agreement is to be set aside as a reckless credit agreement as provided for in terms of Section 83(2)(a) of the Act, alternatively to be declared a reckless agreement, unlawful and void

[14] The Applicant on the other hand maintains that the Loan Agreement was concluded on 26 February 2006 and should as a result be classified as a "pre-existing agreement". ACCORDINGLY, the change to the pre-existing credit agreement should not have the effect that it henceforth constituted a new agreement, to which the provisions of section 80(1)(a) read with Sections 81(3), 83(1)(2), 84 and 164(1) apply".

[15] In the third instance, the Respondent alleges that the credit agreement lapsed due to non-fulfilment of the suspensive condition. In this regard the Applicant argues that the question was settled by Horn J's finding and that this court has no power to revisit it unless if it were sitting as a court of appeal, which it is not.

THE ABANDONMENT OF THE ACTION IN FAVOUR OF THE LAUNCHING OF THIS APPLICATION IS IRREGULAR

[16] In compliance with the order of Horn J dated 1 December 2009, the attorneys of the Applicant sent a 129 notice to the Respondent advising him of his rights afforded to him by Section 129(1)(a) of the NCA. The Respondent, however, holds the view that while the Applicant might have sent the 129 notice, it failed to refer the matter to the consumer court for resolution as envisaged in the section. Besides, argues the Respondent, the action proceedings were not concluded as the case was postponed sine die to enable the Applicant to comply with the provision of the NCA.

[17] Counsel for the respondent is persistent that the Applicant as the *dominus litis* in these proceedings should, in addition to sending the 129 notice, have taken it upon itself to refer the matter to the consumer court for determination. Authority to shore up the aforesaid aberrant proposition was however not forthcoming. In the absence of such authority and the fact that an ordinary interpretation of the wording of the section suggests otherwise, the submission cannot succeed.

[18] Section 129(1)(a) stipulates that if a consumer is in default under a credit agreement, the credit provider:

> "*may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date …*"

[19] The spotlight should fall on the part of the section that provides: "....and *propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction>>>>" It is plain from the reading of the aforesaid section that it is the consumer to whom proposal to refer is made who must take steps to make certain that the matter comes before one of the institutions mentioned in the section, the consumer court in this case.*

[20] To suggest, as the Respondent does, that it was incumbent upon the Applicant to do so is to introduce meaning that is not borne by the language utilised to convey the intended message in the section.

[21] I fully agree that the letter sent by the attorneys of the Applicant on 20 September 2010 is congruent with the provisions of Section 129(1)(a) in that it advises what steps the Respondent is to take and to which institutions to refer the matter. The Respondent had been in default for not less than 20 business days as contemplated in Section 130(1) of the NCA when it was delivered to him. In terms of Section 130(2), a period of 10 days had lapsed since the Applicant had delivered the 129 notice to him and apart from expressing an intention to refer the matter to the consumer court, he failed to execute in terms thereof.

[22] The Respondent's failure to act as he had indicated in his letter responding to the Applicant's 129 notice must be fatal. For the Applicant, it is sufficient to demonstrate that it sent the 129 notice for purposes of

compliance with Horn J's order of 1 December 2009. In view of the Respondent's admission of liability, the lack of referral to the consumer court by the Respondent freed the Applicant to enforce the parties' agreement in whichever manner it wished.

[23] I am mindful of the Respondent's contention that the Applicant's choice of launching motion proceedings deprives him of raising valid defences to the action. The Respondent must live with his choice of admitting liability subject to the court finding that the Applicant had waived its right to have the Respondent cede his insurance policy in respect of the assets. In fact, the Respondent's admission renders his argument entirely untenable considering the court order of Horn J.

[24] Let us for a moment hypothesise a scenario where the court found in favour of the Applicant, as it did, to the question in Paragraph 8.1 but concluded in respect of the question in Paragraph 8.2 that compliance with Section 129(1)(a) was not essential.

[25] The result would have been that the Applicant would have been at liberty to enforce the parties' agreement immediately after the court order. The applicability of the Section 129(1)(a) therefore served nothing but to delay the Applicant's right to enforce the Respondent's compliance.

[26] In the premises, this application is therefore about the Respondent's

undertaking to pay R12 000 000.00 plus interest to the Applicant. In the result I conclude that the Applicant was entitled to launch this application the fact that the action was notionally left in abeyance notwithstanding.

THE APPLICANT'S WRITTEN WAIVER IN TERMS OF CLAUSE 2.4 ON 6 NOVEMBER 2009 CHANGED THE LOAN AGREEMENT AFTER THE EFFECTIVE DATE OF THE ACT, 1 JUNE 2006- LACK OF COMPLIANCE WITH SECTION 81(2)(A) OR (B) OF THE NCA

[27] The Applicant states that in accordance with item 4(2) of Schedule 3 of the NCA, the provisions of Part D of Chapter 4 apply to a pre-existing credit agreement only to the extent that it does not concern reckless credit. According to the Applicant the substance in the existence of the exclusion of the application of the reckless credit provisions to "pre-existing agreements" is that a compulsory assessment prior to the conclusion of the "pre-existing agreement" was not a requirement before the NCA came into operation.

[28] Section 95 is headed, Changes, deferrals and waivers, and it provides:

> "*The provision of credit as a result of a change to an existing credit agreement, or a deferral or waiver of an amount under an existing credit agreement, is not to be treated as creating a new credit agreement for the purposes of this Act if the change, deferral or waiver is made in accordance with this Act or the agreement.*"

[29] I am persuaded that in consequence of item 4(5) of Schedule 3, a change after 1 June 2007 to a pre-existing credit agreement amounts to the making of a new credit agreement unless it is a change to the interest rate.

[30] A "change" envisaged in item 4(5) of Schedule 3 refers to a change that culminates in the provision of credit and "credit" is defined as "a deferral of payment of money".

[31] Bearing in mind the aforegoing definitions, the only change that would result in the provision of credit and accordingly constitute the making of a new credit agreement would be an increase in the credit limit under a credit facility or in the amount of the principal debt under any other credit agreement.

[32] The Applicant's written waiver dated 6 November 2009 should in light of the court order of Horn J finding that the Applicant's failure to require cession of the insurance policy to itself amounted to a waiver of the condition precedent be regarded as superfluous. This must be correct because the finding of the court was not premised on the written waiver of the Applicant.

[33] For that reason, no change was effected and no "new agreement" came into being. Consequently the provisions relating to reckless credit cannot find application. Besides, persists the Applicant, even if the Court had found that the Applicant had not waived the condition through its conduct, its waiver in the letter dated 6 November 2009 would not amount to a change as it did not end in a new agreement by which the Applicant provided further

credit or further capital under the Loan Agreement. The status of the Loan Agreement as a "pre-existing agreement" did not alter and therefore the reckless credit provisions contained in the NCA would not have applied.

THE LAPSE OF THE LOAN AGREEMENT ON ACCOUNT OF THE NON-FULFILMENT OF THE CONDITION PRECEDENT

[34] Contrary to the finding of this court on 1 December 2009, the Respondent is adamant that the Loan Agreement lapsed due to non-fulfilment of the suspensive condition. The Respondent is obviously aware of the decision in that regard but he has passionately argued that the decision of the court is appealable. Citing the decision of Nugent JA in the matter of *NDPP v King* 2010 (2) SACR 146 (SCA) at 166 E-167C (paras 50- 51), the Respondent argues that it is undesirable to deal with appeals in unfinalised cases on piecemeal basis.

[35] In light of the effect of the order of Horn J on 1 December 2009, I have serious reservations on whether or not the Respondent can still appeal this matter after the outcome in this application. I express this doubt because his admission and his subsequent lack of referral to the relevant institution, made the matter final freeing the Applicant to take whatever step it deemed fit to enforce the agreement.

[36] It is plain that the court in the matter of *NDPP v King (supra)* was not prescribing a rule of general application. The intention is that each and every

matter should be decided on its own peculiar set of circumstances. In this present matter, for example, once the Respondent admitted liability the matter became almost final as the last step that the Applicant had to take was compliance with Section 129(1)(a) only.

[37] I agree with the Applicant that the Respondent should not have withdrawn the appeal as the matter has been finally determined. The question of noting appeals piecemeal does not and cannot arise in these circumstances.

[38] In the result the application succeeds and I make the following order:

1. The Respondent is directed to pay the amount of R12 000 000.00 to the Applicant plus interest thereon at Absa Bank's Prime lending rate plus 3% per annum calculated from 26 April 2006 capitalized monthly until date of payment;

2. All the immovable properties mentioned under Sub-paragraph 1.3 of the Notice of Motion are declared executable;

3. The Respondent is to pay the costs of the application.

B MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING:	28 OCTOBER 2013
DATE OF JUDGMENT:	30 MAY 2014
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