

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: A208/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

[Signature]
Date: 7 November 2022

In the matter between:

NEL: JJG

IVY JEWEL 3 (PTY) LTD

IVY JEWEL 4 (PTY) LTD

LABONTE 1 (PTY) LTD

LABONTE 2 (PTY) LTD

SILKBLAZE 3 (PTY) LTD

SILKBLAZE 4 (PTY) LTD

RUSTY ROSE 52 (PTY) LTD

and

CILLIERS: PJJ

FIRST APPELLANT

SECOND APPELLANT

THIRD APPELLANT

FOURTH APPELLANT

FIFTH APPELLANT

SIXTH APPELLANT

SEVENTH APPELLANT

EIGHTH APPELLANT

RESPONDENT

JUDGMENT

ALLY AJ

INTRODUCTION

[1] The dispute between the parties in the Court *a quo* centred around two agreements entered into between the parties and referred to during the trial as “D1” and “D2”. The appellant’s claim was for payment of the cash amount of R 6 million in paragraph 2 of “D2”, *alternatively*, in the event that “D2” was found to be unenforceable, the balance of an amount of R 23 million arising from paragraph 2 in “D1”.

[2] The court dismissed the appellant’s claims, which in turn led to the appeal under consideration, leave having been granted by the Court *a quo*.
The grounds of appeal as raised by the Appellant are contained in Caselines and need not be repeated here save to make a specific point insofar as is necessary.

[3] Counsel on appeal were the same Counsel representing the respective parties in the Court *a quo*.

FACTUAL BACKGROUND

[4] It is common cause that First Appellant and the Respondent entered into two agreements described in the Court *a quo* as ‘D1’ and ‘D2’.

[5] It is appropriate to deal with the agreement described as 'D2' first for the reason that that is how the Appellants founded their claim and alternatively relied on the agreement described as 'D1' should 'D2' be found to be invalid and unenforceable.

[6] The agreement described as 'D2' contained the following clauses:

"OOREENKOMS AANGEGAAN DEUR EN TUSSEN:-

PEET CILLIERS

En

KOOS NEL

NADEMAAL die partye 'n ooreenkoms aangegaan het op 18 Februarie 2008 in terme waarvan die bedrag van R30 miljoen (DERTIG MILJOEN RAND) terugbetaalbaar sou wees binne 'n drie jaar tydperk en

NADEMAAL die partye die ooreenkoms her onderhandel het, nou kom die partye soos volg ooreen:-

- 1. Die bedrag van R6 miljoen (SES MILJOEN RAND) is onmiddelik betaalbaar welke bedrag reeds betaal is.*
- 2. Cilliers onderneem om 'n verdere R6 miljoen (SES MILJOEN RAND) in kontant in drie gelyke jaarlikse paaierementte te betaal. Die eerste betaling sal op die eerste besigheidsdag van Maart 2012 geskied en dieselfde vir die twee daaropvolgende jare. Voormelde jaarlikse paaierementte sal ook saamgestelde rente insluit wat maandeliks bereken sal word teen die heersende Absa prima koers plus 3,5% vanaf Maart 2011.*

3. *Cilliers sal verantwoordelikheid aanvaar vir volle uitstaande balans van ongeveer R5 miljoen op die sewe erwe wat in die Legend & Safari oord geleë is. Cilliers sal ook die maandelikse paaielemente asook die munisipale fooie van ongeveer R70 000 per maand (in totaal) vanaf 1 Junie 2011 betaal, betaalbaar voor of op 30 Junie 2011.*
4. *Die uitstaande BTW wat tergubetaalbaar sal wees aan die Ontvanger sal ookby die kapitale bedrag gevoeg word en sal die BTW bedrag rente dra tot teen die heersende prima koers waarvoor Cilliers aanspreeklikheid aanvaar.*
5. *Cilliers aanvaar verantwoordelikheid om 4 hotel kamers op elk van die sewe erwe te bou en volledig toe te rus met meubels oor 'n drie jaar tydperk waarvan die bouery op die eerste twee erwe afgehandel moet wees aan die einde van April 2012. Die volgende 4 hotel kamers moet voltooi wees aan die einde van April 2013 op nog twee erwe en die laaste drie erwe voor of op einde April 2014.*
6. *Die aandeelhouing in die voormelde sewe erwe sal dan verdeel word op 'n basis van 82% ten gunste van Nel en 18% ten gunste van Cilliers. Dit word vermeld dat Koos die gemagtigde verteenwoordiger van al die verskrye maatskappye is.*
7. *Cilliers onderneem om die onbeswaarde 50% aandelhouing wat deur die Peet Cilliers Familie Trust gehou word in die eiendom wat in die Baviaanskloof Wêreld Erfenis gebied geleë is aan Nel te sedeer as sekuriteit vir die uitstaande verpligting."*

[7] The 'D1' agreement contained the following clauses:

"1. *VERY LAST MINUTE. COM*

Peet Cilliers koop Koos Nel se 2% (twee present) aandeel in VERY LAST MINUTE.COM vir die bedrag van R3 000 000 – 00 (Drie miljoen rand).

Vermelde bedrag is betaalbaar voor of op einde Maart 2008, is nie rentedraend nie, en die transaksie sal "Belasting vriendelik" wees.

2. *LEGEND GOLF EN SAFARI RESORT (PTY) LTD – LANDGOED*

Peet Cilliers koop Koos Nel se 5% (Vyf present) aandeel in Legend Golf en Safari Resort (Pty) Ltd vir die bedrag van R30 000 000 – 00 (Dertig Miljoen Rand). Vermelde bedrag is betaalbaar voor of op einde Februarie 2011, is nie rentedraend nie, en die transaksie sal "Belasting vriendelik" wees.

3. *LEGEND GOLF EN SAFARI RESORT (Pty) LTD – 7 ERWE*

Al 7 (Sewe) erwe word in Koos Nel se naam gekoop en deur hom self finansier by Absa Bank teen prima -2%. Die eerste twee erwe sal deur Peet Cilliers so gou as moontlik verkoop word teen minstens R2 500 000 – 00 per erf, om sodoende die ander vyf erwe te financier. Wins en verlies sal gelykop tussen Cilliers en Nel verdeel word na behoorlike voorsiening vir rente en moontlike belasting implikasies.

4. *LENING VAN R2 000 000 – 00 (TWE E MILJOEN RAND)*

Vermelde lening sal voor of op einde Maart 2008 aan Koos Nel terug betaal word, insluitende renete bereken teen prima -2%, vanaf 22/3/2007 tot en met datum van betaling, en sal uiteraard ook "Belasting vriendelik" wees."

[8] It is clear from the record on appeal that the First Appellant was the only person to testify in the Court a quo.

[9] The First Appellant confirmed agreements 'D1' and D'2'.

ANALYSIS AND EVALUATION

[10] In my view, the following issues warrant determination on appeal:

10.1. Whether 'D2' is a Credit Agreement in terms of the National Credit Act 34 of 2005, as amended?

10.2. Whether 'D1' can be revived if 'D2' is declared to be unlawful and invalid?

10.3. Whether 'D1' was inchoate or not and whether reliance on the inchoateness by the Respondent was appropriate in law;

10.4. Whether 'D1' was a Credit Agreement in terms of the National Credit Act 34 of 2005 ("the Act"), as amended?

[11] Accordingly the first issue for determination as set out above is whether 'D2' falls within Section 8 of the Act, meaning, can it be described as a credit agreement?

[12] Firstly, the Appellants conceded in a pre-trial minute that clauses 2, 3 and 4 of 'D2' fall within the ambit of Section 8 of the Act. Secondly, what logically must follow such a concession is surely that the agreement between the First Appellant and the Respondent is unlawful in terms of Section 89 (2) of the Act for the reason that the neither of the First Appellant and the Respondent were registered as credit providers in terms of the Act.

[13] However, Counsel for the Appellants, submitted in the Court *a quo* and in this Court that 'D2' is not a credit agreement but rather a negotiation or 'settlement' of a dispute regarding the payment of the R30 000 000-00 [thirty million rand]. As I understand this argument, if the agreement can be described as a 'settlement' then in terms of **Ratlou v MAM Financial Services SA (Pty) Ltd**¹, 'D2' is not a credit agreement in terms of the Act and is therefore neither unlawful nor invalid.

[14] This submission, firstly, flies in the face of the concession made by the Appellants which concession was never withdrawn.

¹ 2019 (5) SA 117 (SCA)

[15] Furthermore as found in the Court *a quo*, which finding I agree with, the settlement of a dispute never formed part of the pleadings and cannot be relied on by the Appellants.

[16] Accordingly in my view, the **Ratlou**² decision is not applicable to this case because, as stated above, the pleadings do not lend themselves to such a conclusion nor did the testimony of the First Appellant in the Court *a quo*.

[17] The applicability of the Act generally and Section 40 in particular, to agreements 'D1' and 'D2' was an issue throughout the proceedings in the Court *a quo* and also formed part of the submissions in this Court. In this regard the insightful and in my view, authoritative judgement of **Du Bruyn N.O and Others v Karsten**³ needs mentioning:

"[18] The real issue in this appeal is whether the full court in Friend was correct in finding that that the NCA was directed only at those in the credit industry and did not apply to single transactions where credit was provided, irrespective of the amount involved. The court in Friend para 28 held that notwithstanding the fact an agreement may be a credit agreement in terms of the NCA, this did not necessarily mean that the credit provider was obliged to register in terms of s 40(1)(b). For this interpretation the full court relied on the purpose of the NCA, set out in s 3 which is, 'to promote and advance the social and economic welfare of South Africans' in order to achieve 'a

² *supra*

³ 2019 (1) SA 403 (SCA)

fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers'. Bearing this in mind the court found that the provisions of the NCA were meant to regulate those participating in the credit industry and persons who frequently provide credit, and was not applicable to once-off transactions.

[19] *The court a quo's stance was further complicated by a number of decisions in the same division which held that Friend had been wrongly decided. In Van Heerden v Nolte⁴ the court found that the ratio decidendi in Friend was inconsistent with the approach taken by the Constitutional Court in National Credit Regulator v Opperman & others.⁵ Similarly, Potgieter v Olivier & another,⁶ although the court held that it was bound by Friend, it differed with the finding therein on the grounds that the tenets of interpretation of statutes do not permit such a meaning.⁷*

[20] *There can be no doubt that the approach adopted in Friend is pragmatic and makes good sense. However, it is difficult to marry this interpretation with the unambiguous text of the NCA. Section 40 of the NCA sets out the circumstances under which registration as a credit provider is applicable. The section, in relevant part, provides that:*

(1) *A person must apply as a credit provider if–*

⁴ *Van Heerden v Nolte* 2014 (4) SA 584 (GP) para 14.

⁵ *National Credit Regulator v Opperman & others* [2012] ZACC 29; 2013 (2) SA 1 (CC) (Opperman).

⁶ *Potgieter v Olivier & another* 2016 (1) SA 272 (GP) (*Potgieter*) para 28 and 30-33.

⁷ See also *Naude & another v Wright* [2017] ZAGPPHC 646 para 26 where the court held it was bound by *Friend*.

(a) *that person, alone or in conjunction with any associated persons, 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 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 –*

. . . .

(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.'*

[21] *Section 40(1) was amended by Act 19 of 2014 to delete any reference to 100 credit agreements. It now reads as follows:*

'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 s 42 (1).'

Therefore the amount of credit provided that is now the sole determining factor to ascertain whether a credit provider is obliged to register."

[18] It is clear, in my view, that **Du Bruyn**⁸ applies to 'D2' for the reason that 'D2' is a credit agreement within the meaning of Section 8 as read with Section 40 (1) of the Act. For the reason that neither the Appellant nor the Respondent were credit providers within the meaning of the Act, 'D2' must be found as I do find, to be unlawful and unenforceable.

[19] The next issue for determination as stated above, is whether 'D1' can be revived after a finding that 'D2' is a credit agreement that is unlawful within the meaning of the Act?

[20] Counsel for the Appellants submitted that the Appellants pleaded conditionally that should 'D2' be found to be unlawful and unenforceable then Appellants' claims are based on 'D1'.

[21] In this regard Counsel for the Appellants stated that where a novation or substitution is incomplete for the reason that the novated contract is unlawful and unenforceable, the previous contract revives. Counsel placed reliance on the case of **Acacia Mines Ltd v Boshoff**⁹ for this submission.

[22] Now this case also mentions the fact that novation has to do with the intention of the parties as to the abandonment of the previous contract.

⁸ supra

⁹ 1958 (4) SA 330 AD @ D

[23] It is therefore only proper to investigate whether the parties to 'D2' had such intention to abandon 'D1', if so, then no further reliance can then be placed on 'D1' for any claim.

[24] It should be noted that the First Appellant testified that 'D2' had replaced 'D1'. In my view that is an abandonment of 'D1' and same cannot be resuscitated. Once that occurs, one is only left with 'D2' and since 'D2' has been found to be unlawful and unenforceable, 'D1' cannot be relied upon as a claim against the Respondent.

[24] I now deal with whether 'D1' was inchoate or not and whether reliance on such 'inchoateness' by the Respondent is appropriate in law.

[25] Counsel for the Appellants submitted that the issue of an 'inchoate agreement' cannot be relied on by the Respondent for the reason that this issue was never pleaded and in is trite in civil proceedings that parties are bound by the pleadings. Furthermore, so it is submitted, the Court *a quo* did not have to decide the issue for the same reason, namely, the 'inchoateness' of the agreement.

[26] Now the real issue regarding the agreement 'D1' is that the Plaintiff himself testified that there were certain issues that needed to be clarified and this related to the issue of 'belasting vriendelik' as well as when payment was to start.

[27] Whilst it is correct that a party may not raise a defence that has not been pleaded, the same cannot be said of a party whose obligation it is to prove an agreement, indicating that such agreement is not complete. It is my view that in such circumstances a party can be held to his/her statement that the agreement is not complete. The First Appellant pertinently mentioned that he and the Respondent were still to discuss how exactly certain clauses will be performed¹⁰. This clearly evidences incompleteness.

[28] The result of this circumstance is therefore that 'D1' is inchoate and thus cannot be used to advance the claims of the Plaintiff.

[29] Should I be wrong in the above reasoning regarding the incompleteness of 'D1', the question still remains whether 'D1' in and of itself is a credit agreement and if so whether such agreement is lawful.

[30] Section 8 (4) of the National Credit Act¹¹ provides as follows:

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

(a) a pawn transaction or discount transaction;

(b) an incidental credit agreement, subject to section 5(2);

¹⁰ Record: Volume 2 paginated page 200 et seq

¹¹ 34 of 2005

(c) an instalment agreement;

(e) a lease; or

(d) a mortgage agreement or secured loan;

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."

[31] Having regard to the abovementioned Section, it is my view that the deferment of payment of the amount of R30 000 000-00 [thirty million rand] as contained in 'D1' falls foul of the abovementioned Act and thus unlawful and unenforceable. On this ground also, the Appellants' claim must fail.

CONCLUSION

[32] In conclusion therefore, I am of the view, for the reasons stated above, that the appeal must fail and there is no reason to alter the norm that the party succeeding is entitled to their costs.

In the result I propose the following order.

- a). The Appeal is dismissed.

b). The Appellants to pay the costs of the Appeal which costs shall include the costs of two Counsel where employed, the one paying the other to be absolved.



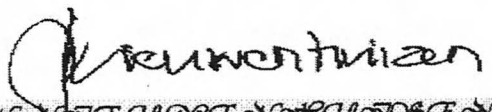

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA



I agree.

T. BOKAKO
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

I agree and it is so ordered.

JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Date of virtual hearing: 7 September 2022

Date of judgment: 07 November 2022

Appearances:

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