IN HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 8084/2013

In the matter between:

ABSA BANK LIMITED **PLAINTIFF**

and

JOHN UTUKILE MANYIKE **FIRST DEFENDANT**

NTOKOBANE MOGOTSI **SECOND DEFENDANT**

CINDY STELLAMOGOTSI **THIRD DEFENDANT**

JUDGMENT

Date Delivered: 06 October 2016

MBATHA J:

[1] The plaintiff is Absa Bank Limited, which seeks a monetary judgment against the defendants, interest thereon, an order declaring property executable and an order for costs.

[2] It is common cause that on about June/July 2007 a loan agreement was concluded between the parties. The plaintiff lent the sum of R1 350 000 to the defendants, the defendants undertook to repay the loan in specific monthly instalments and a mortgage bond was registered over the property purchased by the defendants as security for their obligations in terms of the loan agreement. The property which was purchased by the defendants from Early Light Trading CC is known as Erf [.....] E., KwaZulu-Natal. It is not disputed that the defendants are in default with their payments since December 2012.

[3] The issues that are in dispute are as follows:

(a) the specific terms of the agreement as between the plaintiff and the defendants;

(b) the amount presently owed by the defendants as per the certificate of balance; and

(c) the main issue being whether the advancement of the loan to the defendants amounted to reckless trading in terms of the National Credit Act.[1]

The defendants contend that the loan advanced by the plaintiff exceeded the value of the property in question, that the plaintiff did not assess their monthly affordability to pay the loan in terms of the agreement, and that the credit was advanced recklessly as finance was applied simultaneously for other properties. The plaintiff bears the *onus* of proof to prove the terms of the loan agreement, the certificate of balance and the balance outstanding. The defendants bear the onus of proof in so far as reckless lending is concerned. The plaintiff's argument is twofold in that it submits that the provisions of the National Credit Act are not applicable to the loan agreement between the parties and that should the court not accept that the contract fall outside the provisions of the National Credit Act, it disputes that it engaged in reckless trading with the defendants.

[1] Act 34 of 2005

[4] To prove the terms of the agreement the plaintiff called Lynette Prinsloo. Mr Imtiaaz Mohamed, a witness for the plaintiff, confirmed the certificate of balance and confirmed that as at 17 March 2016 the defendants were indebted to the plaintiff in the sum of R1 589 016.91 together with interest at the rate of 10.5% per annum capitalised monthly from 18 March 2016. The plaintiff also led the evidence of attorney and conveyancer Mr Janse Van Rensburg of Roodepoort, whose evidence was to describe how he receives instructions for registration of the bond from the plaintiff and he confirmed that he explains the terms of the National Credit Act to each client of the plaintiff, the mortgage loan agreement, the repayment terms, the interest rate, terms of the loan and valuation. He could not recall the defendants but confirmed that the procedure is followed in his practice by himself or his professional assistant, who would go and explain to the banks' clients the implications of the National Credit Act, and the entire terms of the loan agreement.

[5] The three defendants also testified in the trial and called only one expert witness, Mr Pardey, a valuator in support of their case.

[6] It is important that I should summarise from the evidence of the defendants what led them to acquire a loan from the plaintiff. This will assist in understanding the defence of reckless lending which they have raised as well as the plaintiff's assertion that the contract between the parties fall outside the ambit of the National Credit Act.

[7] According to Mr Manyike, he learnt from one Portia Sekati, a high ranking member of the Estates Agency Board, about a presentation that was to be presented by one Mr Cecil Uren in Gauteng. Manyike extended the invitation to his friends, the second and third defendants, Mr and Mrs Mogotsi. The presentation was attended by about 20 to 30 people. Cecil Uren presented to them an investment opportunity which would enable them to get a very good return. This related to the purchase of immovable properties in Limpopo, KwaZulu-Natal and Gauteng provinces. He told

them about a property in Elysium, KwaZulu-Natal, which could be rezoned and subdivided into about ten stands and sold at about R400 000 to R500 000 each. This projection related to the Elysium property that was for sale for R1 350 000. It later on transpired that the property was owned by Early Light Trading CC, whereby Cecill Uren was the sole member. It became very clear to all that this would translate to huge profits for the investors. The investors were informed by Cecil Uren that they were only required to use their credit worthiness. He would ensure that the property is rezoned, subdivided and sold within a period of six months. He also will service the bond for six months by depositing a sum of R100 000 in one of their banking accounts. They were shown the Elysium property screen through a projector, which was a beautiful place with sea views.

[8] The gullible three defendants expressed their interest in four properties. A Ms Debbie Mulder, who also participated at the presentation, offered to assist them in getting finance from the various banks, including the plaintiff, in her capacity as a bond originator. They complied with all the minimum requirements for such applications, by signing the relevant application forms for loans, signed the offer of purchase and presented proof of their income and expenses to Debbie Mulder. This was done in respect of all the four properties, including the property that is the subject matter of this action.

[9] Finally, they learnt from Debbie Mulder that the loan applications had been approved. It was their evidence that throughout the entire process they never dealt with an Absa official or any attorney representing the plaintiff, they acted through Debbie Mulder.

[10] They received payments to service the loan after registration of transfer of property to their names as promised by Cecil Uren. The payments were made into the second defendant's account. As the time went on they realised that Uren was not keeping to his side of the bargain as the rezoning did not take place and they were still in possession of the purchased property. After the expiry of the six month period, they had no option save to service the bond.

[11] Cecil Uren was nowhere to be found and Debbie Mulder could not assist them. It was then that after a year or so they resolved to sell the property. Manyike visited the place in Elysium and found it not to be what it was presented to them. It was valueless land which only had a market value of R300 000 according to a local valuator, though it had been purchased for R1 350 000.

[12] According to Manyike, Debbie had informed them that the bank would send an assessor to evaluate the properties that they were purchasing. Their view is that the bank should have not advanced the money paid for the property, as it was a worthless piece of land.

[13] It is important to note that the defendants stated that they knew that they would not have qualified to purchase the said four properties due to their financial commitments. It is also common cause that although they are gainfully employed, they were already servicing their home loan bonds, motor vehicles, and they had family commitments, including school fees for their children and had to cater for other incidental expenses. They believed that they will make a quick and lucrative investment within six months and be debt free as promised by Cecil Uren. Their view is that it was a commercial investment, which they undertook without any benefit of risk advice from the plaintiff, in particular.

[14] It is common cause that the defendants are highly educated persons, all three hold senior degrees, in Industrial Psychology, a MBA degree and a Masters Degree in Mining, respectively. They understood the risk, according to Manyike, but believed that it was viable enough to proceed with it. It is difficult to understand how the defendants armed only with their credit worthiness expected to buy four expensive immovable properties and dispose of them at a huge profit within a period of six months. They should have realised that this was only a scam.

[15] The plaintiff's submission is that the provisions of section 80 and 81 of the National Credit Act do not apply to the defendants. The defendants had formed a partnership and as a result they fall within the definition of a 'juristic person' as set out in section 1 of the National Credit Act, which includes 'a partnership, association or other body of persons'.

[16] It is trite that the requirements of a partnership are as follows:

(a) each party must bring something into the partnership whether it be money, labour or skill;

(b) the business should be carried on for the joint benefit of the parties;

(c) the object should be to make a profit; and

(d) the contract must be legitimate.

It was the evidence of the second defendant that at the presentation Debbie Mulder proposed that they invest together as co-applicants. A decision was taken there and then as they realised that individually they would not succeed in obtaining the bank loans. They identified the property which is the subject matter of this action, processed the loan application through Debbie jointly. Debbie communicated through Manyike in collecting all the requirements for purposes of the joint loan application.

[17] Their partnership started at that stage, when they worked through what they refer to as their 'credit worthiness' and continued with it when they jointly purchased the property and continued to service the bond when funds were no longer forthcoming from Cecil Uren.

[18] The property was acquired with the joint intention to make a profit out of the subdivided plots of the Elysium property. The fruits of such a joint venture as they refer to it were to be enjoyed by the three defendants equally.

Their application to the bank for a mortgage loan was done as a partnership. This is evidenced from their conduct since they attended the presentation.

[19] It is clear from their evidence that they are not certain if Debbie disclosed to the bank their intention to subdivide and sell, that Cecil Uren was to service the loan for six months, that they had not even seen the properties they were purchasing. They undertook to purchase the properties which they had not inspected, and which could have been non-existent, merely at the prospect of making huge profits out of them.

[20] The defendants deny that they formed a partnership, a juristic person, when they applied for a loan.

[21] It is my view that when parties jointly agree to acquire immovable properties with the intention of making profit, the elements of a partnership are there, irrespective that there is no express agreement to that effect. A true consensus *ad idem* exists through the conduct of the parties. This is inferred from their conduct. It is my view that a tacit contract was established between the parties as at the date of the presentation by Cecil Uren. The conduct of the defendants in forming a partnership is clear, unequivocal and unambiguous. It is clear from the evidence before the court that they acted as partners, irrespective that this was not expressly stated.

[22] Our law recognises reasoning by inference in civil cases. The first stage is to decide on the preponderance of probabilities, what is the conclusion to be drawn from the facts. Lastly, in deciding whether a contract has been proved, it is to decide

how the proved facts, namely, the conduct of each party, the surrounding circumstances must have been interpreted by the other. The discussions between the parties are relevant, their working together in processing the applications for a loan, their contributions through their credit worthiness and the prospects of getting a financial reward and the legitimate purchase of property shows to me to be the more probable and logical inference that a tacit partnership agreement had been formed.

[23] I do not agree with the submission made by the counsel for the defendants that a partnership should have had a name and that the defendants should have verbalised their intention to form a partnership agreement. I am of the view that the plaintiff has succeeded in proving that the defendants were a partnership and therefore excluded in terms of the National Credit Act. The defendants have not shown a contrary intention.

[24] I rely on the well-known definition by De Villiers JP in *Joubert v Tarry & Co*[2] at page 279 where he states that:

> 'Where all the four essentials are present in the absence of something that the contract between the parties is not an agreement of partnership, the court must come to the conclusion that it is a partnership.'

A similar view was held by the Appellate Division in *Purdon v Muller*[3] where the court held that where *Pothier's* four requirements for a partnership are shown to be present, the court will find a partnership established unless such a conclusion is negated by a contrary intention disclosed on a correct construction of the agreement between the parties.

[2] 1915 TPD 227
[3] 1961 (2) SA 211 (A)

[25] In *Pezzutto v Dreyer & Others*,[4] the court held that for a partnership to come into existence there must be an agreement to that effect between the contracting parties. In determining whether an agreement constitutes a partnership the court will have regard, inter alia, to the subsistence of the agreement, the circumstances in which it was made and the subsequent conduct of the parties.

[26] The fact that the parties regard themselves as partners, or referred to themselves as such, is not necessarily decisive to create a partnership agreement, but what is important is that the *essentialia* of a partnership should be present.

[27] The cases that counsel for the defendants has referred me to on this aspect confirm what are the essentials of a partnership agreement, in particular the case of *Edward Graham Richard Hughes v Malcom Berwyn Ridley & Others*, case number 6550/2008 (12 June 2009), delivered by AJP Levinsohn in the High Court Of KwaZulu-Natal, Pietermaritzburg.

[28] In the second judgment that he referred me to delivered by Tshabalala JP in *Celeste Bushnell v Karen Robert & Another*, case number 6482/2008, High Court of South Africa, Durban and Cost Local Division, (09 July 2008) it refers to a written agreement between the parties and the principle of *uberima fides* between the parties. It is with respect, not stating that a partnership agreement should always be in writing.

[29] Accordingly, I find that a partnership agreement was formed by the defendants. In the light thereof I find that it is a juristic person, which is excluded in terms of the National Credit Act. Therefore, it cannot avail itself to the defences of reckless lending as envisaged in terms of section 80 and 81 of the National Credit Act.

[4] 1992 (3) SA 379 (A)

[30] I am satisfied that the plaintiff discharged its *onus* of proof in proving the balance outstanding on the amount owing and that it is entitled to the relief sought in the particulars of claim.

[31] Accordingly, I make the following order that judgment be granted against the first and second defendants, jointly and severally, the one paying the other to be absolved for:

(a) Payment of the sum of R1 619 527;

(b) Interest on the sum of R1 619 527 at the rate of 8.50% per annum, as from 07 June 2016 to date of final payment;

(c) An order declaring the immovable property Erf [.....] E., Registration Division ET, Province of KwaZulu-Natal, in extent 1,3024 (one comma three zero two four) hectares, held by deed of transfer No.T52642/07, executable;

(d) Cost of suit on an attorney and client scale.

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MBATHA J

Date of hearing	:	22 September 2016
Date delivered	:	06 October 2016

Appearances:

For the Applicant	:	Adv S Hoar
Instructed by	:	GEYSER, DU TOIT, LOUW & KITCHING PINETOWN INC ATTORNEYS 7 Greathead Lane Pinetown
For the Respondents	:	Mr T Lesomo
Instructed by	:	SEOKANE LESOMO INC ATTORNEYS No 37 Wierda Road West Wierda Valley Sandton