Republic of South Africa

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE No: 16123/2008

In the matter between:

PHILIP CLAASEN t/a MOSTLY MEDIA **Plaintiff**

and

ANDRE DELPORT t/a AD INDUSTRIAL CHEMICALS **Defendant**

JUDGMENT DELIVERED : 4 JUNE 2009

For Plaintiff	:	Adv B O'Dowd
Attorney(s)	:	Vaughan Ulyate & Associates (c/o Fields Attorneys)
For Defendant	:	Adv CHJ Maree
Attorney(s)	:	Smit Kruger Inc (c/o Marais Muller Yekiso)

Heard on 28 April 2009

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MOOSA, J:

Introduction

[1]In this matter the plaintiff seeks provisional sentence against the defendant in respect of two cheques for an amount of R129 578,00 each, both drawn by the defendant in favour of the plaintiff and dishonoured upon presentment. It is common cause that the cheques formed part of several loans made by the plaintiff to the defendant and recorded in various written "I Owe U's" ("IOU"). On 24 July 2008 the defendant handed the plaintiff three post-dated cheques for R129 578,00 each. The first of the three cheques was met on presentment. The remaining two cheques were dishonoured and form the subject matter of these proceedings.

The Defences

[2]The defendant opposes the provisional sentence on a number of grounds. They are as follows:

(i) That the plaintiff has not complied with Sections 129 and 130 of the National Credit Act, 34 of 2005 (the "NCA");

(ii) the defendant is over indebted and requests the protection and relief provided for under Section 85(a) and (b) of the NCA;

(iii) the "interest" on the loans exceeded that permitted in terms of the NCA and/or the Usury Act, 73 of 1968 and is accordingly illegal;

(iv) the outstanding balance in respect of the loans was R85 325,00 and not R388 734,00 at the time the cheques were issued.

The Application of the NCA

[3]The plaintiff did not dispute the fact that he has not complied with Sections 129 and 130 of the NCA, but submitted that he was not required to do so for two reasons: firstly, that the plaintiff and the defendant did not conclude the loan agreements at "arm's length" as referred to in Section 4(1) of the NCA and the NCA – and *a fortiori* Sections 129 and 130 thereof – only apply to credit agreements concluded at "arm's length" and secondly, the plaintiff's cause of action is not for the enforcement of a credit agreement, but for the enforcement of rights and obligations arising out of dishonoured cheques. The parties are *ad idem* that should I find that the NCA is applicable, then, in that event, the action for provisional sentence should be dismissed.

Whether the loan agreements were concluded at "arm's length"?

[4]For the purpose of determining whether the NCA applies or not, the first jurisdictional

fact to consider is whether the loan agreements were concluded at "arm's length" as required in terms of Section 4(1)(a) of the NCA. The NCA and *a fortiori* Section 4(1)(a) of the NCA does not specifically define what is meant by "dealing at arm's length", but Section 4(2)(b) sets out the circumstances in terms of which the parties are not "dealing at arm's length". The relevant section for the purpose of this enquiry is 4(2)(b)(iv)(aa). For purpose of convenience, I will reproduce the two relevant sections.

[5]Section 4(1)(a) provides:

> *"…this Act applies to every credit agreement between the parties dealing at arm's length and made within, or having effect within the Republic, except…".*

Several exceptions follow which are not relevant for the purpose of the present discussion. The plain meaning of the particular section is that the NCA does not apply to credit agreements that are not concluded at "arm's length".

[6]Section 4(2)(b)(iv)(aa) reads as follows:

> *"In any of the following arrangements, the parties are not dealing at arm's length:*
>
> *(i) …*
>
> *(ii) …*
>
> *(iii) …*
>
> *(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) …*

[7]The circumstances set out in subsection 4(2)(b)(iv)(aa) are consistent with the notion of "dealing at arm's length" as described by **Trollip, JA** in the case of **Hicklin v Secretary of Inland Revenue** 1980(1) SA 481 (A). The only contrast is that the learned judge describes the term in a positive sense whereas the NCA casts it in a negative sense. The learned judge describes the term as follows (p498 at 495A):

> "It connotes t*hat each party is independent of the other and, in so dealing, will strive to get the utmost possible advantage out of the transaction for himself."*

[8]The question of "dealing at arm's length" is a factual inquiry and falls to be decided on the facts and circumstances of each particular case. In order to determine whether the transactions in question were conducted at "arm's length" or not, we need to examine the relationship between the parties, the substance and nature of the transactions and the surrounding circumstances. (**Zandberg v Van Zyl** 1910 AD 302 at 309; **Western Bank Ltd v Registrar of Financial Institution and Another** 1975 (4) SA (T) at 45A-E.)

[9]It is common cause that the parties were friends, mixed socially and were involved in previous business ventures. However, friendship *per se* does not necessarily mean that the parties are not dealing at "arm's length". The plaintiff, on the one hand, contended that his relationship with the defendant was akin to that of a familial relationship, in which the defendant was dependant upon him for financial assistance. Their financial transactions, plaintiff submitted, were not conducted at "arm's length" and accordingly fell outside the scope of the NCA. The defendant, on the other hand, contended that, despite their friendship, they were independent of each other in their

dealings, their interests did not overlap and the loan transactions and *a fortiori* those that underpinned these proceedings, were normal money-lending transactions which were conducted at "arm's length".

[10]It is common cause that plaintiff made more than 30 loans to the defendant. All of these loans were agreed to on the same basis. Each of these loans were recorded in a written IOU which sets out (i) the amount advanced; (ii) the considerations for the loan, which were variously described as profit share, finance charges, finance payment and cash finance interest (the consideration) and (iii) a daily penalty interest calculated on a daily basis. The IOU also stipulated the date of repayment of the capital and the consideration and the date from which the penalty interest would accrue. The IOU dated 7 January 2008 reflects that 70% of a life policy valued at R262 000,00 has been ceded to the plaintiff in case the defendant passes away and cannot honour his obligations. Other IOU's contained a clause that it constitutes a legal claim on the defendant's estate should he pass away.

[11]The defendant maintained that the consideration payable by him to the plaintiff was in fact interest and not a share of the profits as alleged by plaintiff. According to the defendant such amounts were inserted by the plaintiff when completing the IOU while the plaintiff stated that the loans made by him to the defendant were always at the latter's instance and on terms proposed by him.

[12]The plaintiff tried to justify these amounts as "profit sharing". The surrounding circumstances militate against these amounts being "profit sharing". Firstly, the plaintiff himself variously describes these amounts as "*profit share, finance charges, finance payment, or cash finance interest and late payment penalty or interest".* Secondly, the

amounts are agreed to in advance like that in the case of interest. Thirdly, the amounts uniformly approximated to 10% per month or 120% per annum and in addition penalty interest was imposed on late payments. Fourthly, there is no agreement that the defendant would produce an income and expenditure trading account which will reflect the actual profit and/or loss made by the defendant in order to determine the profit-share. Fifthly, the plaintiff admitted that there was no discussion or agreement that the defendant would not have to pay him the "profit share" amount that would be due to him if the defendant did not make a profit on a particular transaction. However, on one occasion when the plaintiff told him that he was not going to make any profit, he waived the "profit share" amount. This appears to be an isolated incident. The version of the plaintiff that the consideration is "profit sharing" is on the facts inherently improbable. I am satisfied that such consideration constitutes interest on a money lending transaction and the amounts appear to be excessive.

[13]I return to the question of whether the transactions were conducted at "arm's length". There were more than 30 money lending transactions concluded between the parties. The business relationship accordingly endured for a relatively long time. The plaintiff admitted that he found the terms of the money-lending transactions attractive and derived financial benefit from these transactions. The plaintiff secured the obligations of the defendant by taking cession of 70% of a life policy of the defendant valued at R262 000,00. These characteristics are consistent with normal business transactions that are conducted at "arm's length" and belies any notion of dependence or overlapping of interests.

[14]I have found that the consideration paid and payable by the defendant in fact constituted interest. I accordingly conclude that, despite their close friendship and

social contacts, each party in conducting the money-lending transactions was independent of the other and each strove to obtain the utmost possible advantage out of these transactions. In my view the loan agreements were concluded at "arm's length".

Whether the cause of action based on dishonoured cheques can be said to be the enforcement of credit agreements?

[15]The second jurisdictional fact to consider, is whether or not the cause of action based on dishonoured cheques can amount to the enforcement of credit agreements as required in terms of Section 4(1)(a) of the NCA. The plaintiff submitted that he neither relies upon nor seeks to enforce a credit agreement; his cause of action is not for the payment of the amounts due under the loan agreements but is for payment of amounts due pursuant to the rights and obligations that arise as between the drawee/holder of cheques and the drawer thereof when the cheques are dishonoured on presentment. The defendant submitted that the payment by cheque is merely a method or instrument by which the payment is effected and the underlying transaction cannot be ignored to determine whether the transaction is governed by the provisions of the NCA or not. I will examine the two conflicting propositions.

[16]Section 2 of the NCA provides that the Act should be interpreted in a manner that gives effect to the purposes set out in Section 3. Section 3 provides that the purposes of the Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry and to protect consumers. The NCA has been enacted to protect the interests of the consumers against the unscrupulous credit giver. The objective of the NCA is to strike a balance between the

interests of that of a credit receiver and that of a credit giver. It is improbable that the Legislature would have intended to deprive the consumer of the benefits of the NCA simply because he or she elects to repay the loan by means of cheques. The Legislature, in terms of Section 4(5), expressly excludes payment by cheque in respect of the sale of goods or services from the operation of the NCA. If the Legislature intended to exclude the payment by cheque in respect of a loan from the operation of the NCA, it would have expressly done so. The whole purpose and objective of the NCA would have been defeated if unscrupulous credit givers insisted that the credit receivers furnish the credit receivers with post-dated cheques to cover the indebtedness in terms of the credit agreement in order to escape the provisions of the NCA. In my view, the legislature would have guarded against such eventuality.

[17]Counsel for the plaintiff argued that the cheques, on the face of it, are liquid documents and are *ex facie* complete and regular. It is trite that a court will ordinarily grant provisional sentence unless the defendant can satisfy the court that the probability of success in the principal case is against the plaintiff. (**Barclay's National Bank v H J De Vos Boerdery Ondernemings (Edms)** Bpk 1980 (4) SA 475 (A) at 484D-E and **Mijlof t/a Cape Building Ceramics v Jackson** 1980 (3) SA 13 (C) at 18A-E.)

Findings

[18]I am satisfied that a cheque presented in payment of an amount owing in respect of a credit agreement and which has been dishonoured on presentment is not exempted from the provisions of the NCA. The underlying *causa* still arises from the credit agreement or, as in this case, the money-lending transactions. I am strengthened in this conclusion by the *ratio decidendi* of a full bench in the case of

Western Bank Ltd v Rautenbach 1974 (4) SA 960 (E) at 964D-H. In that case the parties concluded a credit agreement, but in pursuance thereto the debtor handed the creditor a promissory note providing for the acceleration of the payment of the instalment in the event of default. The promissory note was dishonoured on presentment. The debtor was sued on the promissory note, the creditor claimed that there was a novation and that such novation was not subject to the Usury Act. The court rejected the argument and held that in substance the claim arises from the credit agreement and not from the promissory note and the Usury Act is applicable. Although the cases are distinguishable on the facts, the principle enunciated in that case, in my view, is equally applicable to this case. (See also **Western Bank Ltd v Adams** 1975 (4) SA 648 (C) and **Western Bank Ltd v Van der Merwe** 1975 (4) SA 657 (SWA).)

[19]Having found firstly, that the transactions between the parties were conducted at "arm's length" and secondly, that the underlying *causa* for the claim arose from credit agreements and the payment by means of cheques, happens to be incidental thereto, it is axiomatic that the provisions of the NCA do apply to these proceedings. The general import of sections 129 and 130 of the NCA is that the credit provider is prohibited from commencing any legal proceedings to enforce a credit agreement before first providing the credit receiver with notice as contemplated in Section 129(1)(a) and before the lapse of time during which the credit receiver has either failed to respond thereto or has rejected the proposals contained therein as per Section 130 (1). The provisions of Sections 129 and 130 are peremptory and the failure by the plaintiff to comply with such provisions is fatal. The plaintiff has admitted that he has not complied with these provisions. I am satisfied that the defendant has discharged the onus of showing a probability of success in the principal case.

[20]In view of my finding, it is unnecessary for me to deliberate on the remaining issues relating to the outstanding balance, the rate of interest and the over-indebtedness of the defendant.

The Order

[21]In the premises the Provisional Sentence is dismissed with costs.

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