Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 17638/2012

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

PAROW MOTORHANDELAARS (PTY) LTD Plaintiff

And

NAUSHAD PARKER Defendant

JUDGMENT DELIVERED: 18 AUGUST 2014

BINNS-WARD J:

[1] This matter concerned an action by the plaintiff, which is a credit provider registered in terms of the National Credit Act 34 of 2005, for payment of an amount allegedly owed to it by the defendant in terms of a credit agreement transaction. The claim was for the payment

of the balance of a loan advanced to the defendant against the security of a mortgage bond over immovable property. There was a claim in reconvention by the defendant for repayment of all or part of the payments made by him to the plaintiff in terms of the transaction. The claim in reconvention was predicated on the alleged voidness of the credit transaction.

[2] The terms of the loan agreement provided for the repayment of the loan, which was subject to interest at 21,5% per annum calculated daily on the outstanding balance and capitalised monthly, to occur by means of 60 fixed monthly instalments in the amount of R15 015 each. The total amount expected to be payable by the defendant to the plaintiff over the term of the loan was recorded in the contract as R900 900. According to the plaintiff, the defendant had paid an amount totalling R515 444, 70 by 30 August 2012, when by that stage his payments should have totalled R705 705. The defendant testified that he had in fact made payments totalling a greater amount than that acknowledged by the plaintiff, but he was unable to establish the amount involved because certain cash payments made by him to the plaintiff's debt collector (identified only as 'Maurice') had not been receipted.

[3] The agreement also provided that the plaintiff would be entitled to claim the whole amount outstanding at any time in the event of the defendant defaulting on any monthly instalment. It is not in dispute that the defendant did default on his monthly instalments and the plaintiff has exercised its right to claim accelerated payment. The agreement provided that a certificate signed by a manager of the plaintiff would constitute *prima facie* proof of the amount owed by the defendant under the agreement. A certificate of the nature thus provided for was annexed to the plaintiff's summons. It certified that the defendant was indebted to the plaintiff in the sum of R308 567,18 as at 31 August 2012. The amount so certified is the amount claimed by the plaintiff in the action, together with interest thereon calculated on daily balances and capitalised monthly to date of payment. The plaintiff also sought an order declaring the mortgaged property (which is not the defendant's primary residence) directly executable.

[4] According to the tenor of the summons the amount of the loan advanced to the defendant was in the sum of R550 000. The tenor of the summons was consistent with the terms of deed of agreement. The defendant denied having received a loan in the sum of R550 000. He alleged that only the amount of R400 000 had been advanced to him. The evidence adduced on behalf of the plaintiff indeed confirmed that an amount considerably less than R550 000 had been advanced, but the amount actually lent remained in dispute at the trial.

[5] The defendant testified that he had dealt with the then managing director of the plaintiff company, the late Mr AJ van der Merwe, in concluding the loan agreement. He said that Van Der Merwe had paid him the sum of R400 000 in cash, which he had taken from a strong room at the plaintiff's business premises. The evidence given by Van der Merwe's daughter, who had succeeded him in charge of the family business, but who had not been directly privy to the dealings between her late father and the defendant, was that she had been able to ascertain from the company's records that credit in the capital amount of R418 000 had been advanced to the defendant. She testified that an amount of R18 000 had been credited at the defendant's instance to a mortgage bond account in the company's books relating to a property registered in the name of the defendant's wife and that a further amount of just over R70 000 had been paid on the defendant's behalf to a firm of attorneys to settle an outstanding debt on another mortgage bond, including the attorneys' costs in respect of that transaction. The balance had been paid to the defendant.

[6] The defendant testified that he had queried the discrepancy between the amount of the loan indicated in the loan agreement and the associated security bond (viz. R550 000) and the much lower amount advanced to him. He said that Mr van der Merwe had told him that the difference was 'pasella' – by which was understood a benefit for the plaintiff, as credit provider, in consideration for making the credit available. In conventional parlance that would have been described as an 'initiation fee', or by some such similar term.[1] It is the sort of consideration that the National Credit Act requires to be separately identified in a credit agreement of the nature concluded between the plaintiff and the defendant. It is also a consideration that, when it is permissible, is limited in amount in terms of the National Credit Regulations, 2006. The evidence of Van der Merwe's daughter confirming that the defendant had received a much lower amount of credit than that indicated in the written contract, taken together with the agreed payment terms, which were plainly directed at the recoupment of an amount tallying with the redemption of a loan of R550 000, strongly support the probability of the truth of the defendant's evidence concerning the stipulation by Van der Merwe of an unrecorded consideration.

[7] It is therefore probable that Van der Merwe acted in fraud of the National Credit Act by disguising the consideration as part of the loan ostensibly made to the defendant. The

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[1] 'Initiation fee' is defined in s 1 of the National Credit Act to mean:

'*a fee in respect of costs of initiating a credit agreement, and-*

(a) charged to the consumer by the credit provider; or

(b) paid to the credit provider by the consumer upon entering into the credit agreement'.

amount entailed - whether it be R150 000, as the defendant's evidence would have it, or R132 000, according to the plaintiff's current managing director - exceeds by a considerable margin the maximum (R5 000) allowed in terms of the Act and regulations in respect of initiation fees; see ss 101 and 171 of the Act read with reg. 42 of the National Credit Regulations, 2006.

[8] The defendant did not pertinently plead the aforesaid unlawful characteristic of the credit agreement in his plea, although he did plead that he had received only R400 000 and that 'Van der Merwe had indicated that he retained R150 000 for costs'. The illegality was identified in the evidence. It is something that the court cannot overlook and must take into account *mero motu* in the discharge of its duty to apply the law, cf. *CUSA v Tao Ying Metal Industries and Others* 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para. 68. The plaintiff's counsel, quite correctly, did not seek to argue to the contrary. He submitted that the appropriate manner of dealing with the situation would be to excise the notional provision and to treat the loan agreement as having been altered to provide for a loan of R418 000, with no initiation fee. In this regard he called in aid s 90(4) of the National Credit Act.[2] He stressed that notwithstanding the tenor of the claim pleaded in the summons, the claim had in fact been calculated on the basis of the enforcement of a R418 000 loan *simpliciter*. I have referred to the offending characteristic of the agreement as a 'notional provision' because there is no actual provision for an initiation fee, or any other permissible charge. Acceding to the adoption of the course contended for by the plaintiff's counsel would therefore entail altering the written agreement to provide for a loan in a lesser amount, rather than excising a provision. Whether it would be appropriate to do so will be considered presently.

[9] The defendant pleaded a number of other non-compliant features of the loan agreement to support the conclusion contended for that the agreement was 'void *ab initio,* alternatively *contra bonis* [sic] *mores* and voidable, alternatively unlawful'. I do not propose to traverse them all. The defendant's counsel conceded that some of the complaints were so

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[2] Section 90(4) provides:

> '*In any matter before it respecting a credit agreement that contains a provision contemplated in subsection (2), the court must-*
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> *(a) sever that unlawful provision from the agreement, or alter it to the extent required to render it lawful, if it is reasonable to do so having regard to the agreement as a whole; or*
>
> *(b) declare the entire agreement unlawful as from the date that the agreement, or amended agreement, took effect,*
>
> *and make any further order that is just and reasonable in the circumstances to give effect to the principles of section 89 (5) with respect to that unlawful provision, or entire agreement, as the case may be*'.

technical as to be trivial. What is important, in my view, is that the quotation provided in purported compliance by the plaintiff with s 92(2)(b) of the National Credit Act (the agreement in issue being a 'mortgage agreement', as defined, and thus a 'large credit agreement') materially misrepresented the sum of the loan, it fraudulently failed to disclose the credit costs and the total cost of the proposed agreement, and it did not set out the proposed distribution of the amount intended to constitute the principal debt. For essentially the same reasons the loan agreement also did not comply with the form requirements in s 93 of the Act read with reg. 31 of the National Credit Regulations. I shall consider the effect of this later in the judgment.

[10] The defendant's pleaded reliance on s 89 of the National Credit Act was misplaced. That provision makes credit agreements concluded in a given circumstances unlawful, and requires a court to declare any such agreement to be void 'from the date the agreement was entered into', that is *ab initio*. The credit transaction in issue in the current matter was not entered into in any of the circumstances given in s 89(2), and the section is thus of no application.

[11] Section 90 of the Act, in terms of which a court may sever unlawful provisions from a credit agreement or 'alter it to the extent required to render it lawful' or declare it to be unlawful *ab initio* and declare it void or unenforceable (s 90(4)), also does not appear to be of application because the power provided to the court there vests only in respect of agreements containing provisions of the nature itemised in s 90(2). The non-compliant features of the agreement in issue in the current matter do not fall under any of the categories given in s 90(2), save possibly that the provision of the loan as being one for R550 000, when it was not, might be regarded as a provision of the character contemplated in s 90(2)(a), namely one with the general purpose or effect of defeating the purposes or policies of the Act; deceiving the consumer; or subjecting the consumer to fraudulent conduct.

[12] Section 164(1) of the National Credit Act provides:

> Nothing in this Act renders void a credit agreement or a provision of a credit agreement that, in terms of this Act, is prohibited or may be declared unlawful unless a court declares that agreement or provision to be unlawful.

The defendant has pleaded that the agreement is liable to be declared unlawful and, in his claim in reconvention, has claimed such a declaration. The wording of s 164(1) is unusual. Ordinarily, contracts prohibited by a statute are treated as void, whereas prescriptive provisions unaccompanied by sanctions for non-compliance are treated as directory, and non-

compliance therewith will not necessarily result in the contract being void; cf. e.g *Sutter v Scheepers* 1932 AD 165 at 173-174 and also, generally, the discussion in RH Christie and GB Bradfield, *Christie's Law of Contract in South Africa* 6ed at 351-358 s.v. *Statutory illegality and unenforceability*.

[13] On what basis then is a court to determine whether a credit agreement that is non-compliant with the statute in the respects that I have described is void for illegality? Section 164(1) appears to vest a discretion in the court whether to declare a non-compliant contract (other than one identified in s 89(2)) void or not. To that extent, s 164(1) is consistent with the legislature's intention as expressed in s 90(4). That in turn begs the question of by what criteria the discretion falls to be exercised; the determination of whether an agreement should be declared void obviously cannot be arbitrary. In my view the extent to which overlooking the non-compliance would result in the thwarting or undermining of the objects of the Act would be the most material consideration. The possibility of curing the non-compliant characteristics of the agreement by severance would form part of the consideration. Ordinarily, a court would lean in favour of upholding the contract, unless by doing so it would materially prejudice the purpose of the Act. The essence of the approach that I consider to be appropriate is captured in the observation by Van den Heever JA in *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (A) at 682C-E:

> The cardinal rule is still that stated in *Standard Bank v Estate van Rhyn*, 1925 AD 266 at p. 274: 'After all, what we have to get at is the intention of the Legislature' or as Viscount CAVE, L.C., observed in *Salford Guardians v Dewhurst*, 1926 A.C. 619 at p. 626: 'I base my decision upon the whole scope and purpose of the statute, and upon the language of the sections to which I have specially referred. . . .'

An agreement that would in substance materially frustrate the purpose of the statute would fall to be declared unlawful and void. The provision of s 2(1) of the Act, which enjoins that the 'Act must be interpreted in a manner that gives effect to the purposes set out in section 3' also supports the approach I propose to adopt.

[14] The long title of the Act demonstrates that its purposes include the promotion of a fair and non-discriminatory marketplace for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information, the prohibition of certain unfair credit practices and the establishment of national norms and standards relating to consumer credit. These declared objects are fleshed out in s 3 of the Act, which carries the subheading '*Purpose of Act*' and bears quoting in full. It provides:

> The purposes of this 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, by-
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> (a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;
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> (b) ensuring consistent treatment of different credit products and different credit providers;
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> (c) promoting responsibility in the credit market by-
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> (i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and
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> (ii) discouraging reckless credit granting by credit providers and contractual default by consumers;
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> (d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
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> (e) addressing and correcting imbalances in negotiating power between consumers and credit providers by-
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> (i) providing consumers with education about credit and consumer rights;
>
> (ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; and
>
> (iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;
>
> (f) improving consumer credit information and reporting and regulation of credit bureaux;
>
> (g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;
>
> (h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and
>
> (i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.

[15] As mentioned, the plaintiff's counsel submitted that the court should merely exclude the disguised fee or charge from consideration and treat the contract as a loan for R418 000. Counsel was contending in substance for a form of severability. I do not accept that it is as easy as that. Firstly, the postulated exercise does not constitute severing the bad from the good in the usual sense by excluding an objectionable provision. It does not consist of

putting a blue pencil through parts of the agreement and treating the contract as constituted by what is left. It consists rather of altering the ostensible contract to provide for a loan of R418 000 rather than one for a loan of R550 000. On its own that might not appear to be pushing the envelope too far, but the exercise is not that simple. The postulated exercise would entail making a quite different contract from that which the parties in fact entered into. It would entail treating the contract as one for a loan of R418 000 with no initiation fee or other charges, instead of one for a loan R418 000 with an initiation fee or charge of R132 000, together with interest. It is evident that the very considerable fee levied for extending the credit was a material consideration in the late Mr van der Merwe's conclusion of the contract on behalf of the plaintiff. He probably would not have entered into the transaction, but for the fee consideration. To treat the contract as if the consideration had not been stipulated would be to make a quite different contract for the parties to that which they actually concluded; and moreover, one that they never intended to make themselves. In my view the effect of the illegal stipulation of a fee in an amount many multiples of the maximum permitted charge is something that cannot properly be avoided and it therefore must be taken into account with the other features of non-compliance in determining whether the conclusion of the contract in question so subverted the objects of the statute as to constrain the conclusion that its validity should not be countenanced.

[16] There is not only the stipulation of a fee in an amount grossly in excess of what the statutory regime permits to be taken into account, there is also the manner in which the contract was formulated so as disguise the fee as part of the ostensible capital debt. This formulation was in fraud of the Act and it subverted or was fundamentally inimical to a number of the statutory objects: (i) it was inimical to the purpose of consumer protection reflected in the requirement that contracts be in the prescribed form so that credit receivers might understand exactly how their debt is structured; (ii) it manifested a gross and objectionable exploitation by the plaintiff of the imbalance of negotiating power between consumers and credit providers, at odds with the purpose expressed in s 3(d); (iii) it was irreconcilable with the promotion and advancement of the social and economic welfare of the defendant; (iv) it was inimical to the promotion of a fair, transparent, responsible and accessible credit market and industry and (v) by misrepresenting the true character of the contract, it militated against the accurate reporting of consumer credit information (cf. s 69 of the Act). In my view it would be inconsistent with upholding the apparent intention of the legislature manifested in the provisions of the statute to recognise the validity of a contract

that tends to undermine and frustrate the purpose of the Act to the material extent that I have identified. In the result the mortgage agreement in the current case falls to be declared unlawful and void *ab initio*. The plaintiff's claim will therefore be dismissed with costs.

[17] I would not have struck the contract down if its only shortcoming had been an omission to set out the distribution of the principal debt, but the undesirability of the plaintiff's failure to comply with that regulatory prescription was illustrated in the course of the trial, at which it was in dispute how the credit advanced to the defendant had been allocated. Scope for this type of uncertainty and the disputes to which it is liable to give rise would be minimised were compliance made with the prescribed requirement of setting out the distribution.

[18] It is necessary in the light of the conclusion to which I have come to determine the defendant's claim in reconvention, as amended. It is in the nature of a *condictio ob turpem vel iniustam causam*. It falls to be determined applying the flexible approach of fairness and equity enjoined in *Jajbhay v Cassim* 1939 AD 537, in which the common law on the *par delictum* rule was relaxed so as to facilitate the ability of the courts to do simple justice between man and man. The defendant has claimed repayment of the amount which it is common cause he paid under the purported agreement. To accede to that claim would plainly be inequitable, for the defendant has obtained the benefit of the money that was advanced to him by the plaintiff. In my view justice would be done were he to be awarded the amount that he has paid to the plaintiff over and above that received by him in terms of the purported agreement. In that regard I preferred the evidence of Ms van der Merwe who testified that he had received credit in the sum of R418 000 to that of the defendant. Ms van der Merwe was able to describe the allocation of the credit advanced, whereas the defendant was vague. The defendant's counsel did not challenge the evidence of Ms van der Merwe in any effective way. Her reconstruction of the defendant's account in the detail set out in exhibit A at pp 45-46 was not shown to be inaccurate in any way. The award to be made in favour of the defendant shall thus be in the sum of R97 444,70, being the difference between the sum of R515 444,70 paid by him to the plaintiff and the sum of R418 000 received by him from the plaintiff.

[19] The following orders are made:

1. The mortgage agreement purportedly entered into between the plaintiff and defendant on 19 September 2008 is declared to be unlawful and void *ab initio*.
2. The plaintiff's claim is dismissed with costs.

3. The defendant's claim in reconvention is upheld in the amount of R97 444,70, together with interest thereon at the prescribed rate of 9% per annum from date of judgment to date of payment.
4. The plaintiff is ordered to pay the defendant's costs of suit in the claim in reconvention.

A.G. BINNS-WARD
Judge of the High Court

Before:	**Binns-Ward J**
Hearing:	**12 August 2014**
Judgment:	**18 August 2014**
Plaintiff's counsel:	**A. Heyns**
Plaintiff's attorneys:	**Fourie, Basson & Veldman** **Parow**
Defendant's counsel:	**M. Basson**
Defendant's attorneys:	**McClusky Attorneys** **Parow**