Republic of South Africa

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

Case No. 5178/2019

Before: The Hon. Mr Justice Binns-Ward
Date of hearing: 19 June 2019
Judgment: 21 June 2019

In the matter between:

SHAUN ANDREW LLEWELLYN HARRIS Plaintiff

and

RACHEL CORNELIA ROSSOUW Defendant

JUDGMENT

BINNS-WARD J:

[1] In this matter the plaintiff sought in action proceedings to recover the sum of R515 361 plus interest thereon a tempore morae, being in respect of the repayment of a loan

in the aforementioned amount extended by the plaintiff to the defendant '*in or about December 2016*'[1] The claim was not defended, and the case came up before me by way of an application for default judgment. When the matter was called I raised my doubts about whether judgment as prayed for could competently be granted. My concern was that the pleaded case left me in doubt as to the applicability of the National Credit Act 34 of 2005 ('the Act') and, if it was applicable, whether an entitlement to the relief sought had been made out. After hearing counsel's submissions I stood the matter down for further consideration.

[2] It was alleged in the particulars of claim that the loan agreement, which had not been reduced to writing, provided that the loan was repayable on demand and would bear interest at the rate prescribed in terms of the Prescribed Rate of Interest Act 55 of 1975. The defendant subsequently executed an acknowledgment of debt in terms of which she acknowledged her indebtedness in terms of the loan. The acknowledgment of debt, dated 9 January 2018, which made no reference to the term in the loan agreement in respect of mora interest, recorded in material part that:

> The loan amount was contributed towards my personal expenses as well as towards the establishment of the new business, *The Biolab* of which [the plaintiff] was part of at the time. [The plaintiff] decided to exit the new business *The Biolab* by choice early August 2017.
> I won't be able to commit to pay back arrangements as yet as the new business is still in the develpopent phase and I haven' started earning any income.
> I will be able to construct a pay back payment structure during July/August 2018.
> I trust that you will find the above in order.

[3] Subject to the exceptions expressly provided for in terms of the Act, a loan agreement qualifies as '*a credit agreement*' for the purposes of the Act. The plaintiff alleged in his summons that the Act did not apply because the agreement was not between parties dealing at arms' length, and therefore excluded from the application of the Act by virtue of the

[1] I quote from the particulars of claim. An allegedly related acknowledgment of debt attached to the pleading gives the date of the transaction as January 2017.

provisions of s 4(1) read with 4(2)(b) thereof. In this regard it was alleged that the agreement '*amounted to arrangements:*

1. *in terms of which each party was not independent of the other and consequently did not necessarily strive to obtain the utmost possible advantage out of the transaction; or*
2. *that are of the type that has been held in law to be between parties who not dealing at arms' length*'.

[4] The facts pleaded in the particulars of claim gave no insight into the nature of the parties' relationship. The factual basis for the allegation that they were '*not independent of the other*' was not disclosed. The pleading also did not cast any light on the significance of the alleged failure of one or the other parties to '*necessarily strive to obtain the utmost possible advantage out of the transaction*'. It also did not identify - and nor did counsel when I invited her to address the court on the applicability of the Act - the matters in which it has allegedly been held that the transaction is '*of the type that has been held in law to be between parties who not dealing at arms' length*'. As will appear, the latter allegations merely parrot s 4(2)(b)(iv) (aa) and (bb) of the Act without pleading any facts to substantiate why those paragraphs should be applicable. (I would have thought in any event that it would primarily be a matter of fact, rather than one of law, whether parties dealing with each other were doing so at arms' length or not, which makes it difficult to make sense of s 4(2)(b)(iv)(bb) – but that is by the way.)

[5] The contract alleged in the particulars of claim is not of the types of credit agreement specified in paragraphs (a) to (d) of s 4(1) of the Act that are expressly excluded from the application of the statute. The pleader was obviously relying on the introductory part of the sub-subsection, which provides '*Subject to sections 5 and 6, this Act applies to every credit*

agreement between parties dealing at arm's length …'.[2] Section 4(2)(b), which is evidently intended to assist in understanding what is intended by the aforementioned phrase in the introduction to s 4(1), provides:

> For greater certainty in applying subsection (1)-
>
> *(b)* in any of the following arrangements, the parties are not dealing at arm's length:
>
> (i) a shareholder loan or other credit agreement between a juristic person, as consumer, and a person who has a controlling interest in that juristic person, as credit provider;
>
> (ii) a loan to a shareholder or other credit agreement between a juristic person, as credit provider, and a person who has a controlling interest in that juristic person, as consumer;
>
> (iii) a credit agreement between natural persons who are in a familial relationship and-
>
> *(aa)* are co-dependent on each other; or
>
> *(bb)* one is dependent upon the other; and
>
> (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)* that is of a type that has been held in law to be between parties who are not dealing at arm's length

(Underlining supplied.)

[6] It is a requirement of proper pleading that the pleading should '*contain a clear and concise statement of the material facts upon which the pleader relies for his claim … with sufficient particularity too enable the opposite party to reply thereto*'. See Uniform Rule 18(4). As already touched upon, the particulars of claim in the current matter fall short in identifying the material facts upon which the pleaded conclusion that the Act is not applicable supposedly stand.

[7] It is not apparent on what basis it is alleged that the loan was not an agreement entered into between the parties at arms' length. The acknowledgment of debt suggests that the plaintiff and defendant may have been involved in some form of business venture

[2] Underlining provided for emphasis.

together, and that the plaintiff may have advanced the loan in part to finance the intended capital contribution of the defendant to that venture, but that is not pleaded in the particulars of claim and is merely surmise on my part as the reader. Even if the surmise were well founded, it would not sustain the conclusion that the agreement had not been a transaction entered into between the parties at arms' length. The mere fact that parties, even if they are friends, enter into a joint business venture serves as no indication, by itself, that in doing so they are not acting independently of the other; each in its own proprietary interest, and to make a profit for their respective ultimately individual benefit. Equally, any arrangement they may enter into between themselves in furtherance of such venture is not indicative, without more, that they are not transacting at arms' length. Indeed, insofar as it permissible on the pleading to have regard thereto, the subsequent provision of an acknowledgment of debt and the stipulation for *mora* interest on the loan, if anything, stand as pointers suggesting that the parties in this case did act independently of each other and at arms' length in entering into the transaction. Suffice it to say that the allegations in the particulars of claim would require to be supplemented if a case were to be made out that the contract was not a transaction entered into at arms' length.

[8] It was alleged in the alternative that if the Act were applicable, the plaintiff had complied with s 129 thereof. A copy of a letter purporting to give the defendant notice in terms of s 129 was attached as an annexure to the pleading. The pleading gave no indication, however, of how the purported notice had been given. The letter, dated 30 January 2018, bears the endorsement '*By Sheriff*', which suggests that it was intended to be served on the addressee by a sheriff or deputy sheriff. But there is no return to confirm that that happened.

[9] Furthermore, the pleading does not contain any allegation that the plaintiff is a registered credit provider. If the Act is applicable, that would be relevant because the amount

involved exceeds the threshold determined in terms of s 42(1),[3] and the plaintiff would therefore have to be registered as a credit provider by virtue of s 40(1) of the Act. It is also relevant because s 40(4) of the Act provides that 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*'.[4] Thus, if the Act applies and the plaintiff was not registered as a credit provider, or had not within 30 days of entering into the transaction applied to be registered, he would not be entitled to enforce the agreement on the basis pleaded, and would instead be limited to a claim for unjust enrichment.[5]

[10] I believe that I have said enough to indicate why I am not satisfied on the pleading as it stands that the Act is not applicable to the loan agreement in issue, and also why, if it is applicable, the pleading lacks allegations necessary to sustain the claim. In the circumstances the following order is made:

1. The application for default judgment is refused.

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[3] Currently R0,00, with effect from 11 May 2016; having previously been R500 000.

[4] The object to be served by requiring someone like the plaintiff in this case to register as a credit provider eludes me. I expressed my puzzlement in this regard in my judgment in *Opperman v Boonzaaier and Others* [2012] ZAWCHC 27 at para. 28, remarking that it '*was not evident from the provisions of the statute why a person like the applicant intending to provide credit on an ad hoc basis to a personal friend should, in order to be able to do so in an amount exceeding R500 000, have to provide information to the fourth respondent to enable the latter to consider matters such as the commitments, if any, made by him or any associated person in terms of black economic empowerment considering the purpose, objects and provisions of the Broad-based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003), or in connection with combating over-indebtedness (s 48(1)(a) and (b)). Indeed, the 'Memorandum on the Objects of the National Credit Bill, 2005' that accompanied the proposal to Parliament for the adoption of the NCA[4] suggested that the Act would not apply to or regulate 'loans between family members, partners and friends on an informal basis'. (There was no explanation, however, of what was meant by a loan 'on an informal basis', and the statute itself, while excluding from its ambit credit agreements concluded between persons in a familial relationship who are in a situation of dependence or co-dependence, makes no reference to friends.[4]) The content of the prescribed application form for registration as a credit provider is also consistent with that which someone carrying on business as a credit provider might be expected to complete, rather than a person intending to make just one, or even two or three ad hoc loans to someone in their ken, even if in a large sum*' (footnotes omitted), but these considerations do not appear to have been considered in the subsequent amendments to the Act. All that has happened is that the reduction in the threshold in terms of s 42(1) from R500 000 to R nil has apparently been effected to address the anomaly that persons carrying on business as microlenders who previously were not required to register if they kept their book below a total of R500 000 (see *Opperman* at para. 36). Such persons are now required to be registered.

[5] See s 89 of the Act.

2. The plaintiff is granted leave, if so advised, to take such steps as he might consider meet to amend his particulars of claim to address the difficulties identified in this judgment, and to avail of Uniform Rule 28 for that purpose.

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