

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

Case Number: 11610/2022

In the matter between:

MERCHANT COMMERCIAL FINANCE 1 (PTY) LTD Applicant
TRADING AS MERCHANT FACTORS
(Registration Number: 2[...])

and

ACHIAR COLYER HEAD N.O First Respondent

ACHIAR ALEXANDER BROWNLEE N.O Second Respondent

ANDREW GRANT KIRKMAN N.O Third Respondent
(Acting in their capacities as the joint trustees of the
CAPE LEOPARD TRUST (IT 1[...])

JUDGMENT

FRANCIS, J

[1] An urgent application was brought on an *ex parte* basis before Dolamo J on 12 July 2022 in which the applicant sought an order *inter alia* that it be authorised to take and retain in its possession the movable assets of the Cape Leopard Trust (“the Trust”) which were provided to the applicant as security in terms of a special notarial covering bond and a general notarial collateral bond (“the notarial bonds”).

[2] Dolamo J granted the order sought in the form of a rule *nisi* calling upon the respondents, who are all trustees of the Trust, to furnish reasons why an order in the following terms should not be made final:

“[5.1] the applicant be authorised to deal with the immovable property in terms of a notarial bond; and

[5.2] the Trust is ordered to pay the applicant’s costs on the scale as between attorney and client”. (own emphasis)

[3] The matter before this Court concerns the return date of the rule *nisi* which is opposed by the respondents (hereinafter, depending on the context, referred to as the “respondents” or the “Trust”). It is clear that there is a patent mistake in the order granted by Dolamo J in that the order refers to “immovable” property instead of “movable” property, and this court had no difficulty with the applicant’s application to amend the order to correct the mistake. Accordingly, the term “immovable” is substituted with the word “movable” in paragraph 5.1 of the order granted by Dolamo J.

[4] The following facts are not in dispute:

[4.1] The applicant lent and advanced an aggregate capital sum in excess of R700 000 to an entity called Valoworx 33 CC (“Valoworx”) during the period 23 June 2016 to 2 June 2018, commencing with an initial amount advanced of R500 000 in terms of a written agreement (“the Term Loan Facility”) and certain further advances made in terms of various written addenda to the Term Loan Facility.

[4.2] The Trust executed an unlimited suretyship in favour of the applicant for the due performance of Valoworx’s obligations in terms of the Term Loan Facility and the addenda thereto, and for any other indebtedness incurred by Valoworx in favour of the applicant.

[4.3] In order to secure the Trust's obligations towards the applicant in terms of the suretyship, the Trust caused the notarial bonds to be registered in the applicant's favour on 7 July 2016, each of which served to provide the applicant with an amount of R2 000 000 as continuing covering security and an additional amount of R1 million as cover for contingencies.

[4.4] Valoworx breached the terms of the Term Loan Facility, pursuant to which the applicant, Valoworx, and the Trust concluded a written settlement agreement on 15 December 2020 in terms of which Valoworx and the Trust:

[4.4.1] admitted their indebtedness to the applicant in the amount of R1 094 919.8;.

[4.4.2] undertook to pay their debt by paying R100 000 on/or before 20 December 2020 and the balance by means of monthly instalments of R25 000 from 31 December 2020 until the full capital amount, interest, and charges were settled;

[4.4.3] agreed to pay the applicant's costs on an attorney-and-client scale;.

[4.4.4] agreed that if the settlement agreement was breached, the Trust's movable assets could be declared specially executable and

[4.4.5] agreed that a certificate signed by a director of the applicant would serve as *prima facie* proof of the Trust's indebtedness to the applicant.

[4.5] Valoworx and the Trust breached the settlement agreement. They failed to make payment of any amounts in terms of the settlement agreement and, as a result, the applicant alleges that both the Trust and Valoworx are jointly and severally indebted to the applicant in the amount of R1 571 307.38 as at 29 June 2022.

[4.6] In light of Valoworx and the Trust's alleged breach of the settlement agreement, the applicant launched the current application to obtain an order protecting its rights in terms of the notarial bonds registered in its favour by the Trust. As noted, an order was granted by the Dolamo J on 12 July 2022 which embodied the *rule nisi* which the applicant now seeks to be confirmed.

[5] During the course of these proceedings, the respondents brought an application for leave to file a supplementary answering affidavit to introduce bank statements from its bank, Absa Bank, indicating the flow of monies into Valoworx's bank account. This documentation is relevant to the annual turnover of Valoworx which is one of the issues in dispute between the parties. The applicant opposed this application and filed a response which traversed the merits of the respondents' supplementary answering affidavit. The respondents, in turn, filed a further response to the applicant's opposing affidavit.

[6] At the hearing of this matter, the parties did not persist with their opposition to the filing of the further affidavits. Neither of the parties indicated that they would suffer undue prejudice if these affidavits were admitted. After considering the matter, I granted the parties leave to file their further affidavits. Whilst a court usually frowns on entering further affidavits apart from the usual three, it appeared to me to be in the interests of justice to admit the filing of these affidavits as it would allow for a fuller ventilation of the issues in dispute and would bring the matter to finality.

[7] The respondents' defences to the relief sought by the applicant are threefold. Firstly, it was denied that this matter is urgent or that Justice Dolamo's order should have been granted on an *ex parte* basis. Secondly, it was contended that certain items of movable property that were attached in terms of Justice Dolamo's order did not fall within the purview of the security provided by the notarial bonds. Finally, the respondents denied any indebtedness to the applicant because the latter was not registered as a credit provider under the National Credit Act No 34 of 2005 ("the NCA") and consequently did not comply with various provisions of the NCA.

[8] At the hearing of this matter, counsel for the respondents did not persist with the first two defences, and quite rightly so. The interim order granted by Dolamo J disposes of the defences relating to urgency and the order being granted *ex parte*. On the issue relating to the attachment of certain items of movable property that did not fall within Justice Dolamo's order, the correct cause of action was to institute interpleader proceedings; this much was conceded in the answering affidavit.

[9] The respondents' denial of indebtedness is based principally on the submission that the applicant ought to have registered as a credit provider given Valoworx's annual turnover and that the loans advanced to Valoworx were in tranches of less than R250 000. The applicant's failure to register rendered any agreement illegal and unenforceable.

[10] Before addressing whether it was obligatory for the applicant to be registered as a credit provider, it is necessary to set out the relevant provisions of the NCA applicable to this matter:

[10.1] Section 4 deals with credit agreements which are not subject to the NCA. The relevant parts of section 4 states as follows:

"4. Application of Act – (1) Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except—

(a) a credit agreement in terms of which the consumer is—

(i) a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7 (1);

(ii) the state; or

(iii) *an organ of state;*

(b) *A large agreement, as described in section 9(4), in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time, the agreement is made, below the threshold value determined by the Minister in terms of section 7 (1)."*

[10.2] In terms of section 7, the Minister responsible for consumer credit matters¹ is empowered to determine amongst other things monetary thresholds relating to the applicability of the NCA:

"7. Threshold determination and industry tiers - (1) On the effective date, and at intervals of not more than five years, the Minister, by notice in the Gazette, must determine—

(a) *A monetary asset value or annual turnover threshold of not more than R1 000 000 for the purpose of section 4(1); and*

(b) *two further monetary thresholds for the purposes of determining the three categories of credit agreements contemplated in section 9."*

[10.3] The various categories of credit agreements are listed in section 9 which provides as follows:

"9. Categories of credit agreements - (1) For all purposes of this Act, every credit agreement is characterised as a small agreement, an intermediate agreement, or a large agreement, as described in subsections (2), (3) and (4) respectively.

(2) *A credit agreement is a small agreement if it is—*

¹ Currently, the Minister of Trade, Industry and Competition.

(a) *a pawn transaction;*

(b) *a credit facility, if the credit limit under that facility falls at or below the lower of the thresholds established in terms of section 7 (1) (b); or*

(c) *any other credit transaction except a mortgage agreement or a credit guarantee, and the principal debt under that transaction or guarantee falls at or below the lower of the thresholds established in terms of section 7 (1) (b).*

(3) *A credit agreement is an intermediate agreement if it is—*

(a) *a credit facility, if the credit limit under that facility falls above the lower of the thresholds established in terms of section 7 (1) (b); or*

(b) *any credit transaction except a pawn transaction, a mortgage agreement or a credit guarantee, and the principal debt under that transaction or guarantee falls between the thresholds established in terms of section 7 (1) (b).*

(4) *A credit agreement is a large agreement if it is—*

(a) *a mortgage agreement; or*

(b) *any other credit transaction except a pawn transaction or a credit guarantee, and the principal debt under that transaction or guarantee falls at or above the higher of the thresholds established in terms of section 7 (1) (b)."*

[10.4] Section 40 deals with the persons who must be registered as credit providers and the consequences for not doing so. The relevant parts read as follows:

“40. Registration of credit providers - (1) 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 section 42 (1).

[Sub-s. (1) substituted by s. 10 of Act No. 19 of 2014.]

(2) ...

(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.”*

[10.5] The determination of registration thresholds is dealt with in section 42, the relevant part of which states as follows:

“42. Thresholds applicable to credit providers – (1) The Minister, by notice in the Gazette, must determine a threshold for the purpose of determining whether a credit provider is required to be registered in terms of section 40 (1).”

[11] The monetary asset value or annual turnover threshold for the purpose of section 4 (1) of the NCA is R1 million² and the monetary threshold for a large credit agreement contemplated in section 9 is R250 000³.

[12] In light of the applicable statutory provisions of the NCA as it relates to this matter, in order not to be bound by the provisions of the NCA and not register as a credit provider under the said statute, the applicant would have to prove either that Valoworx was a juristic person whose annual turnover or asset value was greater than R1 million or that the credit transactions entered into with Valoworx were large agreements, ie greater than R250 000; it was, of course, common cause that Valoworx is a juristic person. Conversely, if Valoworx's annual turnover was less than R1 million and the Term Loan Facility cannot be classified as a large agreement, the applicant would have been obliged to register as a credit provider in terms of the NCA and its failure to do so would render any agreements concluded with Valoworx illegal and unenforceable. If the agreements are illegal and unenforceable, the Trust, as surety, cannot be held liable.

[13] The respondents did not produce financial statements or books of account to substantiate Valoworx's annual turnover. It was submitted that Valoworx did not employ an auditor or keep comprehensive and detailed financial records as it was not required to do so. Instead, the respondents relied on a letter from its bank, ABSA, in support of its submission that Valoworx's annual turnover was lower than the legislated threshold of R1 million.

[14] The letter from Absa indicates that Valoworx received payments in the total amount of R1,896,858.83 from 1 January to 31 December 2016, and payments of R2,540,267.85 from 1 January to 31 December 2017. The respondents submitted that Valoworx effectively acted as the middleman on behalf of models who were independent contractors. When Valoworx received payment, it immediately paid 80% of the amount received over to the models and it retained 20% as commission for rendering the services of an agent. It was argued on behalf of the respondents that because Valoworx's turnover was limited to its 20% commission, Valoworx's

² GenN 713 in GG 28893 of 1 June 2006.

³ GenN 713 in GG 28893 of 1 June 2006.

annual turnover was R 358,438.08 from 1 January to 31 December 2016 and R 552,553.57 from 1 January to 31 December 2017, which was less than the legislated annual threshold of R1 million.

[15] The applicant, on the other hand, did not dispute the amount of the payments made into Valowox's bank account but submitted that when determining Valoworx's annual turnover, regard must be had to all the monies paid into the bank account and not only the commission due to it.

[16] The applicant submitted further that Valoworx had in fact conducted a thriving business for the relevant periods and produced emails reflecting payments Valoworx expected to receive from third parties. Thus, for example, in an e-mail dated 3 January 2017, Valoworx confirmed that it would receive payments of R56 000, R483 022.85, and R65 251.80 "*in the next couple of weeks*" as well as a R960 000 settlement from Loreal and R400 000 from the sale of a horse (thus, R1 773 526.45 in total). In an e-mail dated 21 April 2017, Valoworx indicated that it would receive R639 695.80. In an e-mail on 19 March 2017, Valoworx confirmed that it would receive at least R373 610.50 for a commercial and, on 16 May 2017, Valoworx confirmed that it will claim R650 000 for alleged infringements pertaining to a photographer and artist. These emails, according to the applicant, demonstrated that Valoworx's annual turnover was far in excess of the R1 million annual statutory threshold and the applicant was thus excused from having to register as a credit provider.

[17] The respondents denied that Valoworx was a thriving company during the relevant period and submitted that although Valoworx was informed that it would receive certain payments, these payments were never received and constituted bad debt.

[18] It is common cause that when the Term Loan Facility was concluded and the loans advanced to Valoworx, the amount of money that passed through Valoworx's bank account exceeded the sum of R1 million per annum. The issue to be determined is whether the total amount received into Valowox's bank account must be regarded as its annual turnover or whether its annual turnover is limited to only

the 20% commission that it earned for services rendered. Having regard to the evidence placed before this court, I am in agreement with the argument proffered by counsel for the applicant that the annual turnover of Valoworx is represented by the total of all the money received into its bank account before any payments were made over to third parties who Valoworx may have represented.

[19] Unfortunately, despite the fact that it is an important concept that plays a pivotal role in determining whether or not the NCA applies to a credit agreement concluded with a juristic person, the term “turnover” is not defined in the definitions section (section 1) of the NCA.

[20] Both counsel referred me to the definition of the term “turnover” in section 151(4) of the NCA - which deals with administrative fines- and argued that this may provide some indication of the meaning of this term for the purpose of determining Valoworx’s annual turnover. The relevant parts of section 151 of the NCA states as follows:

“(4) For the purpose of this section, the annual turnover of-

(a) a credit provider at the time an administrative fine is assessed, is the total income of that credit provider during the immediately preceding year under all credit agreements to which this Act applies, less the amount of that income that represents the repayment of principal debt under those credit agreements; or

(b) any other person, is the amount determined in the prescribed manner.” (own underlining)

[21] The prescribed manner for determining turnover is to be found in Regulation 16 of the National Credit Regulations GN R489 of 2006, which relates to section 151(4)(b) of the NCA, and states:

“16 Administrative fines

(1) *For the purposes of section 151(4)(b) of the Act:*

(a) *the annual turnover of a credit bureau is the total amount of fees and income generated during the immediately preceding financial year in respect of activities relating to the National Credit Act undertaken by the credit bureau;*

(b) *the annual turnover of a debt counsellor is the total amount of fees and income generated during the immediately preceding financial year in respect of activities relating to the National Credit Act undertaken by the debt counsellor.*

(own underlining)

[22] Counsel for the respondents argued that the “turnover” in terms of Regulation 16 of the National Credit Regulations refers to the total amount of fees and income generated – the equivalent of Valoworx’s commission - and not the total amount of money received. In contrast, counsel for the applicant argued that this definition suggests that all money received and not only commission falls to be dealt with as turnover.

[23] In my view, definition of turnover with reference to section 151(1) of the NCA read with regulation 16 of the National Credit Regulations is of limited utility when determining the turnover of juristic entities in general. These provisions relate to the determination of turnover for the specific purpose of determining administrative fines in relation to a restricted class of persons such as credit bureaus and debt counsellors. The type of economic activity engaged by these entities is by its nature limited and the services rendered typically attracts payment in the form of fees or income.

[24] It is generally accepted that if the same, or essentially the same, word or term is used more than once in the same statutory enactment, it would bear the same meaning throughout the enactment unless the context indicates differently (see, ***Minister of the Interior v Machadodorp Investments (Pty) Ltd and***

Another 1957 (2) SA 395 A). This presumption will not apply if the word is used in a different context (**Singer NO v Master and Another 1996 (2) SA 133 (A)** at [139]). As noted, the context within which the term “turnover” is used in section 151 read with regulation 16 of the National Credit Regulations refers to a limited class of persons and for a specific purpose.

[25] Where the meaning of words is not defined in the statute, words must be understood in their ordinary sense (**Independent Institute of Education (Pty) Limited v KwaZulu-Natal Law Society and Others [2019] ZACC 47** at para [18]). Dictionaries are a helpful aid in establishing the meaning of a statutory provision (see, **Fundstrust (Pty) Ltd (in liquidation) v Van Deventer 1997 (1) SA 710 (A)**). Indeed, the Constitutional Court regularly makes use of dictionaries when interpreting specific words in the Constitution (see, for example, **S v Williams and Others 1995 (3) SA 632 (CC)**, and **De Lange v Smuts and Others 1998 (3) SA 785 (CC)**).

[26] The Concise Oxford English Dictionary 10ed (2002) defines “turnover” as “*the amount of money taken by a business in a particular period*”. In my view, this means that the annual turnover of Valoworx refers to all the monies received by it during the course of it operating its business and not only the commission it received. This view is consistent with the e-mail referred to above relating to Valoworx’s anticipated payments. It appears that Valoworx’s business is not only limited to representing models and receiving a commission in respect of this service. The e-mail makes reference to payments anticipated by Valoworx for the sale of a horse and for the recovery of damages relating to the infringement of the intellectual property rights of a photographer and artist. These emails, too, do not distinguish between the commission to be earned and the total payment anticipated.

[27] In summary, then, on the evidence available, Valoworx is a juristic person and its turnover exceeded the threshold of R1 million during the period when the loans were advanced to it. This being the case, the technical defences advanced by the respondents cannot succeed as it was not necessary for the applicant to have registered as a credit provider in relation to the loan agreements concluded with Valoworx. The Trust, as surety, cannot therefore escape liability.

[28] Given the conclusion reached, it is not necessary to determine whether the loans advanced to Valoworx fell below the threshold for large agreements as defined in the NCA. Suffice to say, I am of the view that the Term Loan Facility concluded between the parties on 23 June 2016 was a fresh agreement and the advance of R500 000, accordingly, exceeded the monetary threshold of a large agreement.

[29] In so far as the costs of the interlocutory applications are concerned, these applications were made during the course of proceedings and did not delay or hamper the proceedings in any way. Certainly, neither of the parties asserted any undue prejudice and both parties were provided with an opportunity to fairly ventilate their respective cases. Accordingly, I am of the view that the costs relating to the interlocutory applications should be costs in the course.

[30] In so far as the costs of the application is concerned, I do not see any reason to depart from the usual principle that costs should follow the result.

ORDER

[31] The rule *nisi* is confirmed and made final in the following terms:

[31.1] The applicant is authorised to deal with the movable property in terms of the notarial bonds; and

[31.2] The Trust is ordered to pay the costs of this application on an attorney-and-client scale.

FRANCIS, J

Coram: FRANCIS J

Judgment by: FRANCIS J

For the Applicant: **Adv A R Newton**

Instructed by: **BDP Attorneys**

For the Respondent: **Adv J K Felix**

Instructed by **R Allom Attorneys**

Matter was heard on **9 March 2023.**

The judgment was handed down on **25 May 2023.**