THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 929/2017

In the matter between:

M DU BRUYN NO **FIRST APPELLANT**

[In his capacity as a co-trustee of the DBF Trust]

S.J.C. DU BRUYN N.O. **SECOND APPELLANT**

[In his capacity as co-trustee of the DBF Trust]

MATHYS DU BRUYN **THIRD APPELLANT**

S.J.C. DU BRUYN N.O **FOURTH APPELLANT**

M DU BRUYN NO **FITH APPELLANT**

[In his capacity as co-trustee of the Vaal Steam

Supplies Black Empowerment Trust]

and

ANDREAS STEFANUS JACOBUS KARSTEN **RESPONDENT**

Neutral citation: *Du Bruyn NO & others v Karsten* (929/2017) [2018] ZASCA 143 (28 September 2018)

Coram: Shongwe ADP, Makgoka, Schippers JJA and Mokgohloa and Nicholls AJJA

Heard: 3 September 2018

Delivered: 28 September 2018

Summary:
National Credit Act 34 of 2005 - under what circumstances is a credit provider obliged to register – where the credit agreement exceeds the threshold set out in s 42(1) - irrespective of whether it is a single transaction - irrespective of whether the credit provider is a regular participant in the credit industry

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ORDER

On appeal from: the Gauteng Division, Pretoria (Mavundla J sitting as court of first instance):

1 The appeal succeeds with no order as to costs.
2 The order of the court a quo is set aside and substituted with the following:
'(a) The application is dismissed with costs.
(b) The agreements attached to the founding affidavit in the court a quo as annexures JK5, JK6 and JK7 are declared to be unlawful due to non-compliance with s 40(1) of the National Credit Act (Act 34 of 2005) before the amendment thereof by the National Credit Amendment Act (Act 19 of 2004)'.

JUDGMENT

Nicholls AJA (Shongwe ADP, Makgoka, Schippers JJA and Mokgohloa AJA concurring):

[1] That the National Credit Act 34 of 2005 (the NCA) is not a model of clarity, has been bemoaned by the High Court, this Court and the Constitutional Court on a number of occasions. This appeal is yet another example of the inconsistencies and resultant confusion to which the NCA has given rise. The pertinent question in this matter is

under what circumstances is registration as a credit provider in terms of the NCA obligatory.

[2] Mr Du Bruyn and his wife are an elderly couple, married in community of property. They are the appellants herein. Mr Du Bruyn's business is the sealing of industrial leaks. He first set up his business in 1984 which resulted in the formation of three interrelated entities: Vaal Steam Supplies (Pty) Ltd (Vaal Steam); Naisa Trading CC (Naisa) and Lekoa Steam & Environment (Pty) Ltd (Lekoa Steam). There is some dispute as to the precise role of each entity but nothing turns on this.

[3] The respondent, Mr Karsten, was like a son to the Du Bruyns. He holds an LLB degree, is a lecturer at the Vaal University of Technology and is a municipal councillor. He describes himself as a businessman. In the early 2000's Mr Du Bruyn introduced Mr Karsten into the business with a view to him one day taking over the business. Under Mr Du Bruyn's patronage and pupillage Mr Karsten gradually became more involved with the businesses until he was appointed as the technical director in 2008. Eventually MrKarsten held a substantial number of shares in both companies and 50% member's interest in the close corporation, Naisa.

[4] In 2012 there was a falling out between Mr Du Bruyn and Mr Karsten over operational issues in the business. This led to a decision that they should part ways. By this stage both Mr and Mrs Du Bruyn were in their mid 70's and were looking forward to their retirement. Their initial proposal was that Mr Karsten purchase Mr Du Bruyn's interest in all the entities. A price of R2 500 000.00 was set and an option agreement concluded, valid until 1 March 2013. However, Mr Karsten was unable to obtain the necessary finance, even after having been afforded a further 6 weeks in which to raise the money.

[5] Mr Du Bruyn then made an offer to purchase Mr Karsten's interest in all three entities for the price of R2 000 000.00. A cash offer of R1 500 000.00 was rejected by Mr Karsten. The offer of R2 000 000.00 to be paid in instalments was subsequently re-instated. Pursuant thereto separate sale agreements in respect of the three entities

were drawn up. In Naisa and Vaal Steam Mr Karsten sold his shares and loan account to the DBF Trust, of which Mr and Mrs Du Bruyn are beneficiaries. In Lekoa Steam the purchaser was Vaal Steam Black Empowerment Trust and Marius Fouche. Mr Du Bruyn and Mr Karsten were the trustees of the latter trust.

[6] The three sale agreements are, to all intents and purposes, identical, apart from the purchaser who is different in Lekoa Steam. They were all signed on 26 April 2013. The amount payable for the shares in the different entities differs but in total they amount to R2 000 000.00. An addendum to each agreement dealt with all three entities and the purchase price recorded was of the globular amount of R2 000 000.00. The same terms of payment were applicable to all three agreements of sale: a deposit of R500 000 was to be paid by 1 May 2013; thereafter instalments of R30 000 to be paid on a monthly basis, subject to an identical amortisation table for a period of 5 years; and interest to be levied on the deferred amount. In all three sale agreements Mr and Mrs Du Bruyn bound themselves as sureties and co-principal debtors. In clause 8 of each addendum, Mr and Mrs Du Bruyn undertook to register a covering bond over their immoveable property, Unit 2, Shannon Close, Erf 196, Drie Riviere, within 60 days, which they guaranteed to be unencumbered.

[7] There was much debate over whether the three agreements of sale amounted to a single credit facility or were three self-standing credit agreements. In view of the approach I take in this matter, this distinction is irrelevant.

[8] It is common cause that Mr Karsten was not registered as a credit provider in accordance with s 40 of the NCA at the date of the conclusion of the agreements of sale on 26 April 2013. Mr Karsten accepted that he had to be registered as a credit provider in order to facilitate the registration of the covering bond. He therefore made an application to be registered as such on 22 October 2012 and his registration occurred on 27 November 2013. The Du Bruyns did not register the covering bond within 60 days but eventually effected registration of the covering bond in early 2014.

[9] By 1 May 2013 Mr and Mrs Du Bruyn had taken full control of the businesses which they managed for their own benefit. The businesses started to decline. The deterioration continued to such an extent that Mr and Mrs Du Bruyn were compelled to dispose of personal assets to keep the businesses afloat. In addition the DBF Trust sold the interest it acquired in Naisa and Lekoa Steam from Mr Karsten in terms of the agreements of sale before paying him the full purchase price. An immoveable property owned by Vaal Steam was sold for an undisclosed amount.

[10] The appellants defaulted on the instalment payments. As of 1 September 2014 Mr Karsten had received only the amount of R866 830.61. In November 2014 Mr Karsten instituted proceedings for the balance of the purchase price, the sum of R1 133 169.39. He alleged a breach of the agreements of sale. The Du Bruyns' defence was that the agreements are null and void due to non-compliance with the NCA.

[11] It was first communicated by the Du Bruyns through their attorneys, on 3 September 2014, that the agreements of sale constituted agreements as contemplated by s 8 of the NCA. Accordingly, it was contended that Mr Karsten was obliged to have been registered as a credit provider at the time the agreements were concluded on 26 April 2013. His subsequent registration on 27 November 2013 was insufficient. The non-compliance of ss 40(3) and 40(4) of the NCA rendered the agreements, as well as the mortgage bond registration and the suretyship undertakings, so it was argued, unlawful and void.

[12] The court a quo (per Mavundla J) granted judgment in the amount of R1 133 169.39 plus interest from 1 September 2014. However, he expressly stated that in his view the agreements fell within the purview of the NCA. This obliged Mr Karsten to register as a credit provider by the time the agreement were concluded in April 2013. But for the decision of the full court of that division in *Friend v Sendal (Friend),*[1] to which Mavundla J was bound, he would have found that Mr Karsten's failure to register as a credit provider at the time of concluding the agreements, rendered them null and void.

[1] *Friend v Sendal* 2015 (1) SA 395 (GP)

The alternative defence of reckless lending was dismissed. Unsurprisingly, Mavundla J granted leave to appeal to this court.

[13] Before this court two arguments were advanced on behalf of by Mr Karsten. Firstly, it was submitted that the sales agreements were not arms-length transactions and secondly, that the ratio in *Friend* was applicable in that the requirement to register was directed at the participants in the credit market, not the likes of Mr Karsten. It was not disputed that a finding that Mr Karsten was obliged to have been registered as a credit provider at the time the agreements were concluded, would render them null and void.[2] The consequences thereof have been settled by the Constitutional Court and a counter claim by the appellants for repayment of the R866 830.61 already paid to Mr Karsten was abandoned in light of the Constitutional Court's decision in *Chevron SA (Pty) Ltd v Wilson t/a Wilson Transport*.[3]

[14] Were the agreements of sale arms-length transactions? Section 4(1) states that the NCA shall apply to every credit agreement where the parties are dealing with each other at arm's length. Section 4(2)*(b)* sets out the circumstances in which the parties are not dealing at arm's length. Section 4(2)*(b)*(iv)*(aa),* in relevant part, reads as follows:

(b) in any of the following arrangements, the parties are not dealing at arm's length:

. . . .

(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'

[15] It was argued that because of the almost familial relationship between Mr Karsten and the Du Bruyns there was no attempt by Mr Karsten to get the utmost advantage out of the transaction. The sale was not on the open market but within the context of a family business. This is said to be evidenced by the negotiations where first Mr Karsten was going to buy the Du Bruyns' interest and thereafter when the allegorical

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[2] See *Vesagie NO & others* v *Erwee NO & another* [2014] ZASCA 121 wherein it was held that where a credit provider is unregistered, the agreement is unlawful and the court is required to declare the agreement null and void ab initio.

[3] *Chevron SA (Pty) Ltd v Wilson t/a Wilson Transport* [2015] ZACC 15; 2015 (10) BCLR 1158 (CC).

son could not pay, the father figure stepped in. So, too, is the special relationship said to be shown, by the agreement to pay by instalments at a nominal interest rate of 5%.

[16] This puts a slant on the facts which is not justified by the evidence. When it became apparent that Mr Karsten was unable to procure the necessary finance, Mr Du Bruyn then had no choice but to buy out Mr Karsten. Mr Du Bruyn undertook to get a valuation of his interest in the businesses in order to determine a fair price. This fact alone flies in the face of a suggestion of a special family price. Mr Du Bruyn first offered to purchase Mr Karsten's shares for R2 000 000 and then reduced the price to R1 500 000 When this was rejected the previous offer was re-instated. Both parties instructed their respective attorneys, through whom the negotiations were conducted.

[17] The evidence reveals that far from being a familial arrangement, the relations between Mr Karsten and Mr Du Bruyn soured once they parted ways and, in fact, were positively hostile in the weeks leading up to the signing of the sale agreements. Mr Karsten, through his attorneys, in a letter dated 12 April 2013 commented on the breakdown of trust between them and indicated that if Mr Du Bruyn would not purchase his shares he would sell them on the open market, failing which he threatened to apply for the liquidation of the businesses. These can hardly be described as the actions of someone who was not acting independently and who was not trying to gain the utmost advantage of the situation. Mr Du Bruyn responded, through his attorneys on 16 April 2013, confirming that the relationship had irretrievably broken down. The evidence emphatically shows that the sale agreements were arms-length transactions, thus falling within the ambit of the NCA.

[18] The real issue in this appeal is whether the full court in *Friend* was correct in finding that that the NCA was directed only at those in the credit industry and did not apply to single transactions where credit was provided, irrespective of the amount involved. The court in *Friend* para 28 held that notwithstanding the fact an agreement may be a credit agreement in terms of the NCA, this did not necessarily mean that the credit provider was obliged to register in terms of s 40(1)*(b)*. For this interpretation the full court relied on the purpose of the NCA, set out in s 3 which is, 'to promote and

advance the social and economic welfare of South Africans' in order to achieve 'a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers'. Bearing this in mind the court found that the provisions of the NCA were meant to regulate those participating in the credit industry and persons who frequently provide credit, and was not applicable to once-off transactions.

[19] The court a quo's stance was further complicated by a number of decisions in the same division which held that *Friend* had been wrongly decided. In *Van Heerden v Nolte*[4] the court found that the ratio decidendi in *Friend* was inconsistent with the approach taken by the Constitutional Court in *National Credit Regulator v Opperman & others*.[5] Similarly, *Potgieter v Olivier & another,*[6] although the court held that it was bound by *Friend*, it differed with the finding therein on the grounds that the tenets of interpretation of statutes do not permit such a meaning.[7]

[20] There can be no doubt that the approach adopted in *Friend* is pragmatic and makes good sense. However, it is difficult to marry this interpretation with the unambiguous text of the NCA. Section 40 of the NCA sets out the circumstances under which registration as a credit provider is applicable. The section, in relevant part, provides that:

(1) A person must apply as a credit provider if–

(a) that person, alone or in conjunction with any associated persons, is the credit provider of at least 100 credit agreements, other than incidental credit agreements;

(b) the total principle debt owed to that credit provider under all the outstanding agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1).

(2) In determining whether a person is required to register as a credit provider –

. . . .

[4] *Van Heerden v Nolte* 2014 (4) SA 584 (GP) para 14.
[5] *National Credit Regulator v Opperman & others* [2012] ZACC 29; 2013 (2) SA 1 (CC) (*Opperman*).
[6] *Potgieter v Olivier & another* 2016 (1) SA 272 (GP) (*Potgieter)* para 28 and 30-33.
[7] See also *Naude & another v Wright* [2017] ZAGPPHC 646 para 26 where the court held it was bound by *Friend*.

(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.'

[21] Section 40(1) was amended by Act 19 of 2014 to delete any reference to 100 credit agreements. It now reads as follows:

'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 s 42 (1).'

Therefore the amount of credit provided that is now the sole determining factor to ascertain whether a credit provider is obliged to register.

[22] It must be mentioned that the circumstances under which registration as a credit provider is necessary was not dealt with by the Constitutional Court in *Opperman*. The issue in that case was the constitutionality of s 89(5)*(c)* of the NCA which at the time provided that the rights of a credit provider to recover the money paid in term of an unlawful credit agreement, would be cancelled or, in terms of s 85(5)*(c)*(ii), be forfeited to the State. The Constitutional Court found that s 89(5)*(c),* by denying the credit provider the right to restitution, and denying the court the right to make an order that is just and equitable, amounted to the arbitrary deprivation of property. This lack of discretion of the court was a breach of s 25 of the Constitution, and could not be justified as a reasonable and justifiable limitation. The section was thus held to be invalid.

[23] The registration of credit providers was dealt by both the trial court[8] in *Opperman* and the Constitutional Court only to the following extent. The trial court merely stated that having regard to the amount involved, 'it follows that the applicant was required by

[8] *Opperman v Boonzaaier & others* [2012] ZAWCHC 27.

statutory provisions to have applied for registration as a credit provider.'[9] The Constitutional Court merely narrated, without comment, the facts set out in the trial court's judgment that the credit provider was not registered as a credit provider as required by the NCA at the time of providing the loan to his friend.[10] In neither matter was the issue of when a credit provider is obliged to register canvassed. The decision of the Constitutional Court cannot, in these circumstances, amount to an implied overruling of *Friend*. It does, however, suggest that the Constitutional Court accepted this to be the correct position without further interrogation. .

[24] Insofar as it is contended that this court has decided that once-off transactions do not fall within the ambit of the NCA in *Shaw & another v Mackintosh & another*[11] this proposition, too, is incorrect. In *Shaw* the appellants had bound themselves as sureties in favour of the first respondent for the debts of the second respondent. The real dispute in *Shaw* was whether the agreement in question was a credit guarantee in terms of s 8(5) or a credit transaction in terms of s 8(4)*(f)*. If the agreement was the former the NCA was not applicable, but if the agreement was the latter then it fell within the ambit of the NCA. It was found to be neither. This court held that the appellants, as sureties, were not granted any loan nor was any credit advanced to them. In an obiter remark, this court said that the first respondent was not a credit provider – he was not in the business of granting credit. This comment had no significant bearing on the outcome of the case. There was no interpretation of s 40(1) and no reference to *Friend*. In my view *Shaw* cannot be said to be authority on the requirements of registration of a credit provider.

[25] This court is enjoined to ascertain the correct interpretation of s 40(1). The approach to interpretation of statutes has been clarified by this court in *Natal Joint Municipal Pension Fund v Endumeni Municipality* as follows:

'The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory

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[9] Para 3.
[10] *Opperman* fn 5 para 4.
[11] *Shaw & another v Mackintosh & another* [2018] ZASCA 53 (*Shaw*).

instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'[12] (Footnotes omitted).

[26] A plain reading of s 40(1)*(b)* makes it clear that a person must register as a credit provider if the total principal debt exceeds the prescribed threshold in terms of s 42(1). At the time this section provided that the Minister must, at intervals of not more than five years, determine an applicable threshold of not less than R500 000, for the purpose of determining whether a credit provider is required to register in terms of s 40(1).[13] There is no dispute that R500 000 was the applicable threshold at the conclusion of the sales agreements.[14]

[27] While it may be reasonable, and indeed eminently sensible, to interpret s 40 as being inapplicable to once-off transactions where the role players are not participants in the credit market, it is difficult to reconcile this interpretation with the language of the provision, its context and purpose. The legislature has set thresholds that trigger the

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[12] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

[13] Note that this section was amended by Act 19 of 2014. The new section 42(1) reads '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).

[14] Item 5, National Credit Act Regulations, GN713, 1 June 2006. The current threshold is nil as per item 2, National Credit Act Regulations, GN513, 11 May 2016.

obligation to register where a single transaction is in excess of the prescribed amount. To conclude that this does not apply to once-off transactions or to those who are not regular participants in the credit market, is, however attractive and sensible it may sound, not being true to the text and the context of the statute. As stated in *Potgieter,* to find otherwise would be to substitute what is justifiably seen as regulatory overreach with judicial overreach.[15] Lamenting the dismal drafting of the NCA, the Constitutional Court suggested that we accept the words of the provision of the statute, acknowledge the drafting error and leave it to parliament to correct.[16]

[28] In summary the only conclusion to be drawn is that the requirement to register as a credit provider is applicable to all credit agreements once the prescribed threshold is reached, irrespective of whether the credit provider is involved in the credit industry and irrespective of whether the credit agreement is a once-off transaction. That is an imperfect solution is readily accepted, but it is for the legislature to remedy, rather than for the courts to attempt to accommodate deficient drafting by attributing a meaning to s 40(1)*(b)* that is not justified by the wording of the statute.

[29] It should be noted that the parties agreed that there should be no order as to costs.

[30] In the result I make the following order:

1 The appeal succeeds with no order as to costs.

2 The order of the court a quo is set aside and substituted with the following:

‘(a) The application is dismissed with costs.

(b) The agreements attached to the founding affidavit in the court a quo as annexures JK5, JK6 and JK7 are declared to be unlawful due to non-compliance with s 40(1) of the National Credit Act (Act 34 of 2005) before the amendment thereof by the National Credit Amendment Act (Act 19 of 2004)’.

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[15] Fn 6 para 33.

[16] See the minority judgment, of Cameron J, in *Opperman* fn 5 para 105.

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C H Nicholls
Acting Judge of Appeal

APPEARANCES:

For the Appellants:	J J Botha
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	Bezuidenhouts Inc, Bloemfontein
For the Respondent:	P G Leeuwner
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