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SUMMARY OF THE JUDGMENT

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>> PROPERTY LAW UPDATE

ONCE-OFF LENDERS NEED TO REGISTER WITH CREDIT REGULATOR

Du Bruyn NO and Others v Karsten (929/2017) [2018] ZASCA 143; 2019 (1) SA 403 (SCA) (28 September 2018)

For a while now in our law, there was some uncertainty whether or not a person who makes a once-off arm's length loan to another really needs to register with the Credit Regulator in order to ensure that the law treats the agreement as valid and binding. In this matter, the Supreme Court of Appeal held that this was indeed the condition stated in the National Credit Act. Despite the apparent reasonableness of not requiring such registration in such instance, the Court stated that it was bound to give effect to the clear and unambiguous wording of the Act.

The Judgment can be viewed here.

FACTS

Mr and Mrs Du Bruyn made an offer to purchase Mr Karsten's interest in three business entities for the sum of R2,000,000. This would be paid in instalments. To this end, three separate sale agreements in respect of the acquisition of interests in the three entities were drawn up. (The amount payable for the shares in the different entities differed, but in total amounted to R2,000,000.) The parties previously had business dealings, although their ways had parted at the time of concluding these transactions.

The terms of payment were that a deposit of R500,000 was to be paid and, thereafter, monthly instalments of R30,000 for a period of 5 years. Interest was to be levied on the deferred amount.

Mr and Mrs Du Bruyn bound themselves as sureties and co-principal debtors for all three agreements and registered a covering bond over their immovable property in favour of Mr Karsten.

Mr Karsten however was not registered as a credit provider at the date of conclusion of the sale agreements, as required in terms of section 40 of the National Credit Act (the NCA). Such registration was thus a legal requirement in order to facilitate the registration of the covering bond.

The Du Bruyns subsequently defaulted on their instalment payments, and in November 2014, Mr Karsten instituted proceedings for recovery of the amounts outstanding under the sale. Mr Karsten based the claim on an alleged breach of the sale agreement provisions. The Du Bruyns however defended the matter and contended that the sale agreements were null and void due to non-compliance with the NCA: the sale agreements constituted credit agreements as contemplated in the NCA, and therefore Mr Karsten was obliged to have been registered as a credit provider at the time the agreements were concluded on 26 April 2013. Mr Karsten subsequently registered with the National Credit Regulator as a credit provider.

According to the De Bruyns, Mr Karsten's subsequent registration was insufficient to cure this non-compliance and the effect hereof was to render the agreements, the mortgage bond registration and the suretyship undertakings unlawful and void, so contended the Du Bruyns.

The High Court found in favour of Mr Karsten and the De Bruyns appealed to the Supreme Court of Appeal. In the latter court, Mr Karsten submitted that (a) the sales agreements were not arms-length transactions; and (b) the requirement to register as a credit provider was directed at participants in the credit market, not once-off transactions. Hence, the NCA did not apply and the agreements were valid and binding.

HELD:

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'

- It was argued that because of the almost familial relationship between Mr Karsten and the Du Bruyns (which existed at a time when they were business partners in the past) 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.

- The allegation however was not substantiated by the facts which made it clear that when these agreements were entered into, the relationship between the De Bruyns and Mr Karsten had soured. The facts showed that the relationship was positively hostile in the weeks leading up to the signing of the sale agreements.

- The real issue was whether the 2015 judgment in *Friend v Sendal* , by which decision the court *a quo* was bound, was correct in law, namely whether 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. In *Friend* it was held that the NCA was meant to regulate those participating in the credit industry and persons who frequently provide credit, and was not applicable to once-off transactions.

- However, the judiciary is bound by the rules of interpretation. These rules state that in the first instance, the words, as they appear in a statute, must be ascribed their "plain" meaning. Therefore, although the aforementioned approach in *Friend* was sensible and pragmatic, it was difficult to marry such an approach with the clear and unambiguous wording of the NCA, specifically section 40. Section 40 makes it obligatory for a person to register as a credit provider if the total debt exceeds the prescribed threshold. (At the time of concluding the sale agreement, the applicable threshold was R500,000.)

- It was this threshold that triggered the obligation to register, irrespective of whether it was a single transaction or not. To hold that registration as a credit provider in terms of the NCA does not apply to once-off transactions or to those who are not regular participants in the credit market was not being true to the text and the context of the NCA.

- Further, the party obliged to register in terms of section 40 must be registered at the time at which the transaction is concluded. Retrospective registration will not assist.

The Supreme Court of Appeal accordingly found in favour of the Du Bruyns and set aside the order of the High Court.

CONTACT US

- CAPE TOWN Tel: 021 406 9100
- SOMERSET MALL Tel: 021 850 6400
- TYGER VALLEY Tel: 021 943 3800
- FOURWAYS Tel: 010 001 2632
- CLAREMONT Tel: 021 673 4700
- STELLENBOSCH Tel: 021 001 1170
- MENLYN Tel: 012 348 1682
- CENTURION Tel: 012 001 1546
- FISH HOEK Tel: 021 784 1580
- BLOUBERG Tel: 021 521 4000
- ILLOVO Tel: 011 219 6200
- BEDFORDVIEW Tel: 011 453 0577