STBB | SMITH TABATA BUCHANAN BOYES

SUMMARY OF THE JUDGMENT

LENDERS: IF IT IS A "CREDIT TRANSACTION", REGISTER OR THE LOAN IS VOID

Du Bruyn NO and Others v Karsten (929/2017) [2018] ZASCA 143 (28 September 2018)

For some time now there has been confusion whether it is necessary for a lender, in a once-off loan, to register with the National Credit Regulator where the loan reached a certain threshold. The Supreme Court of Appeal confirmed now that although it would be reasonable and sensible to interpret the National Credit Act as being inapplicable to once-off transactions where the role players are not participants in the credit market, the current wording did not support this. The Court suggested that the legislature should address this aspect.

The Judgment can be viewed here.

FACTS

Mr Du Bruyn and his wife are an elderly couple, married in community of property. Mr Du Bruyn's business is the sealing of industrial leaks, a business he set up 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).

Mr Karsten was like a son to the Du Bruyns. 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 Mr Karsten held a substantial number of shares in both companies and 50% member's interest in the close corporation, Naisa.

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.

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.

The three sale agreements are, to all intents and purposes, identical. They were all signed on 26 April 2013. 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 immovable property, within 60 days, which they guaranteed to be unencumbered.

Mr Karsten was not registered as a credit provider in accordance with section 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.

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, to such an extent that Mr and Mrs Du Bruyn were compelled to dispose of personal assets to keep the businesses afloat. They later 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.

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 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 sections 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.

The High Court found in favour of Mr Karsten and Mr and Mrs Du Bruyn appealed to the Supreme Court of Appeal. Here Karsten argued that (a) the sale 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.

HELD:

- In a previous 2015 judgment, *Friend v Sendal*, the Gauteng High Court held 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.
- However, although the aforementioned approach in *Friend* was sensible and pragmatic, the interpretation was not warranted against a reading of section 40 of the NCA. Section 40 was clear and unambiguous and made 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 it is common cause that the applicable threshold was R500,000.
- It was this threshold which triggers the obligation to register, irrespective of whether it is 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 to not be true to the text and the context of the NCA.

The appeal accordingly succeeded.

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