

ABSENCE OF SPOUSE'S CONSENT FOR BANK LOAN: WHAT NOW?

Rooplal N.O. v Pelesa (22424/2019) [2023] ZAGPPHC 1 (10 January 2023)

This judgment is a reminder that if someone seeks to apply for a loan, ticks a box in the application form stating "unmarried" and signs an affidavit to that effect, he cannot cry foul afterwards because his spouse's consent was not obtained as required in terms of the law. The lending bank in this judgment showed that it performed its own internal checks and that there was no information to indicate that the borrower was married. The borrower's claim that the loan was invalid, was accordingly rejected.

The Judgment can be viewed [here](#).

FACTS

After extensive fraud perpetrated at VBS Bank during 2017, the bank was placed under liquidation and a liquidator appointed to attend to its winding up.

In this matter the liquidator sought to recover money lent and advanced by VBS to Mr Pelesa under two loan agreements, which Mr Pelesa used to buy an upmarket residential property and a Porche Cayenne. The liquidator did not rely on any allegation of fraud on the side of Mr Pelesa and relied on the terms of the loan agreements.

Despite honouring the repayment obligation under the loans for a certain period, Mr Pelesa defended the claim and argued that he was not indebted under the loans because:

- 1) there was a dispute of fact in that parts of the loan agreement in respect of the vehicle were not completed by him but by someone else;
- 2) the loans constituted reckless lending;
- 3) calling up the loan was contrary to the provisions of the National Credit Act ("NCA") as he was now over-indebted and that he therefore had a right to have the court order that his debt be restructured; and
- 4) the loans were entered into in contravention of section 15 (2) of the Matrimonial Property Act "MPA") and therefore invalid, as he had obtained credit without spousal consent.

HELD

Dispute of Facts

- Mr Pelesa alleged that parts of the loan application in respect of the vehicle financing were not completed by him, but by some other bank official. Significantly however, Mr Pelesa did not deny his signature on the application nor deny the subsequent agreement in respect of which the parties had performed. (The fact that VBS' financial statements may have been manipulated did not mean all individual agreements were automatically implicated.)

Reckless lending

- The NCA provides that a court may set aside a credit agreement in circumstances where the credit provider

had not conducted a proper assessment of the lender's ability to meet his prospective obligations under the proposed agreement. There was no merit in this, having regard to the payslips Mr Pelesa had produced at the time, as well as the credit assessments done by VBS.

Over-indebtedness

- Regarding the issue of over-indebtedness, Mr Pelesa claimed to have fallen on hard times and that his debt under the loan agreement should be restructured and payments postponed for three years. Mr Pelesa had however failed to react to the notices sent to him in terms of section 129 of the NCA which, amongst other things, is a reminder to a debtor of the fact that he or she can approach a debt counsellor in order that an arrangement could be made to bring payments up to date. Mr Pelesa had also not made any proposals regarding the basis upon which his debt should be postponed and how repayments should be restructured. He further refused to downscale and consider selling his current immovable property in order to settle some of the debt.
- The conclusion was that for the above grounds of defence, Mr Pelesa had failed to provide sufficient detail and particularity to enable this court to exercise its discretion to come to his assistance.

Contravention of Section 15(2) of the MPA

- Section 15(2) of the MPA provides that a spouse "... shall not, without the written consent of the other spouse, ... enter as a consumer, into a credit agreement..." to which the NCA applies. An agreement entered into in contravention of this statutory prohibition is unlawful, void and unenforceable.
- The required consent by the non-contracting spouse is deemed to have taken place when the other contracting party "... does not know and cannot reasonably know that the contract is being entered into contrary to these provisions ..." (section 15(9) of the MPA). In such an event, the contract would be valid and enforceable.
- The onus is on such other contracting party to show that it has satisfied the duty placed on it by the MPA "... to make the enquiries that a reasonable person would make in the circumstances as to whether the other contracting party is married and, if so, in terms of which marriage regime".
- In his applications for credit to VBS, Mr Pelesa ticked the boxes "single" in respect of his marital status. Apart from Mr Pelesa's say-so, VBS bank relied on a "Personal Affidavit" signed by Mr Pelesa wherein he confirmed, under oath, a number of facts. These related to his full names and identity number, that he was in possession of an identity document, that he was not insolvent, that his estate has never been sequestrated and that his marital status is unmarried.
- The extensive credit check done by VBS indicated some risk due to previous judgments or unpaid accounts but did not indicate any "joint loan participants" in respect of any of the accounts or loans, including a previous vehicle finance agreement. The offer to purchase the immovable property in question was also only made by Mr Pelesa, again indicating himself to be single.
- The only indication of a marriage was the handwritten certificate produced by Mr Pelesa in his answering affidavit submitted to Court, issued by a marriage officer, indicating a recent marriage on 30 January 2017 - being some 10 days before the offer to purchase the property was signed and some three months prior to conclusion of the loan agreements.
- No indication was given in the certificate as to the marital property regime applicable. No indication had been

given whether this marriage had been registered at the Department of Home Affairs at the time of the agreements (or at all). It appears that Mr Pelesa and his wife had attended at the offices of the Department of Home Affairs and got married there, and only Mr Pelesa himself, his wife, the marriage officer and the two unidentified witnesses knew about this.

- Accepting that a credit provider is "put on enquiry" by section 15(9)(a) and cannot rely on the "bold assurance" of a consumer, no allegation had been made as to what exactly VBS should have done in this particular case. It is difficult to fathom what enquiries made by VBS would have unearthed this fact in view of all the other contrary indications.
- In these premises, VBS could not reasonably have known of Mr Pelesa's marriage and the contention that the liquidator had not made out a case also failed.

CONCLUSION

Mr Pelesa was ordered to pay the outstanding amounts.