23 NOVEMBER 2016

DISPUTE RESOLUTION ALERT

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NATIONAL CREDIT ACT: MUST ONE REGISTER?

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INTERNATIONAL ARBITRATION:

SPEAK TO ME IN A LANGUAGE I CAN HEAR

But you fully participated in the arbitration – how can you now, at the enforcement stage claim that you were not properly notified of the commencement of proceedings?

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CLIFFE DEKKER HOFMEYR

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A defence debtors often raise is that the credit provider is not registered as such in terms of the Act, making the particular credit agreement void, absolving the debtor from the obligation to repay the debt.

In the commercial landscape of South Africa it is inevitable that creditors will at some stage or another advance monies to debtors on deferred payment terms with some form of interest component being applicable.

The National Credit Act, No 34 of 2005 (Act) has gone a long way to protect the rights of consumers. A defence debtors often raise is that the credit provider is not registered as such in terms of the Act, making the particular credit agreement void, absolving the debtor from the obligation to repay the debt.

The sole issue before the court was whether the agreement of sale was void on the basis that the agreement of sale is a credit transaction and that Mr Potgieter was obliged, as a credit provider, to register.

Our courts have been called upon to determine this defence on various occasions but in *Potgieter v Olivier and Another* 2016 (6) SA 272 (GP), the court had to determine this proposition, not raised by a debtor, but by a creditor.

This case, and the outcome thereof, have important consequences for parties extending some form of credit, subject to the provisions of the Act, without being registered as a credit provider in terms thereof and heeds a strong warning to creditors, even in the case of a once-off credit transaction.

The plaintiff, Mr Potgieter, sold his property to the defendants in terms of a written agreement. The purchase price agreed upon was R1 million. The purchase price was payable either in cash or by way of payments of R10,000 per month, commencing 1 November 2008 until final payment. In the event that the purchasers elected to pay the purchase price by way of instalments, then interest accrued on the purchase price at the rate of R100,000 for every completed period of three years.

The sole issue before the court was whether the agreement of sale was void on the basis that the agreement of sale is a credit transaction in terms of s8(4)(f) of the Act and that Mr Potgieter was obliged, as a credit provider, to register in terms of s40(1)(b) thereof. Mr Potgieter failed to register as a credit provider, and in consequence, so it was alleged, the sale agreement was unlawful and in terms of s89(5)(a) of the Act, void.

Mr Potgieter, as part of his evidence, confirmed that he was not a provider of credit in the credit industry.

However, a credit provider is defined in s1 of the Act, in relevant part, as follows:

> Credit provider, in respect of a creditor agreement to which this Act applies means:
>
> (h) the party who advances money or credit to another under any other credit agreement.

The court had to determine first whether the sale agreement was indeed a credit agreement as defined in the Act. After considering the relevant provisions of the sale agreement the court held that the sale agreement was one that permits the purchasers to discharge the purchase price by way of monthly instalments over a lengthy period, as an alternative to the payment of cash on registration of title. The court found that this constituted a deferral of the payment of the purchase

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The court remarked that the legislature has thus set thresholds that trigger the obligation to register: first by reference to the number of agreements and secondly by reference to the quantum of the total principal debt.

price. It is this deferral of payment that then attracts the concomitant obligation to pay interest, making the sale agreement a credit agreement and Mr Potgieter a credit provider in that he has advanced credit to the buyers under a credit agreement.

It was argued on behalf of Mr Potgieter that he was required to apply to be registered as a credit provider in terms of s40(1)(b) of the Act, it being common cause that the threshold prescribed in s40(1) was at the relevant time R500,000. The consequence of such failure is set out in s89(2) and s89(5) of the Act. There it is provided that a credit agreement is unlawful if at the time the agreement was made the credit provider was unregistered and the Act required that the credit provider be registered. If a credit agreement is unlawful then, so it was contended, a court must order that a credit agreement is void from the date the agreement was entered into.

The court considered recent cases, in particular a decision of the full bench of its division, and confirmed that at the heart of the issue to be decided was the correct interpretation of s40(1)(b) of the Act, which the full bench of the court reasoned by recourse to the purposes of the Act that s40(1)(b) does not refer to a single credit agreement, but is rather directed at those who participate in the credit market and that a once-off transaction cannot be seen to be participation in the credit market, as such an interpretation would be, so the full bench found, at odds with the purpose of the Act.

The court found that it is bound to follow the decision of the full bench and on this basis found that as there was a single credit transaction and Mr Potgieter was not engaged upon the business of providing credit in the credit market, s40(1)(b) is not directed to transactions of the kind concluded between Mr Potgieter and the defendants. Thus, so the court found, Mr Potgieter was not burdened by an obligation to apply to be registered as a credit provider.

Importantly however was the further remarks of the court in *Potgieter* when the court noted that had the full bench decisions not been binding on the court, it would have been disinclined to follow it as s40(1) imposes an obligation to apply to be registered as a credit provider where a person is a credit provider under at least 100 credit agreements or where the total principal debt owed to the credit provider under all outstanding credit agreements exceeds a prescribed amount, at the time R500,000. The court remarked that the legislature has thus set thresholds that trigger the obligation to register: first by reference to the number of agreements

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The amendment substantially widens the net of credit agreements to which the Act applies.

and secondly by reference to the quantum of the total principal debt. That the principal debt is expressed by reference to 'outstanding credit agreements' is not an indication that a single credit agreement is not implicated in the legislative language and the stress in s40(1)(b) is upon the quantum of the outstanding principal debt and not the origin of that debt in more than one agreement.

The uncertainty created by the judgment and the interpretation of the Act could be seen to have been resolved when the threshold to register as a credit provider in terms of the Act was amended with effect from 11 November 2016.

The position with effect from 11 November 2016 is that a person is required to register as a credit provider if the principal debt owed under all outstanding credit agreements, other than incidental credit agreements, exceeds R0.00. The Minister of Trade and Industry gazetted this amendment on 11 May 2016. This amendment does not eliminate all uncertainty, as it could be argued, applying the principles and reasoning in *Potgieter*, that it does not necessarily follow that the provider of a once-off credit transaction must register.

The amendment substantially widens the net of credit agreements to which the Act applies.

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INTERNATIONAL ARBITRATION:
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The position ultimately adopted by the Appeals Court signals a loud warning to parties seeking to enforce international arbitral awards under the New York Convention where more than one language is involved.

The enforcement proceedings were opposed by LUMOS who then, for the first time, argued that because the notice of arbitration was presented in Chinese, it was deficient.

But you fully participated in the arbitration – how can you now, at the enforcement stage claim that you were not properly notified of the commencement of proceedings?

The United States' Court of Appeals was faced with this question in a recent challenge to the enforcement of an international arbitration award, which was granted against a US company. The position ultimately adopted by the Appeals Court signals a loud warning to parties seeking to enforce international arbitral awards under the New York Convention where more than one language is involved.

CEEG (Shanghai) Solar Science and Technology Co Ltd, instituted the proceedings by means of a request for arbitration to the China International Economic and Trade Arbitration Commission (CIETAC). CIETAC then in turn delivered a notice of commencement of the proceedings to LUMOS LLC, a US based Company. This notification was drafted in Chinese. LUMOS claimed that it did not appreciate the nature of the notification received from CIETAC (being written in Chinese) and as such took no action pursuant to the request. Due to LUMOS's failure to enter an appearance to defend, an arbitrator was duly appointed by CIETAC after consultation with CEEG only.

Subsequent to and without knowledge of the appointment of the arbitrator, LUMOS delivered an offer to CEEG to settle the existing dispute. CEEG's legal representative's responded to LUMOS (in English), making reference to the pending arbitral proceedings. Finally aware of the proceedings, LUMOS immediately took action to defend the proceedings. As a consequence, the tribunal granted LUMOS a two-month extension for the filing of its defence in the matter.

All then appeared to run according to plan.

The arbitral proceedings were concluded and the tribunal issued its award, finding against LUMOS. CEEG then sought to enforce the award in terms of both the New York Convention on the Enforcement and Recognition of Foreign Arbitral Awards and the US Federal Arbitration Act, in the US. The enforcement proceedings were opposed by LUMOS who then, for the first time, argued that because the notice of arbitration was presented in Chinese, it was deficient. Consequently, LUMOS argued, the composition of the arbitral tribunal did not comply with the arbitration agreement which then amounted to a ground for a refusal of the recognition and enforcement of the award under Article V(1)(b) and (d) of the New York Convention.

The US District Court ruled in favour of LUMOS, declaring that the notice was not reasonably calculated to apprise LUMOS of the proceedings. This was in light of the fact that all correspondence between

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the parties up until the commencement of the arbitration had been in English and that the agreements upon which the arbitral proceedings were based envisaged that the arbitration was to be conducted in the English language. The District Court held that LUMOS was thus deprived of an opportunity to participate in the appointment of the arbitrator and that the tribunal's constitution was thus not in accordance with the arbitration agreement.

On 19 July 2016 the US Court of Appeals for the 10th circuit affirmed the decision of the District Court. The Appeal Court ruled that Article V(1)(b) of the New York Convention specifically provides justification for the refusal of the recognition of an award if "the party against whom the Award is invoked did not receive proper Notice ... of the Arbitral proceedings". According to the Court of Appeals, the notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections".

Interestingly, the New York Convention does not require that a party complaining of a procedural irregularity needs to have suffered some form of prejudice occasioned thereby. LUMOS, as the Court of Appeals found, did suffer prejudice. It is not clear whether the Court would have reached the same conclusion had LUMOS been involved in the appointment of the arbitrator, notwithstanding the defective nature of the notice.

The New York Convention provides that the enforcement of an award may be refused under certain circumstances, one of which being that a party was not given proper notice of the initiation of proceedings or of the appointment of the arbitrator. A court at the enforcement stage has a clear discretion in this regard. While it may be reasonable to expect that a court will exercise this discretion against the background of actual prejudice suffered, there is no guarantee that this will occur in every jurisdiction. After all, the New York Convention does not require that prejudice be suffered.

For this reason, it is vitally important to ensure that all procedural requirements are properly adhered to, particularly with the commencement of the arbitral proceeding. Failure to do so may result in the granting of an award which is in reality, incapable of enforcement.

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BBBEE STATUS: LEVEL THREE CONTRIBUTOR
Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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