SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM	The Registrar, Supreme Court of Appeal
DATE	28 September 2018
STATUS	Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

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

Today the Supreme Court of Appeal (SCA) handed down judgment in which it upheld an appeal against the order of the Gauteng Division of the High Court, Pretoria (the High Court). The appeal concerned the question as to when registration as a credit provider in terms of National Credit Act 34 of 2005 (the NCA) is obligatory.

The appellants, Mr and Mrs Du Bruyn, made an offer to purchase the respondent, Mr Karsten's, interest in three business entities for the sum of R2 000 000 to be paid in instalments. Three separate sale agreements, in respect of 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 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 undertook to register a covering bond over their immoveable property, within 60 days, which they guaranteed to be unencumbered.

It was common cause that Mr Karsten was not registered as a credit provider in terms of s 40 of the NCA at the date of conclusion of the sale agreements. Mr Karsten accepted that he had to be registered as a credit provider in order to facilitate the registration of the covering bond.

The Du Bruyns' subsequently defaulted on their instalment payments. In November 2014, Mr Karsten instituted proceedings for the balance of the purchase price, in the sum of R1 133

169.39. Mr Karsten alleged a breach of the sale agreements. The Du Bruyns contended that the sale agreements were null and void due to non-compliance with the NCA: the sale agreements constituted agreements as contemplated by s 8 of 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's subsequent registration, on 27 November, was insufficient. The non-compliance with ss 40(3) and 40(4) of the NCA rendered 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. Before the SCA, 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. The SCA looked at s 4 of the NCA in determining whether the agreements of sale were arms-length transactions or not. After examining the evidence of the parties the SCA found that the sale agreements were arms-length transactions.

The SCA found that the real issue before it was whether *Friend v Sendal* 2015 (1) SA 395 (GP) (*Friend)*, by which decision the High Court 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.

The SCA found that although the aforementioned approach in *Friend* was sensible and pragmatic, it was difficult to marry such an approach with s 40 of the NCA which is clear and unambiguous. Section 40 it makes 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.

The SCA found that it is the 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 being true to the text and the context of the NCA.

The SCA found in favour of the Du Bruyns and set aside the order of the High Court.