IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA 10 AUGUST 2006
BEFORE THE HONOURABLE JUSTICE SHONGWE DJP CASE NO: 38630/05

In the matter between:

THE NATIONAL CREDIT REGULATOR	Applicant
and	
EVERETT FINANCIAL SERVICES (PTY) LIMITED	First Respondent
TOPALE FINANCIAL SERVICES CC	Second Respondent

DRAFT ORDER

Before his Lordship Mr Justice SHONGWE DJP on this the 10th day of August 2006. Having heard counsel for the applicant and having read the stated case attached hereto:

It is declared that:

1. the collection of debts by micro lenders based on letters of demand and consents to judgment that were signed by borrowers before the

relevant debts are due and wherein uncompleted documents are used, are unlawful and are illegal collection methods;

2. the Scheme referred to in paragraph 9 of the stated case attached hereto is illegal and unlawful;

3. the first respondent was not, and is not, entitled to collect interest from a borrower in excess of the rates determined in the Usury Act, 1968, in each collection made in terms of the Scheme.

It is ordered that:

the respondents pay the applicant's costs, including the costs of two counsel, where employed.

REGISTRAR

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIV

R2

CASE NO: 38630/05

In the matter between:

THE MICRO FINANCE REGULATORY COUNCIL Applicant

and

EVERETT FINANCIAL SERVICES (PTY) LIMITED First Respondent

TOPALE FINANCIAL SERVICES CC Second Respondent

STATED CASE FOR THE ADJUDICATION OF THE COURT IN TERMS OF UNIFORM RULE 33

THE PARTIES

1. The applicant is the Micro Finance Regulatory Council (hereinafter referred to as "the MFRC") an association incorporated in terms of section 21 of the Companies Act, 61 of 1973. Its principal place of business is at 11 Park Lane, Parktown, Johannesburg. As is set out in more detail below, the MRFC has been approved by the Minister of Trade and Industry ("the Minister") as the sole regulator of the micro-finance lending industry in South Africa.

2. The first respondent is Everett Financial Services (Pty) Limited ("Everett"). It is a company with limited liability, duly incorporated in terms of the provisions of the Companies Act, 1973. Its principal place

{WVR/LJV3579/LIT-GEN/01851382/}

of business is at 552 Meyer Street, Cnr. 10th Avenue, Wonderboom South, Pretoria.

3. The second respondent is Topale Financial Services CC ("Topale"), a close corporation duly incorporated in terms of the laws of the Republic of South Africa. Its principal place of business is also at 552 Meyer Street, Cnr. 10th Avenue, Wonderboom South, Pretoria.

4. Everett is a micro-lender, registered as such with the MFRC and Topale is a debt collector. Topale collects outstanding debts owing to Everett.

INTRODUCTION

5. Everett conducts business from a number of branches within the area of jurisdiction of this Court. The bulk of Everett's lending activities consists of loans repayable within thirty days, known as "short-term" products in the micro-lending industry.

6. Everett has developed and applied a collection system "(the Scheme") with a number of particular attributes. These are explained below.

7. The MFRC contends that the Scheme constitutes an illegal collection method. Everett and Topale dispute that this is so. A finding that the

Scheme is legal would have a number of consequences for Topale and Everett. These consequences are identified below.

8. The MFRC brought an urgent application against Topale and Everett in which it sought the following relief:

"PART A

1. An order declaring that the application is urgent and that the failure of the applicant to comply with the prescribed rules relating to time periods be condoned.

2. An order declaring that the collection system described in paragraph 9 of the supporting affidavit of Jan Abraham Augustyn, is illegal;

3. An order declaring that the first respondent is not, and was not, entitled to charge interest at rates exceeding the rates provided for in the Usury Act 73 of 1968 and that the first respondent is not, and was not, entitled to the benefit of the exemption form certain provisions of the Usury Act created by Exemption Notices published as Government Notices 713 of 1999 and 1407 of 2005 in respect of the category of money lending transacting of which the loans that were made by the first respondent to the persons identified in annexure "X" hereto, ("the relevant borrowers") form part.

4. An order declaring that all judgments and emolument attachment orders referred to in the next paragraph are null and void.

5. An order obliging the respondents to, on or before 1 February 2006 set aside, at their own cost, each and every judgment and every emolument attachment order pertaining to the relevant borrowers that had been obtained by the respondents as a consequence of the non-payment by the relevant borrowers of loans that had

been advanced by the first respondent to the relevant borrowers before 18 October 2005.

6. An order obliging the respondents to, on or before 15 December 2005, at their own cost, send a copy of this order to the employers of the relevant borrowers who had been served with emolument attachment orders referred to in the previous paragraph.

7. An order obliging the respondents to, from the date of this order, repay to the said employers all amounts, received by the respondents pursuant to emolument attachment orders as referred to in paragraph 5 above.

8. An order interdicting the respondents to, in the future, use uncompleted documents and the collection system referred to in paragraph 2 above.

9. An order that the Respondents pay, jointly and severally, the costs of the applicant, including the costs consequent upon the employment of two counsel.

10. An order that further and / or alternative relief be granted.

11. 11. An order that this notice of motion be deemed to be the summons in an action to be prosecuted by the applicant against the respondents under the present case number ("the action") and

    11.1 an order obliging the applicant to deliver its declaration in this action on or before 1 June 2006;

    11.2 an order that leave be granted to any or all of the relevant borrowers to join in the said action as plaintiffs on or before 1 June 2006 and to claim repayment of any or all amounts paid by them to the respondents exceeding the amounts that could be collected by the respondents in terms of the provisions of the Usury Act, or any other relief;

11.3 an order that the time periods and processes prescribed in the Uniform Rules of Court will follow upon delivery of the said declaration."

9. The case of the MFRC is set out in a founding affidavit by Jan Abraham Augustyn and is based on the documents of Topale and Everett. Paragraph 9 of the affidavit, referred to in paragraph 2 of Part A of the notice of motion reads as follows:

"9 Everett has developed and applied a collection system ("the scheme") with the following essential elements ...:

9.1 It requires its clients, the borrowers, to sign loan agreements that provide for a penalty of 100% of the loan amount should the loan amount not be repaid before or on the due date. If, for example, Everett lends R500,0O to a borrower repayable one month from the date of the loan and the borrower fails to pay it on that day, the amount of the debt is immediately doubled to R1 000,00. As appears below costs and interest charges are then added to this amount.

9.2 At the time that the borrower signs the loan agreement, the borrower is also required to sign two other uncompleted documents. The first is a "letter of demand in terms of sections 56 and 58 of the Magistrates' Court Act 1944" and the second is a document styled "Consent in terms of sections 58 and 65J of the Magistrates Court Act, 1944" (referred to below as "the letter of demand" and "written consent"). These documents are also left uncompleted in that either no witnesses sign the documents, or only one witness signs them..."

9.3 Immediately upon default by the borrower Everett first doubles the loan amount and then hands over the file of papers relating to the borrower to Topale

for collection. Neither Everett nor Topale contacts the borrower upon default.

9.4 The letter of demand and written consent are signed, where necessary and are used in support of applications for judgment in a Magistrates Court and an emolument attachment order requiring the employer of the borrower to pay the amount of the loan (together with the penalty interest of 100%, costs and interest) in a number of tranches.

9.5 When Everett, represented by Topale, applies to the relevant Magistrates Court for judgment and the emolument attachment order, it makes ... [representations] to the Clerk of the Court to the effect that the borrower had fallen into default, a letter of demand had been issued, the letter of demand was thereafter delivered to the borrower, the borrower signed the letter of demand before two witnesses, the borrower also at that point signed the consent to judgment. ...

9.6 ..."

(The word "[representations] added, portions deleted where indicated by ... . Examples of the documents on which the Scheme is based are referred to in paragraph 34 below and its components are set out in more details in paragraph 35 below.)

10. An answering affidavit was filed in which Topale and Everett do not dispute the essence of the Scheme as explained in paragraph 9 of the affidavit of Mr Augustyn but in which the conclusion of illegality was denied. They also raised four other defences. The first was that the application was not urgent. The second was that the MFRC does not have the requisite *locus standi* to bring such an application, the third was that the application is *ultra vires* the powers of the MFRC. The last

defence was that the MFRC and Everett stand in a contractual relationship to one another, one of the incidents of which is that the MFRC has disciplinary powers over Everett and that the MFRC is consequently precluded from bringing an application to court against Everett. These defences are dealt with in a replying affidavit and the matter was enrolled on the urgent roll of 14 December 2005.

11. The urgent application was to be heard by her Ladyship Ms Justice De Vos, but the parties entered into discussions as a result of which her Ladyship made an order, by agreement, in terms of which the hearing was postponed and an interim interdict issued.

12. The parties are in agreement that the essential facts set out in paragraph 9 above are not in dispute but the conclusion of illegality remains in dispute and that this Honourable Court should adjudicate the matter by means of a special case in terms of uniform rule of court 33(1).

THE COMMON CAUSE FACTS

General

13. Everett has at all relevant times conducted business as a micro-lender under exemptions to the Usury Act, 73 of 1968, which allow micro-lenders registered with the MFRC to levy interest in excess of the limits

set through the Usury Act. The exemptions are subject to certain conditions, two of which are, paraphrased, that a micro-lender may not utilise any illegal (or, unlawful) collection method or documents signed in blank, that is, uncompleted documents.

The regulation of the micro-finance industry in South Africa

14. In the past persons who earned low incomes could not obtain access to credit from established and regulated financiers, such as banks. The reason for this was that such financial institutions were subject to the interest rate limitations imposed by the Usury Act and were not prepared to lend money to indigent persons because of the perceived risk of non-payment and the cost of advancing small loans at Usury Act rates.

15. There was, however, a great demand for small loans and there was international recognition of the fact that a duly regulated micro-finance industry greatly assists in poverty alleviation.

16. In order to allow for the establishment of such an industry in South Africa, section 15A was inserted into the Usury Act in 1988. The section provides:

"15A Exemptions by Minister –

The Minister may from time to time by notice in the Gazette exempt the categories of money-lending transactions, credit transactions or leasing transactions which he may deem fit, from any or all of the provisions of this Act on such conditions and to such extent as he may deem fit and may at any time in like manner revoke or amend any such exemption."

17. The section allows for the Minister to exempt, *inter alia*, small- or micro-loans from the provisions of the Usury Act. This the Minister did in three Exemption Notices.

18. Then Minister published his first notice exempting certain categories of loans during 1992. No regulatory framework was, however, created within which such lenders had to operate. As a result of the exemption, a large micro-lending industry, almost immediately, came into existence. (This Notice is not directly relevant to the dispute and is therefore not attached).

19. Apart from humanitarian entities with developmental objectives that extended loans for micro-enterprise, housing and educational purposes, approximately 1500 micro-lenders had become active throughout the country by the end of the 1990's. The loans that they advanced were utilised for consumption purposes.

20. The micro-lending industry was not regulated and Government determined that the industry should be regulated by an independent

body approved by Government in which all the sectors that had interests in the industry would be properly represented.

21. The MFRC was incorporated to regulate the industry and a second Exemption Notice was published on 1 June 1999 under Government Notice 713 of 1999 in Government Gazette 20145 of 1 June 1999. (A copy of this exemption notice is attached hereto as annexure "A"). In terms of this notice a lender, if it wished to grant loans exceeding the maximum annual finance charge rate determined under the Usury Act, was required to register with a regulatory institution approved by the Minister. (Although this Notice was recalled in 2005 and replaced with another, the requirement of registration with the MFRC still exists). The MFRC was duly approved by the Minister and all micro-lenders are accordingly required to register with it.

22. The provisions of the 1999 Exemption Notice appeared in the schedule that formed part of annexure "A" thereto and it included rules (referred to in item 1.7 of the schedule), with which all micro-lenders had to comply.

23. Item 5 of the Rules provided that:

> "5. **Collection methods**
>
> 5.1 ...

5.2 The lender shall not indulge in the use of any processed documents signed in blank;

5.3 ...

5.4 The lender shall not make use of any illegal collection methods."

24. The Minister of Trade and Industry promulgated Notice 1407 of 2005 in Government Gazette 27889 of 8 August 2005, in which he repealed the Exemption Notice 713 of 1 June 1999. Exemption Notice 1407 thus replaced Exemption Notice 713 with effect from 8 August 2005. A copy of Exemption Notice 1407 is attached hereto as "B".

25. Item 30 of the Conditions of Exemption, annexure "A" to the schedule to the latter Notice reads as follows:

"Collection methods

30. (1) The lender shall not take possession of or make use of personal information such as pin codes and bankcards as security or collection arrangements.

(2) The lender shall not permit, require or demand of the borrower to sign any blank process documents.

(3) The lender shall not collect or attempt to collect any amounts for costs exceeding costs allowed for in terms of the Magistrates' Court Act, 1944, (Act No. 32 of 1944), the Attorneys Act, 1979, (Act No. 53 or 1979) or the Debt Collectors Act, 1998, (Act No. 114 or 1998).

(4) The lender shall not make use of any unlawful, unreasonably oppressive or burdensome collection methods."

The respondents

26. Everett is registered as a micro-lender with the MFRC as appears from annexure "C" hereto, its registration certificate.

27. Everett conducts business at approximately 17 different branches located throughout the area of jurisdiction of this Honourable Court. Everett's shareholders are also the shareholders of Topale and they operate, for practical purposes, as one unit.

The provisions of the Magistrates' Court relating to judgments and emolument attachment orders

28. Section 58 of the Magistrates' Court Act deals, *inter alia*, with consents to judgment. It provides for a procedure whereby a creditor does not have to issue summons in order to obtain judgment on a debt, but can obtain judgment based on a letter of demand and written consent by the debtor. It by-passes the Magistrate, and empowers the Clerk of Court to grant judgment on the presentation to him (or her) of the letter of demand and the document evidencing the relevant consent.

29. An extract of section 58 of the Magistrates' Court Act is attached hereto as annexure "D".

Emolument attachment orders

30. Section 65J of the Magistrates' Court Act deals with emoluments attachment orders that may be issued by the Magistrates' Court of the

district in which the employer of the judgment debtor resides or carries on business. The purpose of the order is to attach the present or future emoluments of the borrower. A copy of this section is attached hereto marked annexure "E".

31. One pre-condition for an emolument attachment order to be issued is that the judgment debtor has to have consented to the order in writing. The second is that the lender has to have sent a registered letter to the borrower in which certain information is contained.

INVESTIGATIONS OF MR WHALE

32. During October 2005, the MFRC received a complaint from a Mr Du Plessis of Glofurn Products CC in Cullinan relating to certain garnishee orders that had been obtained by Everett in respect of employees of Glofurn. Mr Whale was consequently appointed by the Chief Executive Officer of the MFRC, Mr Davel, in terms of section 13 read with the definition of "registrar" in section 1 of the Usury Act to investigate the complaint.

33. Mr Whale interviewed the complainants as well as representatives of Everett and Topale. He established that the Scheme has the attributes referred to in paragraph 9 of the affidavit of Mr Augustyn quoted in paragraph 9 above.

34. Mr Whale established that the Scheme is based on the following documents:

34.1. loan agreement/s, an example of which is attached hereto as annexure "F;

34.2. letters of demand, an example of which is attached hereto as annexure "G";

34.3. written consents to judgments and garnishee orders, an example of which is attached hereto as annexure "H";

34.4. applications to the local Magistrates' Court for judgment against the borrowers as well as garnishee orders, an example of which is attached hereto as annexure "I".

35. The Scheme has the following components:

35.1. Everett requires borrowers to sign "letters of demand", "admissions of liability", "written consents to judgment and garnishee orders" when they enter into loan agreements with Everett.

35.2. Some of the documents are not completed when signed by the borrower.

35.3. Upon default, the pre-signed documents are completed and used to obtain judgment from the Clerk of the Court and to obtain emolument attachment orders.

36. Everett and Topale abandoned this collection process on 18 October 2005. At that time it had used the System in respect of each of the debts of the debtors listed in annexure "J" hereto.

THE CONTENTIONS OF THE PARTIES

37. The MFRC contends that Everett employed a system that relied on false documentation and uncompleted documents, aliter, documents signed in blank.

38. The MFRC thus contends that until 18 October 2005 Everett made use of an illegal or unlawful collection method in respect of the category of money-lending transaction at issue herein, involving the persons listed in annexure "J" hereto.

39. The MFRC contends that Everett was consequently not entitled to the benefit of the Exemption in respect of the borrowers listed in annexure "J" hereto. Everett is therefore not entitled to any interest on any of the loans referred to in annexure "J" in excess of the Usury Act's rates of interest.

40. Everett does not deny that it utilised the Scheme up to 18 October 2005. Everett, however, contends that the Scheme is not illegal as is meant in item 30(4) of the schedule to Notice 1407 of 2005, and, before that, in item 5 of the schedule to Notice 713 of 1999.

QUESTIONS TO DECIDE

41. here are consequently two questions for the Court to decide.

42. The first is whether or not, for the purposes of item 30(4) of the Schedule to Notice 1407 and item 5 of the Schedule to Notice 713, the collection method admittedly employed by Everett is illegal, unlawful, unreasonably oppressive or burdensome.

43. Secondly, if it is illegal, unlawful, unreasonably oppressive or burdensome, what the legal consequences are of the employment of the Scheme.

THE ARGUMENT OF THE MFRC

44. The fact that there may be an agreement between Everett and a borrower who participates in the Scheme for Everett to use the process constituting the Scheme is irrelevant for determining the legality or illegality of the collection method and its consequences. Prejudice of the borrower is equally irrelevant. The norms of the private law

relationship between the lender and the borrower do not determine the legality or illegality of the collection process. The norms of the public law provisions of the Magistrates' Court Act dictate the legality of the process.

45. Upon analysis of the letter of demand and consent form (of which examples appear as annexures hereto), a number of misrepresentations are apparent. The most important is that the "letter of demand" is issued before the debt becomes due. A letter of demand of this nature is an *interpellatio*; it is a demand for the payment of a due debt. In terms of section 55 of the Magistrates' Court Act, debt means "a liquidated sum of money due". The meaning of "due" is "that which is owing and has matured". The debt must be actually due, there must be an absolute obligation to pay before a letter of demand can be issued. A document signed before a debt is due, whatever its title may be, cannot fulfil the function of a letter of demand and is not a letter of demand for purposes of section 58. There can thus not be any consent in writing to judgment in favour of the creditor and the pre-signed documents constitute misrepresentations. No judgment can be obtained on such a document and a process built on documents which misrepresent the truth, can only be described as illegal and unlawful.

46. The MFRC consequently submits that the Scheme is illegal and unlawful.

47. The consequences of illegality are clear: an illegal collection method leads to a forfeiture of the right under the exemption to the Usury Act. The Legislature clearly limited the exemption to collection methods that are not illegal.

48. In the light of the aforegoing the MFRC submits that an order should issue in the following terms:

48.1. That it be declared that collection of debts based on a letter of demand and a consent to judgment signed by a borrower before the debt is due, and wherein uncompleted documents are used, is an illegal and unlawful collection method.

48.2. That it be declared that the first respondent was not and is not entitled to collect interest from a borrower in excess of the rates determined in the Usury Act in respect of each collection where such letter of demand was used.

48.3. That it be declared that the Scheme referred to in paragraph 9 above and described in the affidavit of Mr Augustyn is illegal and unlawful;

48.4. That the respondents be ordered to pay the costs of the applicant, including the costs of two counsel.

DATED AT PRETORIA THIS DAY OF APRIL 2006

PETRUS LOUW SC

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To:
THE REGISTRAR OF THE
ABOVE HONOURABLE COURT
Pretoria

And to:

Attorneys for the first and

(WVR/LJV3579/LIT-GEN/01851382/I)

second respondents
Received copy hereof this
day of April 2006

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for: Respondents' attorneys

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