THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 231/12
Reportable

In the matter between:

THE NATIONAL CREDIT REGULATOR **Appellant**

and

STANDARD BANK OF SOUTH AFRICA LIMITED **Respondent**

Neutral citation: *The National Credit Regulator v Standard Bank of SA Ltd* (231/12) [2012] ZASCA 176 (29 November 2012)

Coram: NUGENT, PONNAN, MALAN and PILLAY JJA and SALDULKER AJA

Heard: **15 NOVEMBER 2012**

Delivered: **29 NOVEMBER 2012**

Summary: **National Credit Act 34 of 2005 – administration fees restricted under former Usury Act 73 of 1968 – whether survived the transition.**

ORDER

On appeal from South Gauteng High Court, Johannesburg (J M A Cane AJ sitting as court of first instance).

The appeal is upheld with costs that include the costs of two counsel. The order of the court below is set aside and replaced with the following:

‘1. It is declared that the respondent is not entitled to charge an administration fee on housing loans that existed at the time the National Credit Act 34 of 2005 came into operation in excess of the fee provided for in paragraph 3(b)(i) of the Schedule to the Usury Act 73 of 1968 unless and until that fee is amended under the powers conferred by s 105(1) of the National Credit Act.

2. The respondent is to pay the costs of the application including the costs of two counsel.’

JUDGMENT

NUGENT JA (PONNAN, MALAN and PILLAY JJA and SALDULKER AJA CONCURRING)

[1] The business of the Standard Bank of South Africa Limited, the respondent in this appeal, includes making loans to purchasers of homes. The terms of those loans were at one time regulated by the Usury Act 73

of 1968, which set a limit on, amongst others, the fees that might be charged for administering the loans. The Usury Act was repealed by and replaced with the National Credit Act 34 of 2005. That Act similarly set an upper limit on 'service fees' that might be charged on home loans, which are comparable to administration fees under the Usury Act.

[2] The Bank contends that the limit imposed on administration fees under the Usury Act did not survive the transition to the National Credit Act so far as extant home loans were concerned, with the result that administration fees on those loans ceased to be regulated. Disputing that contention the National Credit Regulator, which is the appellant, applied to the South Gauteng High Court for an order restraining the bank from charging administration fees on those loans in excess of the maximum amount set under the Usury Act, alternatively declaring the bank to be entitled to no more than that amount. The application was dismissed by Cane AJ and the Regulator appeals with the leave of that court.

[3] Administration fees were regulated under the Usury Act by s 5(1)(*k*), which provided that

'no moneylender … shall in connection with a money lending transaction … obtain judgment for or recover from a borrower … an amount exceeding the sum of –

(a) – (*j*)

(*k*) in the case of a housing loan, administration fees to the extent and on the conditions mentioned in the Schedule'.

[4] An 'administration fee' was defined in the Schedule to mean

'an amount payable by the borrower to the moneylender –

(a) where such amount is in terms of an agreement in writing between the moneylender and the borrower recoverable from the borrower;

(b) as valuable consideration for the moneylender's administering the borrower's account; and

(c) where the total amount payable per month does not extend beyond the amount mentioned in paragraph 3(b)(i)'.

[5] Paragraph 2 allowed for the recovery of administration fees subject to the conditions mentioned in paragraph 3. At the time the Usury Act was repealed, paragraph 3(b)(i) of the Schedule set the maximum administration fee at R5.00 per month.

[6] Under the National Credit Act a 'credit agreement' – which includes a home loan – must not require payment by the borrower of any money or other consideration except, amongst others, a 'service fee', which 'must not exceed the prescribed amount relative to the principal debt'.[1] A 'service fee' is defined to mean

'a fee that may be charged periodically by a credit provider in connection with the routine administration cost of maintaining a credit agreement'.

The Minister charged with the responsibility for consumer credit matters is authorised by s 105(1), after consultation with the Regulator, to prescribe 'a method for calculating', amongst others, the service fee. At the time the application was brought, the service fee had been set at a maximum of R50 per month.

[7] Given the tight regulation under both statutes of the fees that may be charged on the administration of home loans it would be extraordinary if the drafter of the National Credit Act had chosen to terminate the regulation of such fees on existing loans. Counsel for the bank readily accepted that he or she could not have done so intentionally but submitted

[1]Section 101(1)(*c*).

instead that the absence of continuing regulation of administration fees on existing loans was inadvertent.

[8] The transitional provisions in schedule 3 to the National Credit Act make it perfectly clear that the drafter was well aware that the regulation of existing agreements required to be provided for. In paragraph 2 existing agreements were subjected to the regime of the National Credit Act in certain respects. Those provisions need not concern us. Paragraph 7 then provides for the 'general preservation of regulations, rights, duties, notices and other instruments' We need concern ourselves only with subsection (2), which provides that

'[any] other right or entitlement enjoyed by, or obligation imposed on, any person in terms of any provision of the previous Act [which includes the Usury Act] which had not been spent or fulfilled immediately before the effective date must be considered to be a valid right or entitlement of, or obligation imposed on, that person in terms of any comparable provision of this Act, as from the date that the right, entitlement or obligation first arose, subject to the provisions of this Act'.

[9] Counsel for the bank submitted that paragraph 3(b)(i) of the Schedule to the Usury Act, properly construed, did no more than impose a prohibition on exceeding the maximum amount, which cannot be considered to create a 'right' or entitlement' of a borrower, nor, by the same token, an 'obligation' upon the moneylender.

[10] The learned judge in the court below was attracted by that submission. She opined that the entitlement to charge an administration fee, and the corresponding obligation to pay it, were not acquired or incurred by virtue of the provisions of paragraph 3(b)(i), but were acquired and incurred by way of the contract of loan. The effect of that paragraph, she went on to say:

‘merely imposed an overriding statutory limitation on the contractual rights and obligations which the mortgagor and mortgagee acquired and incurred by way of contract. The effect of the repeal of that statutory limitation was that the agreement between the parties continued to govern their relationship. The accrued rights and obligations of the parties had their origin in contract and no right or privilege was acquired by or accrued to any borrower by virtue of the provisions of paragraph 3(b)(i) of the Schedule to the Usury Act’.

[11] No doubt the right of the bank to charge an administration fee, and the obligation of the borrower to pay it, has its source in the agreement between the parties, but that is not a full answer to the Regulator’s claim. Quite apart from the contractual right and obligation to charge and pay respectively, the Usury Act entitled a borrower not to pay more than the prescribed amount and obliged the bank not to charge it. Call that a prohibition if you like, but it still gives rise to an entitlement and an obligation respectively, falling within the terms of paragraph (7)(2) of the transitional provisions. That section is clearly intended to sweep up all rights and obligations not specifically provided for elsewhere in the transitional provisions and to preserve their existence through the transition. It would be a parsimonious construction of that section that leaves some regulatory provisions behind.

[12] The restriction that was imposed on the administration fee under the Usury Act must be taken, under Paragraph 7(2), to be imposed on the comparable service fee under s 101(1)(c) of the National Credit Act. It remains, however, the administration fee formerly imposed by the Usury Act, though now subject to variation by the Minister, acting in consultation with the Regulator, as provided for by s 105(1).

[13] It does not seem to me to be necessary to impose a restraint on a reputable bank, as was sought in the main prayer, against acting unlawfully. It will suffice to declare the legal position.

[14] The appeal is upheld with costs that include the costs of two counsel. The order of the court below is set aside and replaced with the following:

‘1. It is declared that the respondent is not entitled to charge an administration fee on housing loans that existed at the time the National Credit Act 34 of 2005 came into operation in excess of the fee provided for in paragraph 3(b)(i) of the Schedule to the Usury Act 73 of 1968 unless and until that fee is amended under the powers conferred by s 105(1) of the National Credit Act.

2. The respondent is to pay the costs of the application including the costs of two counsel.’

R W NUGENT
JUDGE OF APPEAL

APPEARANCES:

For appellants:	M D Kuper SC
	M A Chohan
	Instructed by:
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