THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 498/2017

In the matter between Reportable

RED CORAL INVESTMENTS (PTY) LTD **APPELLANT**

and

CAPE PENINSULA UNIVERSITY OF TECHNOLOGY **RESPONDENT**

Neutral citation: *Red Coral Investments (Pty) Ltd v Cape Peninsula University of Technology* (498/17) [2017] ZASCA 152 (22 November 2017)

Coram: Majiedt, Willis, Saldulker and Mocumie JJA and Schippers AJA

Heard: 10 November 2017

Delivered: 22 November 2017

Summary: Condonation application – pleadings – exception – National Student Financial Aid Scheme Act 56 of 1999 precluding oral agreement between NSFAS and service provider directly or through agent on behalf of NSFAS – exception correctly upheld by high court – no prospects of success – condonation application dismissed with costs.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Klopper AJ, sitting as court of first instance):

1. The application for condonation and for the reinstatement of the appeal is dismissed with costs.

JUDGMENT

Majiedt JA (Willis, Saldulker and Mocumie JJA and Schippers AJA concurring):

[1] A claim for payment of the sum of R758 630.12, instituted by the appellant, Red Coral Investments (Pty) Ltd (Red Coral), in the Western Cape Division of the High Court, Cape Town (the high court) against the respondent, Cape Peninsula University of Technology (CPUT), was met by an exception to the particulars of claim. Klopper AJ upheld the exception and set aside the particulars of claim, but granted leave to appeal to this Court. Although the National Student Financial Aid Scheme (NSFAS) was sued as the first defendant in the high court, it played no role in the exception proceedings and does not feature in this appeal. Red Coral was out of time with the lodging of the appeal record and, in terms of rule 8(3) of this Court's Rules[1], the appeal had consequently lapsed. Red Coral seeks condonation of its non-compliance and an order for the re-instatement of the appeal.

[1] Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa, 1998 as amended.

[2] CPUT contended that the appeal should be struck from the roll, since *ex facie* Red Coral's notice of appeal it impermissibly seeks to appeal against the high court's reasoning and not against its order.[2] While the submission is not without merit, CPUT agreed that we consider the merits of the appeal in order to determine whether there are prospects of success as one of the factors in the adjudication of a condonation application.

[3] The exception was based on a contention that the particulars of claim lacked the necessary averments to sustain a cause of action. In essence, CPUT's argument was that NSFAS is precluded by the relevant legislation from entering into the type of oral agreement which Red Coral alleged it had entered into with NSFAS's agent, CPUT, and on which Red Coral relied for its claim. The claim against CPUT was framed as an alternative to the main claim against NSFAS in the amount mentioned above. The alternative claim was based on delict (*condictio furtiva*), alternatively on unjustified enrichment (the *condictio sine causa*). The claims were premised on the following factual matrix.[3]

[4] It was alleged that CPUT, acting as the duly appointed and authorised agent of NSFAS, agreed to Red Coral providing rental accommodation to CPUT students, who it was unable to accommodate on campus. These students were recipients of funding from NSFAS which, as its name depicts, makes available funding mainly from the public purse to eligible students. It was alleged in the particulars of claim that Red Coral was accordingly designated as an approved service provider of private student accommodation for NSFAS purposes. Red Coral alleged further that, in terms of an oral agreement between it and CPUT (as agent for NSFAS), CPUT would pay to Red Coral the amounts allocated by NSFAS to students who

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[2] *South African Reserve Bank v Khumalo & another* [2010] ZASCA 53; 2010 (5) SA 449 (SCA) para 4.

[3] In accordance with well established principles, the facts are outlined as averred in the particulars of claim, since they cannot be said to be palpably untrue or so improbable that they warrant outright rejection; see: *Stewart & another v Botha & another* [2008] ZASCA 84; 2008 (6) SA 310 (SCA) para 4.

received NSFAS accommodation allowances and who rented private accommodation from Red Coral. Pursuant to the oral agreement, Red Coral leased rooms to students at a fixed monthly rental.

[5] Red Coral claimed the above amount from NSFAS (and another amount, not relevant here) allegedly due and payable in terms of the above agreement. In the alternative, that amount was claimed from CPUT on the two alternative bases outlined above. The delictual claim was based on the allegation that CPUT had knowingly, unlawfully and intentionally appropriated the said amount without Red Coral's permission. The alternative claim of unjustified enrichment was premised on the allegation that CPUT had been unjustly enriched at Red Coral's expense through the appropriation and retention, without cause, of the funds to which Red Coral was lawfully entitled.

[6] In particularising its claim against CPUT, Red Coral prefaced its claim as follows:

' 21. In the alternative to paragraph 20, *only if it is found* that CPUT was not acting in the capacity as agent of NSFAS and within the scope of its authority *when it made the aforesaid deduction* from the payment due to Red Coral, *and that NSFAS is for that reason alone* not liable to pay the sum of R758 630.12 to Red Coral, then and in that event Red Coral avers that . . .' (own emphasis).

The preceding facts pleaded in this regard was that the above amount had been paid by NSFAS to CPUT as agent, but was never paid over to Red Coral and that CPUT was not entitled to withhold the amount. It was contended by CPUT that, consequently, on the pleadings the claim against CPUT for the payment of that amount cannot exist unless the condition in para 21 above is capable of fulfilment. It is CPUT's case that the condition is not capable of fulfilment. In support of its case, CPUT advanced two broad grounds why the condition is incapable of fulfilment. First, it contended that on the pleadings NSFAS cannot in law be bound to the alleged oral agreement relied upon. And, second, it submitted that on the pleadings, NSFAS, as principal, would remain liable to Red Coral in terms of the alleged oral agreement (assuming it is binding), notwithstanding the unauthorised acts of its alleged agent, CPUT. These contentions found favour with the high court

and it upheld these two grounds, which it described as 'the ground of ultra vires' and 'the law of agency ground'. Red Coral's appeal is against the ultra vires ground only. The ultra vires ground emanates from the provisions of the National Student Financial Aid Scheme Act 56 of 1999 (the Act).

[7] NSFAS is a creature of statute, having been created by the Act.[4] As such it is constrained to act within the parameters of the statute and can only exercise the powers conferred on it by that empowering statute.[5] All acts, in particular for present purposes the conclusion of contracts, performed outside the ambit of its statutory powers, are invalid and of no force and effect.[6] Moreover, ss 66 and 68 of the Public Finance Management Act 1 of 1999 provide that where a public institution such as NSFAS enters into a transaction not authorized by its governing legislation, the State and that institution will not be bound by that transaction.[7]

[8] After a comprehensive examination of the relevant provisions of the Act, the high court concluded that NSFAS was not empowered in law to enter into the alleged oral agreement relied upon by Red Coral. For the reasons that follow, I am of the view that the high court cannot be faulted in its finding. It is plain on a close analysis of the relevant provisions of the Act that concluding such an oral agreement does not fall within the ambit of NSFAS's powers.

[9] It is striking that, while the Act defines 'bursar', 'borrower' and a 'designated public college or designated higher education institution', it contains no definition of a service provider. NSFAS's functions, outlined in s 4, are to allocate loans and bursaries to eligible students, to develop criteria and conditions for such loans, to raise funds, to recover loans, and to advise the Minister of Higher Education and Training. For present purposes I will restrict

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[4] Section 3(1).
[5] G B Bradfield *Christie's The Law of Contract in South Africa* 7ed at 267.
[6] *Abrahamse v Connock's Pension Fund* 1963 (2) SA 76 (W) at 79A – C.
[7] *Panamo Properties 103 (Pty) Ltd v Land and Agricultural Development Bank of South Africa* [2015] ZASCA 70; 2016 (1) SA 202 (SCA) para 22.

myself to references to a designated higher education institution. It was common cause that CPUT is such an institution.

[10] The Act contemplates only two types of agreements. Section 19(3) provides for a written agreement to be entered into between NSFAS and every borrower or bursar. In terms of s 20(2)(e) a designated higher education institution may enter into such written agreement with borrowers or bursars on behalf of NSFAS in terms of the provisions of the Act and on the terms and conditions determined by NSFAS.

[11] The second type of agreement contemplated by the Act is one between NSFAS and a designated higher education institution. Section 20, which regulates this type of agreement, reads as follows:

'**20. Designated public college and designated higher education institution**. –

(1) The board [of NSFAS] may enter into an agreement with a public college or a higher education institution which agrees to become a designated public college or designated higher education institution for purposes of administering loans and bursaries to students of that institution on behalf of the NSFAS.

(2) The agreement referred to in subsection (1) must authorise the institution on behalf of the NSFAS –

(a) to administer loans and bursaries granted to students of the institution;

(b) to receive loan and bursary applications from students;

(c) to consider and assess the applications in the light of the criteria for the granting of loans and bursaries determined by the NSFAS;

(d) to grant loans and bursaries if the criteria are met, after ascertaining that funds are available; and

(e) to enter into a written agreement with a borrower or bursar in accordance with the provisions of this Act and on the terms and conditions determined by the NSFAS.

(3) A designated public college or designated higher education institution must –

(a) at such intervals as are agreed on by the college or institution and the board, report to the board on the progress made by a borrower or a bursar with regard to the course of study followed by him or her; and

(b) immediately notify the board if a borrower or bursar discontinues his or her studies.'

[12] The following important aspects are evident in s 20:

(a) First, the agreement is between NSFAS and a designated institution for the purpose of administering loans and bursaries to students of that institution on behalf of NSFAS.[8]

(b) Second, there is a closed list of functions which the institution is authorised to perform on behalf of NSFAS.[9] Entering into contracts with third parties is not one of them. In the present case, this aspect is crucial – any act, power or function performed by CPUT, ostensibly on behalf of NSFAS, outside the purview of s 20(2), would be invalid. Where the contravention of a statute by an act or contract defeats the very purpose of the statute, the contravening act or contract will be void.[10] The alleged oral agreement between Red Coral and CPUT (on behalf of NSFAS) falls within this category – it would defeat the very purpose of the Act. Section 2(1) provides that '[t]he purpose of this Act is to establish a financial aid scheme for students at public colleges or at higher education institutions.'

(c) Third, and closely related to the previous aspect, the designated higher education institution is required to report regularly to NSFAS on the progress of borrowers and bursars,[11] and to notify NSFAS forthwith in the event of a borrower or bursar discontinuing his or her studies.[12]

[13] Section 19(5) provides that 'the amount of the loan or bursary is paid by the NSFAS to the designated higher education institution concerned by way of allocations in respect of amounts payable to the institution by the borrower or bursar'. Thus, a bursary which could conceivably encompass a bursar's tuition, accommodation, transport and study materials, is paid by NSFAS as an allocation to the institution. Nowhere does the Act envisage a scenario where NSFAS itself, or through its agent (CPUT), pays a service provider such as Red Coral in the present instance.

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[8] Section 20(1).
[9] Section 20(2)*(a)* – *(e)*.
[10] *Standard Bank v Estate van Rhyn* 1925 AD 266 at 274; *Metro Western Cape (Pty) Ltd v Ross* 1986 (3) SA 181 (A) at 188 F-J.
[11] Section 20(3)*(a)*.
[12] Section 20(3)(b).

[14] The rationale behind the system of payments envisaged by the Act is evident from its purposes: to provide financial aid to eligible students and for the management of the funds by public colleges and higher education institutions. It is designed to prevent NSFAS funds from being used irresponsibly to incur debts for students. In order to fulfil the objects of the Act, payments are made only to the institution. Thus, s 19(2) is plain and unambiguous in its purpose: '[a] loan or bursary is granted in respect of a particular course of study, which must be specified in the loan or bursary agreement in question, and may not be used for any other purpose'. Understandably, in order to fulfil that purpose, the Act envisages payment only to the institution concerned, and to no other person or entity. And the institution is required to report on the progress of the bursar or borrower and to inform NSFAS without delay of the termination of his or her studies by the bursar or borrower. Not only is the disbursement of funds strictly circumscribed, but there are also several checks and balances to protect public funds.

[15] The Act defines a loan widely:

'"[L]oan" means a loan granted to a person by the NSFAS in order to enable the person to defray the costs connected with his or her education at a designated public college or designated higher education institution, and those connected with the board and lodging of that person for purposes of attending the institution.'

But, ultimately, a loan is to be understood to be strictly confined to the 'allocations in respect of amounts payable to the institution' (s 19(5), above). It was contended on behalf of Red Coral that the power to conclude a contract such as the one relied on, is implied in the Act. The submission is untenable. As I have attempted to demonstrate, the Act is clear and unambiguous regarding the payment system.

[16] In the premises, Red Coral's reliance on an oral agreement between it and CPUT, as an agent of NSFAS, is unsustainable in law. As a consequence, the condition postulated by Red Coral in para 21 of its particulars of claim, is incapable of fulfilment and the particulars of claim lack

averments to sustain a cause of action. The high court rightly upheld the exception. Absent any prospects of success, no case has been made out for condonation. There is no reason why costs should not follow the outcome.

[17] The following order is issued:

The application for condonation and for the reinstatement of the appeal is dismissed with costs.

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S A MAJIEDT
JUDGE OF APPEAL

APPEARANCES

For Appellant:	A R Newton
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