REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: 30476/12

In the matter between:

SABLE PLACE PROPERTIES (PTY) LIMITED Plaintiff

and

ERIC JULIAN BOTT Defendant

JUDGMENT

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[1] This is an application for summary judgment.

[2] On 20 August 2009, Riverside Industrial Park Joint Venture ("the JV") concluded an agreement with CFS Electrical Suppliers (Pty) Limited ("CFS") and the defendant termed a "settlement agreement".

[3] The preamble to the agreement recorded that the purchaser purchased a property from the seller for a price of R2 502 000, that the seller had cancelled the sale as a result of breaches of the sale agreement by the purchaser and

that to avoid further litigation in respect of "*damages and further issues arising*" the parties had agreed on the terms of the settlement agreement.

[4] In terms of the settlement agreement, CFS was to pay to the JV an amount of R120 000 by 20 September 2009. Failing payment by that date, CFS would pay interest to the JV at 15,5% per annum, compounded monthly.

[5] The defendant bound himself as surety and Concessionaire-principal debtor for the obligations of CFS in terms of the settlement agreement.

[6] On 1 November 2009, the JV ceded its rights under the settlement agreement to the plaintiff.

[7] It is not disputed that CFS defaulted on its obligation to pay in terms of the settlement agreement. The plaintiff has accordingly issued summons for the amount of R185 646,87, being the R120 000 referred to in the settlement agreement plus compound interest until 21 July 2012.

[8] The defendant resisted summary judgment on various grounds but ultimately relied only on the averment that the settlement agreement was a credit agreement as contemplated in the National Credit Act No. 34 of 2005 and that the plaintiff had failed to comply with sections 129 and 130 of that Act.

[9] The plaintiff disputed that the agreement was a credit agreement and relied on the fact that the original transaction of which the settlement agreement was borne was a "*large agreement"* as contemplated in section 4(1)(b) (read with

section 9(4) and 7(1)(b) of the Act) concluded by a consumer who was a juristic person, namely CPS.

[10] The plaintiff relied further on the decision in *Grainco (Pty) Ltd v Broodryk NO en andere*[1] where an acknowledgment of debt was held not to have been a credit agreement.

[11] Section 8(4) of the Act provides in relevant part as follows :

> *"An agreement, irrespective of its form … constitutes a credit transaction if it –*
>
> *(a) … a pawn transaction or a discounted transaction;*
>
> *(b) [various specific forms of agreement are then listed];*
>
> *(f) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of-*
>
> *(i) the agreement; or*
>
> *(ii) the amount that has been deferred."*

[12] In the settlement agreement, the payment of the amount of R120 000 is clearly deferred and interest is payable on it.

[13] In *Grainco* the court reasoned as follows in holding that a similar agreement, notwithstanding that it ostensibly fell within the terms of section 8(4)(f), not a credit transaction:

> *"[7.4] Ek stem met mnr Joubert, namens die eiser, saam dat dit nooit die bedoeling van die wetgewer kon gewees het om so 'n transaksie te tref nie. Sodanige uitleg van die Wet sou lei tot 'absurdity so glaring that it would never have been contemplated by the legislature'. (Vergelyk Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika*

[1] 2012 (4) SA 517 (FB)

Bpk; Red Head Boer Goat (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk; Sleutelfontein (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk 1994 (3) SA 407 (A) te 422A – G.)

[7.5] Die onderhawige transaksie val nie binne die besigheid van geldlenings en kredietverskaffing in die gewone sin van die woord nie. Die aanhef tot die Nasionale Kredietwet waarin die doelstellings beskryf word, bevestig 'n uitleg dat dit nie die oogmerk was om so 'n onderlinge uitstel van betaling van skadevergoeding te tref nie. (Vergelyk Bridgeway Ltd v Markam 2008 (6) SA 123 (W) te 127I – 128A.)"

[14] By contrast, in *Carter Trading (Pty) Ltd v Blignaut*[2] that court held that an acknowledgement of debt involving a much shorter deferment of payment and in the present instance did indeed constitute a credit transaction holding-

"[17] In the application of these terms of the acknowledgement of debt to the provisions of s 8(4)(f) of the Act it would appear that those terms are exactly what is envisaged in the Act to be a credit agreement, namely an agreement in terms of which payment is deferred and at least a fee or charge is payable in respect of the acknowledgment of debt, and interest and legal fees are payable in the event of a failure by the defendant to pay the amount as agreed therein."

[15] I am bound by neither of these decisions, but prefer the reasoning in the *Carter* decision. I am accordingly satisfied that the settlement agreement constituted a credit transaction as contemplated in section 8(4)(f) of the Act. The Act is clearly framed in the widest terms and aims at inclusion rather than exclusion.

[16] The question then is whether the agreement still falls outside the provisions of the Act by reason of its being a large agreement indistinguishable from the original agreement which gave rise to the settlement agreement. In this regard

[2] 2010 (2) SA 46 (ECP)

the plaintiff relied on the decision in *Ribeiro and Another v Slip Knot Investments 777 (Pty) Ltd*.[3]

[17] The facts of that case are recorded in the headnote as follows:

> *"The appellants were sureties in terms of a loan agreement between the principal debtor and the respondent. This agreement, to which the NCA did not apply, was later cancelled by agreement and replaced with a new agreement between the same parties, in terms of which the principal debtor was discharged and the appellants agreed to obligations and undertakings that were specifically acknowledged to have originated in their suretyship obligations in terms of the initial agreement. The obligations under the initial loan agreements and those under the new agreement were thus interdependent, and this could only mean that the new agreement was in substance an agreement to guarantee the principal debtor's obligations under the national loan agreements, and was therefore a credit guarantee to which the NCA did not apply."*

[18] The difficulty with the application of this case to the present matter is that I have no proper information before me about the original agreement other than a passing reference in the preamble to the settlement agreement.

[19] Moreover, the settlement agreement pertains more to the settlement of a claim for damages arising from the breach of the early agreement rather than a reiteration of the obligations under the early agreement.

[20] The amount provided for in the settlement agreement falls well below the threshold amount for a large agreement.

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[3] 2011 (1) SA 575 (SCA).

[21] Accordingly, I am satisfied that the settlement agreement constitutes a credit transaction as contemplated in section 8(4)(f) and is not excluded by virtue of the provisions of section 4(1) of the Act.

[22] The consequence of this is that the defendant has signed as surety and Concessionaire-principal debtor in respect of obligations under an agreement which constitutes a credit transaction in terms of the Act. In this regard section 8(5) provides as follows:

> *"An agreement, irrespective of its form … constitutes a credit guarantee if, in terms of that agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which this Act applies."*

[23] Section 4(2)(c) then provides that-

> *"This Act applies to a credit guarantee only to the extent that this Act applies to a credit facility or credit transaction in respect of which the credit guarantee is granted."*

[24] In my view, the defendant having signed as Concessionaire-principal debtor, in addition to having signed as surety, renders that component of his obligation a credit transaction in terms of section 8(4)(f) independently of his obligations as surety.

[25] In the circumstances, the plaintiff was obliged to comply with the requirements of section 129 and 130 of the Act. It is common cause that the plaintiff has not done so. That brings section 130(4)(b) of the Act into play. That provision obliges this court to:

> *"(i) adjourn the matter before it; and*

(ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed."

[26] Accordingly, the plaintiff is entitled to resume the application for summary judgment once there has been compliance with the relevant provisions of the Act. I will make an appropriate order in this regard.

[27] As far as the matter for costs is concerned, counsel for the defendant argued that the plaintiff ought to have complied with its obligations in terms of the Act from the outset and there is no reason why the defendant should be forced to incur the cost consequences of its precipitate action. The plaintiff on the other hand argued that the matter of costs should be reserved to see if the defendant genuinely made use of the remedies afforded him under the Act or was later found simply to have engaged in delaying tactics.

[28] The approach to costs contended for by the defendant was the one followed in the *Carter Trading* matter. In my view, the matter of costs will more appropriately be determined after there has been compliance with the Act and the summary judgment application has finally been disposed of.

[29] I accordingly make the following order:

1. The plaintiff's application for summary judgement is postponed sine die;

2. The plaintiff may not set this matter down until it has-

2.1. complied with the provisions of section 130 of the National Credit Act No. 34 of 2005;

2.2. upon completion of the remedies referred to in section 129(1)(a), if any are resorted to, or otherwise, become entitled to resume its application for summary judgment.

3. Costs are reserved.

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A C DODSON AJ

HEARD:	22 OCTOBER 2012
JUDGMENT DELIVERED:	26/10/12
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