REPUBLIC OF SOUTH AFRICA

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

CASE NO: 32759/13

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE: 7/2/2014

In the matter between

JOHANNES WILLEM BOTHA N.O. 1ST PLAINTIFF
JAN JONATHAN DURAND BOTHA N.O 2ND PLAINTIFF
JOHN NELSON SMITH N.O 3RD PLAINITFF
(In their capacities as trustees of the Willem Botha Family Trust IT No. 5443/02)

And

PETRUS PAULUS GERICKE N.O 1ST DEFENDANT
ELIZABETH GERICKE N.O 2ND DEFENDANT
(In their capacities as trustees for the time being of the Gericke Family Trust IT No. 11683/04)

JUDGMENT

THULARE AJ

[1] The Plaintiffs filed an exception against the Defendant's plea on the basis that the plea does not disclose a defence. The Plaintiffs claim is based on a loan agreement entered into between the parties on 11 May 2011 in terms of which the Willem Botha Family Trust lent to the Gericke Family Trust an amount of R600 000, with no interest payable in respect of the loan, and the loan was to be repaid in full on or before 31 December 2011.

[2] The Plaintiffs avers that the National Credit Act, 2005 (Act No. 34 of 2005) is not applicable to the loan agreement.

[3] The only issue raised by the Defendants in their plea is the application of the National Credit Act.

[4] The Defendants aver that the loan agreement constitutes a credit agreement as defined in section 8(1) read with section 8(4)(f); that in terms of section 49(1)(b) read with section 42(1) and the applicable Regulations a person must apply to be registered as a credit provider if the total principal debt owed to that credit provider under all outstanding credit agreement exceeds R500 000-00 and that despite this the Plaintiffs makes no allegations that they were duly registered as credit providers at the date of conclusion of the loan agreement and that section 89(2)(d) stipulates that a credit agreement is unlawful if, at the time of the conclusion of the said agreement, it was required of the credit provider to have been registered as such and the Plaintiff was in fact not registered.

[5] It seems to me, on a simple reading of the applicable provisions of the National Credit Act, 2005 (Act No.34 of 2005) (the Act) that a distinction must be drawn between any credit granted, and a credit agreement for purposes of the Act.
The point of departure is having regard to the definitions in section 1 of the Act, more specifically of the word "credit" and "credit agreement". They read:
"credit". When used as a noun, means-

(a) A deferral of payment of money owed to a person, or a promise to defer such a payment; or

(b) A promise to advance or pay money to or at the direction of another person.

"credit agreement" means an agreement that meets all the criteria set out in section 8".
Not every credit granted constitutes a credit agreement for purposes of the Act.

[6] Guidance is provided in section 2, as regards interpretation of the Act. Section 2(1) provides as follows:
"2(1) This Act must be interpreted in a manner that gives effect to the purposes set out in section 3."
Section 3 gives the purpose as *"to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by- …"*
The Act strives to balance the interests of both credit consumers and credit grantors.

[7] It is from this premise that section 8(1) read with section 8(4)(f) is understood and interpreted. The applicable provisions of section 8(1), reads:
"8. (1) Subject to subsection (2), an agreement ***constitutes a credit agreement for the purposes of this Act if it is:***
(b) a credit transaction, as described in subsection (4);" (my emphasis)
Section 8(4)(f) reads:
"(4) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is-
(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." (my emphasis).]
In my view, the language in the Act is plain and unambiguous. There are two requirements to be met by the agreement to constitute a credit transaction in terms of this subsection. Simply put, these are that (1) the payment is postponed to a later time, and further that (2) a consideration is charged in respect of the agreement or the amount for which payment is postponed.

In *ABSA Technology Finance Solutions v Pabi's Guest House CC and Others* 2011(6) SA 606 (FB) at 612 paragraph 22 Kruger J said the following:

"[22] … In HCJ Flemming Flemming's National Credit Act (2009) in the commentary under s 8 the author is of the view that s 8 (4)(f) of the Act operates with a dragnet effect, and clarifies the main target of the Act as follows:
"It aims to govern a contract once there is some cost, under whatever name, attached to the deferment of payment.""
Speaking of this consideration, Binns-Ward J had this to say in *Evans v Smith and Another* 2011(4) SA 472 (WCC) at paragraph 17:
[17] In my view, read in context, and with regards to the long title of the Act and the provisions of ss 2 and 3, the words 'any charge, fee or interest' in s 8(4)(f) of the NCA are seen to be intended to be of wide import and to include any consideration payable in respect of any agreement, such as a loan, in terms whereof payment of an amount owed by one person to another is deferred, or in terms of which a consideration is charged by the grantor for the extension of credit to the grantee. The label attached by the parties to the consideration in their agreement is not important. It is the nature as an amount payable as consideration in respect of the agreement or the deferment of the payment of the capital amount owed that is determinant."

[8] Furthermore, Mathopo J in *Bridgeway Ltd v Markam* 2008 (6) SA 123 (WLD), at page 128 paragraph 24, with reference to *Tucker v Ginsberg 1962 (2) SA 58 (W),* correctly so in my view, held that regard must be had to the nature of the transaction, the substance of the transaction, and the intention of the parties gathered from their conduct.

[9 The Plaintiffs lent money to the defendants and the payment thereof was postponed to a later time, and no consideration was charged in respect of the agreement or the amount for which payment was postponed. The second requirement for the agreement to qualify as a credit transaction in terms of the Act has not been met and I conclude that the agreement falls short of the requirements set out in section 8(4)(f) of the Act.
The agreement between the parties does not constitute a credit agreement for the purposes of the Act.
It follows that the Plaintiffs are not credit providers as envisaged in the Act, simply because there is no credit agreement for purposes of the Act between the parties, and I conclude that the argument that the Plaintiffs should have registered as credit providers must fail. The argument of the agreement being unlawful for want of that registration is without merit.

[10] In my view, having regard to the nature and substance of the defence raised in the papers before me, this is one of those rare opportunities where there is no need for the court to consider granting the Defendants an indulgence, which includes an opportunity to amend their papers if so advised. The Defendants admit all the other material averments made by the Plaintiffs. There is no basis, in my view, to deny the Plaintiffs the benefit of a judgment to which they are entitled, under the circumstances.

I make the following order:

1. The exception is upheld.
2. Paragraph 7 of the Defendants' plea is set aside.
3. Judgment is granted in favour of the Plaintiffs against the Defendants for payment of an amount of R600 000-00 plus interest at 15.5% per annum from 1 January 2012 to date of payment
4. Defendants to pay the costs.

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DM THULARE

ACTING JUDGE OF THE HIGH COURT