IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION PRETORIA

CASE NR: 5191/2010

DATE: 13/6/2014

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

10/6/14

DATE SIGNATURE

In the matter between:

INDEPENDENT PLUMBING SUPPLIERS (PTY) LTD PLAINTIFF

and

THOMAS CLASSEN t/a TPC PLUMBING DEFENDANT

JUDGMENT

MULLER AJ:

[1] Plaintiff instituted action for the recovery of R822 287-87 plus interest at a rate of 15,5% per annum[1] *a tempore morae* from 3

[1] The Minister of Justice and Constitutional Development gave notice in terms of s 1(2) of the Prescribed Rate of Interest Act 55 of 1975 of a contemplated reduction of the prescribed *mora* rate of interest from 15,5% to 9,0% per annum as from 1 May 2014 but has failed to implement the amendment. See Government Gazette No 37454 dated 19 March 2014.

February 2010, together with costs on a scale as between attorney and client, in respect of goods sold and delivered to defendant during the period March to November 2009, in terms of a number of oral agreements of purchase and sale.

[2] Defendant raised three interrelated special pleas. I was requested to first adjudicate the special pleas before embarking upon a determination on the merits. I made such an order in terms of Rule 33(4).

[3] The first special plea is premised on the assertion that the terms of a written credit application concluded between plaintiff and defendant amounts to a "credit facility" as contemplated by s 8(3) of the National Credit Act 34 of 2005 (hereinafter referred to as "the NCA"). The contention is that the agreement is unlawful and null and void for want of registration by plaintiff as a credit provider.

[4] In the second special plea, it is contended that plaintiff has failed to deliver the requisite notice to defendant as contemplated by s 129 read with s130 of the NCA, before institution of the action, if the agreement is found to be an incidental credit agreement.

[5] In the third special plea it is asserted that the agreement constitutes reckless credit as envisaged by s 80(1) of the NCA, because credit was extended to defendant in terms of the written agreement without any assessment of his financial position as required by s 81(2).

[6] It was common cause at the trial:

6.1 that plaintiff is not a registered credit provider as required by s 40 of the NCA.

6.2 that no assessment of defendant's financial position has been made before the parties entered into the agreement;

6.3 that no notice in terms of s 129 read with s 130 has been served upon the defendant.

[7] No evidence was adduced by either party and having considered the arguments advanced, I made the following order:

"1. *The second special plea is upheld with costs;*

2. *The first and third special pleas are dismissed;*

3.1 It is ordered that in terms of s 130(4)(b)(i) of the National Credit Act 34 of 2005, that the action be adjourned sine die;

3.2 Plaintiff is directed in terms of s 130(4)(b)(ii) to deliver a notice as envisaged by s 129(1) of the National Credit Act to defendant at 110B Highroad Eastleigh;

4. Plaintiff may not set the action down until it has:

4.1 complied with the order set out in paragraph 3.2;

4.2 complied with the provisions of s 130(1)(a) of the National Credit Act".

[8] I intimated that I will advance reasons for the order in due course. These are my reasons.

[9] When called upon to identify whether the transaction relied upon by plaintiff is a credit facility or an incidental credit agreement as defined by the NCA, regard to the provisions of the statute, as well as the nature and substance of the transaction, rather than the object or form of the agreement, have to be taken into account.[2] The purpose of the NCA, amongst others, is to promote, protect and advance the social and economic welfare of all in the credit market and improve relations between consumers and credit

[2] *Bridgeway Limited v Markham* 2008 (6) SA 123 (W) at 126; *Renier Nel Inc and Another v Cash on Demand (KZN) (Pty) Ltd* 2011 (5) SA 239 (GSJ) at para 20.

providers.[3] The NCA, predominantly, has the protection of consumers in mind, but also seeks to promote an effective, sustainable and efficient credit industry and must be holistically understood and interpreted within the relevant framework of constitutional rights and norms.[4]

[10] The statute must therefore be interpreted with due regard to its purpose and within its context.[5] The clear language and ordinary meaning of the instrument to be interpreted may not be discarded.[6] A statutory provision should, if possible, be construed in such a way that effect is given to every word so that no word, clause or sentence if it can be prevented, be construed as superfluous. If any uncertainty in a provision can be resolved by

[3] s 3 of the NCA.

[4] *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) par 40; *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) par 18-21; *Asmal v Essa* (38/2013) [2013] ZASCA 62 (14 May 2014) par 9-10. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) par 72 the court said: "The Constitution is now the supreme law in our country. It is therefore the starting point in interpreting any legislation. Indeed, every court "must promote the spirit, purport and objects of the Bill of Rights" when interpreting any legislation. That is the command of section 39(2). Implicit in this command are two propositions: first, the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights; and second, the statute must be reasonably capable of such interpretation." (footnotes omitted).

[5] s 2(1) of the NCA requires a purposive approach.

[6] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO and Others* 2001 SA (1) SA 545 (CC) par 23-24; 26.

an examination of the language used in its context there is no rule of interpretation which requires that effect be given to a construction which is found not to be the correct one merely because the construction will be less onerous on the subject.[7] Any doubt as to the meaning of a statutory provision which imposes a burden, should be resolved by construing the provision in a way which is more favourable to the subject, provided that the provision is reasonably capable of such a construction.[8] In *Bothma-Batho Transport v S Bothma & Seun Transport* [9] the Supreme Court of Appeal summarised the current state of our law in regard to the interpretation of documents and legislation with reference to the decision in *Natal Joint Municipal Pension Fund v Endumeni Municipality*:[10] *'Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of*

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[7] *Glen Anil Development Corporation v Secretary of Inland Revenue* 1975 (4) SA 715 (A) at 726 *in fine* 727H.

[8] *Wills Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another* 1992(4) SA 202 (A) at 216C; *Fundstrust (Pty) Ltd (In liquidation) v Van Deventer* 1997(1) SA 710 (A) at 735G-H.

[9] 2014 (2) SA 494 (SCA) at par 10.

[10] 2012 (4) SA 593 (SCA) at par 18; *Aktiebolaget Hässle & another v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA) par 8 and 9.

annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School. The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as

reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'" (footnotes omitted).

[11] For an understanding on how the parties conducted themselves, cognisance must be taken of the salient facts pleaded by plaintiff in the particulars of claim. They are:

"3 That on 16 November 2007 and at Edenvale Defendant personally signed a Credit Application form in terms whereof:

3.1 Plaintiff would sell and deliver goods to Defendant and grant credit facilities to the Defendant for payment of the goods sold and delivered, at agreed prices, alternatively Plaintiff's prevailing prices.

3.2 if any amount was not paid within thirty (30) days of statement, Defendant would be liable to pay

interest at the maximum rate permitted by law from time to time.

3.3 *the Defendant would be liable for cost on the attorney and client scale.*

3.4 *a copy of the Credit Application form is annexed hereto as Annexure "A" the terms and conditions to be incorporated in the particulars of claim.*

3.5 *in terms of Section 5(2) of the National Credit Act No 34 of 2005 an incidental credit agreement is deemed to be made twenty (20) business days after inter alia the supplier of the goods first charges late payment fee or interest in respect of the account.*

3.6 *The Plaintiff waives the right to charge or claim a late payment fee or interest. Accordingly, the provisions of the National Credit Act No 34 of 2005 are not applicable to annexure "A". The plaintiff claims interest a tempore morae in terms of the Prescribed Rate of Interest Act."*

[12] Annexure "A" *inter alia* contains the following relevant clauses:

12.1 *"The Buyer acknowledges that the purchase price is payable within thirty days from the date of statement, which date will be the last day of each succeeding month during which a particular delivery was made."* (clause 3)

12.2 *"Ownership in the goods sold and delivered to the Buyer on account shall pass to the Buyer only when all amounts due by the Buyer to the Supplier has been paid, notwithstanding delivery of the goods to the Buyer. Risk in and to the goods shall however pass to the Buyer on delivery."* (clause 8).

12.3 *"In the event of the Supplier or his agents instructing attorneys to collect from the Buyer an amount owing to the supplier the Buyer agrees to pay all cost on a scale as between attorney and own client including collection commission and tracing charges."* (clause 13).

12.4 *"In the event of the Supplier or its agent instructing a debt collector to collect from the buyer an amount owing to the supplier, the Buyer agrees to pay up to 10% collection commission."* (clause 14).

12.5 *"A certificate under the hand of any director or manager or the Supplier (whose appointment need not be proved)as to the existence and the amount of the Buyers indebtedness and the surety's indebtedness to the Supplier at any time, as to the fact that such amount is due and payable, the amount of morae interest accrued thereon, and as to any other fact, the matter or thing relating to the Buyer's indebtedness to the Supplier and the surety's indebtedness to the Supplier shall be sufficient and satisfactory proof of the contents and the correctness thereof for the purpose of provisional sentence, summary judgment or any other proceedings of whatsoever nature against the Buyer and/or the surety in any competent court shall be valid as a liquid document for such purpose".*(clause 32)

[13] The credit application form records the anticipated monthly purchases as R600 000-00.

[14] A plain reading of the written application for credit that embodies the agreement[11] reveals that the parties entered into a binding

[11] "agreement" as defined in s 1 includes an arrangement or understanding between or among two or more parties, which purports to establish a relationship in law between those parties. The written agreement is thus an enforceable *pactum de contrahendo. Hirschowitz v Moolman* 1985 (3) SA 739 (A) at 765I.

arrangement that the terms and conditions of the written credit application will govern future contracts of purchase and sale of goods on credit between them.[12] They also conducted their business with each other on that basis.

[15] To determine whether the NCA is applicable to their agreement the starting point is the provisions of s 8(1). An agreement constitutes a credit agreement if it is:[13] (i) a credit facility;[14] (ii) a credit transaction;[15] (iii) a credit guarantee;[16] (iv) any combination of (i) to (iii) above. To established whether the agreement is a "credit facility" or a "credit transaction" the content of the agreement

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[12] s 1 defines "credit" to mean (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. Innes CJ formulated the general rule to determine whether the parties agreed to credit in *Laing v South African Milling Co Ltd* 1921 AD 387 at 394 as follows: "Now a seller who has unconditionally agreed to wait for payment until a date subsequent to delivery has, in the ordinary meaning of that expression, given credit to the buyer". Juta JA stated it thus at 402 "...where the price is not claimable at once, but a subsequent period has been fixed for payment, it is a sale on credit..."; *Leandalease Finance Ltd v Corp de Mercado & Associates* 1976 SA 464 (A) at 490D; *Erikson Motors Ltd v Protea Motors and Another* 1973 (3) SA 685 (A) at 694A-F.

[13] A credit agreement is an agreement that meets all the criteria set out in s 8 as per the definition of credit agreement in s 1. s 4(1) states that subject to ss 5 and 6 the NCA applies to every credit agreement between the parties, subject to certain exceptions, which for purposes of the judgment are irrelevant and need no discussion. The reference to s 5 is of importance and will be discussed elsewhere in the judgment. If the NCA applies to a credit agreement, it continues to apply, in terms of s 4(4), to that agreement in relation to every transaction, act or omission under that agreement.

[14] As described in s 8(3).

[15] As described in s 8(4).

[16] As described in s 8(5).

needs to be tested against the definition of, firstly a credit facility defined in s 8(3), and secondly, with regard to a credit transaction, the provisions of s 8(1)(b) read with s8(4)(b).

[16] A credit facility is defined in s 8(3) as *"an agreement, irrespective of its form, but not including an agreement contemplated in subsection (2) or subsection 4(6)(b), constitutes a credit facility if, in terms of that agreement-*

(a) a credit provider undertakes –

(i) to supply goods and services or to pay an amount or amounts, as determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and

(ii) either to –

(aa) defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of an amount contemplated in subparagraph (i); or

(bb) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in subparagraph (1); and

(b) any charge, fee or interest is payable to the credit provider in respect of-

(i) any amount deferred as contemplated in paragraph (a)(ii)(aa); or

(ii) any amount billed as contemplated in paragraph (a)(ii)(bb) and not paid within the time provided in the agreement"

[17] I am satisfied, after considering the terms of the agreement, that it does not satisfy the requirements of a credit facility.[17] Importantly, the parties did not agree to defer the obligations of defendant to pay only part of the goods or to pay any charge, fee or interest in respect of the amount so deferred. The parties, furthermore, also

[17] *JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC and Others* 2010 (6) SA 173 (KZD) at par 14 and 15; Otto "The Incidental Credit Agreement" 2010 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 640-641. See Otto in Scholtz (ed) *Guide to the National Credit Act* (loose leaf) para 8.2.2. See also *Voltex (Pty) Ltd v SWP Projects* 2012 (6) SA 60 (GSJ) at par 7 and 8.

did not agree that plaintiff may bill defendant for part of the purchase price of the goods purchased.[18]

[18] I turn now to establish whether the agreement is a "credit transaction" as envisaged by s 8(4)(b) which states that an agreement, irrespective of its form, but not including an agreement contemplated in subsection (2) constitutes a "credit transaction" if it is an incidental agreement, subject to s 5(2).

[19] An incidental credit agreement is novel statutory creation by the NCA that hitherto was unknown to South African law[19] and takes a prominent place in the statutory frame work of the NCA.[20] An incidental credit agreement is defined in s1 and is: *"an agreement, irrespective of its form, in terms of which an account was tendered for goods or services that had been provided to the consumer, or goods or services that have been provided to the consumer, or*

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[18] s 8(3) (a)(ii)(bb).

[19] The incidental credit agreement is called "a new animal on the legal landscape" in Otto "The Incidental Credit Agreement" 2010 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 649.

[20] The definition has been called "rather meaningless" in Otto "The Incidental Credit Agreement" *supra* 638 and "a strange creature" in Otto "THE DISTINCTION BETWEEN A CREDIT FACILITY AND A CREDIT AGREEMENT IN TERMS OF THE NATIONAL CREDIT ACT, AND AN AFTERTHOUGHT ON CREDIT GUARANTEES AND REGISTRATION" 2011 *Journal of South-African Law* at 548. Wallis J (as he then was) described the definition as: "an unhappy one" in *JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC and Others supra* at par 19.

goods or services that are to be provided to a consumer over a period of time and either or both of the following conditions apply:

(a) a fee, charge or interest became payable when payment of an amount charged in terms of that account was not made on or before a determined period or date; or

(b) two prices were quoted for settlement of the account, the lower price being applicable if the account is paid on or before a determined date, and the higher price being applicable due to the account not having been paid by that date". (I do not propose to deal with para (b) in the context of the facts before me).

[20] Ms Cirone, counsel for defendant, was unable to refer me to any clause in the agreement dealing specifically with the obligation to pay interest.[21] She has drawn my attention to clause 32 of the written agreement and suggested, albeit faintly, that the clause makes provision for interest to be charged. The contention cannot be upheld. Although reference is made to *mora* interest in clause 32, the purpose of the said clause is to facilitate proof of the amount due by means of a certificate issued by a director or

[21] Counsel for plaintiff also accepted that the agreement makes no provision for interest to be charged by the supplier.

manager of plaintiff. In any event, the clause makes no provision for payment of interest on any amount deferred, or that interest is payable if the amount charged in terms of an account has not been paid before a determined date.

[21] However, provision is made for payment of collection commission and tracing charges.[22] Defendant, in addition, also agreed to pay collection commission up to 10% if plaintiff employs a debt collector to recover from defendant any amount owing to plaintiff.[23]

[22] The agreement, in my judgment, is an incidental credit agreement, because of the inclusion of the provisions that allow for the charging and recovery of collection costs and collection commission, both of which are, in my view, fees or charges that are permissible in terms of s 5(3)(a) when payment of the amount charged in terms of the account is not made on or before the determined date. The absence of a provision that allows for interest to be charged by the supplier makes no difference. The

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[22] Clause 13.

[23] Clause 14.

agreements of purchase and sale on credit, as pleaded by plaintiff, qualify to be incidental credit agreements as defined.[24]

[24] *Seaworld Frozen Foods (Pty) Ltd v The Butcher's Block and Another* CA 122/2011 [2011] ZAECGHC (24 November 2011) par 19; *Voltex (Pty) Ltd v Chenleza CC and Others* 2010 (5) SA 267 (KZP) at par 39. See also Otto "The Distinction Between a Credit Facility and an Incidental Credit Agreement in terms of the National Credit Act, and an Afterthought on Credit Guarantees and Registration" 2011 *Tydskrif vir die Suid-Afrikaanse Reg* 552-55; Tennent "The Incorrect Understanding of an Incidental Credit Agreement Leads to Undesirable Consequences: JMV Textiles Ltd v De Chalion" 2011 *South African Mercentile Law Journal* 128 states that the main difference between a credit facility and an incidental credit agreement is that a credit facility will embody a charge, fee, or interest from the onset of the agreement and will be included in the agreement. In case of an incidental credit agreement the parties will agree that a charge, fee or interest may only be charged when the account is not paid on a specified date. Aucamp "The incidental credit agreement: A theoretical and practical perspective (2)" 2013 *Tydskrif vir die Suid-Afrikaanse Reg* 508-509.

[23] For an agreement to be a "credit transaction" as envisaged in s 8(4)(b) it has to be an incidental credit agreement. s 5(4)(b) states that an agreement, irrespective of its form...constitutes a credit transaction if it is an incidental agreement, subject to 5(2). The phrase "subject to s 5(2)" in s 8(4)(b must be given effect to.[25] ("onderworpe wees aan" in Afrikaans.) On a proper interpretation of s 8(4)(b) a "credit transaction" can only be constituted when the deeming provision in s 5(2)(a) is invoked by a supplier.[26] On a proper interpretation of s 8(4)(b) and s 5(2) a "credit transaction"

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[25] In *Rennie NO v Gordon NNO* 1988(1) SA 1 (A) at 21D-H the court stated: "In *S v Marwane* 1982(1) SA 717 (A) this court had to consider the meaning of the words 'subject to the provisions of the Constitution" appearing in s 93(1) of the Republic of Bophuthatswana Constitution Act 19 of 1977. Miller JA, delivering the majority judgement, stated (at747H-748A): "the words "subject to the provisions of the Constitution" in s 93(1) of the Constitution clearly govern the provision that laws in operation immediately prior to the commencement of the Constitution are to continue in operation. The purpose of the phrase "subject to" in such a context is to establish what is dominant and what is subordinate or subservient; that to which a provision is "subject" is dominant - in case of conflict it prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation. When the legislator wishes to convey that that which is now being enacted is not to prevail in circumstances where it conflicts, or is inconsistent, or incompatible, with a specified other enactment, it very frequently, if not almost invariably, qualifies such enactment by the method of declaring it to be "subject to" the other specified one. As Megarry J observed in *C and J Clark v Inland Revenue Commissioner* [1973] 2 All ER 513 at 520: In my judgment, the phrase 'subject to' is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master subsections. When there is no clash, the phrase does nothing: if there is collision, the phrase shows what is to prevail." Also *Sentra-Oes Kooperatief Bpk v Commissioner for Inland Revenue* 1995(3) SA 197 (A) at 207B-G; *Ynuico Ltd v Minister of Trade and Industry and Others* 1996(3) SA 989 (CC) at par 8-10; *Premier Eastern Cape and Another v Sekeleni* 2003 (4) SA 369 (SCA) at 375G-I where it was found that the context indicated that "subject to" should be understood as "except as curtailed by".

[26] I disregard s 5(2)(b) for present purposes.

and thus a credit agreement is constituted 20 business days after the date an incidental credit agreement is deemed to have been concluded.

[24] s 5(1) provides that certain provisions of the NCA are specifically applicable to an incidental credit agreement.[27] The heading of s 5 reads: "*Limited application of Act to incidental agreements.*"[28] If it was the intention of the legislature to make the provisions of s 5(1)(a)-(e) and (g), applicable to an incidental credit agreement once the agreement is deemed to have been made on a future date, in terms of s 5(2), it could have said so in clear language. It would not have been necessary to single only s 5(1)(f) out to come into operation once s 5(2) is invoked by a supplier.

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[27] s 5(1)(a)–(e) and (g) states that only the following provisions of the NCA apply with respect to an incidental credit agreement: (a) Chapters 1,2,7,8 and 9; (b) Chapter 3, sections 54 and 59; (c) Chapter 4 Part A and B; (d) Chapter 4, Part D, except to the extent that it deals with reckless credit; (e) Chapter 5, Part C, subject to subsection 3(a); (f) Chapter 5 Parts D and E, once the incidental credit agreement is deemed to have been made in terms of subsection (2) and; (g) Chapter 6 Part A and C.

[28] *Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics* 1911AD 13 at 24.

It follows, therefore, that s 5(1)(a)-(e) and (g) apply to the incidental credit agreements that were concluded.[29]

[25] s 5(1)(f) makes it clear that Chapter 5, (Parts D and E) apply to an incidental agreement, once the incidental agreement is deemed to have been made in terms of section 5(2)(a). The phrase "once the incidental agreement is deemed to have been made in terms of subsection (2)," clearly conveys that the NCA has in mind that the provisions of Chapter 5 (Parts A and E) will be added to the provisions of s 5(1)(a)-(e) and (g) that are applicable to an existing incidental credit agreement from the date that incidental agreement is deemed to have been made in terms of s 5(2).

[26] Following on s 5(1) are the provisions of 5(2) that commence with the introductory words: "The parties to an incidental credit agreement are deemed to have made that agreement..." The

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[29] s 5(2) cannot be invoked if the agreement is not an incidental credit agreement. In *JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC and Others supra* at par 23 Wallis J (as he then was) in considering the type agreement before him made a broad statement that s 5 has limited application to an incidental credit agreement without elaborating. He did not deal specifically with the consequences of s 5(2) coming into operation, but he must have considered its provisions. If it is accepted, as the court concluded, that the agreement is an incidental credit agreement and that interest was charged on the deferred amount by the supplier, then it follows that a credit transaction came into being which constituted a credit agreement as defined in s 8. I think the learned Judge had he a credit facility in mind and not a credit agreement when he said that the agreement is not a credit agreement. If I am wrong, and the conclusion was indeed that the incidental agreement is not a credit agreement as defined in s 8, then I respectfully disagree with that conclusion.

words imply that s 5(2) applies to an incidental credit agreement that has been concluded prior to the date on which the supplier first charges interest or a late payment fee.[30] I find support for my view in the wording of s 5(1)(f) itself.

[27] s 5(2) has the effect if goods were sold and supplied in terms of an agreement of sale and purchase on credit on a determined date and the credit provider has charged a late payment fee and interest when payment was not made on the deferred date, the date when the agreement was concluded is deemed to have been concluded on a date twenty business days after plaintiff first charged a late payment fee. However, the date on which the credit provider first charged interest or a late payment fee remains unchanged as the deeming provision has no effect on that date. It means that the credit provider has charged interest or a late payment fee on an incidental credit agreement deemed to have been concluded on a date in the future.[31] The absurdity of what the deeming provision accomplishes is apparent.[32]

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[30] s 5(1) supports that proposition.

[31] S 51(1) also comes into operation on the future date as if the agreement was concluded on that date.

[32] The reason for the deeming provision is obscured and seems unnecessary.

[28] The legislature accepts, so it appears, that an incidental credit agreement has indeed been concluded for the agreement to be deemed to have been concluded twenty days hence. Thus the date of that agreement cannot have real importance. What becomes relevant is the date on which payment should have been made as well as the date that the late payment fee or interest is first charged. On the latter date Chapter 5 (Parts D and E) comes into operation in terms of s 5(1)(f) alongside the provisions of s 5(1)(a)-(e)and (g). I am not required to make any finding with regard to s 5(2) for purposes of this judgment. Counsel also did not address me on the topic.

[29] It is important to note that the deeming provision of s 5(2) only comes into operation when a "supplier" of the goods or services, first charges a "late payment fee" or "interest" that are subject to that account. The expression "supplier" and "late payment fee" as well as "interest" are not defined in the NCA. s 5(2)(a) refers specifically to "a supplier" and not to "a credit provider". But, be that as it may, from the context of the definition of "credit provider"

and the purpose of s 5(2)(a), "supplier" includes a "credit provider" that supplies goods or services.[33]

[30] The effect of s 5(2) coming into operation is threefold. Firstly, the date of the particular incidental credit agreement is deferred with s 5(3) becoming applicable to the transaction. Secondly, Chapter 5, (Consumer Credit Agreements) Part D (statements of account) and Part E (alteration of credit agreements) becomes operative on the deemed date in terms of s 5(1)(f). Thirdly, and most importantly, the incidental credit agreement constitutes a "credit transaction"[34] and a "credit agreement"[35] on the deferred date.

[31] s 4(1) states that, subject to s 5 and 6, the NCA is applicable to every credit agreement between parties dealing at arm's length and made in, or having effect within the Republic. The phrase must therefore be interpreted that the NCA, subject to each of the provisions of s 5(1), 5(2), s 5(3) and s 6 being taken into account,

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[33] The definition of "credit provider" in s 1 states that a credit provider in respect of a credit agreement to which the NCA applies is, *inter alia,* a party who supplies goods and services under a discount transaction, incidental credit agreement or instalment agreement.

[34] A credit transaction according to s 1: "means an agreement that meets the criteria set out in s 8(4)." s 8(4)(b) states that an agreement....constitutes a credit transaction if it is, an incidental agreement, subject to s 5(2).

[35] s 1 defines a "credit agreement" to mean an agreement that meets all the criteria set out in s 8.

is applicable to every credit agreement. The same reasoning accorded to the interpretation of the phrase "subject to s 5(2)" in s 8(4)(b) should be adopted to give meaning to the words "subject to s 5 and 6". In my view the purpose of the words "subject to s 5 and 6" are to make the NCA applicable to an incidental credit agreement to the extent provided for in s 5(1)(a)-(e) and (g). The subsection applies to an incidental agreement, so it says unambiguously. Nothing in the whole of s 5 indicates that s 5(1) is subject to s 5(2) coming into operation. Once s 5(2)(a)[36] comes into operation, both a credit transaction and a credit agreement as contemplated by s 8(1) are constituted.[37] At the same time, the provisions of Chapter 5 (Part D and Part E) also comes into operation by means of section 5(1)(f). Chapter 5, Part D, on the one hand, deals with statements of account, and Part E, on the other, with amendments to credit agreements as well as reductions and increases to credit limits. [38]

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[36] I do not find it necessary to deal with s 5(2)(b) in the context of the facts in this case.

[37] s 8(4) (b) of the NCA.

[38] Otto "The Incidental Credit Agreement" *supra* 646.

[32] s 6 stipulates that certain provisions of the NCA do not apply to a credit agreement or "proposed credit agreement" in terms of which the consumer is a juristic person. [39]

[33] A late payment fee is that fee or charge that a "person" is allowed to claim in terms of the provisions of s 101(d)(f) and (g) in terms of s 5(3)(a).[40] s 101, also applies to incidental credit agreements by virtue of s 5(1)(e). In terms of the introductory words of s 5(3) "a person" may charge or recover a fee, or interest in respect of a deferred amount under an incidental credit agreement as provided for in s 101(d), (f) and (g). "Person" is not defined in the NCA. The meaning of "a person," [41] includes a "credit provider" as defined and is no doubt, not confined to a "supplier" The fees, charges or interest that a "person" may charge are subject to the maximum

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[39] The expression "proposed credit agreement" in s 6 is illusory. Broadly speaking a proposal made by the one party has no legal consequences until it is accepted by the other party *animus contrahendi* to create binding rights and obligations between them.

[40] s 101(1)(d) deals with interest which must be expressed in percentage terms and may not exceed that applicable maximum prescribed rate. s101(1)(f) deals with default administration charges and s 101(1)(g) permits a credit agreement to include collection costs, which may not exceed the prescribed maximum for the category of credit agreement concerned and may be imposed only to the extent permitted by Part C of Chapter 6. Regulation 47 provides that for all categories of credit agreements, collection costs may not exceed the costs incurred by the credit provider in collecting the debt to the extent limited by Part C of Chapter 6 which is applicable to an incidental credit agreement.

[41] "person" in s 2 of the *Interpretation Act* 33 of 1957 includes -(a) any divisional council, municipal council, village management board, or like authority;(b) any company incorporated or registered as such under any law;(c) any body of persons corporate or unincorporate; *Commissioner for Inland Revenue v NST Ferrochrome (Pty) Ltd* 1999 (2) SA 228 (T) at 232B-D.

rates of interest or fees imposed in terms of s 105, or in respect of an unpaid amount contemplated in para (a) of the definition of an "incidental credit agreement" only if the credit provider has disclosed, and the consumer has accepted the amount of such a fee, charge, or interest, or the basis on which it may become payable on or before the date on which it may become payable or on or before the date on which the relevant goods were supplied.[42]

[34] Collection costs as defined in s 1: "*means an amount that may be charged by a credit provider in respect of enforcement of a consumer's monetary obligations under a credit agreement, but does not include a default administration charge*".[43] In my view collection costs includes commission and other costs (excluding an administration charge) incurred by plaintiff in enforcing defendant's obligation to pay the purchase price for the goods

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[42] s 5(3)(a) and (b) of the NCA. It is common cause that the credit application was signed during 2007 and that the goods were sold and supplied during the period March-November 2009.

[43] Default administration charge as defined in s 1 "means a charge that may be imposed by a credit provider to cover administration costs incurred as a result of a consumer defaulting on an obligation under a credit agreement".

purchased in terms of their contract, provided that the collection costs do not exceed the maximum amount allowed.[44]

[35] s 5(2) will not in all circumstances come into operation. It cannot come into operation if a credit provider (or supplier) waived its right to claim a late payment fee or the right to interest, or sues for the outstanding capital amount of goods sold and supplied to a consumer without charging a late payment fee or interest at all. In such an event an incidental credit agreement is neither a credit transaction, as contemplated by s 8(4)(b), nor is it a credit agreement, as envisaged by s 8(1)(b), but the NCA has, notwithstanding, limited application in terms of s 5(1)(a)-(e) and (g).

[36] When a consumer pays its obligations to the supplier on or before the pre-determined date the incidental credit agreement is similarly, also not, for the reasons stated above, a credit transaction as contemplated by s 8(4)(b). If a consumer extinguishes its indebtedness after the supplier first charged a late payment fee or interest, but before of the expiry of the twenty business days period, the agreement, although an incidental

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[44] See Van Zyl in Scholtz (ed) *Guide to the National Credit Act* (loose leaf) para 10.9. See also *Evans v Smith* 2011 (4) SA 472 (WCC) at para 16-19.

agreement, is not constituted as a credit transaction as contemplated by s 8(4)(b) or credit agreement as contemplated by s 8(1).

[37] I return to the pleadings. Plaintiff has pleaded that an incidental credit agreement is deemed to have been entered into between the parties. Plaintiff therefore, as a consequence, accepts that the agreement is a credit transaction by virtue of the deeming provision of s 5(2).[45] And, by a parity of reasoning, that a credit agreement to which the NCA applies has come into being.[46] These assertions are conclusions of law to which I am not bound.

[38] Plaintiff also pleaded that it waived its right to charge or claim a late payment fee or interest in respect of the account resulting, so it is pleaded, that the provisions of the NCA are not applicable to the incidental credit agreement. Ironically, it is common cause that plaintiff calculated interest and included the interest in the amount claimed in the summons.[47] The allegations in the particulars of

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[45] s 8(4)(b) read with s 3 of the NCA.

[46] s 8(1)(b).

[47] Surprisingly Plaintiff has pleaded in par 3.2 of the particulars of claim that a term entitling Plaintiff to charge interest is provided for in the credit application notwithstanding the conspicuous absence of such a provision from the agreement. The mere fact that no provision is made for an entitlement to interest, fee or charge as required by the definition of an incidental agreement disqualifies it to be an incident credit agreement.

claim and the actual inclusion of interest in the amount claimed are difficult to reconcile. In addition, plaintiff claims interest *a tempore morae* in terms of the Prescribed Rate of Interest Act of 1975.[48] If a supplier charges interest or a late payment fee when the parties have neglected to include or when they deliberately excluded a term from their agreement that entitles the supplier to claim interest, a fee or a charge, such an agreement is not an incidental agreement and cannot be transformed into an incidental credit agreement by charging *mora* interest in terms of the Prescribed Interest Rate Act of 1975.[49]

[39] A credit provider is not entitled to claim *mora* interest in terms of the Prescribed Interest Rate Act of 1975 in respect of an incidental credit agreement. [50] I must, in this regard, again refer to *JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC*[51] The agreement in that case allows for interest to be charged at a rate

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[48] Para 3.5 and 3.6 of the particulars of claim. In terms of the common law *mora* interest constitutes a form of damages for breach of contract on the basis that that the creditor who cannot employ his capital amount productively has suffered loss. *Crookes Brothers Ltd* v *Regional Land Claims Commission, Mpumulanga* 2013 (2) SA 259 (SCA) par 16.

[49] s 5(2) clearly refers to: [The] parties to an incidental credit agreement.

[50] The provisons of Chapter 5 (Part C) is also applicable to an incidental credit agreement in terms of s 5(1)(e), despite the expressed reference to a credit agreement in s 101(1) read with s 103 and regulation 40.

[51] *supra.*

of 2% per month in terms of clause 4.3 of the applicable standard terms and conditions, if the purchase price is not paid timeously.[52] Wallis J made no reference to the provisions of s101(1)(d) that is applicable to an incidental agreement and which prescribe that interest must be expressed in percentage terms as an annual rate and he also did not refer to regulation 42 that prescribes the permissible maximum interest rate that may be claimed.[53] The learned Judge suggested however, that the Prescribed Rate of Interest Act of 1975[54] is applicable to an incidental credit agreement if it is silent on the entitlement of the supplier to charge a fee, charge or interest.[55] I respectfully disagree. Unless provision is made for an entitlement to claim a fee, charge or interest, as required by the definition of an incidental credit agreement, the agreement is not an incidental credit agreement.[56] If an agreement is silent on the issue of an entitlement to interest if payment is not

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[52] Par 11.

[53] The permissible rate is 2% per month.

[54] s 1(1) states: If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in any other manner, such interest shall be calculated at the rate prescribed under subsection (2) as at the time when such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise.

[55] par 16.

[56] *Voltex (Pty) Ltd v Chenleza CC and Others* 2010 (5) SA 267 (KZP) at par 38-39.

forthcoming on the determined date, no demand is necessary, because in that event *mora* interest automatically attaches to the debt by operation of law.[57]

[40] I respectfully disagree with Bhikha AJ in *Voltex (Pty) Ltd v SWP Projects CC and Another*[58] that interest is payable as damages in consequence of breach of the agreement. The inclusion of the clause that entitles the supplier to claim interest if the debt is not paid on or before the expiry of the determined period brings the agreement into the definition of an incidental credit agreement. It matters not that the provision states that interest may be claimed on all overdue sums or amounts in terms of the Usury Act. That statute has been repealed by the NCA. Interest must therefore be claimed under the NCA for the reasons that I alluded to.[59]

[41] The fact that plaintiff has waived certain rights flowing from their contract of purchase and sale on credit does not detract from the

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[57] *Union Government v Jackson and Others* 1956 (2) SA 398 (A) at 411C-412A; *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) at 1145D-G and *Crookes v Regional Land Claims Commissioner* 2013 (2) SA 259 (SCA) at par 15-17.

[58] 2012 (6) SA 60 (GSJ).

[59] Aucamp "The Incidental credit agreement: A theoretical and practical perspective (2)" *supra* at 511. Also Otto "Mora Interest, Consensual Interest, Incidental Credit Agreement and the National Credit Act: *Voltex (Pty) Ltd v SWP Projects CC 2012 6 SA 60 (GSJ)"* 2014 Journal for South African Law 405-406.

nature of the agreement as an incidental credit agreement. I cannot accept that an unscrupulous credit provider or supplier can change the nature of the agreement by selectively waiving rights to circumvent the provisions of the NCA or to make the agreement more favourable towards the credit provider. An agreement which satisfies (when it is concluded) the requirements of an incidental credit agreement, is and it will remain such an agreement throughout.[60]

[42] The parties agreed to collection commission and collection costs being charged. Plaintiff elected to waive the right to claim a late payment fee and also waived a purported right to claim interest. Plaintiff can only waive a contractual right if it has such a right. No right to interest was established. The purported waiver of the right to claim interest is, therefore, without force and effect, as it amounts to waiver of a non-existing contractual right. By waiving the right to a late payment fee, plaintiff is unable to invoke s 5(2).

[43] Mr Mulligan accepted, during argument, that s 129 and 130 are applicable if the agreement is found to be an incidental credit agreement, but contended that it will serve no apparent purpose

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[60] s 95 of the NCA.

to adjourn the action to allow plaintiff to comply with the provisions of s 129. To insist upon such written notice when both parties are legally represented and present in court, so the argument went, will be a waste of time and costs. The argument is rejected outright. Compliance with s 129(1) is a substantive prerequisite for the valid institution of legal proceedings on a credit agreement or an incidental credit agreement to which the NCA is applicable.[61] The constitutional court in *Sebola and Another supra*[62] ruled clearly that the provisions of s 129(1)(b)(i) precludes the commencement of legal proceedings to enforce a credit agreement unless notice is first given to the consumer.[63] It is common cause that no such notice was served upon the defendant.

In the premises, I granted the order set out in this judgment.

GC MULLER
ACTING JUDGE OF THE HIGH COURT

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[61] *Nkata v Firstrand Bank* 2014 (2) SA 412 (WCC) at par 21.

[62] par 24.

[63] Par 45: See also *African Bank Ltd v Myambo NO* 2010 (6) SA 298 (GNP) at 311A-D.

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