IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

18/11/14

CASE NO: 53658/2010

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

17/11/2014 L.G. Tolmay
DATE SIGNATURE

IN THE MATTER BETWEEN:

NEDAN (PTY) LTD **PLAINTIFF**

and

SELBOURNE FOOD MANUFACTURERS CC **FIRST DEFENDANT**

MR HAROON EBRAHIM ABRAMJEE **SECOND DEFENDANT**

JUDGMENT

TOLMAY, J:

INTRODUCTION

[1] The plaintiff instituted action against the defendants as a cessionary in terms of a written agreement and addendum entered into between plaintiff and

Nedan Oil Mills (Pty) Ltd (Nedan Oil) in terms whereof Nedan Oil ceded and made over to the plaintiff all of Nedan Oil's right, title and interest in and to all of its claims against parties with whom Nedan Oil contracted and/or which are indebted to Nedan Oil.

[2] Nedan Oil entered into a written agreement with the first defendant. In terms of this agreement Nedan Oil sold and delivered goods to the first defendant.

[3] The second defendant bound himself as surety jointly and severally with the first defendant for the due and punctual performance by the first defendant of its contractual obligations to Nedan Oil.

[4] The plaintiff alleged on the pleadings that first defendant became indebted to Nedan Oil in the amount of R1 275 345-60 and after certain payments were made the first defendant remained indebted in the amount of R554 430-00, which amount according to the plaintiff was due, owing and payable. The parties subsequently however agreed that an amount of R517 180-00 is still outstanding.

[5] The defendants entered a special plea and pleaded that the plaintiff extended credit to the first defendant, and that accordingly plaintiff is regarded as a credit provider and should have, in terms of sec 40(1)(b) of the National

Credit Act, Act 34 of 2005 (NCA), applied to be registered as a credit provider, in that the debt the first defendant, owes exceeds the threshold amount, mentioned in sec 42(1) of the NCA which is R500 000-00.

[6] In reply to the special plea no replication was filed, but the plaintiff introduced the following amendment to its Particulars of Claim:-

"7.

7.1 *The written agreement between Nedan Oil Mills (Pty) Ltd and the First and Second Defendants, annexure "B" hereto, is an incidental agreement in terms of the provisions of the National Credit Act, Act 34 of 2005 [as amended] and is therefor exempted from the provisions of the aforementioned Act dealing with registration requirements and the dispute-settlement mechanisms thereof.*

7.2 *The plaintiff therefor ex abundante cautela complied with the provisions of Section 129 of the aforementioned National Credit Act, as reflected in annexures"F" to "G" hereto."*

[7] In terms of sec 40(4) of the NCA a credit agreement entered into by a credit provider who is required to be registered in terms of sec 40(1) but who is not so registered, is an unlawful agreement and void, to the extent provided for in sec 89(2)(d) of the NCA.

[8] The parties agreed that the special plea needed to be determined before they proceed to the merits in terms of rule 33(4) of the Uniform Rules of Court.

ISSUES TO BE DETERMINED

[9] The issue to be determined is whether the agreement, attached to the Plaintiff's particulars of claim, is unlawful and null and void for want of registration by Plaintiff as a credit provider in terms of the NCA or whether the said agreement is an incidental credit agreement resulting in Plaintiff being excluded from the requirement to be registered as such.

COMMON CAUSE FACTS

[10] The parties agreed on a set of common cause facts on which the special plea is to be determined, these common cause facts are *inter alia* that:

10.1 Plaintiff is not a registered credit provider in terms of the NCA and that the credit provided exceeded R500 000-00.

10.2 First Defendant, as duly represented by the Second Defendant, applied for credit in terms of a Credit Application Form, on 18 September 2006 and the application was accepted by the Plaintiff on 19 September 2006.

10.3 In terms of the aforementioned Credit Application Form goods were sold and delivered by the Plaintiff to the Defendant as requested by the Defendant, on different occasions as *inter* alia reflected in the four invoices attached to the Plaintiff's particulars of claim.

10.4 The Credit Application Form stipulates furthermore:

10.4.1 that the purchase price shall be the Plaintiff's ruling price at

the date of dispatch of the First Defendant's order;

10.4.2 that First Defendant will pay the purchase price, referred to above, in full on due date.

10.5 In terms of monthly statements of account, as supplied by the Plaintiff to the First Defendant, due date for payment was within 30 days of the date of the statements.

10.6 The Credit Application Form stipulates that should the purchase price not be paid in full on due date, the Plaintiff would be entitled to charge interest on any overdue amounts at an annual finance charge rate chargeable from time to time in regard to a credit transaction in terms of the Usury Act No. 73 of 1968 as amended.

10.7 The Plaintiff did not charge interest on outstanding amounts on the First Defendant's account when the First Defendant failed to pay his account on due date as stated on Plaintiff's statements.

10.8 Plaintiff did not quote two prices for settlement of the account, the lower price being applicable if the account is paid on or before the determined date on Plaintiff's statement, and the higher price being applicable due to the account not having been paid by the determined date on Plaintiff's statement.

10.9 Before issue of summons against Defendants, Plaintiff did comply with the provisions of Section 129 of the NCA.

THE APPLICABLE LEGAL PRINCIPLES AND LEGISLATION

[11] I need to decide only the limited issue namely whether the agreement between the parties is null and void because the plaintiff did not register as a credit provider and whether the agreement is an incidental credit agreement or not. If it is the plaintiff need not have registered as a credit provider in terms of the NCA.

[12] The distinction between a credit facility and an incidental agreement is relevant, sec 8(3) of the NCA states as follows pertaining to a credit facility:

> *"**8 Credit agreements***
> *(3) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2) or section 4 (6) (b), constitutes a credit facility if, in terms of that agreement-*
> *(a) a credit provider undertakes-*
> *(i) to supply goods or 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 (i); 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) (aa); or

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

[13] An incidental credit agreement is defined as follows in the NCA:

*"**'incidental credit agreement'** means an agreement, irrespective of its form, in terms of which an account was tendered for goods or services that have been provided to the consumer, or 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."

[14] Only sub sec (a) is relevant to this case as the parties have agreed that sub sec (b) is not applicable in this case.

[15] Section 5(3) of the NCA provides as follows:

*"**5 Limited application of Act to incidental credit agreements***

(3) A person may only charge or recover a fee, charge or interest-

(a) in respect of a deferred amount under an incidental credit agreement as provided for in section 101 (d), (f) and (g) subject to any maximum rates of interest or fees imposed in terms of

section 105; or

(b) in respect of an unpaid amount contemplated in paragraph (a) of the definition of '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 the relevant goods or services were supplied."

[16] Section 101(1) (d), (f) and (g) provides as follows:

*"**101 Cost of credit***

(1) A credit agreement must not require payment by the consumer of any money or other consideration, except-

(a) .....

(b) .....

(c) .....

(d) interest, which-

(i) must be expressed in percentage terms as an annual rate calculated in the prescribed manner; and

(ii) must not exceed the applicable maximum prescribed rate determined in terms of section 105;

(e) .....

(f) default administration charges, which-

(i) may not exceed the prescribed maximum for the category of credit agreement concerned; and

(ii) may be imposed only if the consumer has defaulted on a payment obligation under the credit agreement, and only to the extent permitted by Part C of Chapter 6; and

(g) 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."

[17] The terminology used to describe a credit agreement, when certain requirements are met, as an incidental credit agreement has been discussed and lamented[1]. I can contribute nothing further to what has already been stated but to agree with the sentiments raised in this regard.

[18] As mentioned hereinbefore, it is common cause that the Plaintiff at no stage charged any interest on outstanding amounts on the account of the First Defendant, despite the fact that the agreement between the parties made provision for it. The statements provided that the applicable interest rate is 0.00%.

[19] As the agreement makes provision for the charging of interest the pertinent question is whether the fact that the plaintiff didn't actually charge interest, despite the entitlement thereto, excludes the credit agreement from the definition as an incidental credit agreement. It must also be determined, whether the fact that the agreement provided for interest to be charged under the repealed Usury Act, 30 of 1968 has the effect that the clause should be regarded as *pro non scripto.*

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[1] JMV Textiles (Pty) Ltd v De Charlain Spareinvest 14 CC 2010(6) SA 173 (KZN) par 19, Tydskrif van die Suid-Afrikaanse Reg, 2011, p 547. 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.

[20] The wording of the contract and the wording of the NCA should be interpreted in order to establish whether the agreement is indeed an incidental credit agreement. In doing so, one must also keep in mind the objects of the NCA.

[21] The objects of the NCA are set out in sec 3 which reads as follows:

"*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.*"

[22] The main objective of the NCA is to protect consumers, in **Sebola**[2] it was also stated that the interest of credit providers should not be minimised or disregarded in the process of interpretation. This is obviously important as undue interference with business relationships should be avoided as it could impact on the ability to effectively conduct business, which in the end could also impact on the economic welfare of both credit providers and consumers.

[23] The rules pertaining to the interpretation of documents, was set out in **Natal Joint Municipal Fund v Endumeni Municipality**[3] and states as follows:

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[2] Sebola and Another V Standard Bank of South Africa Ltd & Another 2012(2) SA 142 CC

[3] 2012(4) SA 593 SCA p 603 par 18, see also Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others: in re Hyundai Motor Distributors (Pty) Ltd v Smith NO & Others 2001(1) 545 CC par 23 – 24, 26

"*[18] 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 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."

[24] Using the above approach one needs to look at the language used, read in context and having regard to the purpose of the provision and the background to the provision. If one looks at the definition of an incidental agreement the wording requires, for purposes of the facts of this case that interest becomes payable when payment is not made on due date. The agreement between the parties meets this requirement. Section 101(d) requires that such interest be expressed in percentage terms which must not exceed the applicable maximum rate. As 0.00% interest was charged the agreement also meets these requirements. There is no indication in the wording of the Act that there is a duty on the credit provider to actually charge interest. To interpret the wording in the definition to mean that interest must actually be charged would in my view be to read requirements in which the legislature did not provide for. Furthermore such an interpretation would interfere unduly with the business relationship between parties. A credit provider might for various reasons, despite the entitlement to charge interest, decide not to do so, and certainly there is nothing sinister or unlawful about that.

[25] In **JMV Textiles**[4] the difference between a credit facility and an incidental credit agreement was discussed and the following was stated which is relevant to this case:

[15] The agreement between JMV Textiles and Cuts is fundamentally different from this. The agreement is that JMV Textiles will sell goods on credit to Cuts. The expectation is that the price of the goods will be paid each month as it falls due. There is no fee paid for this and there is no entitlement to pay less than the full amount due each month. The obligation to pay interest flows from default in making timeous payment, not from a legitimate decision not to pay the full amount that is due each month. There is no contemplation that MV Textiles will ever send a bill for only part of what is due or at periodic intervals. This type of transaction is so wholly distinct from those that are manifestly intended to fall within s 8(3), that the language should not be stretched to encompass it. Even if it does, I am mindful of the warning given by De Villiers ACJ in Town Council of Springs v Moosa and Another 1929 AD 401 at 417, that:

'An interpretation clause has its uses, but it also has its dangers, as is obvious from the present case. To adhere to the definition regardless of subject-matter and context might work the gravest injustice by including cases which were not intended to be included.'

In my view s 8(3) is directed at the provision by credit providers of charge cards and credit cards and similar arrangements, and not at conventional sales on credit. It accordingly does not cover the transactions before me.

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[4] JMV Textiles (Pty) Ltd v De Chalan Spareinvest 14 CC & Others 2010(6) SA 173 (KZN) p 177 par 15 & 16

[16] Viewed from a broader perspective, that conclusion is consistent with the thrust and purpose of the NCA. In a broad sense it is concerned with the activities of those whose business it is to provide credit to the public and who seek to profit from that business by way of fees, charges and interest. The distinction, drawn between an incidental credit agreement and a credit facility, reflects the fact that, with the incidental credit agreement, the fee, charge or interest only arises when the consumer is in default. There an entitlement to charge interest on default would in any event be permissible, if the contractual terms were silent on the point, by virtue of the provisions of the Prescribed Rate of Interest Act 55 of 1975. By contrast, in the case of a credit facility it is a term of the facility that the consumer is entitled to defer payment in full and make lesser payments, subject to paying interest. Thus, in the case of the credit facility described in s 8(3), part and parcel of the arrangement between the consumer and the credit provider is agreement that the consumer may take advantage of the offer of credit. Indeed, the usual expectation is that most consumers will, either on a regular basis or at least from time to time, take advantage of the availability of credit and be willing to incur the charges, usually by way of interest, resulting from their doing so. That is largely how the credit provider profits from the agreement". (my underlining)

[26] The learned judge went further and also stated that:

"*[18] There are, of course, countless business transactions in which goods and services are provided on credit, where the supplier only charges interest if payment is not received timeously or offers the*

other party a discount if they pay early. Experience suggests that almost all manufacturers supply goods to their customers, whether wholesale or retail, on that basis. Whilst one does encounter sales on a COD basis, in modern conditions of trade that may well be the exception, rather than the general rule. At the day-to-day level of the ordinary citizen it is common place to find that people have an account with their pharmacy or, in poorer communities, with the local general dealer or traders' store. School-children may have accounts at the school shop, and students may run accounts at a student book shop. It would be surprising to discover that all these institutions are credit providers required to register in terms of the NCA. Their focus is not the provision of credit and the securing of profit therefrom, but the simple task of profiting from the buying and selling of goods. It is into that category that JMV Textiles' agreement with Cuts falls"

[27] I agree with the contention that sec 8(3) is directed at those institutions that provide credit and secure profit therefrom and not at conventional sales on credit when goods are sold on credit and in truth only become chargeable on default. Different viewpoints than that expressed in the aforementioned case have been raised[5] but I am of the view that the approach set out in JMV Textiles should be followed. It would create an untenable situation if it is required of businesses who sold products or services to register as credit

[5] Voltex (Pty) Ltd v SWP Projects CC & Another 2012(6) SA 60 GSJ par [11]

providers. This in turn could frustrate business and could lead to situations where businesses who sell products or services are not entitled to supply goods on credit or even worse may not be entitled to payment for goods properly delivered. This could lead to unjust and unfair results, which certainly could not have been the objective of the legislator.

[28] In **Seaworld Frozen Foods**[6] it was stated that it could never have been the intention of the legislator to burden ordinary businesses to register as credit providers when they sell their goods on account to regular customers. I agree wholly with this sentiment, it is inconceivable that under circumstances like the one we find in this case that a credit provider would be required to register in terms of the NCA.

[29] In this agreement the parties agreed that interest could be charged on overdue amounts in accordance with the repealed Usury Act 30 of 1968. The parties signed the agreement during September 2006 and the Usury Act was repealed on 1 June 2006.

[30] The defendant argued that as a result of the fact that the Usury Act was repealed this clause should be regarded as *pro non scripto*. I do not agree with this submission. This requirement merely leads to the result that interest could, if the plaintiff did wish to charge interest, only be charged in

[6] Seaworld Frozen foods (Pty) Ltd v Butcher's Block & Another (CA 122/2011) [2011] ZAECGHC 67 (24 November 2011) par 23

accordance with sec 2 of the NCA. The plaintiff charged 0.00% interest which obviously did not exceed the maximum prescribed rate.

[31] This matter should in my view be distinguished from the **Independent Plumbers**[7] matter where the learned judge concluded that the agreement in that case was an incidental credit agreement because of the inclusion of provisions that allowed for the charging and recovery of collection costs and collection commissions which he regarded as charges that are permissible in terms of sec 5(3) of the NCA when payment is not made on or before the determined date. In this instance, contrary to the situation in that case, the agreement did make provision for the charging of interest.

CONCLUSION

[32] In the light of all the facts I am of the view that the agreement entered into between the parties is an incidental credit agreement as defined by the Act and consequently the plaintiff did not need to register as a credit provider.

[33] The agreement between the parties makes provision for costs on an attorney and client scale and consequently the plaintiff is entitled to such an order.

[34] Consequently I make the following order:

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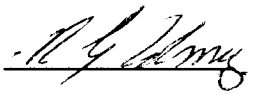
[7] Independent Plumbing Suppliers (Pty) Ltd v Thomas Classen t/a/ TPC Plumbing (unreported judgment, SAFLII: ZAGPPHC 523 (13 June 2014) par 9

1. **The special plea is dismissed.**

2. **The defendants are ordered to pay the costs on attorney and client scale jointly and severally the one paying the other to be absolved.**



R G TOLMAY

JUDGE OF THE HIGH COURT

PARTIES:	NEDAN (PTY) LTD vs SELBOURNE FOODS MANUFACTURERS CC
CASE NO:	53658/10
DATE OF HEARING:	21 OCTOBER 2014
DATE OF JUDGEMENT:	18 NOVEMBER 2014
JUDGES:	TOLMAY J
ATTORNEY FOR APPELLANT:	JAN G OOSTHUIZEN ATTORNEYS PRETORIA
ADVOCATE FOR APPELLANT:	ADV H GOOSSEN
ATTORNEY FOR RESPONDENT:	A W JAFFER ATTORNEYS PRETORIA
ADVOCATE FOR RESPONDENT:	ADV L DE KLERK