REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE: 20/4/2016.
CASE NO: 38642/2011

DELETE WHICHEVER IS NOT APPLICABLE

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

20/04/16 .....

DATE SIGNATURE

In the matter between:

INVESTEC BANK LIMITED	FIRST PLAINTIFF
And	
ERF 367\4 NIEUW MUCKLENEUK (PTY) LTD	FIRST DEFENDANT
ERF 245 WATERKLOOF (PTY) LTD	SECOND DEFENDANT
EQUILAND (PTY) LTD	THIRD DEFENDANT
LOUIS GABRIEL PHILIPPUS SWART	FOURTH DEFENDANT
ERF 364 WATERKLOOF (PTY) LTD	FIFTH DEFENDANT

AND In Re

Case no: 38811/2011

INVESTEC BANK LIMITED	
(REGISTRATION NUMBER :1969/004763/06)	
And	
LOUIS GABRIEL PHILLIPUS SWART	FIRST DEFENDANT
ERF 245 WATERKLOOF (PTY) LTD	SECOND DEFENDANT
EQUILAND (PTY) LTD	THIRD DEFENDANT
ERF 367\4 NIEUW MUCKLENEUK (PTY) LTD	FOURTH DEFENDANT
ERF 245 WATERKLOOF (PTY) LTD	FIFTH DEFENDANT

JUDGMENT

Heard on: 14 March 2016

Date of Judgment: 20 April 2016

LEGODI J

[1] The loan agreement concluded on 6 July 2004 between the Plaintiff, Investec Bank Limited (Investec) and Erf 367\4 Nieuw Muckleneuk (Pty) Ltd (Muckleneuk) in respect of which the fourth defendant, Louis Gabriel Phillipus Swart (Swart) bound himself as a surety for the debt of Muckleneuk, became the subject of the dispute before me.

[2] The dispute arises from the question whether the manner in which plaintiff (Investec) pleaded its cause of action made the provisions of the National Credit Act 34 of 2005 (the Act) applicable to the loan agreement in question and thus obliging Investec to give a notice of its intention to institute the present action as contemplated in section 129 of the Act.

[3] Two actions were instituted by Investec against Swart. In the one other matter under case number 38811\2011 Swart is sued as a principal debtor with other entities as sureties for his debts. In that case, it is acknowledged that Investec was obliged to give a notice to Swart as envisaged in Section 129 of the Act. However, due to the fact that such a notice was given by not using the chosen address, it was concluded that the above mentioned case, which was meant to be heard together with the present action under case number 38642/201, ought to be postponed sine die to allow Investec to give such a notice afresh as envisaged in section 130(4) (b) (i) and (ii) which provides that in any proceedings contemplated in this section, if the court determines that the creditor provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3) (c), the court must adjourn the matter before it; and make an

appropriate order setting out steps the credit provider must complete before the matter may be resumed. I do so later at the conclusion of this judgment.

[4] Coming back to the question under consideration, Investec in its summons, inter alia, pleaded:

"*The Plaintiff confirms that it has complied with the terms of Section 129, 130 and 86(10) of the National Credit Act, Act 34 of 2005 and as proof thereof the registered letters with proof of delivery thereof and directed at the Defendants are attached hereto as Annexure" , "G", "H", "I" and "J".*

The Plaintiff further confirms that the First Defendant signed an admission of liability and offer to pay in terms of Section 57 of Act 32 of 1944 as well as consent to judgment and order for instalments in terms of Section 58 of Act 32 of 1944. These documents are attached hereto as Annexures "K" and "L".

The Plaintiff further confirms that at all relevant times the First, Second, Third, and Fifth Defendants were duly represented by the Fourth Defendant who was authorised to act on their behalf in terms of Resolutions passed by each of the respective companies in this regard. Copies of these Resolutions are attached hereto as Annexure "M", and "N" "O", and "P".

[5] The underlining is my emphasis. What is quoted above was repeated in Investec's declaration and in paragraph 37 thereof, it was pleaded:

"*37.2. The written admission of liability and offer to does not constitute a novation of any existing agreement or debt between the parties.*

[6] Based on the pleaded admission of liability, consent to judgment and offer to pay, counsel for Swart contended that the provisions of the Act have been made applicable to the agreement. I understood this to suggest that the loan agreement which was not subject to the provisions of the Act have been made to be so applicable by having pleaded admission of liability, consent to judgment and offer to pay in the liquidation of the debt.

[7] The submission was made without any evidence being led. For the following reasons, I cannot agree with the submission:

7.1 It was made clear in paragraph 37.2 of the declaration that an admission of liability and offer by Swart did not constitute novation of the existing agreement between the parties.

7.2 The loan agreement, suretyship and covering mortgage bond executed on 11 March 2005 under bond number B032937/05 were pleaded in the declaration.

[8] There was another point taken by counsel on behalf of Swart. That is, Investec was only entitled to claim the arrear amount as there is no acceleration clause in any of the written agreements relied upon, so was the contention. I had difficulties in understanding the gist of the submission especially seen in the light of clause 9 of the covering bond which reads:

"9.1 *The capital or balance thereof, and other moneys which may then be claimable or secured under this bond, and in terms of any and all bonds passed by the Mortgagor in favour of the Bank over the mortgaged property, shall become due and payable forthwith and without the Mortgagor having been specifically placed in default, whether the due date thereof shall have arrived or not, in the event of a failure by the Mortgagor to timeously make any payment or perform any obligation in terms of this bond or comply with any demand made by the Bank or in any manner breach any facility granted by the Bank or obligation owed to the Bank.*

9.2 Should the provisions of 9.1 become applicable, the Bank is further entitled and is hereby authorised to surrender any policy or policies of assurance which is\are ceded or made payable to the Bank as collateral security and to appropriate the surrender value on account of the amount owing to the Bank or secured under this bond."

[9] There can be no question that in the event of a breach, in particular, failure to pay monthly instalments as stipulated in clause 2.14 of the loan agreement, "the capital or balance thereof and other moneys which may be claimable ... shall become due and payable forthwith..."

[10] Furthermore, in terms of the Standard terms and Conditions" in an annexure to the loan agreement; and in particular clause 7.1.7 thereof, should any event occur in respect of a surety, which would constitute an act of default in respect of the borrower, then and in such event Investec will have the right to claim repayment of all amounts owing or claimable by Investec in terms of the loan agreement together with finance charges thereon, and to have the property declared executable. In my view, failure by the principal debtor constituted "any event" in respect of a surety, which resultantly constituted "*an act of default in respect of the borrower*". Therefore, there can be no

merit to the suggestion that only the arrears have become due and payable for lack of acceleration clause.

[9] Section 4 deals the application of the Act and insofar as it might still be relevant to the issue whether the loan agreement is a credit agreement that falls to be dealt with in terms of section 129 of the Act or not, I deal with the issue as follows: Section 129 deals with the procedures required to be followed before institution of legal proceedings based on a credit agreement. Subsection (1) (a) thereof provides that if the consumer is in default under a credit agreement, a credit provider may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombudsman with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring payment under the agreement up to date and (b) (i) (a) creditor provider may not commence any legal proceedings to enforce the agreement before first having provided such a notice to the consumer.

[10] Based on the provisions of section 129, the contention that section 129 is applicable to the loan agreement under consideration, must be seen in the context of the provisions of section 4 of the Act. The provisions of the Act, are in terms of section 4 applicable to every credit agreement except inter alia, where the consumer is a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time of the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7 (1) or in terms of subsection (1) (b) if a large agreement as described in section 9(4), in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below the threshold value determined by Minister in terms of section 7(1).

[11] Counsel for Investec strongly argued that the loan agreement was a large agreement, as envisaged in section 4(1) (b) and as such did not fall to be dealt with in terms of Section 129. Swart did not appear to differ in this regard. What appears to be the contention is put as follows in his written heads of argument submitted at the request of the court:

> *"10. The question is thus- Is the NCA applicable to the written documents, titled; admission of liability and attached as Annexure "T" and\or are these documents, a credit transaction?*

11. Section 8(1) (a) and 8(4) of the NCA find application and is quoted hereinafter for convenience:

> *8. Credit agreements*
>
> *(1) Subject to subsection (2), an agreement constitutes a credit agreement for the purposes of this Act if it is-*
>
> *(a) a credit facility, as described in subsection (3);*
>
> *(4) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is-*
>
> *(a) a pawn transaction or discount transaction*
>
> *(b) an incidental credit agreement, subject to section 5(2); (c0 an instalment agreement;*
>
> *(C) an instalment agreement;*
>
> *(d) a mortgage agreement or secured loan;*
>
> *(e) a lease; or*
>
> *(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. We submit that the agreement (Annexure "T") may be classified under 8(4) (c), (d), of the NCA, and the NCA therefore finds application.

13. Section 4(b) of the NCA on which the Plaintiff relies is not applicable because the Fourth Defendant is not a juristic person, but quoted herein for convenience:

> *4. Application of Act*

(1) Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except-

(b) a large agreement, as described in Section 9(4), in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below the threshold value determined by the Minister in terms of section 7(1);"

[12] I must immediately say, whilst admission of liability is pleaded, that, in my view, was superfluous in that, it did not replace the credit transaction or agreement which is specifically pleaded both in the summons and declaration. Therefore, to seek to rely on the pleaded admission of liability and thus find an application of the provisions of the Act, in my view, amount to taking technical issues which have no significant bearing on the plaintiff's main cause of action based on the loan agreement.

[13] Section 8 of Part C deals with the classifications and categories of credit agreements. It is not clear from the quotations above whether the applicability of sectioning 8(1) (a) and 8(4) of the Act as suggested in paragraph 11 of the quotation , refers to the admission of liability and attached as Annexure "T" or to the loan agreement. In the preceding paragraphs of the judgment, I dealt with the reasons why the provisions of the Act are not applicable to the loan agreement and why the pleaded admissions of liability did not replace the loan agreement and the covering mortgage bond.

[14] Consequently an order is hereby made as follows:

14.1 Judgment is granted under case number 38642\2011 against the fourth defendant, Mr Louis Gabriel Phillipus Swart in the sum of R1 207 482.43.

14.2 Interest on the amount of R1 207 482.43 at the rate of 8% per annum calculated from 14 April 2011 to date of final payment.

14.3 Costs of suit on attorney and client scale.

14.4 Case number 38811/11 is postponed sine die to enable the plaintiff in that case to give a notice as envisaged in section 129 of the Act within 14 days from date hereof and costs in the case aforesaid reserved.

MF LEGODI

JUDGE OF THE HIGH COURT

For the Applicant:	Adv
Instructed by:	MCMENAMIN VAN HUYSTEEN & BOTE INC
For the Fourth Defendant:	Adv MT SHEPPARD
Instructed by:	PRINSLOO INCORPORATED