REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 6722/2016

In the matter between:

COLLOTYPE LABELS RSA (PTY) LTD Plaintiff

and

PRINSPARK CC First Defendant

CHERYL NAIDOO (now PRINS) Second Defendant

JOHANNES CHARL FRANCOIS PRINS Third Defendant

Delivered: 9 November 2016

JUDGMENT

BOQWANA, J

Introduction

[1] This is a summary judgment application brought by the plaintiff against the defendants jointly and severally, one paying the other to be absolved for:

1.1 Payment of the sum of R616 652, 47;

1.2 Interest at 15.5% per annum from 23 July 2015;

1.3 Costs of suit, including the reserved costs of 20 June 2016, on the scale as between attorney and client. (An amendment to the costs was raised in argument which I deal with later in the judgment)

[2] The plaintiff and the first defendant entered into an agreement in September 2009 in terms of which the plaintiff undertook to sell certain products and deliver related services in future on an on-going basis to the first defendant, subject to the terms of an overarching agreement of trade concluded on 3 September 2009.

[3] The first defendant made an application for credit facilities and for the opening of the account on the same day. The first defendant had applied for a credit limit to the value of R900 000 with payment terms requested to be within 60 days. The credit limit was granted to the value of R500 000 at payment terms of 30 days as evidenced by the last page of the agreement of trade. The plaintiff confirmed approval of the application for credit in a letter dated February 2010. The letter further recorded, inter alia, the following:

> 'I would like to point out – if the account is overdue at any time, no new orders are to be processed until the account has [been] [s]ettled in full. Our month end is on the last day of every month. '**We must stress that payment terms are strictly 30 days [f]rom date of statement and is due no later than the last working day of every month**.'

[4] The first defendant is referred to in the agreement of trade as the 'Customer' and the plaintiff as 'Collotype' or the 'Supplier'. The salient terms of the agreement of trade are, *inter alia*, as follows:

> '2. This agreement and any offers, orders or contracts pursuant thereto, become binding when accepted by Collotype at its business address.
>
> …
>
> 29. The customer hereby confirms that the goods or services detailed on the Tax invoice issued duly represent the goods or services ordered by the Customer at the prices agreed to by the Customer and, where delivery/performance has already taken place, that the goods or services were inspected and that the

Customer is satisfied that these conform in all respects to the quality and quantity ordered and are free from any defects.

30. Any delivery note, invoice or waybill (copy of original) signed by the Customer or a third party engaged to transport the products, and held by the Supplier, shall be conclusive proof that delivery was made to Customer.

…

36. All products supplied by the Supplier remain the property of the Supplier until such products have been fully paid for whether such products are attached to other property or not.

37. The Customer agrees to pay the full amount on the Tax Invoice at the Business Address of the Supplier or at such other that the Supplier may designate in writing.

…

39 The Customer agrees that the amount contained in the Tax Invoice issued by the Supplier shall be due and payable at the agreed time as per this agreement.

40. The Customer is not entitled to set off any amount due to the Customer by the Supplier against it's (sic) indebtedness to the Supplier.

41. All discounts shall be forfeited if payment in full is not made on due date.

42. The Customer agrees that the amount due and payable to the Supplier may be determined and proven by a certificate issued and signed by an independent auditor. Such certificate shall be binding and shall be *prima facie* proof of the indebtedness of the Customer.

45. The Customer agrees that interest shall be payable to the Supplier at the maximum legal interest rate prescribed in terms of the Usury Act on any amounts in arrears, and that interest shall be calculated daily and compounded monthly from the date of acceptance of the order.

…'

(Underlined for emphasis)

[5] On 23 October 2009 the second and third defendants bound themselves as sureties and co-principal debtors by way of a written deed of suretyship. During the period of 10 December 2014 to February 2015, the plaintiff sold and delivered

to the first defendant printed labels for various beverages, mainly wine. Goods and/or services ordered and sold are detailed in tax invoices attached to the particulars of claim; prices thereof appear on the invoices. Such goods were delivered and/or effected on or about the date of the invoices to the first defendant by the plaintiff.

[6] The plaintiff's claim is for payment of the agreed printing costs of the labels only, all of which printing had been done and all of which the first defendant took delivery of. This is not disputed. Notwithstanding demand from the plaintiff the first defendant failed to pay the amount reflected on the invoices in the sum of R616 652, 47.

[7] It is apparent from the correspondence between the attorneys of the plaintiff and that of the defendants that the first defendant withheld payment of the aforesaid debts on the alleged basis that the plaintiff was in possession of certain 'tooling' which the defendants alleged would give rise to a counterclaim. Various correspondences were exchanged between the parties on the issue of the delivery of the alleged tooling to which I shall return.

[8] The defendants have opposed the summary judgment application on the basis that they have a *bona fide* defence and a counterclaim. Before I deal with the merits of the defences put forward by the defendants, it is convenient to first deal with the legal principles underlying summary judgments.

Applicable principles and case law relating to summary judgments

[9] Mr MacWilliam SC who appeared for the defendants prefaced his argument on this aspect by submitting that this was not a clear case where summary judgment should be granted. While it is correct that a court should not deprive a defendant of an opportunity to defend a case when there are triable issues, it is equally important to stress that summary judgment is a procedure that is intended "*to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their*

rights."' (See *Majola v Nitro Securitisation 1 (Pty) Ltd* 2012 (1) SA 226 (SCA) at 232F-G)

[10] The Supreme Court of Appeal in the oft quoted decision of *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA) at 11G-12D* observed that it was perhaps time that labels such as extra-ordinary and drastic be done away with when referring to summary judgment as a remedy. It held as follows:

> 'The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time been rightly trusted to ensure that a defendant with a triable issue is not shut out. In the *Maharaj* case at 425G – 426E, Corbett JA was keen to ensure first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both *bona fide* and good in law. A court which is satisfied that the threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.
>
> Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are 'drastic' for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the Maharaj case at 425G – 426E.'

[11] Mr MacWilliam further contended that this was a case where legal questions of considerable difficulty were involved. By that I understood him to mean that the case was not unarguable and that the points raised by the defendants should appropriately be dealt with at the exception stage. While the summary judgment rule is not intended to replace exception proceedings, it seems to me where

defences raised are on points of law, the court dealing with those issues at the summary judgment stage may equally be in the same position as a court determining the exception.

[12] Heher J said the following in the case of *One Nought Three Craighall Park (Pty) Ltd v Jayber (Pty) Ltd* 1994 (4) SA 320 at 323 A-B:

> '…The Judge who hears this matter on exception or at the trial will be in no better position than I am to determine the issue. The plaintiff is entitled to his judgment now if the law and the facts are in his favour. I shall therefore consider the validity of the legal contention.'

See also *Bafokeng Rasimone Management Services (Pty) Ltd v Van Wyk* (87403/2014) [2015] ZAGPPHC 87 (26 February 2015) and *Freeman NO and Another v Eskom Holdings Limited* (43346/09) [2010] ZAGPJHC 137 (24 April 2010)

[13] I align myself with that reasoning. I am of the view that the Court at this stage should be able to find whether the points of law raised as defences are good and if they are, summary judgment must be refused; but if they are not, it must be granted and that should be the end of the matter.

The legal defences of the defendants

[14] The legal defences raised by the defendants are firstly, that the agreement between the plaintiff and the first defendant is a credit agreement as defined in the National Credit Act, 34 of 2005 ('the Act') and that being the case, the plaintiff was obliged in terms of section 40 of the Act to be registered as a credit provider. This, according to the defendants, is so because if it was not registered as a credit provider, the credit agreement is unlawful and void *ab initio* in terms of section 89 of the Act.

[15] Secondly, and in the alternative, should the court find that the agreement is not void then the agreement is a credit agreement and the plaintiff has failed to

comply with ss 129 and 130 of the Act prior to the issuing of summons and as such summary judgment cannot be granted.

[16] The same arguments apply in respect of the suretyship as it is an accessory to the primary agreement. Therefore, if the court finds that agreement to be void then the suretyship necessarily falls away. The same would apply in respect of compliance with ss 129 and 130 the Act.

[17] Thirdly, the defendants allege that the plaintiff has been aware since at least January 2015 that they have a counterclaim and since August 2015 about the defences. The defendants, accordingly, seek the court to dismiss the summary judgment application with costs on the scale as between attorney and client.

Was the plaintiff obliged to register as the credit provider?

[18] Section 40 (1) of the Act provides that:

> '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 agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42 (1).' (Own emphasis)

The threshold which has been R500 000 has been reduced to zero with effect from 11 November 2016, as per GG No 39981 Notice N 513, which was published 11 May 2016.

[19] Section 40 (4) provides that a credit agreement entered into by the credit provider who is required to be registered in terms of s 40 (1) but is not so registered is an unlawful agreement and void to the extent provided for in s 89.

[20] As is evident from s 40, if agreements concluded by the credit provider are incidental agreements, there is no obligation on the credit provider to register in terms of section 40 (1). The focus of the debate would be whether the agreement in the present matter constitutes a credit agreement for the purposes of the Act. The plaintiff argues that it does not. The defendants on the other hand are of the view that the agreement perfectly fits the definition of a credit agreement as it is a credit

facility. It is therefore important to look at the definitions of what constitutes a credit agreement and what would be an incidental credit agreement. If it were to be found that the agreement is a credit facility as contended by the defendants, the plaintiff would have been obliged to register as a credit provider in terms of the Act and therefore the agreement would be void.

[21] The Act defines a credit agreement as an agreement that meets all the criteria set out in s 8. Section 8 (1) identifies three types of credit agreements, being: a credit facility; a credit transaction; and a credit guarantee. It provides as follows:

> '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);
> (b) a credit transaction, as described in subsection (4);
> (c) a credit guarantee, as described in subsection (5);
> (d) any combination of the above.

[22] In turn a credit facility is defined in s 8 (3) of the Act in the following terms:

> '(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 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.' (Underlined for emphasis)

Defendants' contention on this issue

[23] According to the defendants, the agreement that the first defendant had with the plaintiff has the hallmarks of the definition of a credit facility. To support this contention Mr MacWilliam argued that when one considered the entire agreement (which the defendants attached on their opposing affidavit) including two pages that they allege were omitted by the plaintiff, it is plain from the first page being one of the pages so omitted, that an application for credit was completed by the first defendant as indicated by the words: '**Application for Credit'** on that page.

[24] Secondly, in terms of the 'application for credit' document which according to the defendants formed part of the agreement, the first defendant specifically applied for the following:

(a) credit facilities;

(b) opening of an account pursuant to the application for credit facilities

(c) credit in the amount of R 900 000 per month with a credit limit of R900 000;

(d) the credit requested was for 60 days.

(e) The plaintiff agreed to provide credit for only 30 days with a credit limit of R500 000 and approved an application for credit in its letter of February 2010. Furthermore, its own invoices specifically expressed that 'terms strictly 30 days from date of statement'.

[25] Therefore, in this present matter the obligation to pay for the goods is deferred to a date after the delivery of the goods, which date is 30 days from date of statement. The terms of the agreement of trade provide that interest shall be payable '*on any amounts in arrears*' which interest is to run '*from the date of*

acceptance of the order'. This provision on its own constitutes a 'charge, or interest' referred to in s 8 (3) (b) (ii) of the Act.

[26] Accordingly, so contend the defendants, the agreement constitutes a credit facility since in terms of s 8 (3) of the Act, the plaintiff undertakes to supply goods and to defer the consumer's obligation to pay the cost thereof.

Plaintiff's contentions on this issue

[27] It is submitted on behalf of plaintiff that the agreement between the plaintiff and the first defendant is not a credit agreement under the Act, but an overarching agreement for the future sale of products to the first defendant. Mr Stelzner SC who appeared for the plaintiff argued that s 40 only applies to the registration of credit provider under the Act. The fundamental point, according to the plaintiff, is that the agreement of trade and all subsequent individual sale agreements which underlie the present claim are not agreements in terms of which credit was advanced. They are all agreements for the sale of products in respect of which payment became due 30 days upon invoice and if this was not paid, the purchaser was in breach of the agreement and needed to pay interest as part of the damages for such breach.

[28] Mr Stelzner further submitted that this case was on all fours with the judgment of *JMV Textiles (Pty) Ltd v De Chalain Spareinv*est *14 CC & Others* 2010 (6) SA 173 (KZD). In that case parties concluded an agreement in terms of which the plaintiff, *JMV Textiles* would sell fabric to the first defendant, *Cuts*. The credit limit, presumably monthly, was R50 000/R100 000. Payment was to be made within 60 days. As in this case, the second and third defendants bound themselves as co-principal debtors and sureties. The defendants raised numerous defences in their plea, *inter alia*, that the agreement was unlawful and void by reason of the plaintiff not having registered as a credit provider in terms of s 40 of the Act and that the s129 notice was defective. The key issue in that case was whether the agreements, which were similar in their form and content, were

incidental credit agreements, because if they were found to be so, then there would have been no obligation by the plaintiff to register in terms of s 40 (1) of the Act.

Discussion on this issue

[29] An incidental credit agreement is defined in s 1 of the Act as an:

> 'agreement, irrespective of 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 to the account not having been paid by that date.'

[30] In his analysis, in *JMV Textiles* supra, Wallis J (as he then was) observed that at first blush both arguments that the agreements constituted a credit facility and incidental credit agreement were plausible but such arguments could not both be correct. In other words, the incidental credit agreement cannot also be a credit facility (at para 13).

[31] According to the judge, s 8 (3) (a) contemplates two types of transactions that qualify as credit facility. The first transaction involves the supply of goods or services at the consumer's request and either the deferment of the obligation to pay the price or a periodic billing of part of the amount. The second is the payment by the credit provider of amounts to either the consumer, or third parties at the consumer's request, where the obligation to pay is deferred, or is in the form of periodic billing in respect of the amount. He gives an example of the first type as the store-charge card or account and the example of the second as a credit card. In the first instance, the customer is allowed to buy goods up to a certain determined

limit, payment is deferred to the end of the month and the customer is billed monthly. A fee is charged for using the card and interest is liable to be charged on the deficit and the customer decides how much he or she wants to pay, subject to a specified minimum amount. With the credit card the position is similar (at para 14).

[32] According to Wallis J, the kind of agreement which the parties in the *JMV Textiles* case had concluded, was different to the scenario described above. In that case, the plaintiff would sell goods on credit to the first defendant. He illustrated the situation as follows: '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 JMV 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 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.*' (*See *JMV Textiles* supra at para 15)

[33] I am in agreement with the views espoused by the court in *JMV Textiles*. The purpose of the Act broadly speaking is directed at those entities whose activities and business are to provide credit to consumers and who aim to profit from that kind of business by way of fees, charges or interest. In the case of incidental credit agreements interest only arises when the consumer is in default or payment is not made timeously. As was observed by the court in *Filippus Albertus Opperman and Jacobus Boonzaaier and three others* (WCC Case No 24887/10) at para 26 'there are a number of indications in s 40 that the legislature conceived of the credit

provider who requires to be registered as such in terms of the Act to be a person, who either alone or in association with others, is engaged in the business of providing credit to consumers.'

[34] It is sensible to hold that the Act was not aimed at your day-to-day credit transactions between suppliers of goods and services, who are not in the business of providing credit to their customers. It could not have been the legislature's intention to require every trader out there to register as a credit provider. The Act recognises situations where an account would be tendered for goods and services to be provided by a supplier at a fixed time or on an on-going basis to a customer. Payment date in those cases is determined. If payment is not made on or before the date determined, interest would be payable. The fee, charge or interest in this instance is made payable because payment for the goods or services was not made on or before the determined date or period. In respect of a credit facility, any charge, fee or interest is payable on any amount deferred or billed periodically.

[35] Mr MacWilliam argued that clause 45 of the agreement of trade dealing with payment of interest, places the agreement within the definition of a credit facility. He places emphasis on the words '*on any amounts in arrears*' which interest is to run '*from the date of acceptance of the order*'. It would be recalled that the relevant clause stipulates the following:

> 'The Customer agrees that interest shall be payable to the Supplier at the maximum legal interest rate prescribed in terms of the Usury Act on any amounts in arrears, and that *interest shall be calculated daily and compounded monthly from the date of acceptance of the order*.'

[36] In *Voltex (Pty) Ltd v SWP Projects CC and Another 2012 (6) SA 60 (GSJ)* ('*Voltex 2*') at para 23 the court held that: 'If the payment is not received within a 30-day period, the purchaser would be in breach of the agreement and is liable for the consequences upon such breach, and damages are then payable, over and above the amount originally payable.' According to Bhikha AJ, the first defendant was not liable to pay interest in terms of the agreement of sale, but as damages as a consequence of its breach of such agreement of sale. In an earlier *Voltex* decision, involving the same

plaintiff, namely, *Voltex (Pty) Ltd v Chenzela CC and Others 2010 (5) SA 267 (KZP)* (*'Voltex 1'*) at para 39, Madondo J found that the *mora* interest claimed by *Voltex* was in the nature of damages suffered; it was determined not by agreement but by operation of law. The courts in both those cases found that the transactions/agreements were not credit agreements and accordingly there was no obligation on the plaintiff to register as the credit provider. They also found that the agreements were not incidental credit agreements.

[37] In *Independent Plumbing Suppliers (Pty) Ltd v Thomas Classen t/a TPC Plumbing* (5191/2010) [2014] ZAGPPHC 523 (13 June 2014) at para 39 Muller AJ, making reference to s 101 (1) (d) of the Act which prescribes that interest must be expressed in percentage terms as an annual rate and regulation, disagreed with Wallis J's view expressed in *JMV Textiles* at para 16, that the Prescribed Rate of Interest Act of 1975 is applicable to an incidental credit agreement if it is silent on the entitlement of the of the supplier to charge a fee, charge or interest. In his view, '*unless a provision is made for entitlement to claim a fee, charge or interest, as required by the definition of an incidental agreement, the agreement is not an incidental credit agreement. If an agreement is silent on the issue of an entitlement to interest if payment is not forthcoming on a determine date, no demand is necessary, because in that event mora interest automatically attaches to the debt by operation of law*.'

[38] Muller AJ also disagreed with Bhikha AJ's findings in *Voltex 2,* that interest is payable as damages in consequence of the breach of agreement, holding a view that the inclusion of the clause entitling the supplier to claim interest if the debt is not paid brings the agreement within the incidental credit agreement.

[39] In the present matter, a provision has been made in the agreement of trade that interest shall be payable to the plaintiff at the maximum legal interest rate prescribed in terms of the Usury Act on any amounts in arrears. The inclusion of the said clause, in my view, brings the agreement into the definition of an incidental credit agreement. As Muller AJ observed at para 40 of *Independent*

Plumbing supra, it matters not that the provision states that interest will be claimed in terms of the Usury Act. That statute has been repealed by the Act and interest must therefore be claimed in terms of the Act.

[40] The first defendant in this case has no option of paying at a later date. It must make payment for the goods within 30 days of the invoice. There is no deferment of the consumer's obligations to pay any part of the cost nor is there billing for any part of the cost periodically. The charging of the interest is on default of payment after 30 days from delivery.

[41] The plaintiff appeared to be non-committal on the issue of whether the agreement was an incidental credit agreement, particularly as regards the question of whether interest is payable by operation of law if one has regard to the *Voltex* approach, (which would mean that the agreement is not an incidental credit agreement) or is payable in terms of the agreement, by virtue of the clause providing for payment of interest being included in the agreement (which makes it an incidental credit agreement if one follows the reasoning in the decisions of *Independent Plumbing* supra and *Nedan (Pty) Ltd v Selbourne Food Manufacturies CC and Another* (53658/2010) [2014] ZAGPPHC 979 (18 November 2014 at paras 31 and 32.

[42] However, during oral argument with reference to the *JMV Textile* supra, *Seaworld Frozen Foods (Pty) Ltd v Butcher's Block & Another* CA 122/2011 [2011] ZAECGHC (24 November 2011 at para 24 and *Nedan* supra, Mr Stelzner seemed to accept that the agreement in the present matter is an incidental credit agreement.

[43] Whichever construction is accepted between that of Muller AJ and Bhikha AJ on the issue of interest, the agreement between the plaintiff and first defendant is not a credit facility. Accordingly, the plaintiff had no obligation to register as the credit provider in terms of the Act.

Compliance with ss 129 and 130 of the Act

[44] As an alternative argument, the defendants submit that the plaintiff was obliged to comply with ss 129 and 130 of the Act as the agreement is a credit agreement for the purposes of these sections.

[45] The plaintiff's contention on the other hand is that, assuming the agreement of trade and other subsequent agreements are credit agreements under the Act, such agreements constitute a large agreement as the credit limit was up to the value of R500 000. In terms of s 4 (1) (b), the Act does not apply to 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)*'.

[46] Section 9 defines categories of credit agreements as follows:

> **'9 Categories of credit agreements**
>
> (1) For all purposes of this Act, every credit agreement is characterised as a small agreement, an intermediate agreement, or a large agreement, as described in subsections (2), (3) and (4) respectively.
>
> (2) A credit agreement is a small agreement if it is –
>
> (a) a pawn transaction;
>
> (b) a credit facility, if the credit limit and that facility falls at or below the lower of the thresholds established in terms of section 7 (1) (b); or
>
> (c) any other credit transaction except a mortgage agreement or a credit guarantee, and the principal debt under that a transaction or guarantee falls at or below of the thresholds established in terms of section 7 (1) (b).
>
> (3) A credit agreement is an intermediate agreement if it is –
>
> (a) a credit facility, if the credit limit under that facility falls above the lower of the thresholds established in terms of section 7 (1) (b); or
>
> (b) any credit transaction except a pawn transaction; a mortgage agreement or a credit guarantee, and the principal debt under that transaction or guarantee falls at or above the higher of the thresholds established in terms of section 7 (1) (b.)

(4) A credit agreement is a large agreement if it is –

(a) a mortgage agreement; or

(b) any other credit transaction except a pawn transaction or a credit guarantee, and the principal debt under that transaction or guarantee falls at or above the higher of the thresholds established in terms of section 7 (1) (b).' (Underlined for emphasis)

[47] Section 9(4) classifies an agreement as a large agreement if the principal debt under the agreement or guarantee falls at, or above the higher of the thresholds established in terms of s 7 (1) (b). The higher threshold required to be determined in terms of s 7 (1) (b) of the Act is R250 000.00 (See *National Credit Act 34 of 2005, Government Notice 513 in Government Gazette 39981 dated 11 May 2006. Commencement date: 11 May 2016).*

[48] The defendants contend that a credit facility, which they argue the agreement between the parties is, can only be categorised as a small agreement or an intermediate agreement as mention of a credit facility is made in ss 9 (2) (b) and 9 (3) (a) only and not in subsection 4.

[49] It was found in the decision of *Nedbank v Wizard Holdings* 2010 (5) SA 523, at paras 6 that:

'[6] For purposes of determining whether the credit facility, which constitutes the principal debt (in the context of the suretyship agreement) in the current matter, is a large agreement, the 'principal debt' (as defined in s1 of the Act) of the credit facility (as defined in s 1 of the Act) of the credit facility (as defined in s 8(3) is the credit facility under that facility. (See s 7 (2) of the Act.)…'

[50] This finding is supported by s7 (1) (2) of the Act which provides thus:

'…

(2) For the purpose of applying a monetary threshold determined in terms of subsection (1) (b) to a credit facility, the principal debt of the credit facility is the credit limit under that facility.' (Underlined for emphasis)

[51] Mr MacWilliam argued that that the finding in *Nedbank* case is not applicable in this case because the court there did not deal with s 5 of the Act and also because the facts were common cause. I disagree with him. The court did make a finding that the credit agreement giving rise to the principal debt was exempted from the application of the Act in terms of s 4 (1) (b) because the principal debt arose from a large agreement (See *Nedbank* supra at para 8). Therefore the plaintiff was not obliged to give notice in terms of s129 of the Act.

[52] In the judgment of *Standard Bank of South Africa Ltd v Essa and Others (18994/2009) [2012] ZAWCHC 265 (23 May 2012)* a company in liquidation, known as Xaler, concluded an overdraft agreement with the plaintiff which qualified as a 'credit facility' in terms of s8 (3) of the Act or failing that a credit transaction in terms of s 8(4). Xaler was indebted to the plaintiff on overdraft in the sum of R 793 836.53 together with interest thereon. Binns-Ward J found at para 2 that the provisions of the Act were not applicable to the overdraft agreement between the plaintiff and Xaler because the agreement concluded between the parties was a large agreement as contemplated in s 9(4) in that it was '*a credit agreement in respect of which the principal debt falls at or above the higher of the thresholds established in terms of s 7 (1) (b) of the Act and because Xaler, as the consumer, was a juristic person. See s 4(1) (a) (i) and (b) d of the NCA.*'

[53] The argument that the credit facility cannot be a large agreement must be rejected. The term 'any other transaction' in s 9 (4) is wide enough to include a credit facility. Therefore based on the defendant's own version that the agreement in this case is a credit facility, such agreement, in my view, is a large agreement as described in s 9 (4) in terms of which the consumer is a juristic person as set out in s 4 (1) (b). See also *Nedbank Ltd v Tru Essence Products (Pty) Ltd & Another* (86612/2104) [2015] ZAGPPHC 1062 (14 July 2015 at para 10 – where the Court held '[*i*]*t is in any event quite obvious from the credit facility and the amount claimed that the agreement, which is not denied by the respondents, does constitute*

a large agreement which would ipso facto preclude the applicability of the National Credit Act.'

[54] I have, in any event, already found that the agreement may be categorised as an incidental credit agreement. The Act has limited application to incidental credit agreements. In terms of s 5 (1) (g) Part C of Chapter 6 applies to incidental credit agreements, which means ss 129 and 130 should be complied with unless an agreement is found to be exempted on the basis that it is a large agreement in terms of s 9(4) of the Act.

[55] The defendants claim that the amount which, they allege was, '*deferred in terms of the agreement' 'was at no time more than R250 000'*. That may be so, what is clear, however, from the agreement is that the credit limit approved was R500 000 and the plaintiff's claim exceeded the limit to R600 000. Although separate orders were made and invoiced, which if considered individually may possibly not exceed R250 000, the overarching agreement in terms of which the credit was granted was up to R500 000.

[56] Therefore, even if Mr MacWilliam were to be correct that a credit facility can never be a large agreement, which has been found not to be the case; incidental credit agreements may also be large agreements if the description of what constitutes a large agreement is met. I agree with Mr Stelzner that reference to 'any other transaction' in s 9 (4) (b) is so wide that it must include an incidental credit agreement that meets the requirements of a large agreement.

[57] Mr McWilliam seemed to dispute that the term 'any other credit transaction' in s 9 (4) included incidental credit agreements or at least the agreement in this case, even if it were to be categorised as an incidental credit agreement. In view of that a debate ensued as to what a 'credit transaction' was. 'Credit transaction' in section 1 of the Act is defined as an agreement that meets the criteria set out in s 8 (4). Section 8 (4) (b) provides that an agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction <u>if it is an incidental credit agreement, subject to s 5(2)</u>. Section 5(2) is a

deeming provision that parties are deemed to have made that agreement on the date that is 20 business days after, inter alia, the supplier of the goods or services that are the subject of that account, first charges a late payment fee, or interest in respect of that account.

[58] Mr MacWilliam submitted that there is no reliance on s 5(2) by the plaintiff, and therefore the agreement in question cannot be a credit transaction. He relied on paras 29, 30 and 36 of *Independent Plumbing* supra. The decision of *Independent Plumbing* read in context does not support the proposition advanced by Mr MacWilliam, in my view. Muller AJ at paras 26 and 27 in fact stated that the wording of s 5 (2) implies that the section applies to an incidental credit agreement that was concluded prior to the date on which the supplier first charges interest or late payment fee. That provision, in my view, neither excludes the incidental credit agreements from the meaning of large agreements nor does it classify incidental credit agreements. It simply means the supplier has sold and supplied goods and services on credit on a date determined; charged a late payment fee or interest in respect of that account; and the date upon which the agreement was concluded being deemed to be in future. As Muller AJ remarked '*the absurdity of what the provision accomplishes is apparent*'. It is '*obscured and unnecessary*' (See *Independent Plumbing* supra at para 27 and footnote 32). That is however not the issue before me.

[59] It has been established that the agreement before me is an incidental credit agreement. To try and argue that it is not a large agreement on the basis that it is not a credit transaction, by virtue of the plaintiff not having relied on s 5 (2) takes the matter no further. The plaintiff is not obliged to allege the non-applicability of the Act, in a manner suggested. It is for the defendants in establishing a *bona fide* defence to establish that the Act applies to the agreement concerned. In any event, s 5 (2) does not categorise credit agreements.

[60] It is worth noting clause 26.1 of the suretyship which records the following:

'26. CONFIRMATION AND CONSENT – NATIONAL CREDIT ACT

26.1 The Surety confirms and states that this suretyship secures the indebtedness of:

* 26.1.1 a juristic person (as defined in the Credit Act) whose asset value or annual turnover is, at the time this suretyship is signed, respectively below the threshold of R1, 0 million but the indebtedness falls at or above the threshold of R250 000, 00 i.e. a large agreement as referred to in section 4 (1) (b) of the Credit Act.' (Underlined for emphasis)

[61] Whilst it is accepted that the categorisation of the agreement is a matter of law, it is evident that parties to the suretyship viewed the agreement as a large agreement. I agree with Mr Stelzner that the argument that is now presented by the defendants that the agreement is not a large agreement, curiously contradicts clause 26 of the suretyship.

Alleged counter-claim

[62] The defendants claim that the first defendant has a counterclaim against the plaintiff in the amount of R 1 078 340.10, which exceeds the plaintiff's claim. This alleged counterclaim is in respect of a 'tooling' that the plaintiff made for the first defendant. The tooling was allegedly kept by the plaintiff to be used when it did printing for the first defendant. After the plaintiff decided to terminate its business relationship with the first defendant in December 2014, the first defendant requested the return of the tooling. The tooling consists of plates and hot foil cylinders. The defendants allege that the plaintiff only returned a small portion of the tooling. The plaintiff tendered to return some tooling in July 2015. The plaintiff on the other hand alleges that it has on many occasions tendered to return the tooling. I frankly do not understand the to-ing and fro-ing that has been taking place between the plaintiff and the first defendant regarding the delivery of the tooling. The delivery and/or the fetching of the tooling between the plaintiff and the first defendant seems to be a simple matter to me. The real cause of the impasse is not very clear. It appears to be artificial, in my view.

[63] Nevertheless, it may not be necessary, to determine the genuineness of the defendants' alleged counterclaim, as the defendants first have to overcome the 'no set-off' provision in clause 40 of the agreement of trade. In as much as set-off operates *ipso iure*, its operation may be excluded by agreement (See *Blakes Maphanga Inc v Outsurance Insurance Company Ltd* 2010 (4) SA 232 (SCA) at para 15 and *Herrigel No v Bon Roads Construction Co (Pty) Ltd and Another* 1980 (4) SA 669 (SWA) at 676G-677A).

[64] In the decision of *Altech Data (Pty) Ltd v M B Technologies (Pty) Ltd* 1998 (3) SA 748 at 761 B – G, the court stated the following:

> '(*f*) The right to set off the damages to be claimed in the counterclaim
>
> It seems to me that, on a proper construction of the structure and nature of this agreement, the remarks of Lichtenberg J in the case of *Herrigel NO v Bon Roads Construction Co (Pty) Ltd and Another 1980 (4)* SA 669 (SWA) at 676 are apposite. The learned Judge there stated at 676G-677A:
>
> '… (I)f a party to an action wants to obtain the benefit of set-off, he must claim to be entitled to set-off; see *Hardy NO and Mostert v Harsant 1913* TPD 433; *Bain v Barclays Bank (DC & O) Ltd 1937* SR 191.
>
> In the present case, however, Quickbeton and Bon Roads did exactly the opposite in that they *expressly, or at least by necessary implication, in their dealing with each other, agreed not to set off their reciprocal debts but to pay them to each other in full, albeit by the simultaneous exchange of cheques for the amounts of their respective indebtedness.* As already set out above, these two companies had agreed that they would not pass credits in favour of each other but would instead pay each other for their respective indebtedness on a monthly basis. This being the express agreement between them I do not think it lies in the mouth of Bon Roads to contend that set-off operates automatically in respect of their mutual indebtedness, nor can Bon Roads, now insist upon or claim set-off when it specifically chose not to do so at the time that set-off would have operated, had it at that time chose to rely thereon. In my view the inference is irresistible that Bon Roads and Quickbeton expressly, or at least tacitly, agreed that set-off would operate between them or, put differently, they expressly, or by necessary implication contracted out of the applicability of set-off to their mutual debts.'

> It seems to me therefore, having regard to the express wording of clause 4.2 and the various provisions for adjustment mechanisms, that the respondent cannot now rely on set-off to avoid payment of the portion of the purchase price which fell due on 5 December 1997.' (Underlined for emphasis)

[65] Set-off can only take place if both claims are liquidated in the sense that they are capable of speedy and easy proof. This was held in *Blakes Maphanga* supra at para [15].

[66] Mr MacWilliam argued that clause 40 is not applicable in this matter as there is no amount due as postulated in the clause. According to him, the defendants rely on an unqualified and admitted obligation by the plaintiff to deliver the first defendant's tooling to it. There is therefore 'no set-off' of debts that arises.

[67] The suggestion that the defendants would not be seeking to set-off the debt owed by the plaintiff against its claim does not make sense to me. The defendants are asking for a counter-claim to be determined so that they can set-off their debt, as determined at a later stage against the plaintiff's claim. The fact is, the contract does not allow them to do that. Arguments attempting to get around clause 40 are, in my view, unconvincing. For reasons set out above the defendants are precluded from invoking the operation of set-off, which is effectively what the counterclaim would seek to do at the end of the day. It further appears from the correspondence between the parties, that the extent of the claim itself is yet to be quantified. The outstanding tooling is still to be checked and verified for quality. Some may need to be remade. Under those circumstances, it cannot be said that the actual counterclaim is liquidated and I have not understood the defendants to suggest that it is.

[68] Furthermore, in *Spilhaus & Co. Ltd v Coreejees* 1966 (1) SA 525 (C) at 529 G – H, the court held that, the fact that the defendant has a counterclaim for damages is not a 'defence' to plaintiff's action on its claim within the meaning of Rule 32 (3) (b). The summary judgment was therefore granted in favour of the plaintiff with costs.

[69] In any event, nothing prevents the first defendant from instituting action against the plaintiff should it wish to do so. The door is not 'shut' to the defendants so to speak. Furthermore, both parties through their correspondences and in court have conveyed that the matter at hand is capable of settlement.

[70] Mr MacWilliam sought to distinguish the *Altech* case on the basis that it dealt with arbitrations. That distinction is in my view unsustainable. The arbitration issue bears no relevance to the principle at hand. The arbitration point in that case was whether the court should exercise its discretion by referring the claim to arbitration as per a clause in the agreement between the parties which provided that any dispute should be resolved in that forum.

[71] Of relevance to this matter, is the interpretation by the court of the structure and the nature of a clause 4.2 of the agreement, in that case, which stated that '*the purchaser shall pay the seller the purchase price…without deduction or set-off…*' The court found that the express wording of the relevant clause precluded the respondent from relying on set-off to avoid payment of the portion of the purchase price which fell due on 5 December 1997 (*Altech* supra at 761G). The issue contented in that case on behalf of the applicant was that the effect of clause 4.2, '*having regard to the circumstances of this case and more particularly the structure of the agreement, set-off cannot operate in respect of any indebtedness of the applicant to the respondent as envisaged in the respondent's counterclaim.*' In any event, the court decided that, the applicant's claim for payment of the purchase price was undisputed and the counterclaim for damages (which was in dispute) could not be set-off against the applicant's claim. The court at 757 quoted with approval the remarks by Didcott J in *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others 1980 (1) SA 301 (D* where he stated:

> 'That the plaintiff's claim was undisputed seems beyond doubt. The defendants plainly admitted it. They had an answer, to be sure, in the *counterclaim.* But that was not truly a defence to the claim. It was an excuse for not meeting a claim to which there was no defence. Whether the excuse was a good may well turn out to be

disputed. Any such dispute will, however, concern the counterclaim. It will not be the dispute about the claim.'

[72] I am therefore persuaded by the plaintiff's case that in view of the indebtedness to the plaintiff in terms of the agreement of trade having been admitted and the applicable principles of the summary judgment, the defendants cannot avoid judgment being taken against them simply on the basis of their counterclaim which cannot be used to set-off the debt against plaintiff.

[73] The suretyship is accessory to the principal agreement. Therefore, the findings in respect of the principal agreement are equally applicable to it. For those reasons, the summary judgment must succeed.

[74] Mr MacWilliam argued that the plaintiff is not entitled to interest at the rate of 15.5% due to the amendments to the prescribed rate of interest. According to him, at best the plaintiff should get 10.25% interest. It is established in my view that, interest runs at the prescribed interest rate which was applicable when the debt arose. The prescribed interest rate does not operate retrospectively. (See *Katzenellebogen v Mullin* 1977 (4) SA 855 (A); *Davehill (Pty) Ltd v Community Development Board* 1988 (1) SA 290 (A).

[75] As to costs, the plaintiff asked for costs to be awarded on the scale as between attorney and client in its heads of argument on the basis that this is provided for in the agreement between the parties. The defendants did not place any objection to the request for such a relief and I see no reason why it should not be allowed.

[76] I therefore make an order as follows:

1. Summary judgment is granted against the First, Second and Third Defendants jointly and severally, the one paying the other to be absolved, in the following terms:
    1.1 Payment of the sum of R616 652, 47;
    1.2 Interest at 15.5% per annum from 23 July 2015 to date of payment;

1.3 Costs of suit, including the reserved costs of 20 June 2016, on the scale as between attorney and client.

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N P BOQWANA

Judge of the High Court

APPEARANCES

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