



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 2823 /2016

In the matter between:

NDUMISO DLAYEDWA	First Plaintiff
LEBOSTA GIFT MAKOLA	Second Plaintiff
JOHANNES PETRUS ABRAHAMS	Third Plaintiff
LAURIKA MONIQUE HARMSE	Fourth Plaintiff
WINNIFRED MPELA	Fifth Plaintiff
CHARLINE NATASHA JANTJIES	Sixth Plaintiff
ALPHA KOCK	Seventh Plaintiff
FAITH OFENTSE BULLOCK	Eighth Plaintiff
MAETIN ANTHONE MKHABELA	Ninth Plaintiff
MMAPOOTANE DORICCA PHOLOS	Tenth Plaintiff
NOSIHLE NGWEYI	Eleventh Plaintiff
REITUMETSE PRETTY GALENG	Twelfth Plaintiff
SEBENZILE NOTTAH MASHABANE	Thirteenth Plaintiff

SISWE SITHOTI

Fourteenth Plaintiff

RACHEL NOMTHANDAZO

Fifteenth Plaintiff

v

LEWIS STORES (PTY) LTD

First Defendant

NATIONAL CREDIT REGULATOR

Second Defendant

Case No: **5045/16**

In the matter between:

ERALDO EDGAR FRANKLIN ELAND

First Plaintiff

LAVANIA GRACE POTGIETER

Second Plaintiff

TSHEPISO LEVY CHABAKU

Third Plaintiff

PUSELETSO MOKOENA

Fourth Plaintiff

RIAAN LAKAY

Fifth Plaintiff

RODZE VERGOTINE

Sixth Plaintiff

SUNNYBOY LENNOX NONG

Seventh Plaintiff

ASANDA PAKATHI

Eighth Plaintiff

MZIWETHU NOMABHUNGU

Ninth Plaintiff

JAN VAN NEL

Tenth Plaintiff

TUMELO COLLINGS NZINGELWA

Eleventh Plaintiff

MALEKO PETRUS SESINYI

Twelfth Plaintiff

ROBERT PETER JANSE VAN RENSBURG

Thirteenth Respondent

v

LEWIS STORES (PTY) LTD

First Defendant

NATIONAL CREDIT REGULATOR

Second Defendant

*Coram: **Dlodlo J***Date of Hearing: **20 June 2017**Date of Judgment: **04 August 2017**

JUDGMENT

DLODLO, J

INTRODUCTION

[1] The plaintiffs in case numbers 5045/16 (the Eland action) and 2823/16 (the Dlayedwa action) seek to amend their particulars of claim as provided for in notices of intention to amend filed in both actions, which are in substantially the same form. The applications are being heard together. For convenience, the Eland action will be dealt with on the basis of equal applicability. The vexed question to be answered (as Mr De Wet contends) is whether the lack of certificate in terms of Section 164 (3) of the National Credit Act 34 of 2005 ('the

NCA'), issued by the National Consumer Tribunal ('the Tribunal'), is an absolute bar for the plaintiffs who want to proceed with a claim in the High Court based on prohibited conduct. Mr De Wet pointed out that the answer lies in the consideration of the correct interpretation of Section 164 (3) of the NCA.

THE NATURE OF THE ACTION

- [2] The plaintiffs are consumers who concluded written agreements with the first defendant ('Lewis') for the purchase of goods on credit in terms of agreements subject to the provisions of the NCA. These agreements constitute credit agreements for the purposes of the NCA, and Lewis was a credit provider.
- [3] Claim 1 of the plaintiffs' claims is for repayment of all delivery charges collected, plus interest, alternatively for repayment by Lewis of portion of such delivery charges and interest, on the basis that Lewis's charging and collection of the delivery charges from the plaintiffs represented a contravention of Sections 100 (1), 100 (2), 102 (2) (a), 102 (2) (b) and 102 (2) (c) of the NCA. Claim 2 of the plaintiffs' claims is for the repayment by Lewis of the whole or part of the maintenance fee as referred to in paragraph 25 of the particulars of claim, on the basis that the charging and collection of the maintenance fee represents a

contravention of Sections 100 (1), 100 (2), 102 (2) (a), 102 (2) (b) and 102 (2) (c) of the NCA.

- [4] In terms of a notice issued in terms of Rule 23 (1) filed on 14 September 2016 Lewis noted an exception against the plaintiffs' particulars of claim on the basis that the particulars lacked averments necessary to sustain an action, on the following basis: The plaintiffs' claims represented claims for loss or damage as a result of allegedly prohibited conduct or dereliction of required conduct, on the part of the first defendant, as contemplated by S 164 (3) of the NCA. (b) In terms of S 164 (6) of the NCA a person's right to damages arising out of any prohibited or required conduct comes into existence on the date that the National Consumer Tribunal makes a determination in respect of the matter that affects that person, or in the case of an appeal, on the date that the appeal process in respect of that matter is concluded. (c) In terms of S 164 (3) (b) of the NCA, a person who has suffered loss or damage as a result of prohibited conduct or dereliction of required conduct, if entitled to commence an action referred to in paragraph (a) of S 164 (3), when instituting proceedings must file with the registrar of the court a notice from the chairperson of the Tribunal in the prescribed form: (i) certifying that the conduct constituting the basis for the action has been found to be a prohibited or required conduct in terms of the NCA; (ii) stating the date of the Tribunal's finding; and (iii) setting out the relevant Section of the NCA in terms of which the Tribunal made its finding. (d) The plaintiff had failed to (i) allege that the

conduct constituting the basis for the action has been found to be a prohibited or required conduct in terms of the NCA; (ii) plead the date of any finding to this effect by the Tribunal; (iii) indicate the relevant Section of the NCA in terms of which the Tribunal made its finding. (e) Alternatively, and in any event, the plaintiffs had not averred that they had or would when instituting the action be filing with the registrar a notice from the Chairperson of the Tribunal in the prescribed form, complying with the requirements of S 164 (3) (b) of the NCA.

[5] The plaintiffs responded to the notice of exception by filing a notice of intention to amend their particulars of claim. This elicited a notice of objection from Lewis. The basis of the objection is that the proposed amendments were insufficient to cure the excipiability of claim.

[6] In general, an amendment to pleadings will not be allowed where its introduction would render the pleading in question excipiable. See Erasmus **Superior Court Practice** at D1-338 and cases collected in footnote 6. The same principle will apply where a party seeks to amend particulars of claim in response to a notice of exception. Differently stated, the issue proposed to be introduced by the amendment must be a triable issue. See **Trans-Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd** 1967 (3) SA 632 (D) at 641A; **Consol Ltd t/a Consol Glass v TWEE Jonge Gezellen (Pty) Ltd** (2) 2005 (6) SA 23 (C) at 361-J. Indeed the matter raises the proper construction and application of provisions

of the NCA, and in particular S 164. It is necessary to deal with these provisions first, before analysing the plaintiffs' claims and the proposed amendments.

THE PROVISIONS OF THE NCA IMPLICATED IN THIS DISPUTE

[7] Chapter 7 of the NCA deals with disputed settlement other than debt enforcement. Part B provides for the initiation of complaints or applications, while part A provides for alternative dispute resolution. As to the part B provisions, in terms of S 136 (1) any person may submit a complaint concerning an alleged contravention of the NCA to the National Credit Regulator ('the Regulator') in the prescribed manner and form. Upon receipt of the complaint, the Regulator may issue a notice of non-referral or direct an inspector to investigate the complaint as quickly as practicable. See Sections 139 (1) (a) and 139 (1) (c) of the NCA. After completing an investigation, the Regulator may issue a notice of non-referral or refer the matter to the Tribunal. See Section 140 (1) (a) of the NCA.

[8] If the Regulator issues a notice of non-referral in response to a complaint other than a complainant concerning S 61 or an offence in terms of the NCA, the complainant concerned may refer the matter directly to the consumer court or to the Tribunal, with leave of the Tribunal. The Tribunal must conduct a hearing into any matter referred to it under Chapter 7, in accordance with the requirements of the NCA. See Section 140 (1) (a) of the NCA.

[9] Part D of Chapter 7 contains detailed provisions regulating the Tribunal's consideration of complaints, application and referrals. In terms of Section 148 (1) a participant in the hearing before a single member of the Tribunal may appeal a decision by that member to a full panel of the Tribunal. In terms of Section 148 (2), subject to the rules of the High Court, a participant in a hearing before a full panel of the Tribunal may apply to the High Court to review the decision of the Tribunal, or may appeal to the High Court against the decision of the Tribunal.

[10] In terms of Section 150, the Tribunal may in addition to its other powers in terms of the NCA, make an appropriate order in relation to prohibited conduct or required conduct in terms of the NCA, including requiring repayment to the consumer of any excess amount charged, together with interest at the rate set out in the agreement, or any other appropriate order required to give effect to a right, as contemplated in the NCA or the consumer Protection Act 2008. See Section 150 (i) of the NCA. Any decision, judgment or order of the Tribunal may be served, executed and enforced as if it were an order of the High Court. See Section 152 (1) of the NCA.

[11] Section 164 of the NCA provides as follows:

'164 Civil actions and jurisdiction

(1) Nothing in this Act renders void a credit agreement or a provision of a credit agreement that, in terms of this Act, is prohibited or may be declared unlawful unless a court declares that agreement or provision to be unlawful.

- (2) In any action in a civil court, other than a High Court, if a person raises an issue concerning this Act or a credit agreement which the Tribunal-
 - (a) has previously considered and determined that court-
 - (i) must not consider the merits of that issue; and
 - (ii) must apply the determination of the Tribunal with respect to the issue; or
 - (b) has not previously determined, that court may-
 - (i) consider the merits of that issue, or
 - (ii) refer the matter to the Tribunal for consideration and determination.
- (3) A person who has suffered loss or damage as a result of prohibited conduct or dereliction of required conduct or dereliction of required conduct-
 - (a) may not commence an action in a civil court for the assessment of the amount or awarding of damages if that person has consented to an award of damages in a consent order; or
 - (b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the registrar or clerk of the court a notice from the Chairperson of the Tribunal in the prescribed form-
 - (i) certifying that the conduct constituting the basis for the action has been found to be a prohibited or required conduct in terms of this Act;
 - (ii) stating the date of the Tribunal's finding; and
 - (iii) setting out the relevant section of this Act in terms of which the Tribunal made its finding.
- (4) A certificate referred to in subsection (3) (b) is conclusive proof of its contents, and is binding on a civil court.
- (5) An appeal or application for review against an order made by the Tribunal in terms of section 148 suspends any right to commence an action in a civil court with respect to the same matter.
- (6) A person's right to damages arising out of any prohibited or required conduct comes into existence-
 - (a) on the date that the Tribunal makes a determination in respect of a matter that affects that person; or
 - (b) in the case of an appeal, on the date that the appeal process in respect of that matter is concluded.

- (7) For the purposes of section 2A (2) (a) of the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975), interest on a debt in relation to a claim for damages in terms of this Act will commence on the date of issue of the certificate referred to in subsection (3) (b).'

[12] Sections 164 (3) and 164 (6), read together, are to the following effect:

- (a) A person who has suffered loss or damage as a result of prohibited conduct or dereliction of required conduct must, if entitled to commence an action for the assessment of the amount or the awarding of damages ('damages') in a civil court, file with the registrar or clerk of the court a notice from the chairperson of the Tribunal certifying that the conduct constituting the basis for the action has been found to be a prohibited or required conduct in terms of the NCA, stating the Tribunal's finding and setting out the relevant section of the NCA in terms of which the Tribunal made its finding. (b) A person's right to damages arising out of prohibited or required conduct comes into existence on the date that the Tribunal makes a determination in respect of a matter that affects that person, or in the case of an appeal, on the date that the appeal process in respect of that matter is concluded. It must be emphasised that a consumer's cause of action in a claim for loss or damage arising out of prohibited conduct does not derive from contract, delict or unjust enrichment. Rather, it derives from the provisions of the NCA.

[13] It is the NCA which, for example, prescribe the inclusion in a credit agreement of an obligation to pay delivery fees or a charge for an extended maintenance

warranty, in particular circumstances. So too, it is the NCA which effectively provides for a claim for damage or loss sustained by a consumer as a result of a credit provider contracting for fees or charges prescribed by the NCA. That entitlement arises, for example, from Section 150 (h) of the NCA, as well as from Section 164 (3)(b) and Section 164 (6).

[14] It must be said that not only does the NCA establish the wrong and the corresponding entitlement to claim in respect of loss or damage arising out of the wrong, it requires any such claim to be dealt with in a particular way. In particular, the right to claim arising out of any prohibited or required conduct only comes into existence on the date that the Tribunal makes a determination that there has been prohibited conduct. *A fortiori*, this requires a referral of a complaint to the Tribunal, and a finding by the Tribunal in this regard. Differently stated, a determination by a Tribunal that the conduct constituting the basis of a claim for loss or damage has been found to be prohibited conduct in terms of the NCA is an integral part of a claimant's cause of action when claiming loss or damage.

[15] On behalf of the plaintiffs it is suggested that the above postulated construction amounts to the ousting of the jurisdiction of this Court. I, however, mention that the plaintiffs are missing the point in this regard. Their suggestion is clearly a mischaracterisation of the true position. The fact is (as pointed out above) the NCA establishes the cause of action: a consumer has the right to claim loss or

damage arising out of or as a result of conduct prohibited by the NCA, where such conduct has been found by the Tribunal to constitute prohibited conduct. Once this has been established, a party has a claim, justiciable in a court of law, for damages or compensation.

[16] The above construction is fortified by Section 164 (7). The latter Section provides that for the purposes of Section 2A (2) (a) of the Prescribed Rate of Interest Act, 1975, interest on a date in relation to a claim for damages in terms of the NCA will commence on the date of issue of certificate referred to in Section 164 (3) (b). I agree with Mr Rosenberg that the plaintiffs' claims as formulated plainly represent claims for loss or damage as a result of allegedly prohibited conduct or dereliction of required conduct on the part of Lewis, as contemplated by Section 164 (3) of the NCA. In terms of Section 164 (6) any such claims only come into existence on the date that the Tribunal makes a determination in respect of those claims.

[17] It remains common cause that the plaintiffs herein do not: (a) allege that the conduct constituting the basis for the action has been found to be a prohibited or required conduct in terms of the NCA; (b) plead the date of any finding to this effect by the Tribunal; (c) indicate the relevant Section of the NCA in terms of which the Tribunal made its finding. Alternatively and in any event, it must be stated categorically, that the plaintiffs do not aver that they have or will when

instituting the action by filing with the registrar a notice from the chairperson of the Tribunal in the prescribed form, complying (as it must) with the requirements of Section 164 (3) (b) of the NCA. Clearly in the circumstances as sketched above a finding must justifiably be made that the plaintiffs' particulars of claim do not at all contain averments necessary to sustain an action.

THE PROPOSED AMENDMENTS TO THE PARTICULARS OF CLAIM

[18] I refer specifically to claim 1. This claim is in respect of delivery charges. The plaintiffs seek to introduce paragraphs 21A to 21D. It is here alleged that Summit Financial Partners (Pty) Ltd ('Summit') filed a complaint with the Regulator regarding compulsory charging of delivery fees by Lewis, but that the Regulator has failed to refer the complaint to the Tribunal or to direct an investigation or to file a notice of non-referral.

[19] It must be said immediately that these paragraphs do not at all advance the matter for the plaintiffs. As correctly pointed out by Mr Rosenberg, aside from the fact that it is not contended that Summit submitted as complaint on behalf of the plaintiffs in question, the failure of the Regulator to respond promptly in terms of the Act does not suffice to complete the cause of action. The cause of action in this case is a determination that the conduct constituting the basis for the claim has been found to be a prohibited conduct in terms of the NCA. Needless to mention that any failure of the Regulator to comply with obligations under the NCA must be dealt with by means of appropriate remedies directed at the

Regulator, to enforce compliance. Undoubtedly, the Regulator's failure to respond properly cannot establish a cause of action in a claim for damages, which does not exist outside the prescripts of the NCA.

[20] The plaintiffs are engaged in a clear attempt wherein it is sought to circumvent the above outcome by reformulating the relief sought by them in respect of the delivery charges to a declaratory that Lewis has: (a) charged the plaintiffs compulsory delivery fees in contravention of Section 102 (2) (a) and/or (b) of the NCA; (b) charged the plaintiffs delivery fees in excess of what is allowed in terms of Section 102 (2) (c) (i) and (ii) of the NCA; (c) charged the plaintiffs a higher price for delivery charges than that charged to cash clients for the same or substantially the same delivery service, in contravention of Section 100 (2) of the NCA; and (d) committed an offence in terms of Section 100 (3) of the NCA. It must be borne in mind that Section 164 (1) of the NCA provides that nothing in the NCA renders void a credit agreement or a provision of a credit agreement that, in terms of the NCA, is prohibited or may be declared unlawful unless a court declares that agreement or provision to be unlawful.

[21] It is of importance to note that the plaintiffs themselves do recognise that the amended relief is not in the form of a declaration that the credit agreements or delivery charge provisions are per se unlawful. Mr De Wet submitted as follows in this regard:

'Ironically, the credit agreement (quite correctly in terms of the NCA), expressly states that delivery fees, and the service on which it is based on, is voluntary and not compulsory. Rather, it is the case of the plaintiffs that, despite the provisions of a credit agreement, fees are charged as a compulsory charge.'

Clearly, the substance of the plaintiffs' case, notwithstanding the proposed amendments, remains that Lewis has been guilty of prohibited conduct or dereliction of required conducts, as a result of which the plaintiffs have suffered loss or damage. Thus the central enquiry will be whether or not there has been prohibited conduct or dereliction of required conduct on the part of Lewis. That is an enquiry which the NCA requires to be dealt with in a particular way, culminating in a finding by the Tribunal.

[22] In truth, while Section 164 (1) of the NCA contemplates that in appropriate circumstances, a credit agreement may be declared unlawful by a court, Sections 164 (1), 164 (3) and 164 (6) have to be read together and harmonised. Where it is plain in the particular circumstances of a matter (such as the present case) that the purpose of the declaratory relief is for the court rather than the Tribunal to determine whether there has been prohibited conduct or dereliction of required conduct as the first step in a claim for recovery, declaratory relief is neither appropriate nor competent.

[23] No doubt exist or should exist that the reformulation of the relief claimed by the plaintiffs and the insertion of paragraphs 21A to 21D is clearly and solely to

circumvent Sections 164 (3) and 164 (6) of the NCA. I hasten to mention that the submissions of the plaintiffs do recognise this to be the case. On behalf of the plaintiffs, it is contended on the one hand that *'it would be absurd to suggest that the court cannot also grant consequential relief which flows from such an order'*, and on the other that Section 164 (3) is not applicable because *'only a declaratory is sought at this stage'*. Consequently, where it is clear that the purpose of the plaintiffs is to recover loss or damage as a result of alleged prohibited conduct or dereliction of required conduct, multi-stage proceedings in the High Court directed at establishing the conduct in question and thereafter the assessment of loss, are against the scheme of Section 164 and are not countenanced by the NCA.

[24] Section 100 (3) of the NCA creates an offence in that in terms thereof a credit provider who contravenes Section 100 (1) or 100 (2) of the NCA is guilty of an offence. In terms of Section 161 of the same Act, any person convicted of an offence in terms of the Act is liable to a fine and/or imprisonment, as provided for in Section 161 (a) and (b). Mr Rosenberg correctly submitted that a person cannot be convicted of a criminal offence and certainly not an offence contemplated by Section 161 of the NCA in the course of civil proceedings being conducted before a court.

[25] It is so that the plaintiffs seek to amend their particulars of claim to include a declaratory that Lewis is guilty of an offence in terms of Section 100 (3) of the

NCA. It must be pointed out that for a person to be found guilty of an offence, as contemplated by Section 100 (3), a charge must be brought in criminal proceedings, culminating in a conviction. Mr Rosenberg is of course correct in contending that the plaintiffs' endeavour to secure a declaratory in civil proceedings that Lewis be found guilty of a criminal offence is misconceived. In my finding, the proposed amendment is not competent relief at all.

THE MAINTENANCE CLAIMS

[26] With regard to claim 2 (which is in respect of the maintenance charges), the plaintiffs seek to introduce fresh paragraphs 34 to 37. These paragraphs allege that Summit has previously referred a complaint against Lewis relating to the charging of maintenance fees to the Tribunal (as opposed to the Regulator). The plaintiffs plead that as a result, there are matter arising under a credit agreement and pending before the Tribunal, that could result in an order affecting the issues to be determined by this Court, as contemplated by Section 130 (3) (b) read with Section 130 (4) (d) (i) of the NCA.

[27] In Mr Rosenberg's contention more particularly, the amendments do not address the fundamental problem characterising the plaintiff's claims, as referred to above. It is common cause that the plaintiffs persist with their claim for compensation or repayment as set out in paragraphs 33.2 and 33.3 of the particulars of claim. Accordingly, their claims fall within the reach of Section 164

(3) and Section 164 (6). The point, in any event, is absent the required determination by the Tribunal, the plaintiffs have no claims in respect of the maintenance charges.

[28] In addition to the allegation that the maintenance charges represent prohibited conduct on the basis pleaded in paragraphs 27, 30 and 31 of the particulars of claim, it is further alleged on behalf of certain of the plaintiffs that the maintenance agreements are void for vagueness. It is nevertheless contended for these plaintiffs that *pro tanto*, the court may grant declaratory and consequential relief. What is concerning is that, however, even to the extent of this confined element of the claim, it remains one of loss or damage as a result of prohibited conduct or dereliction of required conduct. I agree that the fundamental problem facing claim 2 as pleaded is in no way resolved by the request in the proposed paragraph 37 of the particulars of claim that this Court should adjourn the matter pending determination of those proceedings before the Tribunal which are referred to in proposed paragraphs 34 to 36.

ORDER

[29] In the circumstances, the application to amend lodged in terms of Rule 28 (4) of the Uniform Rules of Court is hereby dismissed with costs.

D V DLODLO

Judge of the High Court

APPEARANCES:

For the Plaintiffs : Adv. H N De Wet

For the First Defendant : Adv. S Rosenberg (SC)

