

SOUTH AFRICA / JUDGMENT

Moyahabo Projects (Pty) Ltd and Another v J & L Linings (Pty) Ltd (3094/2018) [2018] ZAMPMBHC 8 (5 October 2018) [2018] ZAMPMBHC 8

COURT

Mbombela High Court, Mpumalanga

BEFORE

Jansen van Rensburg

CASE / FILE NUMBER

3094/2018

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION

[FUNCTIONING AS THE GAUTENG DIVISION MBOMBELA]

Case number: 3094/2018

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

5 October 2018

Case summary

Credit facility - Application for leave to appeal – section 17 of the Superior Court Act 10 of 2013 – special plea – admission of debt - section 3,4,8 and 40 of the National Credit Act 34 of 2005 – section 25 of the Constitution of the Republic of South Africa Act 108 of 1998 – National Credit Amendment Act 32 of 2014 – section 57 of the Magistrates Court Act 32 of 1944 – ‘incidental credit’ – threshold of R 500 000 – 00 - ‘once off transactions’ – ‘credit agreements’ – ‘credit providers’

- ‘arm’s length transactions

In the matter between

MOYAHABO PROJECTS (PTY)

1st Applicant

THYRZA PAULA LESIA MONYHABO

2nd Applicant

AND

J & L LININGS (PTY) LTD

Respondent

In reply to:

J & L LININGS (PTY) LTD

Plaintiff

And

MOYAHABO PROJECTS (PTY)

1st Defendant

THYRZA PAULA LESIA MONYHABO

2nd Defendant

JUDGEMENT: APPLICATION FOR LEAVE TO APPEAL

JANSEN VAN RENSBURG AJ

INTRODUCTION

[1]. This is an application for leave to appeal by both the applicants against the whole of the judgment handed down by this court on 17 May 2018 where the special plea of the 2nd applicant was dismissed with cost. The written judgment of the hearing of the special plea of the 2nd applicant is available and should be read herewith.

[2]. The 2nd applicants 'special plea' as a defence against the claim of the respondent [the plaintiff in the main action] was the only issue to be decided by this Court on 17 May

2018. The defence of the 2nd applicant was that the respondents' claim against the 2nd applicant was based on an Acknowledgement of Debt ('the AOD') which according to the 2nd applicant constituted a credit agreement as required by section 8 of the National Credit Act 34 of 2005 ('the NCA').

[3]. It is important to highlight at the beginning that the particulars of Claim is silent on whether the agreement is subject to the NCA or not. The respondent did file a replication to the special plea. In the reply, the respondent specifically refers to the exclusion of the NCA in para 3 of the replication. [1]

[4]. The 2nd applicant did serve a notice of an application for leave to appeal against the judgment by this court dated 7 June 2018 on the respondent. On 16 August 2018, the notice of set down for this application for leave to appeal was served on the parties and the

court.

[5]. The respondent served a notice to oppose the application for leave to appeal. [2]

[6]. On 10 September 2018, the index and relevant documents were served on the parties and the court.

APPLICATION FOR LEAVE TO APPEAL

[7]. The grounds for leave to appeal is included in the applicant's application for leave to appeal which should be read herewith and which is not going to be repeated.

[8]. The question which this court grappled with during the hearing of the 2nd applicant's special plea was whether the AOD was subject to the provisions of the NCA or not?

[a]. The 2nd applicant's contention was that the AOD was nothing else but a 'credit agreement' in which instance the respondent must have been registered as a credit provider for the AOD to have any effect on the 2nd applicant.

[b]. The respondent's contention was that the APD was not a 'credit agreement' in terms of the NCA and as such the respondent was not obliged to have registered as a credit provider in terms of the NCA.

[9]. The crux of the 2nd applicant's application for leave to appeal is based on the AOD signed by the 2nd applicant in the name of the 1st applicant as well as in the personal capacity of the 2nd applicant which was signed on 25 May 2016 and which reads as follows –

'Preamble

I the undersigned

MOYAHABO THYRZA PAULA LESIA

[ID number [...]]

In my personal capacity as well as a representative of

MOYAHABO PROJECTS (PTY) LTD

(hereafter referred to as the 'Debtor')

[1] Acknowledgement that I am truly and lawfully indebted the amount of R 1 500 000 – 00 (One million Five Hundred Thousand RAND) to J & L Lining CC t/a JL Lining & Construction

registration number CK97/34581/23 (herein referred to 'the Creditor' with regard to the following claim :

GOODS SOLD AND DELIVERED and/or SERVICES RENDERED on the DEBTOR'S SPECIAL INSTANCE AND REQUEST DURING 2015'

[10]. The debt would be payable within 30 days of demand by the respondent bearing interest at a rate of 15,5% per annum if the 2nd applicant failed to make payment. From this clause, it is clear that interest will only be charged if the 2nd applicant failed to make payment after 30 days' notice given by the respondent to make payment. [3]

[My underlining]

[11]. The 2nd applicant –

[a]. Consented to judgment in the AOD for the amount of R 1 500 000 – 00 as well as legal costs and interest. [4]

[b]. The 2nd applicant waived all the rights and legal expectations. [5]

[c]. The 2nd applicant confirmed that the AOD constituted a demand as contemplated in section 57 of the Magistrates Court Act 32 of 1944. [6]

[d]. That the respondent could enforce the AOD at any time. [7]

ARGUMENTS BY THE 2ND APPLICANT

[12]. The 2nd applicant argues that the AOD signed on 25 May 2016 is null and void as the respondent, as required by the NCA, must have been registered as a credit provider to have granted credit to the 2nd respondent.

[13]. The 2nd applicants argument is that at the date of the signing of the AOD the National Credit Act 34 of 2005 (the NCA) was already amended by GN 513 39981 dated 11 May 2016, which previously included that the required threshold amount of R 500 000 – 00 was the threshold to register as a credit provider, and which was then reduced to 'nil'. However, the amendments only came into effect on 11 November 2016, some 6 months after the signing of the AOD.

[14]. Based on the above amendments, the 2nd applicant argued that -

[a] The respondent should have been registered as a credit provider in terms of section 40(1) of the NCA as the AOD was signed after 11 May 2016.

[b]. The AOD constitute a 'credit agreement' as envisaged in section 8(4) of the NCA.

[c]. The respondent is a credit provider as envisaged by section 1(h) which is a party who advances money or credit to another under any other credit agreement.

[d]. The AOD does not constitute an 'incidental credit agreement' as provided for in section 1 of the NCA.

[e]. Section 40(1) of the NCA was substituted by section 10 of the NCAA 19 of 2014 whereby section 40(1) of the NCA became applicable to so-called 'once-off transactions'.

[f]. That the AOD, interpreted as a 'credit agreement' as alleged by the 2nd applicant, constitute an unlawful agreement read with section 89(2)(d) of the NCA and which is thus unenforceable against the 2nd applicant.

[15]. It was argued that the judgment in *Friend v Sendal* [8] was inconsistent with the Constitutional Court judgment in the case of *National Credit Regulator v Opperman v Olivier and others* [9]. In this matter, Opperman, who was not registered as a credit provider, loaned money to his friend to develop a project. The court

dealt mainly with the forfeiture provisions in sub-sections 89(5)(c) of the NCA and held that it was consistent with the provisions of section 25(1) of the Constitution. It was, therefore, an obligation for Opperman to have registered as a credit provider. In the case of Opperman supra it was clearly a 'LOAN AGREEMENT' and not 'INCIDENTAL CREDIT' which formed the crux of the matter in *Friend* supra. [10]

ARGUMENTS BY THE RESPONDENT

[16]. The dismissal of a 'special plea' is a judgment or order and appealable. [11]

[17]. Returning to the arguments by this court in its judgment that the AOD was not a credit agreement as envisaged by the NCA, the respondent argued that the respondent was not a credit provider in terms of the NCA and had not to be registered as a credit provider in terms of section 40 of the NCA and that the respondent was not a credit provider as envisaged in section 1 of the NCA.

[18]. It was argued on behalf of the respondent that *Friend* supra was held to be applicable in numerous cases [12] after that judgment was delivered by Legodi J [now the JP of this Division of the High Court of South Africa].

[19]. To take the further, it was argued that the nature and purpose of the Act contemplates that persons who are required to be registered are those who are 'part and parcel' of what may be referred to as the 'credit providing industry'; in other words those who make a 'living from borrowing money to individuals and juristic entities and make their living from interest charged on these loans'.

[20]. Section 40(1)(a) of the NCA suggests that a credit provider who 'makes a living' from providing credit to consumers must be registered. In this case, the respondent does not meet this requirement provided for in the legislation.

ANALYSIS OF THE ARGUMENTS BEFORE THIS COURT

[21]. The respondent argued that the AOD was not a credit agreement and therefore enforceable against the 2nd applicant and that the respondent's claim against the 2nd applicant was not based on a credit agreement and does not fall under any definition of a 'Credit agreement'.

[22]. Section 3 of the NCA aims to promote and advance the social and economic welfare of South Africa, to promote fair and transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry and to protect consumers.

[23]. In this application, the 2nd applicant avers that the AOD does not meet the requirements of a credit agreement and as such it is 'null and void'.

[a]. However, the 2nd applicant bound herself in person to pay the outstanding debt of the 1st applicant in the amount of R 1 500 000 – 00 if the 1st applicant failed to honour the debt owed to the respondent.

[b]. There is no allegation in the pleadings that the 2nd defendant did not understand the contents and the effect of the AOD.

[c]. The 2nd applicant argued that in terms of section 4 of the NCA read with section 8(4)(f) thereof the AOD constitute a credit agreement and as result, the NCA applies to the respondents claim.

[d]. Nowhere does the 2nd applicant allege that the respondent, as a purported 'credit provider' was required to serve a notice in terms of section 129 of the NCA on the 2nd applicant before commencing with the action if the AOD was a 'credit agreement'.

[e]. It should suffice to say that for the AOD to constitute a 'credit agreement' it must fall within the confines of section 8(4)(f) of the NCA. This section requires that it must be an agreement 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 the agreement or the amount that has been deferred.

[24]. From the AOD it is clear that the 2nd applicant in no uncertainty acknowledged the personal debt owed to the respondent in a signed and dated AOD. It is not ambiguous in any way but the contents of the AOD is crystal clear without bearing any other meaning thereto that the 2nd applicant assumed personal liability for the debt. [13] After the 1st defendant in the main action failed to make payment to the respondent, the debt as per the AOD became enforceable in terms of the incidental credit agreement and the respondent had the right to enforce the AOD.

[25]. It is clear that the 2nd applicant signed the AOD in order to receive the benefits from the respondent without the 2nd applicant would not have secured the services from the respondent. It could not be argued that the 2nd applicant could have been under any misrepresentation as to the contents of the AOD at the time of the signing thereof. Contracting parties are bound by their written agreements not wrongfully induced to another.

[26]. Section 40(1)(b) must be seen as having been directed at those who are in the credit market and/or industry or those who would engage in this market. This court is still of the view that the transaction between the respondent, the 1st and 2nd applicant was a 'once off transaction' and that it was not necessary for the respondent to have been registered as a credit provider. This as a single transaction as envisaged by Friend *supra* of which the 2nd applicant now stands to argue

that the respondent should have been registered as a credit provider. This court is of the view that this argument by the 2nd applicant does not hold any grounds whatsoever under section 40(1)(b) of the NCA and must fail.

[27]. The NCA is aimed those who would conduct business from lending money as a credit provider as its main function and purpose of the business and not people who would enter into a credit agreement in the course of conducting a business other than providing credit to consumers. The respondent is not a business of providing credit to consumers.

[28]. In the court's view, the respondent in providing the service to consumers does not fall within the ambit of definition of a 'credit provider' who was required to register as such in terms of the NCA 34 of 2005. Section 40(1)(a) of the NCA 34 of 2005 envisaged a person or entity who 'frequently provides credit or concludes credit agreements' as defined in section 1 of the NCA 34 of 2005.

ANALYSIS AND

CONCLUSION

[29]. The court has found no allegation in the 2nd applicant's application for leave to appeal to any allegation as to the prospects of success in any other appeal in another court. Section 17 Superior Courts Act 10 of 2013 provides for the following –

'Section 17 (1)-

(1). Leave to appeal may only be given where the judge or judges are of the opinion that –

(a)(i). the appeal would have a reasonable prospect of success; or

(ii). There are some other compelling reasons why the appeal should be heard, including conflicting judgments on the matter under consideration.

(b). the decision sought on appeal does not fall within the ambit of section 16(2)(a) and

(c). where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

[30]. Section 17(1)(a) to (c) operate in conjunction to posit the requirements that must be satisfied. It is only the requirement stated in para (a) that allows for some latitude. It might be satisfied by either of the ways contemplated in subparagraphs (i) and (ii). Satisfaction of the requirements stated in all three of the paragraphs appears to be required. The effect thereof is to limit the circumstances whereby a high court as court of first instance, may grant leave to appeal against any of its decision. [14]

[31]. The traditional approach that the courts followed was that there should be a reasonable prospect of success of the appeal. [15] Section 17(1)(f) provided that leave to appeal may only be given where the court is of the opinion that the appeal would have a reasonable prospect of success and that a different court might come to a different conclusion.

[32] The next question to be looked at is whether the AOD is a 'credit Transaction' in terms of section 8(4) and therefore a genuine 'credit transaction'.

[a]. Section 8(4)(f) provides for a 'catch-all category' to cater for the granting of credit which falls outside the above definitions. It covers any deferral of payment of an amount when a charge, fee or interest is payable in respect of the agreement itself or in respect of the amount deferred.

[b]. This 'category of credit transactions' may for convenience sake be called the 'extended credit agreement or incidental credit agreement'. This category of agreement may include, for example, a sale of land in terms of which payment of the price is deferred and interest is payable, or a house-improvement scheme in terms of which the building contractor is paid over a period of time and, by agreement, adds interest to the contract amount. [16]

[33] A contract may on the face of it fall within the wide definition of section 8(4)(f), yet a court may decide on the facts and the substance of the contract between the parties that it should nonetheless not be treated as a credit agreement subject to the Act. This may happen if a court is of the view that, bearing in mind the purposes of the Act, it was not the intention of the legislature to cover the type of agreement under consideration. This scenario was demonstrated in the case *Hattingh v Hattingh* [17] where two brothers who had a business relationship stretching over decades decided to terminate their relationship. The contract

provided that the one had to pay the other a certain amount over a period of time. The Court decided that there was no credit provider-consumer relationship between them and it was not the intention of the legislature to cover such a relationship.

[34] In my view, in this matter before me, it is clear that there was no 'credit provider-consumer relationship' between the parties. [18] A more convincing argument was raised on behalf of the respondent to the effect that the provisions of the NCA would not be applicable

because the AOD was not 'a credit agreement between parties dealing at arm's length' as contemplated in Section 4(1) of the NCA.

[a]. Section 4 of the NCA deals with the application of the Act.

[b]. Subsection 4(1) provides that the Act applies to every credit agreement between the parties at 'arm's length' and made within or having an effect within the Republic of South Africa.

[c]. Section 4 sets out certain 'types of credit agreements' that are excluded from the application of the NCA. I am of the view that the AOD entered into between the applicant and the respondent would be expressly excluded from the application of the NCA in terms of Section 4(2)(b)(iv)(aa) which provides:-

‘(2) For greater certainty in applying subsection (1) -

...

(b) In any of the following arrangements the parties are not dealing at arm's length - ...

(iv) any other arrangement -

(aa) in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction’.

[35] The facts in the abovementioned matter were that the 2nd applicant on 25th May 2015 acknowledged in writing that she was indebted to the respondent in the amount of R1 500 000 -00 should the 1st defendant in the main action, not make any payments to the plaintiff in the main action [now the respondent].

[a]. The 2nd applicant undertook to pay the said amount of R 1 500 000 – 00 in full within 30 days of demand to the respondent and the interest thereon, should payment not be made.

[b]. The 2nd applicant failed to make payment of the amount of R 1 500 000 – 00 as demanded by the respondent.

[c]. The respondent subsequently instituted action proceedings in the Mpumalanga Circuit Court of the Gauteng Division of the High Court of South Africa against the 2nd applicant for the payment of R1 500 000 – 00 plus interest due to the failure by the 2nd applicant to make payment after being requested to pay the respondent according to the AOD.

[36] The 2nd applicant contended in this Court that the AOD constituted a credit agreement and further that the respondent was a credit provider who was required to register as such but had not done so and that the AOD, therefore, was null and void.

[37]. Section 40(1)(a) of the Act envisages a situation where a person frequently provides credit or concludes ‘credit agreements’ as defined and not a ‘once-off transaction’ as was the position therein. Section 40(1)(b) must be seen as having been directed at those who are in the credit market and/or industry, or at those who intend to participate in the credit market and/or industry and that the respondent in this ‘once-off transaction’ cannot be seen as participating in the credit market.

[38]. Referring back to Friend *supra* the Full Bench then concluded by holding in paragraph [28] of the judgment, that the respondent was consequently not obliged to register as a credit provider in terms of section 40 of the NCA for a ‘once-off transaction’.

[39]. In my view the AOD entered into between the 2nd applicant and the respondent does not amount to a ‘credit transaction’ and is therefore not a ‘credit agreement’ in terms of the NCA. The respondent was also not a ‘credit provider’ as contemplated in the definition in section 1 of the NCA of a ‘credit provider’ who was required to register as such in terms of section 40 of the NCA.

[40]. I am of the view that should the AOD in this circumstances be classified as a 'credit agreement' as defined in the NCA, it would lead to actions which could be to the detriment of the economy whereby purported 'consumers' would be placed in a position to be afforded 'incidental credit or once off transactions' yet to fall back on 'purported credit agreements and registration as credit providers' in terms of the NCA to evade their responsibilities to repay entities such as the respondent in this matter.

[41]. In my view the NCA is therefore not applicable to the 2nd applicant's allegations regarding the AOD being a credit agreement read with the respondent's demand for payment and the enforcement of the AOD against the 2nd applicant. The AOD is clear in its contents and effect.

[42]. It has been held that AOD has been much debated. The waters started to muddy when the parties would contest the AOD being a 'credit agreement or a once-off credit facility'. Should the person who lends money be classified as a 'credit provider', making a living from lending money to a consumer, then that party needs to be registered and a 'credit provider'.

[43]. That the NCA is not a model of clarity, has been bemoaned by the High Court, this Court and the Constitutional Court on a number of occasions. This appeal is yet another example of the inconsistencies and resultant confusion to which the NCA has given rise. The pertinent question in this matter is under what circumstances is registration as a credit provider in terms of the NCA obligatory?

[44]. In the matter of Du Bruyn NO & others v Karsten

[19] the price of R2 500 000 - 00 was set to purchase the part of the business and an option agreement was concluded, which was valid until 1 March 2013. However, Mr. Karsten was unable to obtain the necessary finance, even after having been afforded a further 6 weeks in which to raise the money.

[a]. To give effect to the sale of the business, the three sale agreements then concluded, were, to all intents and purposes, identical, apart from the purchaser.

[b]. The sale agreements were all signed on 26 April 2013. The amount payable for the shares in the different entities differs but in total it amounted to R2 000 000 - 00.

[c]. An addendum to each sale agreement dealt with all three entities and the purchase price recorded was of the globular amount of R2 000 000 - 00.

[d]. The same terms of payment were applicable to all three agreements of sale: a deposit of R500 000 was to be paid by 1 May 2013; thereafter installments of R30 000 to be paid on a monthly basis, subject to an identical amortization table for a period of 5 years; and interest to be levied on the deferred amount.

[e]. In all three sale agreements, Mr. and Mrs Du Bruyn bound themselves as sureties and co-principal debtors. In clause 8 of each addendum, Mr. and Mrs. Du Bruyn undertook to register a covering bond over their immovable property, Unit 2, Shannon Close, Erf 196, Drie Riviere, within 60 days, which they guaranteed to be unencumbered.

[f]. It is common cause that Mr. Karsten was not registered as a credit provider in accordance with section 40 of the NCA at the date of the conclusion of the agreements of sale on 26 April 2013.

[g]. Mr. Karsten accepted that he had to be registered as a credit provider in order to facilitate the registration of the covering bond. He, therefore, made an application to be registered as such on 22 October 2012 and his registration occurred on 27 November 2013. The Du Bruyns did not register the covering bond within 60 days but eventually effected registration of the covering bond in early 2014.

[My underlining]

[45] The appellants defaulted on the installment payments. As of 1 September 2014, Mr. Karsten had received only the amount of R 866 830.61. In November 2014 Mr. Karsten instituted proceedings for the balance of the purchase price, the sum of R1 133 169 - 39. He alleged a breach of the agreements of sale. The Du Bruyns' defence was that the agreements are null and void due to non-compliance with the NCA.

[46] Were the agreements of sale arms-length transactions?

[a]. Section 4(1) of the NCA states that the NCA shall apply to every credit agreement where the parties are dealing with each other at 'arm's length'.

[b]. Section 4(2)(b) of the NCA sets out the circumstances in which the parties are 'not dealing at arm's length'.

[c]. Section 4(2)(b)(iv)(aa), in relevant part, reads as follows:

'd. in any of the following arrangements, the parties are not dealing at arm's length:

....

(iv) any other arrangement –

(aa) in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction'

[47]. The court in *Friend supra* at para 28 held that notwithstanding the fact an agreement may be a credit agreement in terms of the NCA, this did not necessarily mean that the credit provider was obliged to register in terms of section 40(1)(b) of the NCA. For this interpretation the full court relied on the purpose of the NCA, set out in section 3 which is, 'to promote and advance the social and economic welfare of South Africans in order to achieve a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and

industry, and to protect consumers'. Bearing this in mind the court found that the provisions of the NCA were meant to regulate those participating in the credit industry and persons who frequently provide credit, and was not applicable to once-off transactions.

[48] There can be no doubt that the approach adopted in *Friend supra* is pragmatic and makes good sense. However, it is difficult to marry this interpretation with the unambiguous text of the NCA. Section 40 of the NCA sets out the circumstances under which registration as a credit provider is applicable.

[49] Section 40(1) was amended by Act 19 of 2014 to delete any reference to 100 credit agreements. It now reads as follows:

'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 s 42 (1).'

[50]. Therefore the amount of credit provided is now the sole determining factor to ascertain whether a credit provider is obliged to register. It must be mentioned that the circumstances under which registration as a credit provider is necessary were not dealt with by the Constitutional Court in *Opperman supra*.

[51] The registration of credit providers was dealt with by both the trial court in *Opperman v Boonzaaier & others* [20] and the Constitutional Court commented that –

[a]. The trial court merely stated that having regard to the amount involved, 'it follows that the applicant was required by statutory provisions to have applied for registration as a credit provider.'[21]

[b] The Constitutional Court merely narrated, without comment, the facts set out in the trial court's judgment that the credit provider was not registered as a credit provider as required by the NCA at the time of 'providing the loan' to his friend.[22]

[c]. In neither matter was the issue of when a credit provider is obliged to register canvassed.

[52]. The decision of the Constitutional Court cannot, in these circumstances, amount to an implied overruling of *Friend supra*. It does, however, suggest that the Constitutional Court accepted this to be the correct position without further interrogation. The judgment by the SCA where it has decided that once-off transactions do not fall within the ambit of the NCA in *Shaw & another v Mackintosh & another* [23] it was held that this proposition, too, was incorrect.

[a]. In *Shaw supra*, the appellants had bound themselves as sureties in favour of the first respondent for the debts of the second respondent.

[b]. The real dispute in *Shaw* was whether the agreement in question was a credit guarantee in terms of section 8(5) of the NCA or a credit transaction in terms of section 8(4)(f) of the NCA?

[c]. The SCA held that the appellants, as sureties, were not granted any loan nor was any credit advanced to them. The SCA held that the first respondent was not a credit provider – he was not in the business of granting credit. There was no interpretation of s 40(1) of the NCA and no reference to Friend *supra*. Shaw *supra* could therefore not be said to be an authority on the requirements of registration of a credit provider.

[My underling]

[53]. A plain reading of section 40(1)(b) of the NCA makes it clear that a person must register as a credit provider if the total principal debt exceeds the prescribed threshold in terms of section 42(1) of the NCA. At the time this section provided that the Minister must, at intervals of not more than five years, determine an applicable threshold of not less than R500 000 – 00, for the purpose of determining whether a credit provider is required to register in terms of section 40(1) of the NCA.[24] There is no dispute that R500 000 - 00 was the applicable threshold at the conclusion of the sales agreements.[25]

[54]. One could, therefore, interpret section 40 of the NCA as being inapplicable to once-off transactions where the role players are not participants in the credit market, but it must reconcile this interpretation with the language of the provision, its context, and purpose. As stated in Potgieter *supra*, to find otherwise would be to substitute what is justifiably seen as regulatory overreach with judicial overreach.[26] Lamenting the dismal drafting of the NCA and acknowledge the drafting error which should be left to parliament to correct.[27]

[55]. Where the purported allegation by the 2nd applicant relates to the respondent who then provided credit to the 2nd applicant by virtue of ‘a credit agreement’ such as in this matter, such allegation is classified as a ‘once off transaction’, as defined in the NCA, whereby it is not a requirement for the respondent to have been registered as a ‘credit provider’.

[56]. Read with the arguments above, this court is of the view that another court will not be persuaded otherwise regarding the classification of this specific AOD (as analysed and motivated in this judgment) not being a ‘credit agreement’ as alleged by the 2nd applicant wherefore the respondent had to be registered in terms of the NCA as a ‘credit provider’.

[57]. To conclude, this court is of the view that –

[a]. The AOD was not a ‘credit agreement’ whereby the respondent was required to have registered as a credit provider at the time of signing the AOD in terms of the NCA.

[b]. The AOD was a separate ‘contractual agreement’ between the 2nd applicant and the respondent for the payment of a debt which did not constitute a credit agreement whereby should the 1st applicant fail to make payments in this regard, the applicant in this application, would be held responsible for any payments due to the respondent.

[c]. There is no indication by either of the parties to the AOD that the AOD constituted a 'loan agreement whereby money would have been lent to the 2nd applicant or that the purported money would have been repaid over a period of time in specific amounts bearing any interest whatsoever'.

[d]. That the AOD is rightly and lawfully enforceable by the respondent against the 2nd applicant for the monies due by the 1st and 2nd applicants in terms of the AOD.

[e]. That the AOD between the respondent and the 2nd applicant could be classified as a 'once off transaction'.

ORDER

[58]. The following order is made –

[a]. That the 2nd applicant's application for leave to appeal against the dismissal of its special plea is hereby dismissed.

[b]. That the 2nd applicant pays the cost of the respondent in this application for leave to appeal.

H.C.J. VAN RENSBURG

ACTING JUDGE

HIGH COURT OF SOUTH AFRICA

MBOMBELA DIVISION

Date of hearing: 26 September 2018

Date of judgment delivered : 5 October 2018

REPRESENTATIVES

Counsel for the 2nd applicant

Adv E.J.J. Nel

Instructed by WDT Attorneys

Russel Street Chambers

Mbombela

Counsel for respondent

Adv B.D. Stevens

Instructed by

Krugel Heinsen Inc

Nelspruit

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- [1] Page 48 of the pleadings.
- [2] See page 40 of the bundle.
- [3] AOD pages 36 and further of the pleadings bundle.
- [4] AOD page 37 clause 6.
- [5] AOD page 37 clause 7.
- [6] AOD page 37 clause 8.
- [7] AOD page 37 clause 14.
- [8] 2015 (1) SA 396 (GP).
- [9] (15456/2011) [2014] ZAGPPHC 829; 2016 (6) SA 272 (GP) (16 October 2014).
- [10] Opperman loaned money to his friend in the amount of R 7 000 000 – 00 in three separate written credit agreements for a development in Cape Town. The CC held that the three agreements were indeed ‘credit agreements’ as envisaged by the NCA.
- [11] Smit v Oosthuizen 1979 (3) SA 1079 (A); Constantia Insurance Co Ltd v Nohamba 1986 (3) SA 27 (A).
- [12] Black v Stroberg (8960/2012) [2013] ZAKZPHC 16 (15 April 2013) unreported and Kruuse v Hillhouse (83/2015) ZAECG (7 July 2015) – IMPORTANT - the latter being handed down after the amendment of the NCA.
- [13] Preamble to the AOD on page 36 read with the remainder of the AOD.
- [14] City of Cape Town V SANRAL Ltd (612/2012) [2015 ZAWCHC 135, 2016 (1) BCLR 45 (WCC), [2016] 1 All SA 99 (WCC), 2015 (6) SA 535 (WCC) dated 30 September 2015.
- [15] Commissioner of Inland Revenue v Tuck 1989 (4) SA 888 (T) at para 890 B.
- [16] Scholtz: Guide to The National Credit Act, para 8.2.3.8.
- [17] 2014
- (3) (SA) 162 (VB).
- [18] Els v Swart NO and another (MG10/2015) [2016] ZANWHC 43 delivered 16 September 2016.
- [19] (929/2017)
- [2018] ZASCA 143 (28 September 2018).
- [20] [2012] ZAWCHC 27.
- [21] At para 3 of the judgment.
- [22] Opperman supra at fn 6 at para 4.

[23] [2018] ZASCA 53.

[24] Note that this section was amended by Act 19 of 2014. The new section 42(1) reads ‘The Minister, by notice in the Gazette, must determine a threshold for the purpose of determining whether a credit provider is required to be registered in terms of section 40(1).

[25] Item 5, National Credit Act Regulations, GN713, 1 June 2006. The current threshold is nil as per item 2, National Credit Act Regulations, GN513, 11 May 2016.

[26] Potgieter *supra* at para 33.

[27] See the minority judgment, of Cameron J, in Opperman fn 6 at para 105.

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