

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 3748/2010

In the case between:

SCANIA FINANCE SOUTHERN AFRICA (PTY) LTD Plaintiff

and

JOHANNES GERHARDUS BESTER BOUER Defendant

JUDGEMENT: MOCUMIE, J

DELIVERED ON: 23 DECEMBER 2010

[1] This is an opposed application for summary judgment. The plaintiff alleges that the defendant defaulted in his payments and seeks judgment in respect of arrear rentals, damages and the return of goods with interest (where applicable) and costs on attorney-client scale in accordance with the written lease agreement. The claim is for the amount of R77 591,32 (claim 1) and R168 420,90 (claim 3). The plaintiff has abandoned the second claim.

[2] The defendant raised various points *in limine*. I will only deal

with one: Non-compliance with section 129 of the National Credit Act, no 34 of 2005 (“the NCA”) because in the event that I come to the conclusion that the credit agreement falls within the purview of the NCA that would be the end of the matter.

[3] It is common cause that the plaintiff and the defendant concluded the lease agreements during 2008 and the defendant failed to pay stipulated instalments in terms of the said leases. It is further common cause that the plaintiff cancelled the leases on 5 November 2009 as it was entitled to do in terms of the agreement upon specified unauthorised conduct on the part of the defendant, including default on payment of instalments. It is also common cause that the defendant subsequently returned the vehicles after the prescribed period had lapsed.

[4] The defendant’s defence in essence is that each agreement is a credit agreement in terms of the NCA and that the defendant made an application for debt counselling to a debt counsellor. The plaintiff was not interested in the process and instead, in a letter dated 25 November 2009, confirmed that:

‘Our client has terminated the agreements as per our letter of 5 November 2009...Our client has furthermore taken a decision not to partake in your client’s intended debt review and for this purpose, our client has elected to waive all arrears on this account and our client has no further claims against your client in respect of the now terminated agreements’.

I do not intend going into the legality of that letter or the question of waiver as I was not asked to adjudicate the issue. The inquiry in this case is whether each agreement is a credit agreement as contemplated in the NCA.

- [5] It is common cause that the plaintiff has not complied with section 129(1)(a) of the NCA which obliges a credit provider to draw to the attention of a consumer its intention to take legal steps against the consumer and to advise the defaulter that one or more of the steps identified in the section may be taken to resolve any dispute under the agreement between them or to develop and agree on a plan to bring the payments under the agreement up to date. (**Absa Technology Finance Solutions (Pty) Ltd** unreported case no 2008/28978 of the North Gauteng division, 2 March 2010.)

- [6] In terms of section 130(4)(b) a credit provider, having met all the requirements under section 129(1)(a) and others applicable, may approach the court to enforce the credit agreement. There are conflicting decisions as regards the meaning and implications of section 129(1)(a) or (b). See **Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors** 2009 (2) SA 512 (D); **First Rand Bank v Wayne Thomas Evans** unreported case No 1593/10. Of relevance in this matter is the **Prochaska** decision with which I agree. Naidu AJ held there that a creditor was obliged to inform the consumer before it takes action of its intention to institute action. This, in my view, is in line with the spirit and purport of the NCA.
- [7] It is common cause that the plaintiff is a credit provider as defined in section 1 of the NCA and that the defendant is a consumer as defined in section 1 of the NCA. A consumer is defined as, in respect of a credit agreement, *inter alia* and for purposes of this matter 'the lessee under a lease' and a credit provider as 'a lessor under a lease'. A lease is defined as '... an agreement in terms of which-

- (a) temporary possession of any movable property is delivered to or at the direction of the consumer, or the right to use any such property is granted to or at the direction of the consumer;
- (b) payment for the possession or use of that property is-
 - (i) made on an agreed or determined periodic basis during the life of the agreement; or
 - (ii) deferred in whole or in part for any period during the life of the agreement;
- (c) interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred; and
- (d) at the end of the term of the agreement, ownership of that property either-
 - (i) passes to the consumer absolutely; or
 - (ii) passes to the consumer upon satisfaction of specific conditions set out in the agreement;'

[8] Mr Snellenberg, on behalf of the plaintiff, submitted that the agreements in issue did not fall within the purview of the NCA for the simple reason that these agreements were lease agreements and ownership was never intended to pass over to the lessee at the end of the lease. He referred to the different

clauses of the agreements which, he submitted, said so categorically. He relied heavily on the unreported judgment of Kruger J in **Absa Technology Finance Solutions (Ltd) Pty v Pabi Guest House CC and Others (Free State, Bloemfontien)**, Case No 2169/2008 delivered on 22 October 2009 and the unreported judgment of Tuchten AJ of **Absa Technology Finance Solutions (Pty) Ltd v Jacobus Schalk Viljoen t/a Wonderhoek Enterprises (North Gauteng, Pretoria)**, Case No 2008/28978 delivered on 2 March 2010.

- [9] In the **Pabi Guest House**-case *supra* Kruger J had to deal with more or less the same situation. The essential question for determination was whether the agreement for the rental of certain office equipment was subject to the NCA. Kruger J considered the definition of 'lease' in the NCA where it is defined as a contract where ownership passes to the consumer. After analysing the relevant provisions of the rental agreement in issue he relied on JM Otto's work, **The National Credit Act Explained** (2006), where the author criticises the definition of lease in the NCA and concludes that:

“... a lease in terms whereof the lessee pays rent which does not include a fee, charge or interest, and in terms whereof ownership remains with the lessor throughout will not be subject to the National Credit Act at all....”

- [10] Kruger J came to the conclusion in para 22 of his unreported judgment that when faced with this situation the Court must have regard to the substance of the contract, not by virtue of its name or merely its form (or outward appearance). On the facts he found himself unable to find that the rentals were calculated to include interest or other fees or charges. He concluded that the plaintiff's contention that the Act is not applicable had to be accepted in the absence of evidence that the rentals were calculated to include interest or other fees or charges. Tuchten AJ followed the same approach in the **Jacobus Schalk Viljoen** matter.

- [11] Mr Van der Merwe on behalf of the defendant submitted that if this was the case in all cases then credit providers could, as J M Otto puts it,

“...charge a flat rental, which on the face of it, does not include any interest. However when the financial realities of the contract are analysed, it will often be the case that because that the total rental representation full amortisation of the purchase price of the object that the lessor himself paid to a third party to obtain it in order to let it, and includes his profit as well. This profit is often nothing else but disguised interest.”

[12] He submitted further that the agreement is subject to the provisions of section 8(4)(f) of the NCA which provides as follows:

“8(4)(f) any other agreement other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of-

- (i) the agreement ;or
- (ii) the amount that has been deferred”

[13] Flemming in his book: Flemming’s National Credit Act(2009), 2nd ed at page 76 is of the view that s8(4)(f) operates with a drag-net effect in that the Act aims to govern a contract once there is some cost, under whatever name, attached to the

deferment of payment.

[14] The purpose of the NCA *inter alia* is “to promote ...a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry and to protect consumers, by inter alia -

- (d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
 - (e) addressing and correcting imbalances in negotiating power between consumers and credit providers by-
 - (i) providing consumers with education about credit and consumer rights;
 - (ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; and
 - (iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;
- ...

[15] The promulgation of the NCA is premised on the underlying reality that scales relating to the negotiating power between consumers and credit providers are skewed. The greater majority of consumers are not conversant with the fine print of agreements such as ones in issue which they conclude without

the assistance of a lawyer or anyone who has no vested interests in the agreement. That's why the Legislature brought about new forms of protection for debtors in South Africa (JM Otto). It also introduces innovative mechanisms and concepts directed more at consumers than credit providers (**Prochaska supra**).

[16] In the **Pabi Guest House** matter Kruger J could not find that the NCA was applicable on the basis that there were no specific provisions relating to the interest and finance charges in the agreement concerned. The defendants did not oppose the application although they were given the opportunity to do so by the Court and consequently Kruger J had no evidence before him to show that the rentals in that matter were calculated to include interest or other fees or charges.

[17] This case is distinguishable from the **Pabi Guest House** matter for the fact that the Financial Lease Agreement no 4001639G – Transaction schedule “POC1.1” to the paginated papers, shows on page 2 thereof that the finance charges

“...are linked to the prime interest rate, at the rate of prime (14% plus 2.50% = 16.50%) per annum calculated daily and compounded monthly and payable from the date of commencement.”

[18] In my view Kruger J's approach cannot be faulted. Mr Van der Merwe too did not argue otherwise. Had there been properly established facts before it, the Court may have decided differently. (Flemming's National Credit Act (2009), 2nd ed at page 80.

[19] In this matter, as I alluded to earlier on, there is a specific clause relating to interest and finance charges. It is thus persuasive that the agreements in issue are in line with the approach set out in the **Pabi Guest House** matter and consequently fall within the purview of the NCA. Even if I may be wrong in my conclusion and the basis thereof I am of the view that this section too, like s129 (1)(a)(b) read with s130 and s86(10), is another indication that the Act is not a model of clarity as shown in numerous decisions referred to above. It is inconceivable that the Legislature would withhold from the

majority consumers of the rights and protection contained in the provisions simply because the agreement concluded does not show that interest or charges and fees were calculated into the initial amount. It is common knowledge that most consumers depend largely on rental agreements or what used to be called hire-purchase agreements of the nature under discussion. What is more concerning is that even unsophisticated consumers are expected to read the fine print as to be able to say such and such a clause divests them of the protection provided by the NCA.

- [20] The NCA provides that a credit provider should give notice to a consumer in all instances before it institutes action. Without having delivered a notice, as conceded by counsel for the plaintiff, the plaintiff acted improperly or without any attempt to resolve the impasse first or alert the defendant to the impending action as provided for in the NCA. This is contrary to the spirit and purport of the NCA and cannot be justified under any clause which is inconsistent with the provisions of detracts from the NCA and puts the defendant in a more disadvantageous and unequal position to other consumers

who conclude agreements which specifically inform consumers of their rights as set out in s129 read with s130 or in a manner that does not give effect to the purposes already set out.

[21] In the circumstances, I am of the view that the plaintiff should have brought its intention to institute action to the notice of the defendant. Not having done so it still has the opportunity to give the necessary notice before it embarks on this route again. The plaintiff must go a step further and improve on its standardised agreement to incorporate the substance of the provisions of s129 read with s130 of the NCA to avoid falling foul of apprising consumers adequately of their rights.

[22] Having come to this conclusion it is unnecessary to traverse the other points *in limine* raised by the defendant or whether the defendant has complied with the provisions of R32 (3) (b) of the Superior Court Rules. Such issues will be properly ventilated during the hearing at a later stage.

[23] **In the circumstances I make the following order:**

ORDER:

1. The Application for summary judgment is postponed sine die.

The plaintiff may not set the matter down until it has complied with the following steps:

- (a) it has complied with the provisions of section 129 (1)(a) of the National Credit Act 34 of 2005 (“the NCA”). In particular it must draw the default to the notice of the defendant by delivering a notice which complies with the provisions of section 129(1)(a) of the NCA, at the address chosen by him as his domicilium in the Lease contract .
- (b) the provisions of section 130 of the NCA have been complied with.

2. The plaintiff is ordered to pay the costs of this application.

B.C. MOCUMIE, J

On behalf of the plaintiff:

Adv. N. Snellenburg

Instructed by:
Honey and Partners
BLOEMFONTEIN

On behalf of the defendant:

Mr L.K. Van der Merwe
Instructed by:
Kramer Weihmann & Joubert
BLOEMFONTEIN