

IN THE NORTH GAUTENG HIGH COURT
(REPUBLIC OF SOUTH AFRICA)

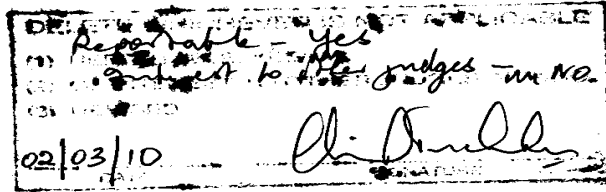
2/3/2010

CASE NO: 2008/28978

In the matter between:

ABSA TECHNOLOGY FINANCE SOLUTIONS (PTY) LIMITED Plaintiff

and



JACOBUS SCHALK VILJOEN

t/a WONDERHOEK ENTERPRISES

Defendant

JUDGMENT

- 1 In this action the plaintiff claims under a written agreement described in the body of the document as a Master Rental Agreement, which I shall call in this judgment the Agreement. The Agreement is a common law lease, *locatio conductio rei*, in terms of which the plaintiff leased to the defendant a digital display board for 60 months at an agreed invariable monthly rental.

- 2 The plaintiff alleges that the defendant defaulted in his payments and seeks judgment in respect of arrear rentals, damages and return of the goods together with the usual ancillary relief.
- 3 A number of defences have been raised on the pleadings, of which I need mention only two. In response to the allegation that the parties entered into the Agreement, the defendant pleaded that he was misled and coerced into signing the Agreement in circumstances in which the defendant would never have done so if he had full knowledge of the documentation he signed and its implications and that "[i]n the premises the defendant denies any valid master rental agreement as alleged by the plaintiff".
- 4 A further defence raised is that the Agreement is subject to the National Credit Act, 34 of 2005 ("the NCA") and that the plaintiff is barred from proceeding with the action because of the provisions of s 129 read with s 130 of the NCA. The enquiry is therefore whether the Agreement is a credit agreement as contemplated by the NCA.
- 5 It is common cause that the plaintiff has not complied with s 129(1)(a) of the NCA which empowers a credit provider to draw to the attention of a consumer the default of the consumer and to propose that the consumer take one or more of the steps identified in the section to

resolve any dispute under the agreement between them or develop and agree on a plan to bring the payments under the agreement up to date.

- 6 Subject to an exception not presently relevant, it is only where a credit provider has given the consumer a notice under s 129(1)(a) and certain other requirements have been met that a credit provider is entitled to approach a court to enforce a credit agreement. Section 130(4)(b) provides that unless there has been such compliance, a court asked to enforce a credit agreement *must* adjourn the matter before it and make an appropriate order setting out the steps the credit provider must complete before the court case may be resumed.
- 7 So it is very important to determine whether the NCA applies to the agreement relied upon by the plaintiff because if it does, then the matter cannot proceed. For this reason, after hearing the parties, I ruled under Rule 33(4) that this question be decided first and separately from all other issues arising in the action.
- 8 A credit agreement is defined in s 1 of the NCA to mean (unless the context indicates otherwise) an agreement that meets all the criteria set out in s 8. Section 8 is contained within Part C of Chapter 1 of the NCA. The rubric is headed *Classification and categories of credit*

agreements. Subject to certain exceptions not presently relevant, an agreement will constitute a credit agreement if it is a credit facility, a credit transaction or a credit guarantee (or a combination of one or more of them) as described in subss (3), (4) or (5) of s 8.

- 9 During the course of argument for the plaintiff, counsel subjected the Agreement to an analysis in relation to each of these subspecies of credit agreements but I need not deal with all of them because counsel for the defendant contended only that the Agreement constituted a credit transaction as contemplated by s 8(4)(f), which reads as follows:

(4) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is-

- (a) a pawn transaction or discount transaction;
- (b) an incidental credit agreement, subject to section 5 (2);
- (c) an instalment agreement;
- (d) a mortgage agreement or secured loan;
- (e) a lease; or
- (f) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of-
 - (i) the agreement; or
 - (ii) the amount that has been deferred.

- 10 It will be noted that the legislature has identified the agreements hit by s 8(4)(f) by reference to their terms (“... *in terms of* ...”), something to which I shall return later. I therefore turn to summarise those terms of the agreement I regard as relevant to the enquiry.
- 11 In the section of the Agreement described as the Schedule, provision is made for 60 monthly rentals, all of the same amount, to be paid by the defendant “monthly in advance from the commencement date”.
- 12 Clause 2: Ownership of the goods vests in the plaintiff. The defendant never acquires ownership of the goods. I pause to mention that this means that the Agreement is not a “lease” for the purposes of s 8(4)(e) because a *lease* as defined in s 1 of the NCA is an agreement in terms of which, amongst other things, ownership of the goods passes to the consumer at the end of the term of the agreement. As has been observed, the *lease* contemplated by the NCA is not a lease at all (Guide to the National Credit Act, *Scholtz et al*, 8-9 per *JM Otto*) but the old hire purchase agreement.
- 13 Clauses 5.1 and 5.2: By signing the Agreement, the defendant acknowledges that he has inspected the goods and is satisfied with them. The defendant must at his own cost procure (from someone other than the plaintiff and described in the Agreement as the

supplier) and take delivery of the goods, accepting them on the plaintiff's behalf and holding them on behalf of the plaintiff for the duration of the Agreement.

- 14 Clause 5.3: The defendant is deemed to accept the goods on behalf of the plaintiff when they are delivered to him by the supplier and he acknowledges such delivery.
- 15 Clause 5.4: The defendant has no claim against the plaintiff if, after having signed the "schedule and acceptance certificate", it subsequently transpires that the goods are unacceptable to the defendant.
- 16 Clause 6: The question of maintenance of the goods is not dealt with in the Agreement and the monthly payments do not include any payment in respect of maintenance which, if dealt with at all, must be dealt with in a maintenance agreement, separate and distinct from the agreement.
- 17 Clause 9.1: If the defendant defaults in his obligation to pay, the plaintiff may terminate the Agreement, take possession of the goods, retain all amounts paid by the defendant and claim all amounts which are in arrears together with, as pre-estimated liquidated damages, the

future rentals which would have fallen due during the currency of the agreement.

- 18 Clause 9.3: If the defendant defaults in his obligation to pay, he must pay interest at the rate of 6% above the publicly quoted prime interest rate of the plaintiff's bankers at the nominal annual rate compounded annually.

Discussion

- 19 It seems to me essential that for an agreement to be brought within the reach of s 8(4)(f), it must provide for payment of an amount which

19.1 is *owed* by one person to another; and

19.2 is *deferred*.

- 20 The Agreement is simply not one in terms of which any payment of an amount owed is deferred. The defendant was obliged to pay the monthly rentals *in advance*. There can in my view be no question of the deferral of an obligation to pay in this context because there could be no deferral unless there was a prior obligation to pay which for monetary consideration was postponed to a later date.

- 21 Furthermore, in my view, to qualify under s 8(4) (f), there must in terms of the relevant agreement be a fee, charge or interest payable to the plaintiff in respect of the agreement or the amount that has been deferred. There is no such fee, charge or interest payable under the Agreement.
- 22 Counsel for the defendant submitted that the monthly rentals were in fact deferred because, so it was argued, the obligation to pay the rentals for months 2 to 60 were deferred until those months arrived. Counsel's submission is supported by Professor *Otto*. See Guide to the National Credit Act, *op cit*, at 8-10.
- 23 But that is not what the Agreement provides. The defendant is neither obliged nor entitled under the terms of the Agreement to defer any such payment (or to put it another way, he does not owe any amount for eg month 2 until the last day of month 1) and incurs no obligation to pay any fee, charge or interest if he chooses to wait until the day before the month in question before he pays the instalment for that month.
- 24 Lastly, counsel for the defendant submitted that if one had regard to the relationship between the parties and the fact that the goods are supplied not by the plaintiff but by a supplier, the true nature of the

agreement was a credit transaction in terms of which, in effect, the plaintiff provided the defendant with finance to enable it to acquire the use of the goods. Counsel referred me to the following passage from Guide to the National Credit Act where Professor *Otto* says the following at 8-10:

A lease in terms of which the lessee pays rent which does not include a fee, charge or interest, and in terms of which ownership remains with the lessor throughout, is not subject to the National Credit Act at all. A warning should be sounded here, however. One of the oldest tricks in the book is a contract of lease in terms of which the lessor charges a "flat rental" which, on the face of it, does not include any interest. However, if the financial realities of the contract are analysed, it will often become clear that the total rental represents full amortisation of the purchase price of the object the lessor himself paid to a third party to obtain the object in order to let it, and includes his profit as well. This profit is nothing other than disguised interest. In fact, such a contract often provides for a variable rental during the term of the contract which rental is determined by a particular reference rate, such as the prime rate of a certain bank. That is in itself a dead give-away. Courts will always look at the substance of an agreement and not be misled by its form. These so-called "interest-free" leases may well end up being subject to the National Credit Act, either as leases in terms of the Act or as credit agreements in the broad sense. [footnotes omitted]

- 25 In addition, I was referred during argument to an unreported judgment of Kruger J in the Free State High Court delivered on 22 October 2009 in the matter of *Absa Technology Finance Solutions Ltd v Pabi's Guest House CC and Others* under case no 2169/2008. This was an application for default judgment upon an agreement very similar to that with which I am dealing. The learned judge came to the conclusion with reference to *Tucker v Ginsberg* 1962 2 SA 58 W at 62F-H (at p15 of the typewritten judgment) that when a financial institution leases goods which are to be supplied by a trader, the likely inference is that interest will be payable, but that in the absence of such provisions in the contract, evidence will be required to show that interest has been stipulated and charges are included.
- 26 However, as the case before the learned judge was one in which default judgment was sought, he came to the conclusion that as he was bound to accept the allegations on the papers before him, he was bound to grant default judgment.
- 27 In *Tucker v Ginsberg* at 62F, the following was stated:
- As each party has given the transactions a different label, I think that it is appropriate to add here that the label used is not decisive. Despite the label, the Court must look at the nature of the transaction and not its object because, as stated above, the object is the same in both cases - see *Olds*

Discount Co. Ltd v John Playfair Ltd 1938 (3) AER 275 at p277, and in ascertaining its nature the Court must have regard mainly to its substance and not merely its form.

- 28 *Tucker v Ginsberg* was decided under the Usury Act, 37 of 1926. Under s 14(1) of the Usury Act, the provisions of the Usury Act applied to:

... any transaction which, whatever its form may be and whether or not it forms part of another transaction, is substantially one of money lending and whether or not the transaction forms part of any other transaction, and includes any arrangement under which goods are purchased under a condition of re-purchase at a higher price. In any such arrangement for re-purchase the transaction shall be regarded as a loan of the amount of the purchase price, and the excess of the higher price over the lower price shall be deemed to be interest on the lower price and subject to the provisions of the Act.

In those circumstances it was of course entirely appropriate to look to see whether the transaction was substantially one of money lending.

- 29 But there is no equivalent provision under the NCA. Section 8(4)(f) requires, as I have pointed out, that the transaction be examined by reference to the terms of the agreement under consideration.

- 30 The situation would be different if the case were made that the agreement under scrutiny is a simulated transaction or a transaction in fraud of the NCA. As Innes CJ said in *Dadoo Ltd v Krugersdorp Municipality* 1920 AD 530 at 543:

That a transaction *in fraudem legis* is of no effect is an undoubted principle of our law. But the extent and limits of the doctrine are not easy to determine. Speaking generally, every statute embodies some policy or is designed to carry out some object. When the language employed admits of doubt, it falls to be interpreted by the Court according to recognized rules of construction, paying regard, in the first place, to the ordinary meaning of the words used, but departing from such meaning under certain circumstances, if satisfied that such departure would give effect to the policy and object contemplated. I do not pause to discuss the question of the extent to which a departure from the ordinary meaning of the language is justified, because the construction of the statutory clauses before us is not in controversy. They are plain and unambiguous. But there must, of course, be a limit to such departure. A Judge has authority to interpret, but not to legislate, and he cannot do violence to the language of the lawgiver by placing upon it a meaning of which it is not reasonably capable, in order to give effect to what he may think to be the policy or object of the particular measure.

- 31 And in *Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd* 1941 AD 369, Watermeyer JA said at 395-396:

A transaction is not necessarily a disguised one because it is devised for the purpose of evading the prohibition in the Act or avoiding liability for the tax imposed by it. A transaction devised for that purpose, if the parties honestly intend it to have effect according to its tenor, is interpreted by the Courts according to its tenor, and then the only question is whether, so interpreted, it falls within or without the prohibition or tax. A disguised transaction in the sense in which the words are used above is something different. In essence it is a dishonest transaction: dishonest, in as much as the parties to it do not really intend it to have, *inter partes*, the legal effect which its terms convey to the outside world. The purpose of the disguise is to deceive by concealing what is the real agreement or transaction between the parties. The parties wish to hide the fact that their real agreement or transaction falls within the prohibition or is subject to the tax, and so they dress it up in a guise which conveys the impression that it is outside of the prohibition or not subject to the tax. Such a transaction is said to be *in fraudem legis*, and is interpreted by the Courts in accordance with what is found to be the real agreement or transaction between the parties.

- 32 The legislature was at pains to exclude both the common law lease of goods *simpliciter* and the lease of immovable property, irrespective of its form - as to which see s 8(2)(b) - from the ambit of the NCA. The type of lease under discussion, where the lessor acquires the goods

for the purpose of leasing them to the lessee, has been part of our commercial life for generations. If the legislature had wished to bring such a lease within the NCA as a credit transaction it could easily have done so by the use of plain and unambiguous language to that effect. After pointedly excluding the common law lease *simpliciter* from the reach of the statute in s 8(4)(e), it is most unlikely that the legislature intended to bring a subset of the common law lease within the statute under s 8(4)(f).

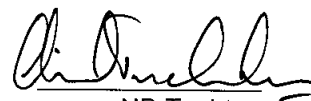
- 33 Amongst the purposes of the NCA as stated in its long title are the intention to promote access to consumer credit and generally to regulate consumer credit. "Credit" as defined in the NCA means, when used as a noun, (a) the deferral of payment of money owed to a person, or a promise to defer such a payment; or (b) a promise to advance or pay money to or at the direction of another person. A common law lease such as the Agreement does not involve the provision of credit either as defined in the NCA or as the term is generally understood in commerce. A lessor who buys goods for the purpose of leasing them to a specific lessee does not extend credit to such a lessee, regardless of how the lessor calculates the rentals he wishes to receive, any more than does a landlord who buys a building not for his own use but for the purpose of accommodating tenants.

- 34 The Agreement is therefore not one which is calculated to thwart the objects of the NCA. Even if one assumes that its terms were carefully drafted to keep it outside the reach of the NCA, this would make no difference. The legislature has decided that common law leases not providing for the deferral of an amount owed should not be hit by the NCA. Persons of business are fully entitled to regulate their affairs to take advantage of this legislative decision.
- 35 The defendant has not raised a defence that the Agreement is a simulation and that the true inwardness of the contractual relationship between the parties is that it is a credit transaction. There is therefore no reason to consider this aspect.
- 36 The parties were agreed on the form of the order I should make. Costs were however not argued and I shall therefore rule that the costs of the argument before me are to be reserved for later determination.

Order

- 37 I make the following order:

- 37.1 The agreement pleaded by the plaintiff in paragraph 3 of the particulars of claim and reproduced at pages 13-14 of the paginated pleadings is not a credit transaction as contemplated in s 8(4)(f) of the National Credit Act, 34 of 2005 ("the NCA");
- 37.2 The plaintiff is not barred from proceeding with the action by reason of the provisions of s 129 read with s 130 of the NCA;
- 37.3 The trial of this action is postponed sine die;
- 37.4 The costs of the argument before me in relation to the applicability of the provisions of the NCA mentioned above to the agreement pleaded by the plaintiff are reserved for later determination. Either party may set the matter down on the opposed motion roll or the trial roll for argument on the question of these costs.



NB Tuchten
Acting judge of
the High Court
2 March 2010
AbsaVlijoen28978.08

Argued:	26 February 2010
For plaintiff:	Adv JJ Durandt, instructed by Jay Mothibi Inc, Johannesburg
For defendant	Adv M van Rooyen, instructed by Le Grange Attorneys, Pretoria