

FORM A
FILING SHEET FOR EASTERN CAPE HIGH COURT, POR ELIZABETH JUDGMENT

PARTIES:

CARTER TRADING (PTY) LTD Plaintiff
And
VENECIA BLIGNAUT Defendant

- Registrar: **CASE No. 444/09**
- Magistrate:
- High Court: **EASTERN CAPE HIGH COURT, PORT ELIZABTH**

DATE HEARD: 5 May 2009

DATE DELIVERED: 14 May 2009

JUDGE(S): Van der Byl, AJ

LEGAL REPRESENTATIVES –

Appearances:

for the Plaintiff(s)/Applicant(s)/ Appellant(s): **ADV C K MEY**

-
- for the Defendant(s)/Respondent(s): **ADV D A SMITH**

Instructing attorneys:

- Plaintiff(s)/ Applicant(s)/Appellant(s): **VAN ZYL'S INCORPORATED**
- Defendant(s)/Respondent(s): **J R BESTER & ASSOCIATES**

CASE INFORMATION -

- *Nature of proceedings* :

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IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE - PORT ELIZABETH)

CASE No. 444/09

In the matter between:-

CARTER TRADING (PTY) LTD

Plaintiff

and

VENECIA BLIGNAUT

Defendant

JUDGMENT

Van der Byl, AJ:-

Introduction

[1] This is an application for summary judgment in terms of Rule 32 for an amount due to the Plaintiff in terms of an Acknowledgement of Debt.

[2] In its Particulars of Claim the Plaintiff contends -

(a) that the Defendant on 23 December 2008 signed an Acknowledgement of Debt in respect of goods sold and delivered to the Defendant;

(b) that in terms of the Acknowledgement of Debt the Defendant acknowledged that she was indebted to the Plaintiff in an amount of R107 082,30 and that the amount was to be paid in full by 16h00 on 24 December 2008, being the date immediately after the date on which the Acknowledgement of Debt was signed;

(c) that the Defendant failed to pay the debt so owed to the Plaintiff.

[3] On the Defendant having entered an appearance to defend, the Plaintiff filed an application for summary judgement against the Defendant for -

(a) payment of the sum of R104 587,70, being the amount of R107 082,32, less less R2 494,60 worth of goods it recouped during January 2009.;

(b) interest on the aforesaid amount at the legal rate of 15,5 per cent per annum; and

(c) costs of suit.

[4] The Defendant, thereupon, filed, in opposition to the application for summary judgment, an opposing affidavit, in which she states -

(a) that the Acknowledgement of Debt in question is a credit agreement described in section 8(4)(f) of the National Credit Act, 2005 (Act 34 of 2005) ("*the Act*"); and

(b) that the Plaintiff failed to comply with the provisions of sections 129 and 130 of the Act.

[5] From the Defendant's opposing affidavit it is apparent (and it was not contended otherwise by Mr. Smith who appeared on behalf of the Defendant) that it is not disputed by the Defendant -

(a) that she is liable to pay the sum claimed by the Plaintiff; and

(b) that she validly concluded the Acknowledgement of Debt in question.

[6] Ms. Mey who appeared on behalf of the Plaintiff, on the basis that for those reasons the merits of the matter were not in dispute, contended -

(a) that an acknowledgement of debt in effect constitutes a settlement between parties (and, therefore, a novation of the sale agreement) which is not a "*credit agreement*", as defined in the Act, and, therefore, not subject to the Act; and

(b) that the Plaintiff was, therefore, under no obligation to comply with the provisions of sections 129 and 130 of the Act.

[7] On the other hand, Mr. Smith contended on behalf of the Defendant -

(a) that, upon a proper interpretation of the provisions of, particularly, subsection (1)(b), read with subsection (4)(f) of section 8 of the Act, the Acknowledgement of Debt relied upon in this matter is indeed a “*credit agreement*” envisaged in sections 129 and 130 of the Act; and

(b) that, conceding, correctly in my view, that the failure to comply with the provisions of sections 129 and 130 of the Act is in itself no defence on the merits of the Plaintiff’s claim, the matter should be adjourned as envisaged in section 130(4)(b) of the Act and an order be made as to the steps to be taken by the Plaintiff before the matter may be resumed.

[8] I am accordingly called upon to pronounce on the question whether the Acknowledgement of Debt concerned is, as is contended on behalf of the Defendant, indeed a credit agreement envisaged in the Act.

[9] Should I hold that the Acknowledgement of Debt concerned is, upon a proper interpretation of the relevant provisions of the Act, not a credit agreement, it would in the circumstances follow that the Plaintiff will be entitled to summary judgment.

[10] Should I, however, hold that the Acknowledgement of Debt concerned is indeed a credit agreement envisaged in the Act, the question of the application of the provisions of section 130(4)(b) of the Act will arise.

[11] I deal *seriatim* with these issues.

Is the Acknowledgement of Debt in question a “*credit agreement*” as envisaged in the Act?

[12] This question requires a scrutiny of the provisions of subsection(1)(b), read with subsection (4)(f), of section 8 of the Act and, of course, also of the terms of the Acknowledgement of Debt on which the claim is based.

[13] Those provisions, in so far as they are relevant for present purposes, read as follows:

“ 8. (1) an agreement constitutes a credit agreement for the purposes of this Act if it is -

(a) a credit facility;

(b) a credit transaction, as described in subsection (4);

(c) a credit guarantee;

(d);

(2)

(3)

(4) An agreement, irrespective of its form constitutes a credit transaction if it is -

(a);

(b);

(c);

(d);

(e);

(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.”.*

[14] As far as the Acknowledgement of Debt is concerned, I need to point out that it consists of a roneoed form which seems to be ordinarily used in the Plaintiff's business to record an acknowledgement of debt.

Paragraphs 1, 2, 3 and 7 thereof read as follows (the words which are underlined in the quoted passages are those which were inserted in handwriting in the blank spaces provided therein):

- “1. *I undertake to pay the undermentioned amount, interest calculated monthly in advance ~~from~~ on the 24.12/2008 by 4pm (16h00 on the balance of capital owing from time to time at the rate of 15.5 % [fifteen and a half percent] per annum, the cost of negotiating and preparing this Acknowledgement of Debt and collection commission calculated with the Rules of the Law Society of the Cape of Good Hope.*
2. *The creditor shall be entitled from time to time to increase the interest rate to the maximum allowed by law, upon having given me 15 (fifteen) days [-----] written notice to such effect.*
3. *I undertake to make payments of R102 467,30 and R4615,00 (crates) [] each, the first of such payments being due on 24/12/2008 by 4pm (16h00 full amount and each subsequent payment being due on the _____ day of each and every _____ thereafter and I agree that the Creditor shall be entitled to review the amount of the aforementioned payment by giving me 30 (Thirty) days notice in writing of his intention to review the amount.*
7. *Should I fail to make any payment promptly on due date, the total amount owing will immediately become due and payable. I further accept that in such circumstances I shall be liable for the payment of all legal fees on the attorney and own client scale of costs, including collection commission, incurred by the Creditor in enforcing*

compliance with my obligations in terms hereof.”.

It is from a reading of these passages obvious that the roneoed form was designed to provide for circumstances where the amount owing was to be paid by way of instalments and not, as in this case, by way of one single payment and, furthermore, the form was not filled in or adapted with proper care so as to properly provide for the circumstances of this matter.

No point was, however, made in argument on the efficacy of the Acknowledgement of Debt relied upon by the Plaintiff.

[15] I will according, in pronouncing upon the issues raised before me, accept that the Defendant by having signed this Acknowledgement of Debt on 23 December 2008 in effect intended -

(a) to acknowledge that she is indebted to the Plaintiff in the sum of R102 467,30 and R4 615 for crates;

(b) to undertake to pay that sum on 24 December 2008 by 16h00 together with “*the cost of negotiating and preparing this Acknowledgement of Debt and collection commission calculated with (sic) the Rules of the Law Society of the cape of Good Hope*”;

(c) to undertake that, should she fail to make the payment promptly, she will be liable for the payment of all legal fees on the attorney and own client scale of costs, including collection commission, incurred by the Plaintiff in enforcing compliance with her obligations under the Acknowledgement of Debt.

[16] From the foregoing it in my view follows that the payment of the amount owing was deferred to 24 December 2008 and that the Defendant undertook to pay, in addition to the amount owing, at least the cost of preparing the Acknowledgement of Debt (whatever it may have been) and, in the event of a failure to pay the sum owing, also collection commission and legal fees.

[17] In the application of these terms of the Acknowledgement of Debt to the provisions of section 8(4)(f) of the Act it would appear that those terms are exactly what is envisaged in the Act to be a credit agreement, namely, an agreement in terms of which payment is deferred and at least a fee or charge is payable in respect of the Acknowledgement of Debt and interest and legal fees are payable in the event of a failure by the Defendant to pay the amount as agreed therein.

[18] For this reason alone the Acknowledgement of Debt in my opinion clearly falls within the ambit of the provisions of section 8 of the Act and, therefore, constitutes a credit agreement as envisaged in the Act.

[19] There are in my opinion also other and, perhaps, even more persuasive considerations on which the Acknowledgement of Debt in question must be adjudged as being a credit agreement envisaged in the Act.

[20] As is apparent from the Particulars of Claim, the Acknowledgement of Debt in question was concluded in respect of goods sold and delivered on credit with the obvious intention that the amount owing in respect thereof should be paid the following day.

[21] In this regard I can refer to subsection (1)(a), read with subsection (3), of section 8 of the Act which reads, in so far as it is relevant for present purposes, as follows:

“ 8. (1) an agreement constitutes a credit agreement for the purposes of this Act if it is -

(a) a credit facility, as described in subsection (3);

(b) ;

(c) ;

(d)

(2)

(3) An agreement, irrespective of its form, constitutes a credit facility if, in terms of that agreement -

(a) a credit provider undertakes -

(i) to supply goods to the consumer ; and

(ii) either to -

(aa) defer the consumer's obligation to pay any part of the cost of goods contemplated in subparagraph (i); or

(bb); and

(b) any charge, fee or interest is payable to the credit provider in respect of -

(i) any amount deferred as contemplated in paragraph

(a) (ii) (aa); or

(ii)”.

[22] It is apparent from these provisions that an agreement in terms of which a credit provider undertakes to supply goods to a consumer and to defer the consumer's obligation to pay any part of the cost of such goods together with any charge, fee or interest payable to the credit provider in respect of any amount so deferred, is regarded as a credit facility and therefore to be

a credit agreement.

[23] In so far as the Plaintiff provided goods to the Defendant on credit on the basis set out in the Acknowledgement of Debt which was eventually concluded, it would appear that such an agreement would in any event have been a credit agreement.

[24] As I have already indicated, Ms. Mey submitted, relying on three decisions dealing with the question whether one agreement substituted for another constitutes novation, that an acknowledgement of debt constitutes a settlement between parties and, therefore, a novation of the Defendant's obligation to pay for the goods sold and delivered.

[25] In my opinion the Acknowledgement of Debt in this matter is not a novation of the obligations of the Defendant under the agreement in respect of the goods sold and delivered. It rather appears that the Acknowledgement of Debt has been intended to be a confirmation that creates a further obligation relating to the same performance and not as a replacement of the obligation which existed under the agreement in respect of the goods sold and delivered (see: ***Adams v S A Motor Industry Employers Association 1981(3) SA 1189 (A) at 1199H***).

[26] In my opinion the Acknowledgement of Debt is indeed a credit agreement as envisaged in the Act and that, because of the Plaintiff's failure to comply with the provisions of sections 129 and 130 of the Act, the summons must be regarded as having been prematurely issued so that summary judgment cannot at this stage be considered.

[27] This brings me to the second issue to which I have already referred, namely, whether the provisions of section 130(4)(b) of the Act can find any application in this matter.

Application of the provisions of section 130(4) of the Act

[28] Both counsel argued that, should I conclude that the Acknowledgement of Debt in this matter is indeed a credit agreement, I should adjourn this application as provided in section 130(4)(b) of the Act.

[29] Section 130(4)(b) of the Act reads, in so far as it is relevant for present purposes, as follows:

“ (4) In any proceedings contemplated in this section, if the court determines that -

(a)

(b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3) (a), the court must -

(i) adjourn the matter before it; and

(ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed;

..... ”

[30] In considering Counsel's submissions on the application of these provisions, I asked myself the question whether these provisions can find application in an application for summary judgment. In summary judgment proceedings under these circumstances the failure to comply with the provisions of sections 129 and 130 of the Act is not a defence on the merits of the Plaintiff's claim. The question which came to mind is whether the application of the provisions

of section 130(4) of the Act should not be regarded as an issue which should be raised in the action proceedings.

In my view those provisions can in the circumstances find application in these proceedings since the Plaintiff may, bearing in mind that the merits of the matter are not in dispute, after the remedies referred to in section 129(1)(a) of the Act, if resorted thereto, have been exhausted, resume its application for summary judgment (see: ***ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors 2009(2) SA 512 (D) at 518B-F, para [24] and [25]***).

Costs

[31] The Defendant was clearly entitled to oppose these proceedings because the summons was, the Plaintiff having failed to comply with the provisions of sections 129 and 130 of the Act, prematurely issued.

Order

[32] For the reasons set out in this judgment the following order is made:-

1. The Plaintiff's application for summary judgment is postponed *sine die*;
2. The Plaintiff may not set this matter down until -

(a) it has complied with the provisions of section 129(1)(a), read with section 130, of the National Credit Act, 2005; and

(b) it has, upon completion of the remedies referred to in section 129(1)(a) of the Act, if resorted to, or otherwise become entitled to resume its application for summary judgement.

3. The Plaintiff is ordered to pay the Defendant's costs incurred in opposing this application.

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P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF PLAINTIFF
On the instructions of:-

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Tel: (041) 363 3677

ON BEHALF OF DEFENDANT

On the instructions of:

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DATE OF HEARING

5 May 2009

JUDGMENT DELIVERED ON

14 May 2009