

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



Case number: 2024-096735

Date of hearing: 18 February 2025

Date delivered: 3 March 2025

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED	
DATE 3/3/25	SIGNATURE [REDACTED]

In the application of:

THE PROFIT HUB (PTY) LTD

Applicant

and

ZUWON CONSULTANTS (PTY) LTD
THOKOZANI LLOYD NDAWONDE

First Respondent
Second Respondent

JUDGMENT

SWANEPOEL J:

[1] This matter came before me in the unopposed motion court. The applicant seeks payment from the first respondent (and from the second respondent as surety) of R 785 292.91 based on an Invoice Discounting Agreement. When I read the papers, it immediately occurred to me that the agreement might be a credit agreement in terms of the National Credit Act, 34 of 2005 ("the Act"). The applicant did not make any allegation that there had been compliance with the Act. Therefore, when counsel mentioned the matter, I asked the question whether the agreement relied upon is a credit agreement within the meaning of the Act.

[2] Counsel has provided me with heads of argument on the issue, for which I am grateful.

[3] It is widely accepted¹ by now that one should have regard to the substance of an agreement, and not merely at the form, when considering what the nature of the agreement is. There are authorities, that I will address hereunder, that have held that a discounting agreement is not a credit agreement. However, there is no magic in the words "discounting agreement", and to merely call an agreement such, does not exclude it from the definition of a credit agreement. To make a determination on this issue, one should look to the terms of the agreement.

[4] The agreement in this case has the following material terms:

[4.1] The first respondent, being a supplier of goods, agreed with the applicant to discount certain invoices for which the first respondent was awaiting payment. The applicant advanced to the

first respondent an amount less than the invoiced amount. In exchange, the applicant acquired all of the first respondent's right title and interest arising from the invoices by way of an 'out-and-out cession'.

[4.2] When an invoice that has been discounted is paid, the first respondent makes payment to the applicant of the amount advanced, plus a factoring fee and any applicable penalty interest for late payment. The balance of the invoice is retained by the first respondent.

[4.3] The first respondent pays the applicant a 'factoring fee' equal to 13% of the amount advanced.

[4.4] The first respondent is liable to pay a penalty fee equal to 8% per month, calculated daily, should the outstanding amount not be repaid within the agreed repayment period.

[4.5] The first respondent also borrowed R 2 000 from the applicant as a 'legal fee', which was added to the total amount owed by the first respondent to the applicant.

[4.6] The first respondent unconditionally and irrevocably guaranteed payment of the amounts owed to the applicant, including the factoring fees, penalty fees and the legal costs, within the agreed repayment period.

[4.7] In the event of an invoice becoming irrecoverable, the applicant was entitled to demand immediate payment by the respondent of all amounts owed to it in respect of the particular invoice.

[5] To sum up the aforesaid: the applicant advances monies to the first respondent, who cedes his right title and interest in a specific agreed invoice to the applicant as security. When the invoice is paid, the amount advanced, plus a factoring fee and penalty fee (if applicable) is repaid to the applicant, whilst the first respondent retains the balance of the money.

[6] Section 8 (3) (a) and (b) of the Act reads as follows:

"(3) An agreement, irrespective of its form, but not an agreement contemplated in subsection (2) or section 4 (6) (b), constitutes a credit facility if, in terms of that agreement-

(a) a credit provider undertakes-

(i) to supply goods or services or to pay an amount or amounts, as determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and

(ii) either to-

(aa) defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of an amount contemplated in subparagraph (i); or

(bb) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in subparagraph (i); 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

(j) any amount billed as contemplated in paragraph (a) (ii) (bb) and not paid within the time provided in the agreement."

[7] A credit transaction is defined in section 8 (4) as:

"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 transaction, 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.”

[8] The applicant pointed me to three relevant judgments in which it was held that a discounting agreement is not a credit agreement. The first was *Bridgeway Ltd v Phillip*². In this case the applicant advanced R 350 000 to the respondent who had sold an immovable property and was awaiting payment of the purchase price. The respondent raised the defence, amongst others, that the agreement was a credit agreement, and that the applicant had not complied with the Act. The Court referred to *De Villiers v Roux*³ where it was said that:

“The difference between advancing, lending money and discounting is distinct and palpable. Discounting is purchasing, not lending. The discounter whether of a bill or bond, or any other security, becomes the owner. If the thing bought, turns out, when realized, to be of less value than the price paid for it, the loss falls upon the purchaser or discounter. If a profit or gain is made on the transaction, it belongs wholly to the discounter or purchaser.”

[9] The Court, in *Bridgeway*, went on to say:

“I accept, as having merit the submission, by Mr Subel that the agreement in issue was a discount sale which provided the respondent with ready money and clearly distinct from money lending or credit transaction because in the latter instance, the transaction occurs when a party borrows money from the lender and undertakes to pay an equal amount in full, in instalments or periodically. The lender is compensated

for laying out his money by the interest that he charges the borrower.

See also section 8 (4) (f) (i) or (ii) of the Act.”

[10] The Court held that the discounting agreement, in the form that it was, was not a credit agreement within the meaning of the Act. The difference between the *Bridgeway* scenario and this case is that in *Bridgeway* the discounter was to receive its dues by way of the profit that it stood to make on the discounted transaction or bond. It was to receive the entire amount payable from the transaction, and whether it made a profit or loss would be determined by the amount received from the transaction.

[11] In *Renier Nel Inc and Another v Cash on Demand*⁴ a finance company provided advances on pending property transactions in exchange for purchasing the seller's right title and interest in and to the proceeds of the transactions. The Court summarized the claim as follows:

“The claim would be defined as being the right to receive payment of a surplus after transfer. The surplus, in turn, was defined as the net amount that would otherwise have been payable to the seller after all specified deductions (eg payments in terms of a mortgage bond registered over the property) had been made. The applicant would charge a ‘discounting fee’.

[12] In *Renier Nel* the Court held that the agreement resembled more closely an agreement of purchase and sale (of the respondent's right title and interest), than one of lending. Once again, a distinction between

Renier Nel and this case lies in the fact that, although the applicant 'owns' the invoices as security, upon payment being received, the respondent retains the balance after payment of the entire amount owing, including penalty fees where applicable, and a factoring fee. The discounting fee, being the difference between the claim amount and the amount advanced accrued to the first respondent.

[13] The facts were similar in *Rodel Finance Services (Pty) Ltd v Naidoo and Another*⁵ to *Renier Nel*, in that the applicant advanced money to the respondent against the purchase of claims that the respondent held. The Court found, having relied on *Bridgeway*, that a discount agreement in this form is not a credit agreement.

[14] The difference between the facts in *Bridgeway*, *Renier Nel* and *Rodel*, as opposed to this case, is palpable. In all three of those cases the financier purchased the respondent's claim to receive payment from certain transactions. The financier's profit or loss was determined by whether it received the full value of the claim, in which case the difference between that amount and the discounted advance would be its profit.

[15] In this case, the applicant stood to receive the exact amount that was advanced, plus the factoring fee and penalty fees where applicable. The balance was to accrue to the first respondent. That is a classic lending transaction, in which the rights arising from the invoice is ceded to the applicant as security for repayment of the loan. The applicant

derives its profit from the factoring fee and the penalty fee, and not, as in *Bridgeway* and *Renier Nel*, from the surplus of the claim.

[16] In this case the applicant advanced monies to the first respondent. It deferred repayment for the duration of the repayment period. It charged a factoring fee, and if the repayment was outside of the repayment period, it raised penalty fees of 8% per month. In my view this agreement falls squarely within the definition of a credit facility in section 8 (3) (a). I therefore come to the conclusion that the agreement is a credit agreement.

[17] In the premises, absent an averment that the Act has been complied with, and that the applicant is a registered credit provider, judgment cannot be granted. It goes without saying that if judgment cannot be granted against the first respondent, it can also not be granted against the second respondent as surety.

[18] I make the following order:

The application is dismissed.



SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

Counsel for the applicant:

Adv. J Lerm

Instructed by:

Van Rooyen & Associates

Date heard:

18 February 2025

Date of judgment:

3 March 2025

¹ Tucker v Ginsberg 1962 (2) SA 58 (WLD)

² 2008 (6) SA 123 (W)

³ 1916 CPD at 298

⁴ 2011 (5) SA 239 (GSJ)

⁵ (13335/2009) (2011) ZAKZDHC 7