IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Not reportable

Case no: A131/2024

In the matter between:

TIMAC AGRO SOUTH AFRICA (PTY) LTD **APPELLANT / PLAINTIFF**
[Registration No: 2011/005705/07]

and

THEUNIS LODEWYK ADRIAAN NEL **RESPONDENT / DEFENDANT**
[ID No. 7[…]]

Neutral citation: *Timac Agro South Africa (Pty) Ltd v Nel* (A131/2024) [2026] ZAFSHC 297 (11 May 2026)

Coram: VAN ZYL J *et* CHESIWE J *et* MANYE AJ

Heard: 25 July 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by e-mail and released to SAFLII. The time and date for hand-down is deemed to be 15h00 on 11 May 2026.

Summary: Appeal – incidental credit agreement – commencement of proceedings without compliance with the provisions of ss 129 and 130 of the National Credit Act, 34 of 2005 – proceedings not a nullity – adjournment of proceedings to give notice, whereafter proceedings may be resumed.

ORDER

1 The appeal is upheld; the matter is referred back to the court *a quo* and the order of the court *a quo* is set aside and substituted with the following order:

'1.1 The trial is adjourned *sine die*.

1.2 The plaintiff is ordered to comply with the provisions of sections 129 and 130 of the National Credit Act, 34 of 2005, in respect of the Acknowledgement of Debt referred to in the plaintiff`s particulars of claim.

1.3 Leave is granted to the plaintiff to amend its particulars of claim after compliance with paragraph 1.2 above, the costs of which amendment and the consequent amendment of the defendant`s plea, if any, are to be paid by the plaintiff.

1.4 The plaintiff is granted leave to resume the action before the court *a quo* after compliance with paragraphs 1.2 and 1.3 above.

1.5 The costs of the action stand over for later adjudication.'

2 The respondent is ordered to pay the costs of the appeal, counsel`s fees on Scale B.

JUDGMENT

Van Zyl J (Chesiwe J *et* Manye AJ concurring)

[1] This is an appeal against the following order made by the court *a quo* (single judge of this Division):

'1. The plaintiff's action is declared to have been issued prematurely.

2. The plaintiff may not commence any legal proceedings to enforce the agreement between the parties before:

2.1 First providing the defendant with the notice as contemplated in section 129(1)(a) of the National Credit Act, 34 of 2005; and

2.2 Meeting any further requirements set out in section 130(1) of the National Credit Act, 34 of 2005;

3. The plaintiff to pay the costs of suit.'

[2] I will refer to the parties as in the present appeal.

Background

[3] On or about 13 June 2018 the appellant and the respondent concluded a written, what was called, credit facility, a copy of which is annexed to the particulars of claim as annexure 'A'. The credit facility was concluded subject to written terms and conditions, a copy of which is annexed to the particulars of claim as annexure 'B1' (signed copy). In accordance with the terms and conditions, and

as also averred in the particulars of claim, the credit facility and the terms and conditions are collectively referred to as ‘the agreement’.

[4] In terms of the agreement, the appellant and the respondent agreed that the appellant would sell and deliver fertilizer to the respondent upon the latter’s request.

[5] With reference to the agreement, the court *a quo* adjudicated the matter on the basis that the appellant and the respondent agreed that the respondent must pay within 180 days from the delivery of the fertilizer and the appellant was entitled to charge interest at the rate of 2% above the prime interest rate per month charged by Absa Bank Limited (which was 10% *per annum*) from the date that the payment became due until the payment was made in full.

[6] The appellant invoiced the respondent for the fertilizer sold and delivered. The respondent failed to pay the appellant the full amount due in respect of the said fertilizer. The balance remained outstanding.

[7] The appellant caused a notice complying with the provisions of s 129(1)*(a)* of the National Credit Act 34 of 2005 (‘the NCA’), to be delivered via registered mail to the respondent. The said notice was dated 21 January 2020.

[8] The respondent answered the appellant’s s 129-notice through his attorney at the time, Jac N Coetzer, who addressed correspondence to the appellant’s attorneys of record, which letter is attached to the particulars of claim as annexure ‘G’. In terms thereof:

(a) The respondent acknowledged receipt of the appellant’s s 129-notice.
(b) The respondent indicated that he wants to conclude an agreement in terms of which the outstanding debt is settled via instalments.
(c) Respondent tacitly elected not to exercise any remedies provided to him in terms of s 129(1)(a) of the NCA.

[9] On 19 March 2019, the respondent signed a written Acknowledgement of Debt, attached to the particulars of claim as annexure ‘D’. In terms of the

Acknowledgement of Debt, the respondent undertook to settle the outstanding amount due to the appellant, namely R1 582 642.26, in three equal instalments of R527 547.42 each, the first became payable on 31 May 2020 and the last instalment on 31 July 2020.

[10] The respondent only made three partial payments to the appellant, namely R225 000.00 on 8 June 2020, R50 000.00 on 30 June 2020 and R50 000.00 on 17 July 2020.

[11] As the Acknowledgement of Debt contained an acceleration clause, the entire outstanding amount due by the respondent to the appellant became payable on 31 May 2020.

[12] In terms of paragraph 17 of the particulars of claim the Acknowledgement of Debt does not constitute a compromise or novation of the agreement. Furthermore, it is averred at paragraph 22 of the particulars of claim that the agreement and the Acknowledgement of Debt constitutes an incidental credit agreement as defined in s 1 of the NCA.

[13] In the appellant's particulars of claim, at paragraph 23 thereof, the appellant averred as follows:

> 'In light of the fact that the agreement and the acknowledgement of debt constitute an '*incidental credit agreement*', the plaintiff was exempted from the following requirements of the NCA:
>
> a. registration as credit provider;
>
> b. pre-agreement disclosures;
>
> c. the requirements pertaining the form and content of agreements;
>
> d. unlawful agreements and unlawful provisions in agreements;
>
> e. reckless credit; and
>
> f. the dispute settlement mechanisms of the NCA.'

[14] In his plea, the defendant pleaded as follows:

> 'Defendant pleads that both the purported agreements, annex A and the purported acknowledgment of debt, annex D (credit agreements) are in their entirety – and

not only partially as averred by the Plaintiff – regulated by the National Credit Act (NCA) and accordingly pleads . . .'

[15] In addition the defendant raised special pleas in respect of the following:

(a) Non-compliance with the provisions of Rule 41A.
(b) Lack of jurisdiction of the High Court.
(c) Contravention of the provisions of Part D of Chapter 4 of the NCA.
(d) Contravention of the provisions of Sections 103 and 104 of the NCA.
(e) Non-compliance with the provisions of Sections 123, 129 and 130 of the NCA 'by not affording the defendant the opportunity to remedy the alleged defaults as required by the NCA'.
(f) Unlawfulness and ineffectiveness of the certificate of balance.
(g) Unlawfulness of the acceleration provisions.

[16] The defendant also pleaded to the merits of the appellant's particulars of claim.

[17] In addition the defendant filed three conditional counterclaims based on s 110, Part D of Chapter 4 and Part A of Chapter 5 of the NCA, respectively.

[18] At the inception of the trial the parties requested the court *a quo* to make a ruling as to which party had the duty to begin with the presentation of evidence. The court *a quo* ruled that such duty rested upon the defendant. The defendant thereupon closed his case without presenting any evidence. The appellant called two witnesses to testify in support of its case. Thereafter the appellant applied for the amendment of its prayers as contained in the particulars of claim.

Findings by the court *a quo*

[19] The court *a quo* made the following main findings which are relevant to the present appeal:

'[14] The crucial point for determination is whether the credit facility agreement and the acknowledgement of debt were incidental agreements or not. . . .

[20] . . . I conclude, therefore, that the transaction or transactions that the parties entered into were incidental credit transactions.

[22] The long and short of the defendant's contention is that after the section 129 notice and the signing of the acknowledgement of debt, the amount of R325 000.00 was paid to the plaintiff. The settlement that was reached in terms of the acknowledgement of debt, irrespective of whether it was a novation of compromise, constituted a new arrangement of payment that the defendant was entitled to remedy. The defendant was not afforded the opportunity to remedy his default in terms of the acknowledgement of debt as no section 129 notice was addressed to him. The plaintiff used a "stale" section 129(1)(a) notice to initiate legal proceedings to enforce the agreement whereas the subsequent default obliged the plaintiff to issue a fresh section 129(1)(a) notice.

[26] There are two statutory conditions which must be met before the credit provider may institute litigation under section 129. In peremptory terms, the section declares that legal proceedings to enforce the agreement may not commence before (a) providing notice to the consumer; and (b) meeting further requirements set out in section 130. The two sections must be read together. When a credit provider seeks to enforce the agreement by means of litigation, it must first show compliance with section 130, which, by extension, refers back to section 129. The application of these sections is triggered by the consumer's failure to repay the loan. These sections suspend the credit provider's rights under the credit agreement until certain steps have been taken. The credit provider is not entitled to exercise its rights immediately under the agreement. It is first required to notify the consumer of the specific default and demand that the arrears be paid. If the consumer pays the arrears, then the dispute is settled.

[27] Section 130(3)(a) of the NCA provides that despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with. The plaintiff has not complied with the requirements of section 129 read with section 130, having as consequence that the action was instituted prematurely. The plaintiff must first issue a notice in terms of section 129(1)(a) of the NCA before any further steps could be pursued against the defendant.'

[20] The court *a quo* consequently made the order quoted at the beginning of this judgment.

Application for leave to appeal

[21] This appeal is with leave of the court *a quo*.

[22] The grounds of the application for leave to appeal are, *inter alia*, the following:

> '2. The learned Judge erred by finding in paragraph [22] of the judgment that the acknowledgment of debt "…c*onstituted a new arrangement of payment that the defendant was entitled to remedy*". This finding is in direct contradiction of the judgment of the Supreme Court of Appeal in *Ratlou v MAN Financial Services (Pty) Ltd 2019 (5) SA 117 (SCA)* . . .
>
> 3. The learned Judge should have held that the acknowledgment of debt signed by defendant was linked to the underlying *causa*, the credit facility. Accordingly, in the absence of express wording in the acknowledgement of debt to the contrary, the plaintiff was not required to comply with the provisions of s 129 and 130 of the NCA for a second time upon the default of the defendant.
>
> 4. The learned Judge erred by finding that the plaintiff used a "…'*stale' section 129(1)(a) notice to initiate legal proceedings to enforce the agreement whereas a subsequent default obliged the plaintiff to issue a fresh Section 129(1)(a) notice*". The learned Judge erred by relying on *Mashele v BMW Financial Services (Pty) Ltd and Another 2021 (2) SA 519 (GP)* as authority for this proposition. In the *Mashele* judgment the court expressly rejected the argument relating to a "*stale*" S 129 notice.
>
> 5. The learned Judge made an order that is not competent in terms of the NCA and that conflict with S 130(4)(b) of the NCA. Having found that the plaintiff did not properly comply with the required procedures of ss 129 and 130 of the NCA, the only competent order that the learned Judge could have made was an order in terms of s 130(4)(b) of the NCA . . .
>
> 6. It was incompetent for the Court to issue a final order in form of a declaratory order when the express provisions of the NCA states that the Court must adjourn the matter temporarily whereafter the plaintiff will be entitled to

resume the proceedings if it had complied with the order. In the alternative, it was incompetent for the Court to declare that the action has been instituted prematurely.

7. The learned Judge only had the power to grant an order in terms of s 130(4)(b) of the NCA. . . .

8. The effect of the order of the Court is that the plaintiff must commence proceedings *de novo* after it had complied with the requirements of ss 129 and 130 of the NCA. This position conflicts with the express wording of S 130(4)(b) of the NCA.

11. The learned Judge should have postponed/adjourned the trial to enable the plaintiff to comply with the provisions of the NCA after which the plaintiff would have been entitled to resume the action.

12. The order of the Court elevates the defendant's plea of non-compliance with s 129 to a defence on the merits which it is not. . . .

13. The learned Judge erred by ordering the plaintiff to pay the costs of suit. The learned Judge should have ordered the defendant to pay the costs of the action on an attorney and client scale. Alternatively, the Court should have reserved the issue of costs for determination when the action is resumed.'

Appealability of the order

[23] In *Zweni v Minister of Law and Order* [1993] 1 All SA 365; [1992] ZASCA 197; 1993 (1) SA 523 (A) at 532I – 533B, the court determined as follows:

> 'A "judgment or order" is a decision which, as a general principle, has three attributes, first the decision must be final in effect and not susceptible of alteration by the Court of first instance;
> Second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial proportion of the relief claimed in the main proceedings . . .'

[24] Mr Rautenbach, who appeared on behalf of the respondent, referred in his heads of argument and also during his oral argument to the principles applicable to the interpretation of court orders, as decided in *HLB International (South Africa)*

(Pty) Ltd v NWRK Accountants and Consultants (Pty) Ltd 2022 (5) SA 373 (SCA); (113/2021) [2022] ZASCA 52 (12 April 2022) where the following was stated at paragraphs 26 to 28:

> '[26] The now well-established test on the interpretation of court orders is this:
> "The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual, well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention."
>
> [27] The manifest purpose of the judgment is to be determined by also having regard to the relevant background facts which culminated in it being made. For as was said in *KPMG Chartered Accountants (SA) v Securefin Limited and Another*, "context is everything".
>
> [28] A fairly recent illustration of the linguistic, contextual and purposive approach to the interpretation of a judgment or order is to be found in *Elan Boulevard v Fnyn Investments*, in which it was said that "(a)n order is merely the executive part of the judgment and, to interpret it, it is necessary to read the order in the context of the judgment as a whole", and –
>
> '(a) part of the 'usual well-known rules' of interpretation, according to Olivier JA, is –
> "dat mens jou nie moet blind staar teen die swart-op-wit woorde nie, maar probeer vasstel wat die bedoeling en implikasie is van wat gesê is. Dit is juis in hierdie proses waartydens die samehang en omringende omstandighede relevant is." [footnotes omitted]
>
> Loosely translated:
> '"One should not stare blindly at the black-on-white words but try to establish the meaning and implication of what it is being said. It is precisely in this process that the context and surrounding circumstances are relevant."'

[25] Mr Rautenbach referred to the fact that the court *a quo* found that the appellant had not complied with the requirement of s 129 read with s 130 of the NCA '*having as consequence that the action was instituted prematurely. The plaintiff must first issue a notice in terms of Section 129(1)(a) of the NCA before any further steps could be pursued against the defendant*'. He submitted that the reference by the court *a quo* to the action being '*premature*' should be understood within the context of s 129 and s 130 as well as the judgment of *Amardien and Others v Registrar of Deeds and Others* [2018] ZACC 47; 2019 (3) SA 341 (CC) referred to by the court *a quo*. He further contended that by holding that the appellant must '…*first issue a notice in terms of section 129(1)(a) of the NCA*

before any <u>further</u> steps could be pursued against the defendant', the court *a quo* recognized the steps already taken, namely the issuing of summons, but required further notification in terms of s 129 of the NCA.

[26] Mr Rautenbach consequently submitted that the appellant's contentions that the effect of the court *a quo*'s order is that it must commence proceedings *de novo* is not correct, since, so he submitted, the order of the court *a quo*, even if not specifically stated, on a balanced interpretation of the context within which the judgment was delivered, recognized the statutory provisions contained in s 130(4)*(b)* of the NCA. Mr Rautenbach therefore submitted that the court *a quo* merely required an adjournment of the matter.

[27] He consequently contended that the court *a quo*'s order is not appealable and that the appeal should, in the circumstances, be dismissed with costs. I do not agree with the aforesaid submissions on behalf of the respondent.

[28] Although the court *a quo* indeed stated that '…the plaintiff must first issue a notice in terms of section 129(1)(a) before any <u>further steps</u> could be pursued against the defendant, this finding must be read in context with the order as such where the court ordered that '…the plaintiff may not <u>commence</u> any legal proceedings to enforce the agreement between the parties before compliance with ss 129(1)(a) and 130(1) of the NCA'. The word 'commence', in my view, is clearly indicative thereof that the court *a quo*'s intention with the order is that the appellant needs to comply with s 129 of the NCA and then commence proceedings *de novo*.

[29] That the court *a quo* undeniably intended to order that the appellant should commence proceedings *de novo*, is clearly evident from the judgment in the application for leave to appeal where the court *a quo* stated the following:

> 'The applicant made persuasive arguments that, in the light of the order made, the court <u>should have</u> postponed or adjourned the trial to enable the plaintiff to comply with the provisions of the National Credit Act, ("the NCA"), whereafter the plaintiff would have been entitled to resume the action.'

[30] The words '…in the light of the order made' is, in my view, a reference to the finding that the appellant's action had been issued prematurely. What the court *a quo* subsequently stated, namely that that order should have resulted in an order that the trial be postponed or adjourned to enable the appellant to comply with the provisions of the NCA, instead of the order which the court *a quo* in fact made, confirms that the court *a quo* intended its order to mean that the proceedings should start *de novo.*

[31] The judgment and order of the court *a quo* consequently, in my view, has a final and definitive effect on the present action and is therefore appealable.

Notice of abandonment in terms of rule 41(2)

[32] The respondent filed a notice of abandonment in terms of Rule 41(2) whereby he abandoned the judgment granted in his favour handed down by the court *a quo* on 7 December 2023. The date of 8 August 2023, as well as the date of 8 August 2024, appear on the said notice. I accept that the notice was filed on 8 August 2024.

[33] Rule 41(2) determines as follows:

> 'Any party in whose favour any decision or judgment has been given, may abandon such decision or judgment either in whole or in part by delivering notice thereof and such judgment or decision abandoned in part shall have effect subject to such abandonment. The provisions of sub-rule (1) relating to costs shall *mutatis mutandis* apply in the case of a notice delivered in terms of this sub-rule.'

[34] The defendant contended in his heads of argument that in the alternative to the submissions that the order is not appealable, the respondent's abandonment of the order of the court *a quo* have caused the order to become moot or of academic importance.

[35] Section 16(2)*(a)*(i) of the Superior Court's Act 10 of 2013, determines as follows:

> 'When at the hearing of an appeal the issues are of such a nature that the decision sought will have not practical effect or result, the appeal may be dismissed on this ground alone.'

[36] In the present matter it is evident from the notice of appeal that the order the appellant is seeking on appeal, is the following:

> '1. That the appeal be upheld;
>
> 2. That the order of the Court *a quo* be set aside and replaced with the following:
>
> 2.1 Judgment is entered into in favour of the plaintiff;
>
> 2.2 The defendant is ordered to pay the plaintiff R1 239 433.75 (ONE MILLION TWO HUNDRED AND THIRTY-NINE THOUSAND FOUR HUNDRED AND THIRTY-THREE RAND AND SEVENTY-FIVE CENT);
>
> 2.3 The defendant to pay interest on the amount above at the rate of 1% (ONE PERCENT) per month calculated from the date of service of the summons being 20 September 2020 until the date of payment;
>
> 2.4 The defendant's special pleas are dismissed;
>
> 2.5 The defendant's counterclaim is dismissed;
>
> 2.6 The defendant to pay the plaintiff's costs of suit on an attorney and client scale;
>
> 3. That the defendant/respondent be ordered to pay the costs of the appeal on an attorney and client scale.'

[37] Because the notice of abandonment was filed and received after the appeal record was finalized, a copy of the said notice and correspondence in relation thereto, are attached to the appeal record as a separate bundle.

[38] From an e-mail attached to the bundle addressed from the respondent's attorney of record to the appellant's attorney of record, it appears that the respondent initially relied on the unreported judgment of *Department: Transport, Province of Kwazulu-Natal v Ramsaran and Others* [2019] ZASCA 62; 2019 JDR 0944 (SCA) for the contention that in abandoning the judgment, the respondent has removed the *lis* between the parties and that the appellant's appeal has consequently been rendered moot as a result thereof.

[39] The appellant appeals the alleged error by the court *a quo* by having failed to enter judgment in favour of the appellant despite hearing evidence and despite the trial being concluded. The appellant is therefore seeking affirmative relief in the form of a judgment in its favour. The fact that the respondent has abandoned the order made by the court *a quo*, does not mean that judgment is automatically entered into in favour of the appellant.

[40] The respondent's notice of abandonment in terms of rule 41(2) does therefore not affect the status of the issues in the appeal.

[41] The appeal has therefore, in my view, not become moot or of mere academic importance.

The merits of the appeal

[42] Section 129(1) of the NCA provides as follows:

> '**129 required procedures before debt enforcement.**
>
> (1) If the consumer is in default under a credit agreement, the credit provider –
>
> (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternatively dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
>
> (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before –
>
> (i) first providing notice to the consumer, as contemplated in paragraph (a) or in section 86(10), as the case may be; and
>
> (ii) meet any further requirements set out ins section 130.'

[43] Section 130(1) of the NCA provides as follows:

> '**130. Debt procedures in a Court.**
>
> (1) Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and –

(a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(10), or section 129(1), as the case may be;

(b) in the case of a notice contemplated in section 129(1) the consumer has –

(i) not responded to that notice; or

(ii) responded to the notice by rejecting the credit provider's proposals; and

(c) in the case of an instalment agreement, secured loan or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in Section 127.

(2) . . .

(3) Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that-

(a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with;

(b) . . .'

[44] The purposes of s 129 of the NCA are set out in *Amardien and Others v Registrar of Deeds and Others* [2018] ZACC 47; 2019 (3) SA 341 (CC) para 56:

'(a) It brings to the attention of the consumer the default status of her credit agreement.

(b) It provides the consumer with an opportunity to rectify the default status of the credit agreement in order to avoid legal action being instituted on the credit agreement or to regain possession of the assets subject to the credit agreement.

(c) It is the only gateway for a credit provider to be able to institute legal action against the consumer who is in default under a credit agreement.'

[45] At paragraphs 58 and 59 of *Amardien*, *supra*, the following are determined with reference to ss 129 and 130 of the NCA:

'[58] There are two statutory conditions which must be met before the credit provider may institute litigation under s 129. In peremptory terms, the section declares that legal proceedings to enforce the agreement may not commence before (a) providing notice to the consumer; and (b) meeting further requirements set out in s 130.

[59] The reference to s 130 reveals a strong link between the two provisions hence they are required to be read together. When a credit provider seeks to

> enforce the agreement by means of litigation, it must first show compliance with s 130, which, by extension, refers back to s 129. The application of these sections is triggered by the consumer's failure to repay the loan. These sections suspend the credit provider's rights under the credit agreement until certain steps have been taken. The credit provider is not entitled to exercise its rights immediately under the agreement. It is first required to notify the consumer of the specific default and demand that the arrears be paid. If the consumer pays up the arrears then the dispute is settled.'

[46] The court *a quo* also referred to the aforesaid quotation in its judgment.

[47] As is evident from the notice of application for leave to appeal referred to earlier, the first ground of the leave to appeal is based on the contention that the appellant was not required to comply with the provisions of s 129 and 130 of the NCA following the respondent's default under the Acknowledgement of Debt.

[48] In this regard, the appellant relied on *Ratlou v MAN Financial Services (Pty) Ltd* 2019 (5) SA 117 (SCA) where it was held that the settlement and the written credit facility in that matter, are interdependent. It was consequently found at paragraph 26 of the said judgment that:

> '. . . there can only be one conclusion: that the NCA was not designed to regulate settlement agreements where the underlying agreements, or causa, would not have been considered by the Act.'

[49] It was consequently found that the settlement agreement did not fall within the ambit of the NCA and the respondent therefore had no obligation to comply with the provisions thereof prior to enforcing its terms.

[50] However, contrary to the present matter, in that matter the original rental agreements did not fall within the ambit of the NCA. In the present matter, even based on the appellant's own case in paragraph 23 of the particulars of claim, both the agreement and the Acknowledgement of Debt constituted incidental credit agreements. This fact was also referred to in the court *a quo's* judgment, paragraph 7 thereof, and the question was then raised in paragraph 14 thereof whether the credit facility agreement and the Acknowledgement of Debt were

incidental agreements or not. The court *a quo* concluded at paragraph 20 of the judgment as follows:

> 'I conclude, therefore, that the transaction and/or transactions that the parties entered into were incidental or credit transactions.'

[51] The finding that the Acknowledgment of Debt also constitutes an incidental credit transaction is not a ground of appeal and must therefore be accepted.

[52] Section 8(1) of the NCA determines, *inter alia*, as follows with regard to the classification and categories of credit agreements:

> '**8. Credit agreements.**
>
> (1) Subject to subsection (2), an agreement constitutes a credit agreement for the purposes of this Act if it is –
>
> (a) . . .
>
> (b) a credit transaction, as described in subsection (4);
>
> (c) . . .
>
> (4) An agreement, irrespective of its form but not including an agreement in subsection (2), constitutes a credit transaction if it is –
>
> (a) . . .
>
> (b) an incidental credit agreement, subject to section 5(2);
>
> (c) . . .'

[53] The aforesaid determinations are made recognizing the limited application of the NCA to incidental credit agreements in terms of s 5 of the NCA.

[54] A credit transaction therefore constitutes an incidental credit agreement, which constitutes a credit agreement for purposes of the Act.

[55] In terms of s 4(1), subject to ss 5 and 6, the NCA generally applies to every credit agreement between parties dealing at arm's length and made within or having an effect within, the Republic.

[56] Consequently, the provisions of s 129 of the NCA are applicable to the Acknowledgement of Debt in the present instance.

[57] The appellant therefore had to comply with the provisions of s 129 of the NCA, read with the provisions of s 130 of the NCA, before it approached the court for an order to enforce the provisions of the Acknowledgement of Debt. The court *a quo* was consequently correct in its finding in this regard.

[58] The consequent finding which must be made, is what the consequences are of the fact that the appellant did not properly comply with the required provisions of ss 129 and 130 of the NCA with regard to the Acknowledgment of Debt.

[59] In this regard the appellant correctly referred to the applicability of the provisions of s 130(4)*(b)* of the NCA in its notice of application for leave to appeal, read with the provisions of s 130(3)*(a)*, which determine as follows:

> '130(3)(a) Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that –
>
> (a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with;
>
> (b) . . .
>
> (c) . . .
>
> (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), or has approached the court in circumstances contemplated in subsection (3)(c) 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;
>
> (c) . . .'

[60] I already found earlier in this judgment that the court *a quo* in fact found that the appellant must commence proceedings *de novo* after it had complied with the requirements of ss 129 and 130 of the NCA.

[61] I agree with the contention on behalf of the appellant by Mr Swart that this finding of the court *a quo* conflicts with the express wording of s 130(4)(b) of the NCA.

[62] The aforesaid finding is also contrary to and conflicting with the established legal position enunciated by the Constitutional Court in *Sebola and Another v Standard Bank Limited and Another* [2012] ZACC 11; 2012 (5) 142 (CC) and followed by, *inter alia*, the full court in *Benson and Another v Standard Bank of South Africa (Pty) Ltd and Others* [2019] ZAGPJHC 30; 2019 (5) SA 152 (GJ) wherein it was held as follows at paragraph 16 thereof:

> '[16] In Sebola the Constitutional Court made the following clear: First, the commencement of proceedings without prior notice does not render the proceedings a nullity, but simply requires an adjournment of proceedings so as to permit the credit provider to give notice before the proceedings may be resumed. A failure to give notice does not invalidate the proceedings but is simply dilatory.'

[63] I consequently find that the court *a quo* should have adjourned the trial to enable the appellant to comply with the provisions of the NCA and to amend its particulars of claim accordingly, after which the appellant would be entitled to resume the action.

[64] The appeal should consequently succeed on the said basis and the matter is to be referred back to the court *a quo*.

[65] The merits of the action as such can therefore not be determined in this appeal. The court *a quo* has not yet determined the merits of the action. Furthermore, the order which is to be made in the appeal may result in a reopening of the case of the respective parties in order lead further evidence.

The costs

[66] The court *a quo* ordered the appellant to pay the costs of suit. Although it was argued on behalf of the appellant that the court *a quo* should have ordered the respondent to pay the costs of the action on an attorney and client scale, I cannot agree with this contention.

[67] As stated above, the court *a quo* has not yet determined the merits of the action, which determination will obviously have an impact upon the appropriate order as to costs. In my view, it will consequently not be appropriate to make an order as to the costs of the action at this stage.

[68] As to the costs of the appeal, the appellant is in my view entitled thereto, following its success on appeal, albeit on its alternative grounds of appeal. The fact that the respondent abandoned the order of the court *a quo*, did not have a practical effect on the continuation and/or finalization of the action. The appellant was left with no other option but to appeal the matter.

Order

[69] The following order is made:

1 The appeal is upheld; the matter is referred back to the court *a quo* and the order of the court *a quo* is set aside and substituted with the following order:

'1.1 The trial is adjourned *sine die*.

1.2 The plaintiff is ordered to comply with the provisions of sections 129 and 130 of the National Credit Act, 34 of 2005, in respect of the Acknowledgement of Debt referred to in the plaintiff`s particulars of claim.

1.3 Leave is granted to the plaintiff to amend its particulars of claim after compliance with paragraph 1.2 above, the costs of which amendment and the consequent amendment of the defendant`s plea, if any, are to be paid by the plaintiff.

1.4 The plaintiff is granted leave to resume the action before the court *a quo* after compliance with paragraphs 1.2 and 1.3 above.

1.5 The costs of the action stand over for later adjudication.'

2 The respondent is ordered to pay the costs of the appeal, counsel's fees on Scale B.

C VAN ZYL

JUDGE OF THE HIGH COURT

I concur:

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S CHESIWE

JUDGE OF THE HIGH COURT

I concur:

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L MANYE

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Appellant:	Mr DD Swart
Instructed by:	Salley`s Attorneys, Bloemfontein
For the Respondent:	Mr JS Rautenbach
Instructed by:	Blair Attorneys, Bloemfontein