Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Reportable

CASE NO: A387/2014

In the matter between:

QUINCE PROPERTY FINANCE (PTY) LTD	Appellant
and	
DANIEL STEFANUS JOOSTE	First Respondent
MARGITTE HELOISE SEMER	Second Respondent
MARIA MAGDALENA HAMMAN	Third Respondent

Heard on 22 May 2015

JUDGMENT DELIVERED ON 2 JUNE 2015

INTRODUCTION

1. This is an appeal from the Magistrate's Court against the *ex tempore* findings and order of 9 April 2014, of the Magistrate for the Magisterial

District of Hermanus, Mr Le Roux ("the Magistrate"). On 9 April 2014 the Magistrate provided the following judgment ("the judgment") and order:

> **"Die Hof moet in hierdie aangeleentheid beslis of die nasionale Kredietwet op die twee transaksies naamlik QPF1, die terme soos uiteengesit op bladsye 13 tot 14 en GPF, die terme soos uiteengesit op bladsye 17 tot 18 van toepassing is. Dit is verder so dat Eiser nie aan die Verweerders 'n kennisgewing ingevolge Artikel 129 gestuur het nie. Ingevolge die Kredietwet vorm die bepalings van Artikel 84(f) 'n kredietooreenkoms. Artikel 84(f) lees soos volg en ek haal die Afrikaanse vertaling aan:**
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>> **'Enige ander ooreenkoms, anders as 'n kredietfasiliteit of kredietwaarborg, ingevolge waarvan betaling van 'n bedrag teen een persoon verskuldig aan 'n ander uitgestel is, en enige koste, fooie, of rente is aan die kredietverskaffer betaalbaar ten opsigte van 1) die ooreenkoms; of 2) die bedrag wat uitgestel is.'**
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> **Indien die terme van bovermelde ooreenkoms bestudeer word, is ek daarvan oortuig dat die twee ooreenkomste inderdaad kredriettransaksies is soos bedoel in Artikel 84(f) van die Kredietwet.**
>
> **Sekere bepalings van die Kredietwet het op 1 Junie 2006 in**

werking getree. Artikel 129 en 130 het egter eers op 1 Junie 2007 van krag geword. QPF1 is op 18 en 19 Desember 2006 onderteken. QPF4 is op 23 Januarie 2007 onderteken. Skedule 3 van die Kredietwet wat op 1 Junie 2006 in werking getree word, bevat die oorgangsbepalings. Item 4 daarvan is hier van toepassing. Om op te som, ek gaan verder akkoord met die argumente van die Verweerders se regsverteenwoordiger, mnr De Villiers, dat Eiser gebonde is aan die Artikel 129.

Die bevinding van die Hof is derhalwe soos volg:

Die Hof bevind dat die spesiale pleit gehandhaaf word.

Gevolglik word Eiser se eise van die hand gewys, met kostes.”

2. The Appellant and the Respondents were the Plaintiff and the First and Second Defendants respectively in the Court *a quo*. The Appellant is a bridging finance company. The First and Second Respondents are the two partners of a partnership of attorneys which conducts such business under the name of Jooste & Semer.

3. I am satisfied that the appeal was prosecuted in accordance with the Uniform Rules of the High Court (“the Uniform Rules”). I however point out that the Magistrate failed to comply with Magistrate’s Court Rule

51(8)(a).[1] If the Magistrate had provided the statement referred to in the aforesaid Rule, the task in dealing with this appeal would have been less complicated. This appeal is against the order, upholding the First and Second Respondents' special plea and dismissing the Appellant's claims with costs.

4. The appeal record comprises of the pleadings before the Magistrate, the requests for further particulars, and the replies thereto. The First and Second Respondents filed five detailed special pleas.[2] The Third Respondent was not represented it would appear, at the hearing before the Magistrate, no order was made in respect of the Third Respondent, and this appeal accordingly does not involve the Third Respondent. I will hereinafter refer to the First and Second Respondents collectively as the Respondents, which thus excludes any reference to the Third Respondent.

5. The Appellant was represented by Mr Van der Merwe and the First and Second Respondents by Mr De Villiers. Mr De Villiers also appeared at the hearing in the Magistrate's Court for the Respondents.

6. The judgment and consequent order is regrettably no model of clarity

[1] **"(8) (a) Upon the delivery of a notice of appeal the relevant judicial officer shall within 15 days thereafter hand to the registrar or clerk of the court a statement in writing showing (so far as may be necessary having regard to any judgment in writing already handed in by him or her) (i) the facts he or she found to be proved; (ii) the grounds upon which he or she arrived at any finding of fact specified in the notice of appeal as appealed against; and (iii) his or her reasons for any ruling of law or for the admission or rejection of any evidence so specified as appealed against."**

[2] Record, pp 71 to 73

and limited in extent, the reasons provided are also of no help in resolving the factual and legal issues. The references to Section 84(f) of the National Credit Act, 34 of 2005 ("the NCA"),[3] and Magistrate's Court Rule 11(6), in the judgment as well as the reasons provided in terms of Magistrate's Court Rule 51(1) are clearly wrong. The reference to Section 84(f) of the NCA is a mistake or misnomer, it is understood that this is a reference to Section 8(4)(f) of the NCA,[4] as this section falls within the context of the present litigation.

7. A notice in terms of Magistrate's Court Rule 50(1) was filed by the Appellant wherein it sought from the Magistrate a written judgment indicating which special pleas (since there were five of them) were upheld, the facts found to be proven, the reasons for the judgment and order delivered on 9 April 2014 and why the Magistrate did not exercise his discretion in terms of Section 130(4)(b)(ii)[5] of the NCA, him having

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[3] Section 84 does not have a sub-section (f), and relates specifically to the effect of the suspension of a credit agreement.

[4] **"(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."

[5] **"(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) …
(ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed;"

found that the Appellant had not complied with the relevant provisions of the NCA.[6]

8. The Magistrate's response in respect of the notice in terms of Magistrate's Court Rule 50(1) was, with respect, rather terse and confusing, his response being as follows:

> **"Met verwysing na my bevinding gedateer 9 April 2014 wat meganies getranskribeer is en hierby aangeheg is, wens ek om die volgende by te voeg.**
> **Eiser het in sy Besonderhede van Vordering tot sy dagvaarding nie die vereiste soos gestel in Reël 11(6) van die Wet op Landdroshowe, Wet 32 van 1944, nagekom nie, deurdat daar nêrens in die Besonderhede van Vordering verwys word na die Nasionale Kredietwet, 34 van 2005 nie."**

9. The Magistrate was thus requested, in terms of Magistrate's Court Rule 51(1), to provide his written judgment. Therein the Magistrate expanded on his *ex tempore* judgment by adding thereto his finding that the Appellant in its Particulars of Claim failed to comply with Magistrate's Court Rule 11(6). He also recorded that the Appellant failed to refer to the NCA in the Appellant's Particulars of Claim. This reasoning is with respect nonsensical and factually incorrect.[7] In any

[6] The Appellant's counsel also takes this point in paragraphs 50 and 51 of his heads of argument.
[7] Rule 11(6):

event, Magistrate's Court Rule 11(6) has no application whatsoever, as it deals with a consent to judgment.

BACKGROUND

10. In the Appellant's[8] heads of argument it is submitted that it is pertinently clear what the position was with regard to the second to fifth special pleas at the hearing before the Magistrate, and that such special pleas were abandoned by the Respondents when argument was presented to the Magistrate. To this the Respondents have not alluded to in the heads of argument filed on their behalf, the parties thus have divergent views regarding what happened to the remaining special pleas. It is in my view, however apparent, that there could not have been an abandonment of the other four special pleas. In argument Mr De Villiers conceded that the first special plea was what was adjudicated before the Magistrate, and it is clear that this was the case before the Magistrate, if cognisance is taken of the content of the judgment and order.

11. As far as the pleadings are concerned, the following is of relevance:

11.1. In paragraphs 24 and 25 of the Appellant's Particulars of Claim it

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"(6) When a defendant has consented to judgment, the registrar or clerk of the court shall, subject to section 58 of the Act and rule 12(5), (6) and (7), enter judgment in terms of the defendant's consent: Provided that where such consent to judgment is contained in defendant's plea, the registrar or clerk of the court shall refer the matter to the court and the court may thereupon exercise its powers under rule 12(7)."

[8] Footnote 21

is alleged that the Respondents are a juristic person as defined in Section 4(1)(a)(i) of the NCA.[9] However, the NCA, it is alleged in such Particulars of Claim, was not applicable in respect of the Respondents' partnership due to the provisions of Section 4(1)(a) of the NCA, this was because the Respondents' asset value or annual turnover equals or exceeds the R1 million threshold.[10]

11.2. In paragraph 33 of the Respondents' plea it is denied that the Respondents were not a juristic person in the form of a partnership, and that the NCA did not apply in relation to the Respondents, in that they exceeded the threshold requirements laid down in Section 7(1) of the NCA.

11.3. It was specifically pleaded, by the Respondents, that the Appellants failed to comply with the provisions of Section 129 of the NCA, accordingly it was contended that the legal proceedings instituted by the Appellant were premature.[11]

11.4. A request for further particulars was filed by the Appellant, wherein the Respondents were requested to provide information regarding the Respondents' combined asset value or yearly turnover, clearly to see whether the provisions of Section

[9] Read with the definition in respect of a juristic person.
[10] Record, p 11
[11] Record, p 72, paragraph 1.6

4(1)(a)(i) of the NCA apply. Detailed figures and supporting documents and a request for the provision of information which would assist the Appellant in deciding why the Respondents contended that Section 4(1)(a) of the NCA did apply, was requested.[12] The Respondents replied thereto that the Respondents' turnover as at 28 February 2007 was R515 217,00 and its owners' interest R93 681,00, the Respondents attached their financial statements for the relevant period as at 28 February 2007. In furtherance of their response, the Respondents specifically stated that the Respondents' combined turnover and combined asset value was less than the threshold as set out in Section 7(1) of the NCA.

11.5. It is clear from the information provided by the Respondents to the Appellant, that in the Respondents' view the Respondents were a juristic person and that the NCA did apply.

12. On the pleadings read with the requests for further particulars and the answers thereto, it is apparent that the question of whether the Appellant had to comply with the NCA and its provisions, was heavily disputed.

[12] Record, p 107

THE FACTS

13. The facts are in essence common cause, save for the differences in interpretation regarding the written documents which are attached to the Plaintiff's Particulars of Claim. The Appellant, in order to set out its cause of action, attaches to its Particulars of Claim applications for bridging finance (annexures "QPF1" and "QPF4") ("the bridging finance agreements"), letters of undertaking written on the Respondents' letterhead by their conveyancing secretary on 19 December 2006 (annexures "QPF2" and "QPF5") ("the letters of undertaking") and schedules setting out certain calculations regarding what amounts would be available to be paid to creditors in respect of a certain conveyancing transaction involving the late Mr B J Davids ("Mr Davids"), pursuant to the registration of a mortgage bond over certain immovable property of which Mr Davids was the owner.

14. The Appellant contends that the letters of undertaking bound the Respondents to repay any shortfall in respect of the moneys paid to the debtor in terms of the bridging finance agreements inclusive of interest, but that the letters of undertaking do not constitute credit agreements. In essence on face value the letters of undertaking are credit guarantees premised upon the bridging finance agreements. The Appellant however in the Magistrate's Court and again in this Court contended that the letters of undertaking are not credit agreements which are subject to the NCA. Mr Van der Merwe rightly so conceded

that the bridging finance agreements were in fact credit agreements falling within the meaning of the NCA.

15. Both the applications for bridging finance are identical and contain the following wording:

> **"5. FINANCING AGREEMENT**
>
> **ZS Rational Finance (Pty) Ltd ('ZS Rational') will advance money to the Borrower under the following terms and conditions, on which the parties agree:**
>
> **5.1 The Borrower is entitled to the proceeds from either the sale of property or a mortgage bond and the Borrower wishes to borrow money from ZS Rational.**
>
> **5.2 The Borrower agrees to pay the said sum as set out hereunder to ZS Rational:**
>
> **5.2.1 Advanced amount**
>
> **5.2.2 Application fee: R300**
>
> **5.2.3 Finance charge: 1.4 % per month (16.6 % per annum)**
>
> **5.2.4 Service charge: 1.6 % per month**
>
> **5.2.5 VAT calculated at 14 % will be payable on 5.2.2**

and 5.2.4

5.3 The amount advanced shall be paid into the Attorney's Trust Account on behalf of the Borrower, or such other account that the Borrower may appoint in writing.

5.5 For this purpose the Borrower cedes, transfers and makes over to ZS Rational his right, title and interest in said to the surplus of the proceeds such cession and transfer shall be of full force and effect, without any further act of delivery.

5.6 The outstanding amount will be calculated on a day-to-day basis from the date that the amount is advanced to the date of payment.

5.7 In the event of the Deed of Sale or the bond registration being cancelled for whatsoever reason, or within 90 days after the amount has been advanced, which ever may be the soonest, the amount so advanced shall become due and payable immediately.

6. UNDERTAKING BY THE ATTORNEY

The Attorney undertakes to ZS Rational that:

6.1 The Sale / Mortgage Agreement is enforceable in law and contains all the terms and conditions between the Purchaser and the Buyer or between the Mortgager and the Bond Grantor and the said parties have the necessary authority to bind themselves.

6.2 To that extent that the Sale / Mortgage Agreement contains any suspensive condition, such condition has been fulfilled.

6.3 All relevant documentation required for the transfer of the property involved or the registration of the bond have been signed by all the relevant persons and that there is no impediment thereto.

6.4 He has been instructed by the Seller, Purchaser, Mortgager, or Bond Grantor to attend to and is proceeding with the transfer of the property or the registration of a bond.

6.5 He has received an irrevocable mandate from the Borrower that upon the transfer of the property or registration of a bond he is to pay so much of the proceeds of the sale or bond to ZS Rational that is due

and owing in terms of the above agreement between ZS Rational and the Borrower.

6.6 He has accepted such instruction and will supply ZS Rational with an independent undertaking, which shall not derogate in any way from these warranties.

6.7 No other person or institution has any other claim to the surplus of the proceeds of the sale or bond.

6.8 No other undertakings have been given which will reduce the proceeds to an amount less than the amount due and owing to ZS Rational in terms of the agreement between ZS Rational and the Borrower.

6.9 This undertaking is subject to any claim by the Commissioner of Inland Revenue and any obligation on him as an agent for the said Commission in terms of Section 99 of the Income Tax Act of 1962 as amended, and or any Court Order prohibiting him from doing so.

6.10 He shall keep ZS Rational informed to matters relating to the transfer of the property or registration of the Bond. In general and in particular in regard to any

event or circumstance which may arise subsequent to the signing of this agreement.

6.11 In the event of the transaction being cancelled, the Borrower and/or the Attorney shall immediately advise ZS Rational of such as an occurrence.

6.12 If this agreement is entered into and signed by the Attorney on behalf of the Borrower, he warrants that he is duly authorised to do so."

16. Both the letters of undertaking contain the following wording:

"We undertake to pay to you on registration the amount of R38 000,00 plus costs and interest, which amount shall be paid directly into your bank account. Please let us have your banking details."

"We undertake to pay to you on registration the amount of R20 000,00 plus costs and interest, which amount shall be paid directly into your bank account. Please let us have your banking details."

17. In the Particulars of Claim the Appellant states that it is a registered

credit provider[13] and that the Respondents are, given the fact that they are a firm of attorneys and practicing under the name and style of Jooste & Semer, a juristic person as defined in the NCA. The Appellant then pleads that due to the provisions of Section 4(1)(a) of the NCA and because the Respondents' asset value or annual turnover equals or exceeds R1 million (One Million Rand) the NCA is not applicable. This is denied in the Respondents' answer to the Appellant's request for further particulars.[14] The Appellant contends that to determine whether a partnership is a juristic entity in terms of the NCA, and whether the NCA applies to the Respondent, in that the threshold requirements as set out in Section 7(1) of the NCA apply, oral evidence in respect of such issues would be required. The issues whether the Respondents are a juristic person and whether the threshold requirements contained in Section 7(1) of the NCA are met, were thus placed in dispute by the Appellant.

18. In paragraph 33 of the Respondents' plea it is denied that:

18.1. the NCA does not apply to the Respondents; and

18.2. the Appellant is exempted from complying with the provisions of Section 129 of the NCA, in terms whereof a notice of intended legal action is to be given to a debtor.[15]

[13] Record, p 11
[14] Record, pp 105 and 106
[15] Record, pp 88 and 89

THE ISSUES

19. The issues to be decided are limited to the following:

19.1. Did the Magistrate err in deciding that the bridging finance agreements and the letters of undertaking were in fact credit agreements subject to the NCA's provisions.

19.2. Did the Magistrate err in not deciding:

19.2.1. whether or not the Respondents were a juristic person;

19.2.2. whether or not the Respondents were subject to the threshold requirements in Section 7(1) of the NCA, making the NCA applicable or not applicable;

19.2.3. whether or not the Appellant ought to have been given a respite as envisaged in terms of Section 130(4)(b) of the NCA;

19.2.4. if the NCA applied, what steps were to be followed by the Appellant.

THE LEGAL PRINCIPLES

20. The NCA applies only to a credit agreement when an agreement is regarded as a credit agreement for purposes of the NCA if it is a credit facility, credit transaction, credit guarantee or a combination of these.

21. A credit agreement is defined as follows in the NCA:

> **“8(5) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit guarantee if, in terms of that agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which this Act applies.”**

22. A credit agreement to which the NCA applies has two main elements:

22.1. credit that is granted, in other words, the consumer’s obligation to pay an amount owed to the credit provider is deferred; and

22.2. a fee, charge of interest in respect of the deferred payment (or repayment).[16]

23. Once it is determined that an agreement is a credit agreement, the next enquiry is whether the agreement was entered into between the parties dealing at arm's length. A credit agreement which is not at arm's length is not affected by the provisions of the NCA.[17]

24. The NCA also does not apply in respect of agreements where the consumer is a juristic person whose asset value or annual turnover, together with that of all its related juristic persons equals or exceeds R1 million.[18]

25. In the definitions section to the NCA a juristic person is defined as, including a partnership, association or other party of persons corporate or unincorporated, or a trust.

26. In **Absa Bank Ltd v Mkhize and two similar cases**[19] the Supreme Court of Appeal provided the following guidelines to a credit provider in complying with Section 129 of the NCA:

> **"[51] I do not think it necessary to go so far. The purpose of s 130(4)*(b)* is to require the court, where a credit provider has not complied with any provision of the NCA (in this**

[16] Evans v Smith 2011(4) SA 472 (WCC) at paras [16] to [19]
[17] Section 4(2)(b)
[18] Section 4(1)(a)(i)
[19] 2014(5) SA 16 (SCA) at [51] and 52]

instance it would be non-compliance with s 129(1), as interpreted in *Sebola*), to adjourn the matter and 'make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed'. Once the credit provider complies with the court order, when the matter is set down again the court will doubtless be able to grant judgment. As Alkema J pointed out, the adjournment will increase the burden on the credit provider and on the courts, and will of course increase the cost of providing credit. But that is the consequence of the poorly drafted NCA and the interpretation of its provisions by the Constitutional Court. That court appreciated that consumers would bear the additional costs of obtaining credit by requiring proof of receipt of notices sent by registered mail at post offices. But that was warranted by the importance of ensuring that s 129(1) notices be provided to consumers. Cameron J said:

> **'I accept that this judgment may heighten the cost of credit and that this will affect the pockets of not only credit institutions but also consumers, particularly those new to the credit market. That is a social burden the legislation imposes. The alternative would be to underplay the importance of the notice, and under-weigh the impact of the wording of s 129.'**

[52] The costs of adjourning matters so that credit

providers can take further steps and give evidence by way of affidavit to establish 'to the best of the plaintiff's ability that the notice was provided to' the consumer and explaining the credit provider's choice of mode of delivery, will add to that which would have been foreseen by the Constitutional Court. But that does not make the order of the high court incorrect."

27. Section 8(5) of the NCA provides that an agreement constitutes a credit guarantee if, in terms of that agreement, a person undertakes or promises to satisfy, upon demand, any obligation of another consumer in terms of a credit facility or a credit transaction to which the NCA applies. An ordinary common-law suretyship where one person provides security for another one's debts constitutes a credit guarantee for purposes of the NCA.

28. It is clear that the NCA applies to a credit guarantee only to the extent that it applies to the primary debt secured by the guarantee. If the NCA does not apply to the credit facility or credit transaction in respect of which the guarantee is granted, it does not apply to the credit guarantee. The NCA therefore does not apply to a suretyship granted by a person for the debts of a juristic person which is a large juristic person or which has concluded a large agreement for purposes of the NCA.

DISCUSSION

29. In the Appellant's[20] heads of argument it is submitted that all of the special pleas filed by the Respondents which were set down to be determined on 9 April 2014, save for the first special plea, were abandoned, when the matter was argued before the Magistrate, without any evidence being presented. If one has regard to the judgment it appears that the Magistrate upheld the first special plea and did not deal with the remaining special pleas. Accordingly all that this Court is capable of adjudicating is the order upholding the first special plea.

30. At the hearing in the Magistrate's Court, the parties seem to have agreed that the *onus* to prove the first special plea rested on the Respondents. The Respondents appear not to have elected to lead any evidence in support of the first special plea, the first special plea was accordingly argued on the pleadings before the Magistrate. It is however common cause that the Appellant and Respondents held diametrically opposed views whether the Appellant had to comply with the NCA and whether the requisite jurisdictional facts existed compelling the Appellant to comply with the NCA.

[20] Footnote 18

31. The first special plea was thus argued without any evidence being led. It is also unclear, as to whether any of the allegations contained in the first special plea and replies to the requests for further particulars, were considered to be correct or not, or even conceded. All questions pertaining to compliance with the NCA or not, thus remained alive.

32. This Court cannot be called upon to reconstruct what took place in the Magistrate's Court when the first special plea was argued. The parties' legal representatives only have themselves to blame, given the limited extent of the judgment, and I cannot go beyond the contents of such judgment.

33. The order against which this appeal lies, only deals with the first special plea which in a nutshell is aimed at both the Appellant's claims A and B. This special plea is premised on the fact that the Appellant's claims are subject to Sections 129 and 130 of the NCA, in that "QFP1" and "QFP4" are credit agreements and "QFP2" and "QFP5" are credit guarantees. In addition, the appeal lies against the finding that the Appellant failed to comply with Section 129(1)(a) of the NCA[21] by

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[21] **"(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) **there is no matter arising under that credit agreement, and pending before the Tribunal, that could result in an order affecting the issues to be determined by the court; and**

(c) **that the credit provider has not approached the court-**

(i) during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction; or

drawing the default to the Respondents' attention, therefore the Appellant was not empowered to commence any legal proceedings to enforce the bridging finance agreements and the letters of guarantee.

34. In the first special plea, the Respondents claimed that both claims of the Appellant had to be dismissed on the grounds that:

34.1. Their obligations in terms of clauses 6.6 of the bridging finance agreement annexed to the Appellant's Particulars of Claim,

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(ii) despite the consumer having-
_(aa)_ surrendered property to the credit provider, and before that property has been sold;
_(bb)_ agreed to a proposal made in terms of section 129 (1) _(a)_ and acted in good faith in fulfilment of that agreement;
_(cc)_ complied with an agreed plan as contemplated in section 129 (1) _(a)_; or
_(dd)_ brought the payments under the credit agreement up to date, as contemplated in section 129 (1) _(a)_.

(4) In any proceedings contemplated in this section, if the court determines that-
_(a)_ the credit agreement was reckless as described in section 80, the court must make an order contemplated in section 83;
_(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)_ the credit agreement is subject to a pending debt review in terms of Part D of Chapter 4, the court may-
(i) adjourn the matter, pending a final determination of the debt review proceedings;
(ii) order the debt counsellor to report directly to the court, and thereafter make an order contemplated in section 85 _(b)_; or
(iii) if the credit agreement is the only credit agreement to which the consumer is a party, order the debt counsellor to discontinue the debt review proceedings, and make an order contemplated in section 85 _(b)_;
_(d)_ there is a matter pending before the Tribunal, as contemplated in subsection (3) _(b)_, the court may-
(i) adjourn the matter before it, pending a determination of the proceedings before the Tribunal; or
(ii) order the Tribunal to adjourn the proceedings before it, and refer the matter to the court for determination; or
_(e)_ the credit agreement is either suspended or subject to a debt re-arrangement order or agreement, and the consumer has complied with that order or agreement, the court must dismiss the matter."

marked “QPF1” and “QPF4”, constitute credit guarantees within the meaning of Section 8(12) of the NCA.

34.2. The Appellant failed to comply with the provisions of Section 129, as read with Section 130 of the NCA, prior to instituting the action.

35. The Appellant submits that the letters of undertaking by the Respondents do not constitute credit guarantees, let alone credit transactions. I cannot agree with this submission as it is clear that the tenor of “QPF1” and “QPF4” is that a credit agreement is constituted together with an undertaking or guarantee that certain steps and actions will be undertaken by the Respondents dependant on certain events, and that payment would be made to the Appellant in such circumstances.

36. It thus follows that the Magistrate was correct in finding that the bridging finance agreement and the letters of undertaking were credit agreements in terms of the NCA, but failed to consider whether:

36.1. the Respondent was a juristic person;

36.2. the threshold requirement in Section 4(1)(a)(i) of the NCA had been met;

36.3. the Appellant to proceed with claims A and B had to comply with the NCA;

36.4. the Appellant was to have given notice in terms of Section 129 of the NCA to the Respondents;

36.5. in the event of the Appellant not having given the requisite notice in terms of Section 129 of the Act, what the Appellant ought to have done in such circumstance.

37. If the Respondents had presented evidence regarding the threshold requirements, then in that event this appeal could have been dealt with in a more cost effective and effective manner. The Respondents however did not present any evidence in this regard, and for this reason the Appellant, in my view, is only partly successful with this appeal, which clearly impacts upon the issue of costs. I have a wide discretion in this regard and intend to exercise such discretion in consideration of fairness and justice.

38. It was the Respondents who raised the special pleas and who, in the circumstances, ought to have presented their case in accordance with the law, and on a proper basis, given the disputes as they materialised at the time of the hearing. On the other hand, the Appellant has only been partly successful, therefore in the circumstances the costs should not follow the result, but each party should be ordered to pay their own

costs. In any event, the general rule that costs follow the event is not applied as rigidly on appeal.[22]

FINDING

39. The following findings are made on appeal:

39.1. Only the first special plea was adjudicated before the Magistrate.

39.2. The bridging finance agreement and the letter of undertaking are credit agreements in terms of the NCA.

39.3. The Magistrate did not determine:

39.3.1. whether the Respondent was a juristic person;

39.3.2. whether there had been compliance with Section 129 of the Act;

39.3.3. what steps the Appellant was to take if there was non-compliance with Section 129 of the Act.

ORDER

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[22] Law of Costs: AC Cilliers: Butterworths, paragraph 14-09

40. I would make the following order.

41. The appeal is upheld to the extent set out below with the costs order being set aside, the matter is referred back to the Magistrate, to determine, in respect of the first special plea:

    41.1. whether the Respondent was a juristic person;

    41.2. whether there had been compliance with Section 129 of the Act;

    41.3. whether the Appellant is entitled to the respite provided in terms of Section 130(4)(b)(i) and (ii) of the NCA;

    41.4. what steps are to be undertaken by the Appellant if the NCA applies and the Appellant is to give notice in terms of Section 129 of the Act;

    41.5. the issue of costs in adjudicating the Respondents' first special plea.

42. Each party is to pay their own costs in respect of this appeal.

FERREIRA, AJ

I concur and it is so ordered.

HLOPHE, JP