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

Reportable:	**YES**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case no **3955/2019**

In the matter between:

PHILIPPUS JOHANNES JACOBUS CRONJE	1st Excipient
ADOLF JOHANNES DE BRUYN N.O.	2nd Excipient
PHILIPPUS JOHANNES JACOBUS CRONJE N.O.	3rd Excipient
CECILE CRONJE N.O.	4th Excipient
ANDRIES GUSTAV LE GRANGE N.O. (In their capacities as trustees of the PC Trust registration number IT780/2011)	5th Excipient
DIE CRONJE SEUNS BOERDERY CC	6th Excipient
HENDRIK BERNARDUS CRONJE N.O.	7th Excipient
HESTER CRONJE N.O. (In their capacity as trustees of the Hendrik Cronje Family Trust registration number IT2254/2001)	8th Excipient

and

FIRSTRAND BANK LTD t/a FIRST NATIONAL BANK	Respondent

In *re*:

FIRSTRAND BANK LTD t/a FIRST NATIONAL BANK	Plaintiff

and

PHILIPPUS JOHANNES JACOBUS CRONJE	1st Defendant
ADOLF JOHANNES DE BRUYN N.O.	2nd Defendant
PHILIPPUS JOHANNES JACOBUS CRONJE N.O.	3rd Defendant
CECILE CRONJE N.O.	4th Defendant
ANDRIES GUSTAV LE GRANGE N.O. (In their capacity as trustees of the PC Trust registration number IT780/2011)	5th Defendant
DIE CRONJE SEUNS BOERDERY CC	6th Defendant

HENDRIK BERNARDUS CRONJE N.O. 7th Defendant

HESTER CRONJE N.O. 8th Defendant
(In their capacity as trustees of the Hendrik Cronje Family Trust registration number IT2254/01)

and

Case no **2778/2021**

In the matter between:

JUDITH MARYNA STEYN N.O. 1st Excipient
(In her capacity as trustee of the Mooiplaas Boerdery en Bemarkings Trust, registration number: IT948/02)

JUDITH MARYNA STEYN 2nd Excipient

PHILIP STEYN 3rd Excipient

JUDITH MARYNA DE WITT N.O. 4th Excipient

TANYA DE WITT N.O. 5th Excipient
(In their capacity as trustees of the Maryna De Witt Trust, registration number: TMP1753)

PHILIP STEYN N.O. 6th Excipient

JUDITH MARYNA DE WITT N.O. 7th Excipient
(In their capacity as trustees of the PM Family Trust, registration number: IT1421/2000)

and

FIRSTRAND BANK LTD t/a FIRST NATIONAL BANK Respondent

In *re*:

FIRSTRAND BANK LTD t/a FIRST NATIONAL BANK Plaintiff

and

JUDITH MARYNA STEYN N.O. 1st Defendant
(In her capacity as trustee of the Mooiplaas Boerdery en Bemarkings Trust, registration number: IT948/02)

JUDITH MARYNA STEYN 2nd Defendant

PHILIP STEYN 3rd Defendant

JUDITH MARYNA DE WITT N.O. 4th Defendant

TANYA DE WITT N.O. 5th Defendant
(In their capacity as trustees of the Maryna De Witt Trust, registration number: TMP1753)

PHILIP STEYN N.O. 6th Defendant

JUDITH MARYNA DE WITT N.O. 7th Defendant
(In their capacity as trustees of the PM Family Trust,
registration number: IT1421/2000)

CORAM: JP DAFFUE J

HEARD ON: 20 OCTOBER 2023

DELIVERED ON: 07 NOVEMBER 2023

ORDERS

Case number 3955/2019:

1. The exception is dismissed with costs, including the costs consequent upon the employment of two counsel.

Case number 2778/2021:

1. The exception is dismissed with costs, including the costs consequent upon the employment of two counsel.

JUDGMENT

INTRODUCTION

[1] First National Bank (FNB) instituted action in two separate matters against a private person, trustees of several trusts as well as a close corporation. The defendants are part of the farming community in the Free State. The total claims against them, accepting that not all of them are held liable for all amounts claimed, is in excess of R30m in the case against the Cronje group of defendants (case number 3955/2019), and in excess of R25m in the case of the Steyn and De Witt group of defendants (case number 2778/2021).

[2] The two separate groups of defendants filed exceptions to the FNB's particulars of claim which are strenuously opposed by FNB. In both instances it is the excipients' case that FNB did neither expressly plead compliance with s 81(2) of the

National Credit Act 34 of 2005 (the NCA), nor any other provision thereof relating to reckless credit. The exceptions were so framed that a similar outcome in both cases was anticipated. Consequently, the parties agreed that both matters be set down before the same judge to be argued together and that one judgment be delivered.

THE PARTIES AND THE RELIEF CLAIMED IN THE MAIN ACTIONS

[3] As mentioned, FNB is the plaintiff in both actions. It is the respondent in the exceptions. Advv DJ van der Walt SC and S Tsangarakis appeared for FNB on instructions of Symington and De Kok, Bloemfontein.

[4] Mr Philippus Johannes Jacobus Cronje, a major male person, is the first excipient. He is cited as the principal debtor in the main action in respect of claims 1 and 2, being facility and term loan agreements respectively. Messrs Adolf Johannes De Bruyn and Philippus Johannes Jacobus Cronje, Ms Cecile Cronje and Mr Andries Gustav Le Grange in their capacities as trustees of the PC Trust are cited as the second to fifth defendants. It is alleged that they not only signed suretyships on behalf of the PC Trust in favour of FNB in respect of claims 1 and 2, but the PC Trust is also the principal debtor in respect of claim 3 in respect of certain term loan agreements. The Cronje Seuns Boerdery CC is cited as the sixth defendant and Mr Hendrik Bernardus Cronje and Ms Hester Cronje are cited as seventh and eighth defendants in their capacities as trustees of the Hendrik Cronje Family Trust. It is alleged that the last three defendants, as is the case with the other defendants, signed various suretyships in favour of FNB. Claim 1 is for payment of an amount in excess of R21m, claim 2 for R555 423,29 and claim 3 for an amount in excess of R8.5m.

[5] In case number 2778/2021, Ms Judith Maryna Steyn in her capacity as trustee of the Mooiplaas Boerdery and Bemarkings Trust is cited as first defendant in the main action in respect of amounts allegedly due pertaining to loan and facility agreements in the amounts of R8 229 568.95 and R17 425 448.44 respectively. She and Mr Philip Steyn, a major male, are cited as second and third defendants respectively, having allegedly signed suretyships on behalf of the Mooiplaas Boerdery and Bemarkings Trust. Ms Judith Maryna de Witt and Ms Tanya de Witt, in

their capacities as trustees of the Maryna de Witt Trust, who allegedly signed a suretyship in favour of FNB, are cited as fourth and fifth defendants respectively. Mr Philip Steyn and Ms Judith Maryna de Witt, in their capacities as trustees of the PM Family Trust who allegedly signed a suretyship in favour of FNB, are cited as sixth and seventh defendants respectively.

[6] All the defendants in the main actions, they being the excipients in the exceptions, were represented by Advv H van Eeden SC and B van der Merwe, instructed by Lovius Block Inc, Bloemfontein. In order to avoid confusion, I shall refer to them as the excipients, unless it is required to refer to any individual, trust or group separately. In such events I shall refer to the parties by their names, or to the Cronje group, or the Steyn & De Witt group, as the case may be.

THE ISSUES AND BASIS OF THE EXCEPTION

[7] The court is called upon to decide whether FNB (and so Mr Van Eeden submitted, any other credit provider seeking to enforce a credit agreement that is regulated by Part D of Chapter 4 of the NCA) must plead compliance with ss 80 to 83 of the NCA in order to avoid their claims being excipiable for lacking averments necessary to sustain causes of action as is envisaged in rule 23(1) of the Uniform Rules of Court. The excipients contended that FNB's particulars of claim did not disclose causes of actions as it had failed to plead that it had conducted the required assessments required by s 81(2), read with s 80(1)(a), of the NCA and that the credit agreements did not constitute reckless credit.

[8] Mr Van der Walt countered the excipients' submission in argument, submitting *inter alia* that the excipients had failed to prove that the particulars of claim did not disclose causes of action and that FNB had complied with rule 18(4) of the Uniform Rules of Court. The causes of action in both instances were properly pleaded, so he submitted. If it was the excipients' case that the agreements relied upon by FNB were invalid, irregular or unlawful, this could not be determined on exception, simply on the basis that FNB was not required to plead the *facta probantia* that had given rise to the agreements. If the excipients wanted to rely on non-compliance with the NCA, it would be for them to plead and prove such a special defence.

RULE 18 OF THE UNIFORM RULES OF COURT RELATING TO PLEADINGS GENERALLY

[9] Sub-rules 18(4) and (6) are relevant in this instance. These sub-rules read as follows:

'(4) Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.

(6) A party who in his or her pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading'

[10] In *Amler's Precedents of Pleadings*,[1] the author provides a precedent of a claim for payment under the NCA. Although the author suggests that it is prudent to *inter alia* allege that the credit agreement complies with the NCA, he does not insist that a credit provider shall also plead compliance with the provisions of ss 80 to 83 of the NCA. Instead, the author specifically provides a precedent of a special plea where reliance is placed on reckless credit provided to a consumer as a special defence.

THE TEST ON EXCEPTION

[11] It is trite that a charitable test is applied in adjudicating an exception, especially in deciding whether a cause of action has been established. The excipient must prove that the pleading is excipiable on every interpretation that can reasonably be attached to it.[2]

[12] In order to consider an exception, the court should accept the allegations pleaded by the plaintiff as true and correct to assess whether they disclose a cause

[1] Harms, *Amler's Precedents of Pleadings* 9th ed pp 134 – 141 and pp 139 and 140 *in fine*.
[2] *First National Bank Southern Africa Ltd v Perry N.O and Others* 2001 (3) SA 960 (SCA) at 965 D; *Theunissen* en Andere *v Transvaal Lewendehawe Koöp Bpk* 1988 (2) SA 493 (A) at 500 E – F.

of action. An over-technical approach must be avoided. As stated in *Delmas Milling* Co *Ltd v Du Plessis,*[3] confirmed in *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd,*[4] the validity of an agreement and the question whether a purported contract may be void for vagueness do not regularly fall to be decided by way of an exception.

[13] It is accepted that exception procedure serves as a valuable tool to weed out cases without legal merit in order to avoid the leading of unnecessary evidence at a trial. However, if it does not have that effect, an exception shall not be upheld.[5] It is reiterated that this was still trite law in 2001, before the advent of the NCA, as confirmed in *Vermeulen v Goose Valley Investments*.[6] The Supreme Court of Appeal dealt with the inaccurate description of immovable property in a deed of sale involving the Alienation of Land Act 68 of 1981 as follows:

'It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that *ex facie* the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim *is* (not may be) bad in law.' (My emphasis)

[32] In 2023 Ponnan JA summarised the principles relevant to an exception in *Tembani and Others v President of the Republic of South Africa and Another as follows:*[7]

'Whilst exceptions provide a useful mechanism 'to weed out cases without legal merit', it is nonetheless necessary that they be dealt with sensibly. It is where pleadings are so vague that it is impossible to determine the nature of the claim or where pleadings are bad in law, in that their contents do not support a discernible and legally recognised cause of action, that an exception is competent. The burden rests on an excipient, who must establish that on every interpretation that can reasonably be attached to it, the pleading is excipiable. The test is whether on all possible readings of the facts no cause of action may be made out, it being for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts.' (My emphasis)

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[3] 1955 (3) SA 447 (A).
[4] 1991 (1) SA 508 (A) at 514 F.
[5] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at 465 H; *Pretorius v Transport Pension Fund and others* 2019 (2) 37 (CC) para 21; and *Brocsand (Pty) Ltd v Tip Trans Resources (Pty) Ltd and Others* 2021 (5) SA 457 (SCA) para 14.
[6] [2001] 3 All SA 350 (A) para 7.
[7] 2023 (1) SA 432 (SCA) at para 14.

I shall consider during my evaluation of the parties' submissions whether the NCA requires a different approach. It is apposite to now deal with some aspects of the NCA.

THE NATIONAL CREDIT ACT 34 OF 2005 (THE NCA)

[14] In *Sebola and Another v Standard Bank of South Africa Ltd and Another*[8] (*Sebola*) the Constitutional Court explained why the NCA was needed in our country. It pointed out that the financial credit market was ill-suited to South Africa's post-apartheid economy and society. Low income consumers relied increasingly on commercial credit and many were becoming swamped with debt. It insisted that the purposes of the NCA were to promote and advance the social and economic welfare of South Africans with the main object to protect consumers.

[15] In *Sebola* the court was at pains to explain the main object of the NCA, *ie* to protect consumers, but that the interests of credit providers should not be overlooked in the following words:

'The statute sets out the means by which these purposes must be achieved, and it must be interpreted so as to give effect to them. The main objective is to protect consumers. But in doing so, the Act aims to secure a credit market that is 'competitive, sustainable, responsible [and] efficient'. And the means by which it seeks to do this embrace 'balancing the respective rights and responsibilities of credit providers and consumers'. These provisions signal strongly that the legislation must be interpreted without disregarding or minimising the interests of credit providers. So I agree with the Supreme Court of Appeal that —

'(t)he interpretation of the NCA calls for a careful balancing of the competing interests sought to be protected, and not for a consideration of only the interests of either the consumer or the credit provider'. [Footnote omitted.]

I also agree that 'whilst the main object of the Act is to protect consumers, the interests of creditors must also be safeguarded and should not be overlooked. (Footnotes omitted.)' (My emphasis)

[16] The *dicta* of the Constitutional Court must be seen in proper perspective. The NCA provides for different categories of credit agreements in s 9, to wit small, intermediary and large agreements. The agreements *in casu* are large agreements.

[8] 2012 (5) SA 142 (CC) paras 38 – 40.

A 'juristic person' includes ‘a partnership, association or other body of persons, corporate or unincorporated, or a trust if-

(a) there are three or more individual trustees; or

(b) the trustee is itself a juristic person,

but does not include a stokvel.’

[17] Section 4 stipulates that, subject to ss 5 and 6, the NCA applies to every credit agreement between parties dealing at arm’s length, except *inter alia* where the consumer is a juristic person, or in the case of a large agreement. The PC Trust, the Hendrik Cronje Family Trust and the Maryna De Witt Trust are juristic persons for purposes of the NCA. These aspects have not been argued before me and it is unnecessary to make a pertinent finding. I merely raised the aspects to show that, primarily the legislature intended to protect the poor and uneducated people. All too many consumers in our country are completely or partially illiterate, possessed of poor education and have no access to legal advice or social power. It is not unthinkable that legal relationships are often imposed upon them and that freedom to act cannot simply be assumed in such cases. These consumers are too glad to receive credit and would often sign any document without understanding the consequences of the credit advanced to them. Contrary to the marginalised people in our country, the excipients should not be heard to allege that they fall in the same category as the poor and uneducated who the NCA predominantly tries to protect.

[18] Insofar as ss 80 to 83 are relied upon by the excipients, it is appropriate to quote the relevant parts thereof. I shall deal hereunder with the effect of s 84 as well, and consequently, this section is also quoted partially. The highlighted portions will be considered during the evaluation of the parties’ submissions. The sections read as follows:

‘**80 Reckless credit**

(1) A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119 (4)-

(a) the credit provider failed to conduct an assessment as required by section 81 (2), irrespective of what the outcome of such an assessment might have concluded at the time; or

(b) the credit provider, having conducted an assessment as required by section 81 (2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that-

(i) the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement; or

(ii) entering into that credit agreement would make the consumer over-indebted.

(2) When a determination is to be made whether a credit agreement is reckless or not, the person making that determination must apply the criteria set out in subsection (1) as they existed at the time the agreement was made, and without regard for the ability of the consumer to-

(a) meet the obligations under that credit agreement; or

(b) understand or appreciate the risks, costs and obligations under the proposed credit agreement, at the time the determination is being made.

(3) ….

81 Prevention of reckless credit

(1) When applying for a credit agreement, and while that application is being considered by the credit provider, the prospective consumer must fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section.

(2) A credit provider must not enter into a credit agreement without first taking reasonable steps to assess-

(a) the proposed consumer's-

(i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;

(ii) debt re-payment history as a consumer under credit agreements;

(iii) existing financial means, prospects and obligations; and

(b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement.

(3) A credit provider must not enter into a reckless credit agreement with a prospective consumer.

(4) For all purposes of this Act, it is a complete defence to an allegation that a credit agreement is reckless if-

(a) the credit provider establishes that the consumer failed to fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section; and

(b) a court or the Tribunal determines that the consumer's failure to do so materially affected the ability of the credit provider to make a proper assessment.

82 Assessment mechanisms and procedures

(1) A credit provider may determine for itself the evaluative mechanisms or models and procedures to be used in meeting its assessment obligations under section 81, provided that any such mechanism, model or procedure results in a fair and objective assessment and must not be inconsistent with the affordability assessment regulations made by the Minister.

(2) The Minister must, on recommendation of the National Credit Regulator, make affordability assessment regulations.

(3) and (4) .....

83 Declaration of reckless credit agreement

(1) Despite any provision of law or agreement to the contrary, in any court or Tribunal proceedings in which a credit agreement is being considered, the court or Tribunal, as the case may be, may declare that the credit agreement is reckless, as determined in accordance with this Part.

(2) If a court or Tribunal declares that a credit agreement is reckless in terms of section 80 (1) (a) or 80 (1) (b) (i), the court or Tribunal, as the case may be, may make an order-

(a) setting aside all or part of the consumer's rights and obligations under that agreement, as the court determines just and reasonable in the circumstances; or

(b) suspending the force and effect of that credit agreement in accordance with subsection (3) (b) (i).

(3) If a court or Tribunal, as the case may be, declares that a credit agreement is reckless in terms of section 80 (1) (b) (ii), the court or Tribunal, as the case may be-

(a) must further consider whether the consumer is over-indebted at the time of those proceedings; and

(b) if the court or Tribunal, as the case may be, concludes that the consumer is over-indebted, the said court or Tribunal may make an order-

(i) suspending the force and effect of that credit agreement until a date determined by the Court when making the order of suspension; and

(ii) restructuring the consumer's obligations under any other credit agreements, in accordance with section 87.

(4) Before making an order in terms of subsection (3), the court or Tribunal, as the case may be, must consider-

(a) the consumer's current means and ability to pay the consumer's current financial obligations that existed at the time the agreement was made; and

(b) the expected date when any such obligation under a credit agreement will be fully satisfied, assuming the consumer makes all required payments in accordance with any proposed order.

84 Effect of suspension of credit agreement

(1) During the period that the force and effect of a credit agreement is suspended in terms of this Act-

(a) the consumer is not required to make any payment required under the agreement;

(b) no interest, fee or other charge under the agreement may be charged to the consumer; and

(c) the credit provider's rights under the agreement, or under any law in respect of that agreement, are unenforceable, despite any law to the contrary.

(2) After a suspension of the force and effect of a credit agreement ends-

(a) all the respective rights and obligations of the credit provider and the consumer under that agreement-

(i) are revived; and

(ii) are fully enforceable except to the extent that a court may order otherwise; and

(b) for greater certainty, no amount may be charged to the consumer by the credit provider with respect to any interest, fee or other charge that were unable to be charged during the suspension in terms of subsection (1) (b).' (My emphasis)

EVALUATION OF THE PARTIES' SUBMISSIONS

[19] Before I evaluate the parties' submissions, it is, notwithstanding the parties' agreement mentioned above, apposite to note the following differences between the two exceptions. In the case of the Cronje group, the defendants filed their plea to the original particulars of claim as long ago as 11 December 2019, alleging *inter alia* that the first defendant was over-indebted as contemplated in s 79(1) of the NCA, that no credit assessment was conducted in terms of s 81(2) and that FNB advanced reckless credit to the first defendant and the PC Trust. A rule 37 conference was held and the defendants requested further particulars for trial purposes to which FNB responded. Hereafter, on 9 June 2022, FNB amended its particulars of claim whereupon the first defendant filed a claim in reconvention a year later, on 12 June 2023, claiming cancellation of the mortgage bonds held by FNB as security. On the same day all the defendants filed their exception as excipients in response to FNB's amendment of its particulars of claim the previous year.

[20] In the case of the Steyn & De Witt group, the defendants filed a special plea on 27 June 2023, *inter alia* relying on FNB's alleged granting of reckless credit. Simultaneously with the filing of the plea, they filed four so-called conditional counterclaims. A few days later, on 5 July 2023, they filed an unconditional counterclaim, seeking cancellation of the mortgage bonds registered in FNB's favour as security. FNB filed a replication as well as a plea to the unconditional counterclaim. Again, further particulars for purposes of trial were requested by the defendants to which FNB responded. The defendant also sought further discovery to which FNB responded by way of an affidavit in terms of rule 35(3). In this case no conference has been held in terms of rule 37 *ex facie* the documents in the court file. In this case the notice of exception was served on FNB's attorneys on 5 June 2023, thus preceding the filing of the plea and counterclaim, although it was only filed with the court on 8 August 2023.

[21] In order to understand why the excipients claimed that the particulars of claim in both instances were excipiable, the reader is referred to paragraph 8 of the exceptions which reads the same in both instances. Mr Van Eeden reiterated during oral argument that it was expected of FNB to make the same averments to prevent the pleadings to be held excipiable. I quote:

'8. The respondent failed to allege that:

8.1 prior to entering into the credit agreements, it took reasonable steps to assess the considerations listed in section 81(2) of the NCA;

8.2 it used evaluative mechanisms or modules and procedures to meet its assessment obligations, resulting in a fair and objective assessment not inconsistent with the affordability assessment regulations as envisaged in section 82 of the NCA;

8.3 the credit agreements are not reckless for want of compliance with section 80(1) of the NCA;

8.4 it did not enter into reckless credit agreements as envisaged in section 81(3) of the NCA;

8.5 the court is precluded from declaring the credit agreements reckless as envisaged in section 83(1); and

8.6 the ancillary process envisaged by sections 83(2) and (3) of the NCA is consequently not applicable.'

[22] Consequently, Mr Van Eeden submitted that insofar as FNB failed to plead as set out in the exceptions, it did not give any effect to these cardinal requirements of the NCA. Therefore, the particulars of claim in both instances lack averments necessary to sustain causes of action and the exceptions should be upheld. He went so far to submit that in each and every case where a credit provider institutes action for payment under the NCA, the aforesaid allegations should be contained in the particulars of claim, with specific reference to those thousands of cases coming before the courts for default judgment. He submitted that if the allegations are not made in the particulars of claim, the court will be facing a predicament at the default judgment stage as it will not have any information whether or not the credit agreement under consideration does or does not constitute reckless credit. If the required averments are made, so he argued, it will give effect to the court's judicial oversight obligation to ensure consumer protection as expected by the legislature. He submitted further that if the aforesaid allegations are to be contained in the particulars of claim, the court will prevent a credit provider from hiding relevant information and documentation from consumers.

[23] When I asked Mr Van Eeden whether it was his case that in each and every action under the NCA it should be expected of a credit provider to not only plead compliance with ss 80 to 83, but also to attach all documents considered in the assessment process which might consist of numerous financial statements, he was not prepared to go that far. With respect to him, the argument lacks any substance. I cannot understand on what basis a court, adjudicating a default judgment application, will be able to provide proper judicial oversight upon a mere allegation that the plaintiff complied with ss 80 to 83 of the NCA. If that was expected of the court, this should have been made clear by the legislature. It is unreasonable to expect a plaintiff to attach to the particulars of claim all relevant financial information and supporting documents received during the assessment process to enable the court to scrutinise these to establish whether there was compliance. I conclude in finding that I do not agree with Mr Van Eeden's submission that if compliance with ss 80 to 83 is not pleaded in the particulars of claim, a credit provider may well obtain default judgment in circumstances where information is hidden from the court. There is more than one avenue available to consumers that believe that they have been treated unfairly as I shall explain later.

[24] I agree with Mr Van der Walt that the issue of reckless credit cannot be equated with s 40 of the NCA, requiring registration of a credit provider, read with s 89(2) on the one hand and s 129 read with s 130 on the other. Section 40(4) provides in clear language that a credit agreement entered into by an unregistered credit provider is an unlawful agreement and void to the extent provided for in s 89. Section 89, which deals specifically with unlawful credit agreements as is also evident from the heading, confirms that, subject to subsecs 89(3) and 89(4), a credit agreement is unlawful if the credit provider was not registered at the time when the NCA required registration. However, subsec 89(5) provides that if the credit agreement is unlawful, a court may make a just and equitable order, including, but not limited to an order that it is void from the date the agreement was entered into.

[25] Sections 129 and 130 deal with the required procedures before debt enforcement and the procedure in court. These sections are clear. A credit provider may not commence any legal proceedings to enforce a credit agreement unless notice has been given to the consumer as provided in subsec 129(1)(b), read with subsec 129(1)(a) and subsec 86(10), as the case may be. The notice requirements have been dealt with exhaustively in *Sebola and Another v Standard Bank of South Africa Ltd and Anther.*[9] I reiterate that the court in *Sebola* confirmed with approval in paragraph 45 that the default notice had correctly been described as a 'gateway provision' or a 'new pre-litigation layer' to the debt enforcement process. The whole purpose of s 129, read with s 130, is to alert defaulting consumers of their rights to utilise the provisions of the NCA to their advantage. The s 129 notice affords consumers a last opportunity to follow the alternative dispute resolution route and/or to submit their complaints to the National Credit Regulator. Sections 134, 136 and 139 provide for sufficient extra-judicial processes in terms of which consumers may raise issues such as reckless credit, over-indebtedness, restructuring of debts and/or to obtain other relief.

[9] 2012 (5) SA 142 (CC), in particular paras 45 & 77 to 88.

[26] Clearly, ss 80 to 83 do not suggest that a reckless credit agreement is unlawful and void *ab initio*. In fact, as set out in s 83, even if it is declared that a reckless credit agreement was entered into, the court may set aside all or part of the consumer's rights and obligations as it determines just and reasonable in the circumstances, or suspend the force and effect of the credit agreement on certain conditions. Furthermore, s 84 even deals with the termination of suspension and for the parties' rights and obligations under the agreement to be revived. No doubt, the clear wording is indicative of a valid and not an unlawful agreement. It is also apposite to consider subsec 130(4)(a) and (b) in this context which reads as follows:

'(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;'

The interpretation contended for by the excipients simply ignores the express and unambiguous provisions of s 40, read with subsec 89(2) and in particular ss 80 to 83, read with subsec 130(4)(a) and (b), as well as the clear wording of ss 129 and 130.

[27] It is trite, as Mr Van der Walt submitted, that in order to establish a cause of action, a plaintiff must plead the material facts, the *facta probanda,* in order to prove the claim, but that does not comprise every piece of evidence, the *facta probantia,* which is necessary to prove each material fact. The defendant must be given a clear idea of the material facts which are necessary to make the cause of action intelligible. It is not required of the plaintiff to anticipate each possible defence and to close all gaps in that regard. I agree with the following *dictum* of Coetzee J in *Prins v Universiteit van Pretoria*[10]*:*

'Dit is nie doenlik om elke moontlike verweer, *a priori*, toe te stop nie want dit kan die funksie wat die totaliteit van pleitstukke vervul, naamlik om die geskilpunte *pittig* te identifiseer, onnodiglik vertroebel.'

[10] 1980 (2) SA 171 (T) at 174 F - H.

This *dictum* was quoted with approval by the Supreme Court of Appeal in *F & I Advisors (Edms) Bpk en 'n Ander v Eerste Nasionale Bank van Suidelike Afrika Bpk.*[11]

[28] I am satisfied that FNB pleaded complete causes of action in both instances in a clear and intelligible manner, identifying the issues upon which it will seek to rely at the trial and on which evidence will be led. It was not necessary for FNB to plead the *facta probantia* that gave rise to the agreements. I noted that it alleged in both instances that it had complied with its contractual obligations in respect of the various agreements as it was obliged to do, but failed to state that it had complied with all provisions of the NCA, save for s 40 relating to registration and s 129 relating to notice. However, the excipients' exceptions are not directed at the failure to allege general compliance with the NCA, but specifically insofar as FNB failed to allege compliance with ss 80 to 83.

[29] I invited Mr Van Eeden to provide me with any judgments, reported or unreported, in support of his submissions. Notwithstanding the fact that the NCA has come into force in 2005, nearly two decades ago, no consumer has apparently opted to take a similar legal point as the excipients *in casu*. Insofar as Mr Van Eeden expects me to make new law, I am not prepared to do so as the facts do not justify such an opportunity. There is no reason to disregard the trite general principles applicable to pleadings and exceptions which have been applied over many decades. Even if I consider the NCA and the purpose thereof as contained in s 3 through the prism of the Constitution, there is no room for an interpretation as suggested by Mr Van Eeden.

[31] As said in the beginning, the irony of the exceptions before me is apparent. In both instances the two groups of excipients have already filed pleas and counter-claims. They relied exhaustively on special defences such as over-indebtedness and reckless credit. It is not necessary for me to finally determine on whom the *onus* rests to prove these special defences, save to record that, based on the trite legal

[11] 1999 (1) SA 515 (SCA) at 525 B – E.

principles, the excipients as defendants in the main actions will on all probabilities have to prove their defences.[12]

[33] The excipients failed to convince me that the particulars of claim in both instances do not disclose causes of action. I reiterate what was stated in *Vermeulen v Goose Valley Investments (Pty) Ltd*[13] and *Tembani and Others v President of the Republic of South Africa and Another*[14] quoted above.
Although Mr Van der Walt did not raise the issue in argument before me, it is apparent from some of the attached documents referred to in both particulars of claim, that the consumers acknowledged that they provided FNB with financial statements, that financial assessments were done, that the consumers were able to afford the repayments and understood the risks pertaining to the granting of credit. These admissions appear in the annexures to the pleadings in the case of the Cronje group[15] and in the case of the Steyn and De Witt group.[16] Although I have taken note of these admissions, I do not deem it necessary to use this information to bolster my conclusion that the exceptions should be dismissed. Mr Van Eeden's submission that the NCA called for a different approach to the long-standing legal principles pertaining to pleadings and the adjudication of exceptions is rejected.

[34] The dismissal of the exceptions does not deprive the excipients of the opportunity of raising their defences as substantive defences at the trials as they have already done in their respective pleas. Consequently, the merits of their pleas may still be determined after the hearing of evidence. As stated in *Pretorius and Another v Transport Pension Fund and Others,*[17] an adjudication of the special pleas during a trial on the merits is in any event a better way to determine potentially complex factual and legal issues.

CONCLUSION

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[12] Pillay v Krishna and Another 1946 AD 946 at 952 and numerous judgments confirming the principle set by the Appellate Division.
[13] 2001 (3) SA 986 (SCA) at para 7.
[14] 2023 (1) SA 432 (SCA) at para 14.
[15] Paras 17, 18 & 19 of the particulars of claim, pp 8 & 9 of the record, read with annexure POC1 at pp 91 & 92.
[16] Para 7 of the particulars of claim, record p 10, read with annexure POC2 on p 36; para 8 of the particulars of claims on p 17, read with annexure POC5 on pp 73 and 74.
[17] 2019 (2) SA 37 (CC) at 44 F - G.

[35] Having found that the exceptions in both cases shall be dismissed, there is no reason why costs shall not be awarded to the successful party. Both parties employed two counsel and both sought the costs of two counsel if successful. I am satisfied that the exceptions raised a novel issue that needed to be dealt with carefully, bearing in mind the complexity of the matter and the importance for both credit providers and consumers under the NCA. In the exercise of my discretion I conclude that FNB is entitled to its costs in both matters, including the costs consequent upon the employment of two counsel.

ORDERS

[36] The following orders are issued:

Case number 3955/2019:

1. The exception is dismissed with costs, including the costs consequent upon the employment of two counsel.

Case number 2778/2021:

1. The exception is dismissed with costs, including the costs consequent upon the employment of two counsel.

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JP DAFFUE J

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