



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

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

**Case No: 3379/2020**

In the matter between:

**TIMAC AGRO SOUTH AFRICA (PTY) LTD**

Plaintiff

and

**THEUNIS LODEWYK ADRIAAN NEL**

Defendant

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**HEARD ON:** 15 JUNE 2023

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**JUDGMENT BY:** MHLAMBI, J

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**DELIVERED ON:**

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[1] On 13 June 2018, the plaintiff and the defendant entered into a written credit facility, subject to terms and conditions, in terms of which the plaintiff undertook to provide and supply agricultural fertilizer to the defendant from time to time at the instance and request of the defendant.

[2] It was agreed between the parties that the defendant would pay within 180 days from the date of delivery of the fertilizer. Interest was chargeable at the rate of 2% above the prime interest per month charged by ABSA bank limited, the defendant signed a written acknowledgement of debt at Vesselbron in terms of which the defendant acknowledged to be indebted to plaintiff in the

amount of R 1 582 642.26 which the defendant undertook to repay in three equal instalments of R 527 547.42. The first instalment was payable on or before 31 May 2022, the second instalment on or before 30 June 2020 and the third instalment on or before 31 July 2020. As of 17 July 2020, the defendant had effected the total payments in the amount of R 325 000.00.

- [3] On 09 September 2020, the plaintiff, relying on the agreement and the acknowledgement of debt, issued summons against the defendant for the payment of the amount of R 1 398 220.25 together with interest calculated from the date of service of the summons. In the alternative, interests are *tempore morae* calculated at 10.5% per annum from the date of service of the summons. In the further alternative that the defendant pay the plaintiff R 1 194 367.65 together with interest at the rate of 10.5% per annum and costs of suit.

The plaintiff, relying on a document titled Application for Credit Facility completed and signed by the defendant on 13 June 2018 and an acknowledgement of debt signed by the defendant, issued a summons in September 2020 against the defendant for the payment of R 1 340 000.00.

- [4] The defendant raised special pleas such as non-compliance with the provisions of Rule 41A, the jurisdiction of the High Court, reckless credit, non-compliance with the provisions of sections 103, 104, 123, 129, and 130 (inclusive of the unlawfulness of the accelerations provisions) of the NCA and the ineffectiveness of the certificate of balance. The defendant admitted having appended his signature to both the credit facility and the acknowledgement of debt; that the fertiliser was sold and delivered to him by the plaintiff and the outstanding amount was not paid on/or before 31 July 2020. The defendant also filed three conditional counterclaims based on sections 110,81,89 and 90 of the NCA.
- [5] At the commencement of the trial proceedings, the defendant was ordered to commence with the presentation of his evidence whereupon the defendant closed his case without presenting any evidence in support of his defence or the conditional counterclaims.

[6] The plaintiff called two witnesses, Ms Britz and Mr Bothma. During the testimony of Mr Bothma, Mr Swart, on behalf of the plaintiff, applied for the amendment of the amount in prayer 1 which read R 1 398 220.95. The Particulars of claim were therefore amended to read as follows:

- a) Payment in the amount of R 1 239 533.75.
- b) Interest on the amount above at a rate of 1% per month calculated from the date of service of the summons being 20 September 2020.
- c) In the alternative to the interest claimed above, interest a *tempore morae* calculated at 7% from the date of service of the summons.

[7] The defendant argued that as the plaintiff's claim was premised upon the credit facility and acknowledgment of debt, the plaintiff had to prove both these agreements and the defendant a special defence. The defendant contended that<sup>1</sup> the plaintiff succeeded in proving the contents of these documents but contested the enforceability of these contracts on the following basis:

- a) In that they did not comply with the provisions of the NCA;
- b) The plaintiff was not registered in accordance with section 40 of the NCA;
- c) It failed to comply with clause 20 of the credit facility which determined that disputes should be referred to a joint committee for resolution;
- d) Failure to comply with clause 12.1 requiring a 14-day notice period enabling the party in default to remedy the default;
- e) Failure to prove that the agreement constituted incidental credit agreements.

[8] In an oral address, Mr Du Plessis submitted that if annexure "A", the acknowledgment of debt is found to be an incidental agreement, then the defences based on sections 103, 104, 123 and 130 would fall away. In his written heads of argument, he stated that the parties were *ad idem* that in the

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<sup>1</sup> Paragraph 4.1 of the defendant's heads of argument.

event of the court holding that the agreements in question constituted incidental credit agreements, the issues relating to reckless credit as pleaded by the defendant fell by the wayside.

#### The facts not in dispute

[9] It is not in dispute that the defendant signed the credit facility, subject to written terms and conditions as reflected on annexures “B1” and “B2” to the Particulars of Claim, and the acknowledgment of debt<sup>2</sup> and that the plaintiff sold and delivered the fertilizer to him. The plaintiff duly performed in terms of the agreement and sold and delivered fertilizer to the defendant from June 2018 until June 2019 when requested to do so by the defendant. A copy of the customer statement that constituted a summary of the fertiliser sold and delivered to the defendant by the plaintiff was attached to the Particulars of Claim as annexure “ C”. The defendant used and consumed the fertilizer for which he made various payments to the plaintiff.<sup>3</sup> The defendant received the plaintiff’s notice in terms of section 129 (1)(a) of the NCA but elected not to exercise any of his rights mentioned in that section.<sup>4</sup> The customer statement, annexed to the particulars of claim, was no longer disputed. The acknowledgment of debt was signed by the defendant whilst being represented by an attorney.

[10] The crucial point for determination is whether the acknowledgment of debt was an incidental agreement or not. An incidental agreement is defined as follows in the Act: 'incidental credit agreement' means an agreement, irrespective of its form, in terms of which an account was tendered for goods or services that have been provided to the consumer, or goods or services that are to be provided to a consumer over a period of time and either or both of the following conditions apply:

- (a) a fee, charge or interest became payable when payment of an amount charged in terms of that account was not made on or before a determined period or date; or

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<sup>2</sup> Paras 6 and 7 of the Particulars of Claim and 9.4 of the Plea.

<sup>3</sup> Paras 10-13 of the Particulars of Claim and paras 9.5 and 9.6 of the Plea.

<sup>4</sup> Para 25 of the Particulars of Claim and para 9.16 of the Plea.

- (b) two prices were quoted for settlement of the account, the lower price being applicable if the account is paid on or before a determined date, and the higher price being applicable due to the account not having been paid by that date.

[11]

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**MHLAMBI, J**

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