

[1] ~~05/2/2024~~ **IN THE HIGH COURT OF SOUTH AFRICA**
[2] DATE **GAUTENG DIVISION, JOHANNESBURG**

Case No.: 2022-021528



In the matter between:

RHENUS LOGISTICS PROPRIETARY LIMITED
(formerly WORLD NET LOGISTICS
PROPRIETARY LIMITED)

Plaintiff/Plaintiff

and

GOOD TO GO TRADING CC

Defendant/Defendant

JUDGMENT

CORAM: NOWITZ AJ

INTRODUCTION

1. This is an Application for Summary Judgment, where the Plaintiff's cause of action is based on an Acknowledgement of Debt entered into between the Plaintiff and the Defendant on **21 June 2018** ("the AOD").¹
2. The salient terms of the AOD are summarised below:
 - 2.1. The Defendant acknowledged that it is indebted to the Plaintiff in an amount of **R1, 237, 912.88** ("the Capital Sum"), plus interest calculated

¹ Annexure "A" to the POC, pp 01-13 to 01-22

at 2% above the prime lending rate of the Plaintiff's bankers, from time to time;

2.2. the Defendant undertook to make payment to the Plaintiff on the following bases:

2.2.1. equal monthly instalments of an amount of R25, 000.00, with the first payment to be made on or before **10 May 2018**, and thereafter each instalment is to be paid on the 10th of each month until the full outstanding amount is repaid to the Plaintiff;²

2.2.2. interest would be paid as follows:

2.2.2.1. no interest for the first 6 months;³

2.2.2.2. thereafter, for the following 6 months, interest would be payable at a rate of 6% per annum;⁴

2.2.2.3. thereafter interest would be payable at a rate of 2% above the prime lending rate of the Plaintiff's bankers;⁵

2.2.3. If the Defendant defaulted on any of its obligations under the AOD the full outstanding balance would immediately become due, owing and payable to the Plaintiff;⁶

2.2.4. The Defendant warranted that, at the date of signing the AOD, its annual turnover and/or asset value exceeded the threshold contemplated in section 4 of the National Credit Act, 34 of 2005 ("the NCA");⁷

² AOD, clause 4.1.1

³ AOD, clause 4.1.2.1

⁴ AOD, clause 4.1.2.2

⁵ AOD, clause 4.1.2.3

⁶ AOD, clauses 5.1.2 and 5.1.3

⁷ AOD, clause 6.1

2.2.5. The AOD is the whole agreement between the parties;⁸

2.2.6. No variation of the AOD will be binding on the parties unless agreed in writing and signed by both parties;⁹

2.2.7. The Defendant shall pay the Plaintiff's costs of litigation on a scale as between attorney and client.¹⁰

3. The Defendant made payment of a total amount of **R555, 000.00** to the Plaintiff and thereafter, from **September 2018** to **June 2022**¹¹, failed to make payment in accordance with its obligations in the AOD.

4. The full outstanding amount claimed by the Plaintiff in these Summary Judgment proceedings is thus **R682, 912.88**,¹² plus interest calculated as per the AOD.

THE DEFENCE

5. The Defendant alleges that it has a *bona fide* defence, which may be summarised as follows:

5.1. the Defendant's defence is set out in the Plea¹³ as is amplified in the Opposing Affidavit;

5.2. the AOD was proposed by the Plaintiff due to services rendered by the Plaintiff to the Defendant in terms of a "business application form" and agreement reached between the parties on **29 January 2015**¹⁴. A copy of this agreement is attached to the Plea marked "**GTG 1**"¹⁵;

⁸ AOD, clause 6.4

⁹ AOD, clause 6.5

¹⁰ AOD, clause 6.10.2

¹¹ POC, para 7, pp 01-10 to 01-11

¹² POC, para 9, p 01-11

¹³ Caselines 01/2, p 01-27 to 01-37

¹⁴ Plea, paragraph 6, p 01-29

¹⁵ Caselines, p 01-36 to 01-37

5.3. the business application form is the underlying *causa* of the AOD and is a credit agreement as is envisaged by the National Credit Act, Act 34 of 2005 (the NCA), the following provisions of which are relevant¹⁶:

5.3.1. Credit limit requested in Rands: R 300 000-00.

5.3.2. Gross asset value more than R 2 million: No.

5.3.3. Annual turnover more than R 2 million: No;

5.4. to allow the Defendant to become indebted to the Plaintiff in the amount of R 1 237 912-88 (the capital sum in the AOD) or R 682 912-88 (the amount claimed in the summons), is over the credit limit requested by the Defendant and constitutes reckless lending in terms of the NCA;

5.5. Section 8(1) of the NCA provides that an agreement constitutes a 'credit agreement' if it is, *inter alia*, a 'credit transaction'. A 'credit transaction' includes an agreement 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 the agreement, or the amount that has been deferred (s 8(4)(f)). As was stated in the Plea, the costs of drawing up the AOD was borne by the Defendant¹⁷. The AOD is per definition a credit agreement in terms of s8(4)(f);

5.6. the AOD ought to be declared to be a reckless credit agreement as envisaged in Section 83 of the NCA for the following reasons:

5.6.1. the Plaintiff failed to conduct an assessment as required by section 81 (2) of the NCA; alternatively,

5.6.2. the Plaintiff, having conducted an assessment as required by section 81 (2), entered into the credit agreement with the

¹⁶ Caselines, p 01-36

¹⁷ Plea, Paragraph 26, p 01-32

Defendant despite the fact that the preponderance of information available to the Plaintiff indicated that:

5.6.2.1. the Defendant was already, at the time of entering the AOD, indebted to the Plaintiff for an amount exceeding the credit facility granted on 29 January 2015; alternatively,

5.6.2.2. entering into that credit agreement would make the Defendant over-indebted¹⁸.

THE LAW ON SUMMARY JUDGMENT

6. Rule 32(1)(a) provides that the Plaintiff may, after the Defendant has delivered a Plea, apply to court for Summary Judgment on each of such claims in the Summons as is on a liquid document, together with any claim for interest and costs.
7. Rule 32(3)(b) requires a defendant to “satisfy the Court by affidavit ... that he has a bona fide defence to the action; such affidavit ... shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.” The statement of material facts must “be sufficiently full to persuade the court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff’s claim.”¹⁹
8. It is incumbent upon a defendant to formulate his opposition to the Summary Judgment Application and to do so (a) with a sufficient degree of clarity to enable the Court to ascertain whether he has deposed to a defence which, if proved at trial, would constitute a good defence to the action;²⁰ and (b) with reference to the Plea that was delivered. In this regard a defendant must

¹⁸ Plea, paragraph 36, p 01-33

¹⁹ *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 266 (T).

²⁰ See *District Bank v Hoosain* 1984 (4) SA 544 (C).

engage meaningfully with the material in the plaintiff's affidavit supporting the Application for Summary Judgment.²¹

9. Thus, a defendant will fail if it is clear from his Affidavit that he is advancing a defence simply to delay the obtaining a judgment to which the defendant well knows that the plaintiff is justly entitled.²²

10. In ***NPGS Protection and Security Services CC & another v FirstRand Bank Ltd***²³ the Supreme Court of Appeal held as follows:

"Rule 32(3) of the uniform rules requires an opposing affidavit to disclose fully the nature and grounds of the defence and the material facts relied upon therefor. To stave off summary judgment, a defendant cannot content him or himself with bald denials, for example, that it is not clear how the amount claimed was made up. Something more is required. If a defendant disputes the amount claimed, he or she should say so and set out a factual basis for such denial. This could be done by giving examples of payments made by them which have not been credited to their account."

11. The Defendant is therefore required to disclose fully the nature and grounds of its *bona fide* defence to the action, and the material facts relied upon therefor.

THE DEFENCES RAISED BY THE DEFENDANT

12. The Defendant's Affidavit Resisting Summary Judgment thus raises the following defences to the action:

12.1. the Plaintiff did not comply with Rule 18(6) of the Uniform Rules of Court as one page is missing from the AOD which is attached to the POC.²⁴

²¹ *Saglo Auto (Pty) Ltd v Black Shades Investments (Pty) Ltd* 2021 (2) SA 587 (GP) at paragraph [55].

²² *Skead v Swanepoel* 1949 (4) SA 763 (T) at 766 - 7.

²³ (314/2019) [2019] ZASCA 94 (6 June 2019).

²⁴ Defendant's affidavit, para 12, p 02-9

12.2. the NCA does apply to the AOD;²⁵

Rule 18(6) of the Uniform Rules of Court

13. If there is a material defect in any of the formalities required by the Rules of Court, the Court should not readily grant Summary Judgment. On the other hand, where it is clear that the Rules have substantially been complied with and there is no prejudice to the Defendant, the Court should condone a failure to comply with a technical requirement of the Rules.²⁶
14. Technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.²⁷
15. The Defendant has suffered no prejudice that could not be cured by the provisions of rule 35(12) and rule 35(14), both of which entitle a litigant to call for such documents, as may be referred to in a pleading, before pleading.²⁸ IN casu, neither subrule was invoked by the Defendant.
16. The Defendant has not shown that it has suffered any prejudice by the non-compliance, and accordingly the Plaintiff's non-compliance with rule 18(6) ought to be condoned.²⁹
17. During the course of argument, this defence was to all intents and purposes abandoned by the Defendant. In the premises, the Plaintiff's non-compliance can be condoned.

The National Credit Act, 34 of 2005

18. Section 4(1)(a)(i) of the NCA provides:

²⁵ Defendant's affidavit, paras 5 to 9, pp 02-8 to 02-9

²⁶ *Charsley v Avbob (Begrafnisdiens) Bpk* 1975 (1) SA 891 (E) at 893C-D

²⁷ *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A), at 278F-G

²⁸ *Nxumalo v First Link Insurance Brokers (Pty) Ltd* 2003 (2) SA 620 (T) para [9]

²⁹ *Dass and Others NNO v Lowewest Trading (Pty) Ltd* 2011 (1) SA 48 (KZD) at para [16]

Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except a credit agreement in terms of which the consumer is a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7 (1)"

(own emphasis)

19. Section 4(2)(a) of the NCA provides:

"the asset value or annual turnover of a juristic person at the time a credit agreement is made, is the value stated as such by that juristic person at the time it applies for or enters into that agreement"

20. Section 5(1)(d) of the NCA provides that Chapter 4, Part D applies with respect to an incidental credit agreement, save to the extent that it deals with reckless credit.

21. An "incidental credit agreement" is defined *inter alia* as "an agreement, irrespective of its form, in terms of which... goods or services are to be provided to a consumer over a period of time and ... a fee or charge of 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".

22. *In casu*, Clause 3 of the Terms and Conditions agreed to by the Defendant (**Caselines 001-37**) provided for interest to be charged on amounts not paid on due date, at 2% above the prime rate charged by the Plaintiff's Bankers.

23. In **Ratlou v Man Financial Services SA (Pty) Ltd** (1309/17) [2019] ZASCA 49; 2019 (5) SA 117 (SCA), the Court found that the purposive approach in determining whether the NCA was applicable to settlement agreements, is the correct approach:

*"[24] MAN's reliance on three cases in which our courts have used the purposive approach in determining whether the NCA was applicable to settlement agreements, is well placed. In **Grainco (Pty) Ltd v Broodryk NO & others**[5] the court found that although the settlement*

agreement referred to deferral of payment and interest the agreement did not constitute a credit transaction because the underlying transaction was a damages claim in respect of which the Plaintiff, by agreement, afforded the first, second, and third Defendants deferment of payment. It was held that the transaction did not fall within the business of moneylending and the furnishing of credit, in the ordinary sense of the word. The NCA was not intended to encompass an underlying causa of the postponement of payment of damages.

*[25] In **Hattingh v Hattingh**[6] a settlement agreement in which two brothers terminated their business relationship and provided for payment of R6,6 million in annual instalments of R734 000,00 together with interest on the capital was found not to fall within the ambit of the NCA. The court found specifically that there had been no credit provider-consumer relationship. This and the parties' intention viewed against the background of the objects of the NCA showed that it could not have been the intention of the Legislature that an agreement such as the impugned agreement should be regarded as a credit agreement. Although the one brother, prima facie, fell within the definition of a credit provider as intended in the NCA it could not – given the purpose and the context of the NCA – have been the intention of the Legislature that the brother would be regarded as a credit provider subject to the obligations imposed by the NCA.*

*[26] In **Ribeiro & another v Slip Knot Investments 777 (Pty) Ltd**[7] it is found that the underlying causa remained extant despite settlement and that the two agreements were interdependent. In this case the underlying agreement was a damages claim pursuant to the repossession and re-sale of the vehicles. There was also no credit provider – consumer relationship and the settlement agreement and the underlying agreements were interdependent. There can only be one conclusion, that the NCA was not designed to regulate settlement agreements where the underlying agreements or cause, would not have been considered by the Act.”*

ANALYSIS

24. There is no doubt that the Defendant is fully aware of the entire contents of the AOD. It does not deny its signature thereof and its partial performance in terms thereof is common cause. Further:

24.1. the Defendant made **17** payments between **September 2018** and **June 2022** and never once raised the NCA defence until sued for breach of and non-compliance with the provisions of the AOD;

24.2. the Defendant specifically warranted in Clause 6.1 of the AOD (Caselines 001-18) that the NCA was not of application. Even if the Credit Application form was relevant and interdependent (which I find is not the case), then this constituted a novation, alternatively, a variation of this specific provision. Moreover, Clause 6.4 of the AOD reflects that the contents of the AOD, which was signed 3 years after the Credit Application form was completed, records that same constitutes the entire contract.

25. I am of the view that ***Ratlou v Man Financial Services SA (Pty) Ltd*** is the correct reflection of our law as it currently stands and that NCA is not applicable to settlement agreements or compromises, which is what the present AOD is.

26. It is the Plaintiff's contention that the cause of action is based on the AOD, that the Defendant is bound by the terms of same and cannot rely on the prior agreement.³⁰ The Defendant submits that the agreements do not exist independently from each other and avers that "(20)...*The compromise therefore remained linked to the underlying causa, ... The artificiality of ignoring them is self-evident.*"

27. In my view, *Ratlou* makes it clear that the agreements do not exist independently and underlying *causa* cannot be ignored. However, having said that, I find:

27.1. that the underlying *causa*, ie the 2015 business application form does constitute an *incidental credit agreement* and accordingly, the Defendant's reliance on reckless lending as a defence cannot succeed;

³⁰ Founding affidavit paragraph 9.1, p 02-31

27.2. that if the business application form and the AOD are to be read together, then the AOD varied or novated the business application form *inter alia* insofar as the Defendant's asset value is concerned. Even if there has been no variation, or novation, the impediment highlighted in **27.1** above remains.

28. Accordingly, for these reasons, I find that the NCA, including its provisions relating to reckless lending are not of application and that this defence must fail as well.

ORDER

29. In the circumstances, I make the following Order:

Summary Judgment is granted in favour of the Plaintiff against the Defendant as follows:

29.1. Payment of the sum of R682 912.88;

29.2. Interest on the outstanding balance as at 11 November 2018, at the rate of 6% per annum for 6 months; and thereafter, interest on the outstanding balance as at 11 May 2019 at the rate of 2% above the prime lending rate of the Plaintiff's bankers, until the entire balance outstanding is paid in full;

29.3. Costs of suit on the Attorney and client scale.

M NOWITZ
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA GAUTENG DIVISION,
JOHANNESBURG

5 February 2024

APPEARANCES

FOR PLAINTIFF:

Adv L F Laughland

Instructed by Harris Billings Attorneys

FOR DEFENDANT:

Adv Carmen Botha

Instructed by Gerhard Botha Attorneys