REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO. 15136/09

In the matter between:

J M V TEXTILES (PTY) LIMITED Plaintiff

and

DE CHALAIN SPAREINVEST 14 CC
REGISTRATION NO:2000/016097/23 1st Defendant

ANWAR ISMAIL LOCKHAT
ID NO: 2nd Defendant

MOHOMED ISMAIL LOCKHAT 3rd Defendant

J U D G M E N T

Delivered on 20 August 2010

WALLIS J

[1] On 18 February 2009 the plaintiff, J M V Textiles, and the first defendant, a close corporation trading as Cuts, concluded an agreement in terms of which JMV Textiles would sell fabric to Cuts on credit. The credit limit was described as 'R50 000.00/R100 000.00', presumably a monthly limit, and the agreement provided that payment should be made 'sixty days nett'. The second and third defendants bound themselves as sureties and co-principal debtors with Cuts for its obligations in terms of this agreement. The present action is one by JMV Textiles to recover the price of goods that it claims to have supplied under this arrangement. Whilst Cuts is cited as the

first defendant it has gone into liquidation and accordingly the action proceeds only against the sureties.

[2] In their plea the defendants have raised various defences in terms of the provisions of the National Credit Act 34 of 2005 (the 'NCA'). These are that:

(a) JMV Textiles was obliged to be registered as a credit provider in terms of s 40 of the NCA and as it was not registered the credit agreement is unlawful and void and JMV Textiles is precluded from recovering the purchase price of the goods;

(b) The notice in terms of s 129(1)(a) of the NCA given to the defendants before the commencement of proceedings was defective;

(c) A consent to the jurisdiction of Magistrates' Court in terms of the conditions of sale is unlawful in terms of s 90(2)(k)(vi)(aa) of the NCA and accordingly the defendants deny that this court has jurisdiction to hear this action;

(d) The provision in the deed of suretyship that the sureties waive the benefits of excussion and division is unlawful and void in terms of s 90(2)(c) of the NCA and the sureties are entitled to rely upon these benefits.

Apart from these defences the defendants simply deny the plaintiff's allegations in respect of the supply of fabric and the amounts outstanding.

[3] At the outset of the trial I was asked to make an order in terms of Rule 33(4) separating the determination of the four defences under the NCA from the other issues in these proceedings and such an order was made. Thereafter the case was argued on the basis of certain agreed facts and in the light of

certain documents made available to the court.

[4] The principal issue relates to the question of JMV Textiles' obligation to register as a credit provider in terms of s 40(1) of the NCA. If they were obliged to register and did not do so then any credit agreement concluded by them is an unlawful agreement and void to the extent provided for in s 89. In terms of s 89(5) a credit agreement that is unlawful and void must be declared to be void from the date upon which it was entered into and all the rights of the credit provider under the credit agreement to recover goods delivered to the consumer are cancelled unless the court concludes that such cancellation would unjustly enrich the consumer. As the agreement is void the credit provider is precluded from recovering the purchase price of goods supplied. In the result if it was obliged to register as a credit provider JMV Textiles is not entitled to recover the price of the goods supplied to Cuts.

[5] In terms of s 40(1) a person is obliged to register as a credit provider if:-

'(a) that person…is the credit provider under at least one hundred credit agreements, other than incidental credit agreements; or

(b) the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1).'

The threshold is R500 000.00.

[6] For present purposes the key to whether JMV Textiles was obliged to register as a credit provider is whether its agreements with Cuts are incidental credit agreements. Whilst a party to an incidental credit agreement

is a credit provider as defined in s 1 of the NCA a distinction is drawn between an incidental credit agreement, which is also defined in s 1, and a credit agreement, which is an agreement that meets the criteria set out in s 8 of the NCA. As is apparent from s 40 if the agreements concluded by a credit provider are incidental credit agreements there is no obligation on the credit provider to register in terms of s 40(1). I should add that for the purpose of determining whether JMV Textiles was obliged to register the parties agreed that it is party to more than one hundred agreements, similar in their form and content to the agreements concluded with Cuts that give rise to the present action, and the total amount owing to it in terms of those agreements exceeds R500 000.00. It is not suggested that apart from those agreements there are other agreements concluded by JMV Textiles that would constitute credit agreements and require it to be registered. That means that the only question is whether the agreements that it concluded with Cuts are incidental credit agreements.

[7] An incidental credit agreement is defined as:

'An agreement, irrespective of its forms, 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

(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.'

[8] The argument on behalf of JMV Textiles is that the agreements under

consideration fall squarely within this definition. They are agreements in terms of which it agrees to sell goods on credit because the obligation to pay the purchase price is deferred for a defined period. If payment of that amount is not made timeously then interest on the overdue amount is to be paid in terms of clause 4(3) of the standard conditions of sale at a rate of 2% per month from due date until date of payment. Accordingly the condition in sub-sect (a) is satisfied because interest becomes payable when payment of an amount charged in terms of the account is not made on or before a determined date. Sub-sect (b) is not applicable because JMV Textiles does not sell goods on the basis that if payment is made within a specified period the consumer receives a discount.

[9] In advancing this argument Mr Shapiro, who appeared for the plaintiff, placed some reliance on the provisions of clauses 2.1 and 2.2.1 of the standard conditions of sale. These read as follows:

'2.1 The particulars endorsed on the order form read with these conditions of sale shall constitute the customer's offer.

2.2.1 The company shall be entitled to accept the customer's offer in whole or in part.'

On that basis he contended that each accepted order constituted a separate agreement of purchase and sale. However, the contention that whenever Cuts placed an order with JMV Textiles the latter could accept or reject it at will, is inconsistent with the agreement embodied in the credit application signed in February 2009 on which JMV Textiles relied in its particulars of claim. It is alleged by JMV Textiles and admitted by all three defendants that this formed part of the contract between the parties. It clearly contemplated that goods would be supplied, provided they were ordered within the agreed credit limits and Cuts was not otherwise in default. That is

inconsistent with the notion that JMV Textiles was at liberty either to accept or reject any order placed upon it. In my view a better construction of the arrangement is that it was an agreement that JMV Textiles would sell goods to Cuts in accordance with the latter's orders, provided Cuts remained within the defined credit limits and made payment for the goods within sixty days of purchase. In other words the various purchases and sales were conducted on the basis of an open running account within the agreed credit limits. That accords with the manner in which the plaintiff formulated its claim in annexure B to the particulars of claim.

[10] The defendants rely upon this construction of the agreement between the parties to contend that it constitutes a credit facility as defined in s 8(3) of the NCA and not an incidental credit agreement. In terms of that section an agreement, irrespective of its form, constitutes a credit facility if in terms of the agreement:

'(a) a credit provider undertakes

(i) to supply goods or services or to pay an amount or amounts, as determined by the consumer from time to time, to the consumer; or on behalf of, or at the direction of the consumer; and

(ii) either to

(aa) defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of an amount contemplated in subparagraph (i); or

(bb) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount contemplated in subparagraph (i); and

(b) any charge, fee or interest is payable to the credit provider in respect of:

(i) any amount deferred as contemplated in paragraph (a)(ii)(aa); or

(ii) any amount billed as contemplated in paragraph (a)(ii)(bb) and paid within the time provided in the agreement.'

[11] It was accepted by Mr Shapiro that the transactions between JMV Textiles and Cuts involve the supply of goods and the deferral of the purchaser's obligation to pay the cost of the goods. However, he submitted that no charge, fee or interest is payable to JMV Textiles in respect of the amount deferred. The purchase price is fixed at the time the goods are ordered and supplied and it is that price that must be paid within sixty days. Interest only becomes payable in terms of clause 4.3 of the standard conditions if the purchase price is not paid timeously. That analysis is clearly correct. That leaves the question whether these agreements fall within s 3(a)(ii)(bb).

[12] The argument in that regard is that JMV Textiles would bill Cuts for each supply of goods in accordance with the invoices, copies of which were made available to me. Those invoices all refer to the same account number and that appears to be the account reflected in the ledger sheets annexed to the particulars of claim. Almost certainly, in addition to the invoices in respect of each purchase JMV Textiles also rendered a monthly statement reflecting the total amount then outstanding and due to it. Accordingly, so the defendants' argument ran, it billed Cuts periodically for the cost of the goods supplied and where such amounts were not paid within the time provided in the agreement it charged interest thereon. That it contended means that the requirements of s 8(3)(a)(ii)(bb) and (b)(ii) are satisfied and the agreement constitutes a credit facility as defined.

[13] At first sight both the argument that the arrangements under consideration constitute an incidental credit agreement and the argument that they constitute a credit facility are plausible. However, they cannot both be

correct. In terms of s 5 of the NCA it only has limited application to incidental credit agreements. A credit facility constitutes a credit agreement to which the Act applies in full force. More particularly, for present purposes, a credit provider that concludes credit agreements in the numbers or for the amounts referred to in s 40(1) is obliged to register as a credit provider on pain of nullification of the credit agreements that it concludes. A person who enters into incidental credit agreements is not obliged to register and does not run the risk of the agreements being rendered void for lack of registration. It necessarily follows that an incidental credit agreement cannot also be a credit facility.

[14] In my view the proper starting point is to identify the type of transactions contemplated in sub-sect (a). They are of two types. The first is the supply of goods or services at the consumer's request and either the deferment of the obligation to pay the price or periodic billing of part of the amount. The second is the payment by the credit provider of amounts to either the consumer or third parties at the consumer's request, where the obligation to repay is deferred or is the subject of periodic billing in respect of part of the amount. The former aptly describes the position with store charge cards or accounts and the latter the position with credit cards. In the case of a store card the customer is allowed to buy goods up to a determined limit, payment is deferred to the end of the month and the customer is billed monthly. A fee may be charged for the right to use the card and if the full balance is not paid monthly interest is chargeable on the shortfall. The customer decides how much to pay each month subject to paying a stipulated minimum amount such as 10% of the amount owing. With a credit card the position is similar save that the card provider pays amounts to

persons from whom the cardholder buys goods or obtains services and may also disburse cash to the cardholder. Repayment is deferred and the monthly billing results in interest being levied if the full amount is not paid, as the customer is free to do subject to making a minimum payment. In some cases a fee is charged for the right to use the card. All of this is part and parcel of the agreement under which the card is issued.

[15] The agreement between JMV Textiles and Cuts is fundamentally different from this. The agreement is that JMV Textiles will sell goods on credit to Cuts. The expectation is that the price of the goods will be paid each month as it falls due. There is no fee paid for this and there is no entitlement to pay less than the full amount due each month. The obligation to pay interest flows from default in making timeous payment not from a legitimate decision not to pay the full amount that is due each month. There is no contemplation that JMV Textiles will ever send a bill for only part of what is due or at periodic intervals. This type of transaction is so wholly distinct from those that are manifestly intended to fall within s 8(3) that the language should not be stretched to encompass it. Even if it does I am mindful of the warning given by De Villiers ACJ in *Town Council of Springs v Moosa and another* 1929 AD 401 at 417 that:

'An interpretation clause has its uses, but it also has its dangers, as it is obvious from the present case. To adhere to the definition regardless of subject-matter and context might work the gravest injustice by including cases which were not intended to be included.'

In my view s 8(3) is directed at the provision by credit providers of charge cards and credit cards and similar arrangements and not at conventional sales on credit. It accordingly does not cover the transactions before me.

[16] Viewed from a broader perspective that conclusion is consistent with the thrust and purpose of the NCA. In a broad sense it is concerned with the activities of those whose business it is to provide credit to the public and who seek to profit from that business by way of fees, charges and interest. The distinction drawn between an incidental credit agreement and a credit facility, reflects the fact that with the incidental credit agreement the fee, charge or interest only arises when the consumer is in default. There an entitlement to charge interest on default would in any event be permissible, if the contractual terms were silent on the point, by virtue of the provisions of the Prescribed Rate of Interest Act, 55 of 1975. By contrast in the case of a credit facility it is a term of the facility that the consumer is entitled to defer payment in full and make lesser payments subject to paying interest. Thus in the case of the credit facility described in s 8(3) part and parcel of the arrangement between the consumer and the credit provider is agreement that the consumer may take advantage of the offer of credit. Indeed the usual expectation is that most consumers will, either on a regular basis or at least from time to time, take advantage of the availability of credit and be willing to incur the charges, usually by way of interest, resulting from their doing so. That is largely how the credit provider profits from the agreement.

[17] That is a fundamentally different situation from the ordinary contract for the purchase and sale of goods or services where credit is extended and interest is only charged if payment is not made timeously. There the expectation of the parties is that payment of the purchase price will be forthcoming in accordance with the credit arrangements agreed between the parties. It is not the intention underlying those transactions that the supplier will profit from the interest charged. Rather that amount is levied in order to

compensate the seller for the non-receipt of the purchase price. In broad terms the seller suffers a loss because of the non-receipt of the purchase price, either because it does not have those funds and cannot deploy them profitably or because it is itself funding its business operations on credit, such as an overdraft, and is compelled to pay more interest than it would have done had the payment been made timeously.

[18] There are of course countless business transactions in which goods and services are provided on credit where the supplier only charges interest if payment is not received timeously or offers the other party a discount if they pay early. Experience suggests that almost all manufacturers supply goods to their customers, whether wholesale or retail, on that basis. Whilst one does encounter sales on a COD basis, in modern conditions of trade that may well be the exception rather than the general rule. At the day-to-day level of the ordinary citizen it is commonplace to find that people have an account with their pharmacy or in poorer communities with the local general dealer's or trader's store. School children may have accounts at the school shop and students may run accounts at a student bookshop. It would be surprising to discover that all these institutions are credit providers required to register in terms of the NCA. Their focus is not the provision of credit and the securing of profit therefrom, but the simple task of profiting from the buying and selling of goods. It is in that category that JMV Textiles' agreement with Cuts falls.

[19] Lastly, it is important to bear in mind that one is dealing with expressions in a statute that have been given a defined meaning. In common parlance people speak of a bank overdraft as a credit facility and it is

certainly conceivable that Cuts might have described their arrangements with JMV Textiles as a credit facility. However the definition in s 8(3) of the NCA is a technical definition for the purposes of a technical statute and common descriptions are not of great assistance in construing the language of such a provision. Similarly the choice of the expression 'incidental credit agreement' to describe arrangements such as those that JMV Textiles has with its customers is unhappy insofar as it conveys that one is dealing with ancillary or occasional transactions. That is not so. A party is free to enter into as many transactions as it likes falling within the definition of incidental credit agreement without incurring the obligation to register in terms of s 40(1) of the NCA.

[20] I conclude therefore that Mr Shapiro is correct in his submission that the transaction in this case and the other transactions that JMV Textiles has entered into in similar form with other customers are incidental credit agreements. As such they do not give rise to an obligation to register as a credit provider in terms of s 40(1) of the NCA. Accordingly neither the agreement to permit goods to be purchased on credit nor the individual sales are unlawful agreements as contended by the defendants and the main ground of defence advanced on behalf of the sureties must be rejected.

[21] The remaining three defences advanced in the pleadings can be disposed of shortly. The first was that the s 129(1)(a) notice delivered to the defendants on behalf of JMV Textiles merely repeated in rote form the provisions of the section, without making any specific proposals. The point is without merit. The letter quite clearly proposed that the defendants refer the agreements and any dispute in that regard to a debt counsellor with a

view to resolving those disputes or developing and agreeing on a plan to make payment. Not only was that clear, but it was clearly understood as the two sureties responded to the invitation by agreeing that the credit agreement and the dispute be referred to a debt counsellor. These proceedings were only pursued after that route had failed to reach a resolution. It cannot be thought in those circumstances that the notice was defective.

[22] The next contention in regard to the jurisdiction of this court was not pursued with any vigour in argument. That is hardly surprising because the provisions of s 90(2)(k)(vi)(aa) of the NCA are directed at nullifying a consent to the jurisdiction of the High Court in circumstances where a Magistrates' Court has concurrent jurisdiction. The consent on which the defendants rely is a consent to the jurisdiction of the Magistrates' Court, not the High Court. Indeed, it is hard to think why anyone would embody a consent to the jurisdiction of the High Court in a credit agreement bearing in mind that the High Court has inherent jurisdiction in respect of all persons resident and all causes arising within its area of jurisdiction. The point is misconceived.

[23] Lastly there is the defence based on waiver of the right of excussion. There are several difficulties with this. The first is that the two sureties bound themselves both as sureties and as co-principal debtors. A co-principal debtor does not enjoy the right of excussion. A glance at the leading textbook on the subject shows that this is put on the grounds of an implied renunciation of the benefit. It is by no means clear to me that it is not simply a necessary corollary of the fact that the person has bound themselves as a co-principal debtor, without the need to rely upon the notion

of tacit renunciation. Be that as it may, however, the point is bad for two other reasons. Firstly, renunciation of the benefit of excussion does not fall within the provisions of s 90(2)(c) of the NCA because (on the assumption that excussion is a common law right that has been waived) it is not one that has been prescribed in terms of s 90(5). Accordingly it is not an unlawful provision for the purposes of the NCA. Secondly, my conclusion that the arrangements between the parties constitutes an incidental credit agreement and not a credit agreement as defined in s 8 of the NCA, has the consequence that the deed of suretyship executed by the second and third defendants is not a credit guarantee. This flows from the provisions of s 8(5) of the NCA. Accordingly s 90, which deals only with unlawful provisions in credit agreements, is inapplicable.

[24] It follows that all four of the special defences under the NCA raised by the defendants are bad and fall to be dismissed. I accordingly make the following order:

1. The defences set out in paragraphs 7.3 to 7.6, 10.2 to 10.6 and 11 of the second and third defendants' amended plea are dismissed.
2. The second and third defendants are ordered to pay the plaintiff's costs of the preparation for and argument at the separated hearing on 16 August 2010, such costs to be paid on the scale as between attorney and client.
3. The action is adjourned *sine die*.

DATE OF HEARING	15 AUGUST 2010
DATE OF JUDGMENT	20 AUGUST 2010
PLAINTIFF'S COUNSEL	MR W N SHAPIRO
PLAINTIFF'S ATTORNEYS	ATKINSON, TURNER & DE WET
DEFENDANTS' COUNSEL	MR R MOHAMED
DEFENDANT'S ATTORNEYS	SHAUKAT KARIM & COMPANY