**IN KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG**

**REPUBLIC OF SOUTH AFRICA**

**REPORTABLE**

Case no: 14833/08

In the matter between:

| | |
|---|---|
| **VOLTEX (PTY) LIMITED** | Plaintiff |
| And | |
| **CHENLEZA CC** | First Defendant |
| **POTGIETER, JAN NICOLASS** | Second Defendant |
| **POTGIETER, ESTELLA MARIANNA** | Third Defendant |

**JUDGMENT**

---

## MADONDO J

### INTRODUCTION

[1] This is an exception to the defendants' plea to the plaintiff's Particulars of Claim on the ground that it lacks averments which are necessary to sustain a defence to the plaintiff's claim. For its claim the plaintiff relies on the Agreements of Sale in terms of which it sold and delivered goods to the first defendant, and on the contract of suretyship which the second and third defendants signed as the sureties and co-principal debtors for the obligations

of the first defendant to the plaintiff. The defences the defendants set out in their plea are all based upon the National Credit Act No.34 of 2005 (the Act).

**PARTIES**

[2] In the interest of clarity I shall refer to the parties as the plaintiff and the defendants.

[3] The plaintiff is Voltex (Pty) Limited, a company duly incorporated and registered with limited liability in accordance with the Company Laws of the Republic of South Africa trading under the names and styles of Voltex Newcastle, Waco Distributor Durban and/or Waco Industries and having its principal place of business at Block B, SA Andrews Office Park, 39 Wordsworth Avenue, Senderwood, Gauteng.

[4] The first defendant is Chenleza CC, a close corporation duly incorporated and registered in accordance with the provisions of the Close Corporations Act, 1984 trading under the style N &S Electrical Wholesalers, having its registered office, alternatively, principal place of business at 110 East Street, Vryheid.

[5] The second defendant is Jan Nicholaas Potgieter, an adult businessman, having his place of business at 110 East Street, Vryheid.

[6] The third defendant is Estella Marianna Potgieter, an adult businesswoman, married to the second defendant in community of property and having her place of business at 110 East Street, Vryheid.

**FACTUAL BACKGROUND**

[7] On 11 November 2008 the plaintiff instituted an action against the defendants, jointly and severally, wherein it claimed:

7.1 the payment of the sum of R159 129.41 and the interest thereon at the rate of 15,5% per annum from the 31st of August 2008 to date of payment;

7.2 the payment of the sum of R80 328.16 and the interest thereon at the rate of 15,5% per annum from the 31st of July 2008 to date of payment.

[8] The plaintiff's claim arose from the written agreement of sale entered into between the plaintiff and the first defendant during February 2001 at Vryheid, alternatively at Gauteng, and from a series of oral agreements of sale entered into between the plaintiff and the first defendant subsequent to the conclusion of the aforesaid written agreement. A copy of which is annexure "A" to the papers.

[9] During February 2001 and at Vryheid, alternatively at Gauteng, the first defendant being represented by the second and third defendants lodged a written application with the plaintiff for credit facilities. The plaintiff being represented by its credit manager accepted the aforesaid application and

inconsequence thereof, a written Agreement of Sale (annexure "A") was entered into between the parties in terms of which the first defendant would from time to time purchase goods from the plaintiff on the terms set out therein.

[10] The essential terms of the written agreement were that:

10.1 the first defendant would from time to time purchase goods from the plaintiff at the agreed, alternatively the plaintiff's usual or at a fair and reasonable price;

10.2 the purchase price would be due and payable by the first defendant to the plaintiff within thirty (30) days of the date of delivery or within thirty (30) days of the date of the plaintiff's statement or written a reasonable time of delivery or upon demand.

[11] The first defendant then chose *domicilium citandi et executandi* for purposes arising out of the application at 110 East Street, Vryheid.

[12] In its Particulars of Claim the plaintiff alleges that during the period between March and July 2008, pursuant to annexure "A", the plaintiff and the first defendant entered into a series of oral agreements of sale in terms of which the first defendant purchased goods from the plaintiff. Pursuant to the aforesaid oral agreements of sale the plaintiff delivered the purchased goods to the first defendant and the total purchase price thereof was R159 129.41.

[13] Plaintiff also alleges that during or about the period from February to June 2008 the plaintiff and the first defendant entered into a series of oral agreements of sale in terms of which the first defendant purchased goods from the plaintiff at the agreed, plaintiff's usual or fair and reasonable prices. The plaintiff duly delivered the said goods to the first defendant. The total purchase price in the aforesaid agreements amounted to R80 328.16.

[14] The second and third defendants signed annexure "A" on behalf of the first defendant. By their signatures thereto, the plaintiff avers, the second and third defendants jointly and severally bound themselves in their private and individual capacities as sureties for and co-principal debtor in solidum with the first defendant in favour of the plaintiff for the due performance of any obligations of the first defendant and for the payment to the plaintiff by the first defendant of any amounts which might at anytime become owing to the plaintiff by the first defendant from whatever cause arising.

[15] In the premises, the plaintiff alleges that the second and third defendants are jointly and severally liable with the first defendant to the plaintiff. The plaintiff alleges that the amount of R159 129.41 was due not later than 31st August 2008 and that the amount of R80 328.16 was due by not later than 31st July 2008. Further, that the defendants are also liable to pay the interest on the aforesaid sums of money at the rate of 15.5% from the 31st July 2008 and 31st August 2008 respectively to date of payment. However, notwithstanding demand the defendants have failed to make payment of the aforesaid sums to the plaintiff.

[16] After the plaintiff had caused the summons to be issued against the defendants wherein it claims payment of the sums of R159 129.41 and R80 328.16 respectively, the defendants filed a Notice of Intention to Defend. Upon receipt of such notice the plaintiff lodged an application for Summary Judgment. In the supporting affidavit the second defendant raised various defences under the Act. In consequence thereof an application for Summary Judgment was refused and the defendants were granted leave to defend the action.

[17] Subsequently, the defendants pleaded to the plaintiff's Particular of Claim, and paragraph 1 of their plea reads:

> "Defendants admits averments contained in the plaintiffs Particulars of Claim save and except insofar as it is alleged that the defendants are liable to pay the plaintiff the amount claimed or at all."

[18] It is apparent from the defendants' plea that all of the factual averments in the Particulars of Claim are admitted. However, the defendants deny that they are liable to pay the amounts claimed on the basis set out in paragraphs 2 and 3 of their plea. The defences raised in the defendants' plea are as follows:

(i) The agreements entered into by the parties are credit agreements as contemplated by section 8(3) and section 8(5) of the Act and that as such are governed by the provisions of the Act;

(ii) The plaintiff is a credit provider in terms of section 40(1) and section 42(1) of the Act, and that it must therefore be registered with the National Credit Regulator as a credit provider;

(iii) The plaintiff is not registered as a credit provider, and that accordingly the agreements entered into between the plaintiff and the defendants are void in terms of section 40(4) read with section 89 of the Act;

(iv) Alternatively, no notice was given in terms of section 129 of the act;

(v) Further, alternatively, the second and third defendants are over-indebted and pray for an order under section 85 of the Act and that the matter be referred to a debt counsellor.

[19] Mainly, the defendants' defences are based on the allegation that the agreements of sale upon which the plaintiff proceeds are credit agreements as defined by the Act.

[20] The plaintiff excepted to the defendants' plea on the grounds that the defendants' plea lacks averments which are necessary to sustain a defence to the plaintiff's claim. The plaintiff alleges that the agreements of sale entered into between it and the first defendant are not credit agreements as defined in the Act. Accordingly, the plaintiff is not a credit provider in terms of section 40(1) and section 42(1) of the Act and does not need to be registered with the National Credit Regulator as a credit provider.

[21] Further, the plaintiff avers that the agreements between it and the defendants are accordingly not void in terms of section 40(4) of the Act, and that no notice is required to be given in terms of section 129 of the Act in respect of the plaintiff's claim under such agreements of sale.

[22] The matter was set down for hearing on an exception on 30 November 2009. However, on 26 November 2009 W Lentik Attorneys, being the attorneys of record for the defendants withdrew as such. The defendants were notified of the said withdrawal by having a copy of the Notice of Withdrawal served upon them by hand, and this is evidenced by the signatures of the defendants appearing at the bottom of the last page of the Notice of Withdrawal.

[23] On the day of the hearing there was no representation for the defendants. Nor were the defendants in attendance. However, in order to satisfy me that the plaintiff was entitled to succeed in its claim Mr Senegal for the plaintiff had to address me on the order sought in the Notice of Motion.

**ISSUE**

[24] The issue raised by the facts in this matter is whether the agreements of sale the plaintiff relies upon for its claim, where the purchase price was payable within thirty (30) days of the delivery of the goods, constituted the credit agreements as defined in the Act.

[25] The purpose of the Act is to afford protection to the consumers in credit transactions. With regard to its interpretation and application section 2 of the act provides:

> "(1) This Act must be interpreted in a manner that gives effect to the purposes set out in section 3.
>
> (2) Any person, court or tribunal interpreting or applying this Act may consider appropriate foreign and international law."

[26] Whether or not the Act applies to an agreement and extent to which it applies, is determined by classification and the definitions set out in section 8(1), (3), (4) and (5) of the Act. In making such determination the nature, the subject matter, substance, purpose and the function of a particular agreement as well as the intention of the parties gathered from their conduct, should be taken into account and form the basis of the prime considerations in this regard. See *Bridgeway Ltd v Markam 2008(6) SA 123(W).*

[27] Section 8 (1) provides –

> "Subject to subsection 2, an agreement constitutes a credit agreement for the purposes of this Act if it is-
>
> (a) a credit facility, as described in subsection (3);
>
> (b) a credit transaction, as described in subsection (4);
>
> (c) a credit guarantee, as described in subsection (5) or
>
> (d) any combination of the above."

There is a distinction between different types of agreements which is based on the purpose and function of the credit supplied. Certain agreements may fall within two or more of the categories mentioned in the Act, or may have a part falling into a different category or not falling into a category at all.

[28] Section 8(3) provides –

"An agreement, irrespective of its form but not including an agreement contemplated in subsection (2) or section 4(6) (b), constitutes a credit facility if, in terms of that 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 consumers' obligation to pay any part of the costs 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 subparagraph (a)(ii)(aa); or

(ii) any amount billed as contemplated in paragraph (ii)(bb) and not paid within the time provided in the agreement."

[29] Section 8(3)(a)(i) defines an agreement where the credit provider supplies goods, services or pays an amount of money to the consumer as constituting a credit facility. However, the supplied goods, services or paid amount must have been determined by the consumer concerned.

[30] It has been argued on behalf of the plaintiff that the type of credit facility referred to in section 8(3) (a)(i), only relates to a facility such as credit card or bank overdraft, where a credit facility maybe used at the discretion of the consumer. The first defendant did not have discretion to demand goods, but it had to enter into separate agreements of sale with the plaintiff whenever it wished to acquire goods.

[31] It follows that the goods supplied in law having been determined by the first defendant, that the supply of those goods fall within the ambit of section 8(3)(a)(i) of the Act. I therefore, find no merit in the plaintiff's argument that the credit facility referred to in section 8(3)(a)(i) only relates to a credit card or bank overdraft.

[32] Section 8(3)(a)(ii)(aa) provides for the deferment of the consumer's obligation to pay part of the purchase price. The distinguishing feature in the

present case is that the payment of the whole debt amount was deferred for thirty (30) days.

[33] Generally, a credit agreement is an agreement for the sale of goods under which the purchase price is payable by instalments. In casu, the plaintiff deferred the first defendant's obligation to pay the whole purchase price for thirty (30) days. However, when making such payment on fixed period, the first defendant was in terms of the agreement required to pay the amount owed in full. Since the whole amount owed was payable on or before the specified date or period, giving the first defendant thirty (30) days to pay the purchase price, in my view, cannot be construed as deferring the first defendant's obligation to pay the purchase price in the manner provided for in section 8(3)(a)(ii)(aa).

[34] Section 8(3)(a)(ii)(bb) entitles the credit provider to bill the consumer periodically for the balance of the purchase price. In the present case the plaintiff was not in terms of the agreement required to bill the first defendant periodically. Such an exercise seems to have been rendered unnecessary by the fact that no part payment of the purchase price had been made by way of deposit or down payment. As a result, there was no balance payable by the first defendant as part of the cost of goods. But, the debt amount was payable in full on the specified period.

[35] Having found that none of the sale agreements in casu, satisfy the requirements of section 8(3)(a)(ii)(aa)(bb), it is not necessary to deal with section 8(3)(b).

[36] Section 8(4) provides –

> "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 provided in respect of –
>
> (i) the agreement; or
>
> (ii) the amount that has been deferred."

[37] Clearly none of the agreements relevant herein constitute a pawn transaction, an incidental credit agreement; an instalment sale agreement, a mortgage agreement, secured or lease.

[38] Regarding "any other agreement" referred to in section 8(4)(f) such an agreement constitutes a credit transaction if it is an agreement other than a

credit facility or credit guarantee in terms of which the payment of the amount owed by one person to another is deferred and a charge, fee or interest is payable to the credit provider in terms of the agreement or on the amount that has been deferred.

[39] In the present matter, even though the purchase price was payable within thirty (30) days of the delivery of goods, no charge, fee or interest was payable to the plaintiff in terms of the agreement or on the deferred amount, save the interest which was payable as damages in consequence of the breach of the contract. Such interest was not fixed or determined by the agreement, but by the operation of law. See also *Victoria Falls & Transvaal Power Co. Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1 at 22* and *Koch v Panovka 1933 NPD 776 at 780.* The agreements of sale in question thus fall short of constituting “any other agreement” referred to in subsection (4)(f).

[40] In terms of section 8(5) 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 the credit facility or credit transaction as defined in the Act.

[41] Though the second and third defendants herein undertook to satisfy the first defendant’s obligation, such an obligation, as I have already found, does not arise from a credit facility or credit transaction.

[42] Section 8(a)(d) refers to “any combination” of credit facility, credit transaction and credit guarantee as described in section 8 (3)(4) and (5) respectively. However, upon proper construction of the provisions of section 8(3)(4) and (5), none of the sale agreements in question fall within the ambit of any of the categories mentioned therein. It, therefore, follows that no combination of the credit transactions or agreements referred to in section 8(1) has been found to exist in the sale agreements in question.

**CONCLUSION**

[43] Since the agreements of sale in question do not satisfy all the criteria set out in section 8(1)(3)(4)and (5) of the Act, they cannot be said to be credit agreements as defined in the Act. In the premises, there was no obligation at all on the plaintiff to register as the credit provider. Accordingly, it follows that all the defences raised by the defendants in their plea fall away.

**ORDER**

[44] In the result, I make the following order:

1. The exception is upheld with costs.
2. Judgment is granted in favour of the plaintiff against the first, second and third defendants jointly and severally, the one paying the others to be absolved, and are ordered to pay to the plaintiff:
    2.1 The sum of R159 129.41.
    2.2 Interest on such sum at the rate of 15.5 % per annum from 31st August 2008 to date of payment.

2.3 The sum of R80 328.16.

2.4 Interest on such sum at the rate of 15.5% per annum from 31st July 2008 to date of payment.

| | |
|---|---|
| Date reserved on: | 30 November 2009 |
| Date delivered on: | 19 March 2010 |
| Counsel for Plaintiff: | Adv Segal |
| Instructed by: | Norman Barling<br>c/o Johnathan Carr & Co.<br>REF: (Mr JF Carr/ Shantell/01N003004) |
| Counsel for Defendant: | |
| Instructed by: | W Lentink Attorneys<br>c/o Barry Bruce Attorneys |