/CCC CASE NO 385/91

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ESIAS PHILLIPPUS OOSTHUIZEN FIRST APPELLANT

WILHELMINUS JOHANNES McDERMOTT

VAN DEN BERGH SECOND APPELLANT

and

STANDARD CREDIT CORPORATION LIMITED RESPONDENT

CORAM: BOTHA, SMALBERGER, KUMLEBEN JJA et NICHOLAS,

KRIEGLER, AJJA

DATE HEARD: 18 MARCH 1993

DATE DELIVERED: 14 MAY 1993

J U D G M E N T

NICHOLAS, AJA:

The two appellants, Mr E P Oosthuizen and Mr W J M van den Bergh, were the respective defendants in two actions brought in the witwatersrand Local Division by Standard Credit Corporation Ltd ("Standard Credit"). The actions were consolidated, together with similar actions brought against Messrs strydom and De Kock. At the pre-trial conference all the parties agreed in terms of Rule 33(1) of the Uniform Rules of Court upon a written statement of facts in the form of a special case for the adjudication of the court. The actions against Strydom and De Kock were settled before the trial, but the proceedings against Oosthuizen and Van den Bergh continued. In the actions, which were based on lease agreements relating to mini-buses, Standard Credit claimed the balances alleged to be owing under the

respective agreements. The defence in each case was that the lease agreement was illegal as being contrary to the provisions of the Credit Agreements Act 75 of 1980 ("the Act") and was consequently null and void. The trial judge (CLOETE AJ) found in favour of Standard Credit in each case. The judgment has been reported under the name of Standard Credit Corporation Ltd v Strydom & Others 1991(3) SA 644(W), and I shall refer to it as "the reported judgment". The terms of the order granted are set out at 654 C-F.

With the leave of the court a quo the appellants now appeal to this court. The issues relate solely to questions of law. I shall accordingly set out only the facts which relate to Oosthuizen's case.

A prominent feature in the stated case was a scheme called the "Sampson Beck Scheme", which was

described as follows:

"1. Sampson Beck (Pty) Ltd ('Sampson Beck') is a company incorporated and registered in South Africa of which one CAREL CHRISTIAAN VAN DYK ("van Dyk") was the sole shareholder and director at all material times and in particular, during 1985.

2. The general purport of the scheme operated and administered by Sampson Beck involved the using of creditworthy clients in order to obtain finance for mini-buses from financial institutions, which mini-buses were intended for use by black taxi operators. The description of the scheme set out hereunder is intended to describe the scheme generally, and does not purport to describe the numerous variations and exceptions to the general scheme.

3. Sampson Beck either approached members of the public (hereinafter referred to as 'the client' or 'the clients') or was approached by the clients, to use the clients' names for the financing of mini-buses.

4. The client would sign a written application form for credit to the financial institution, which application form was usually completed on the client's behalf. Such a form contained, inter alia, the following information:

the description of the goods to be leased/purchased; the personal particulars of the applicant and his

credit references. The application form would bear no mention of the involvement of Sampson Beck or the taxi operator. The application form would be presented by van Dyk or a staff member of Sampson Beck to the client for signature.

5. Thereafter the application form would find its way to the financial institution, which would be ignorant of the involvement of Sampson Beck.

6. Once the financial institution approved the application, the client would conclude a credit agreement with the financial institution in terms whereof the financial institution would either sell or lease the mini-bus to the client. Simultaneously with the signing of the credit agreement, the client would sign a debit order form, which formed part of the agreement, authorising the financial institution to draw against his bank or building society account the amounts due in terms of the credit agreement.

7 The client would conclude a contract with Sampson Beck in terms whereof the client would give possession and control of the mini-bus to Sampson Beck in order that Sampson Beck could make it available for use by a taxi operator nominated by Sampson Beck and Sampson Beck undertook to pay to the client a monthly commission and to make all payments due in terms of the credit agreement to the financial institution. Copies of typical agreements are annexed hereto marked 'A1' and 'A2'. The

sole purpose for the client concluding the credit agreement with the financial institution was in order to give possession and control of the mini-bus to Sampson Beck as aforesaid.

8. The mini-bus would be placed in the possession of a taxi operator.

9. The initial rental/payment as set out in the credit agreement would be paid to the financial institution.

10. The financial institution would pay the purchase price of the mini-bus to the dealer.

11. Sampson Beck would enter into some agreement with the taxi operator in terms whereof Sampson Beck would make the mini-bus available to the taxi operator. A copy of a typical agreement is annexed hereto, marked 'A3'.

12. Sampson Beck would receive payment of rentals from the taxi operator in terms of the aforesaid agreement, from which it would pay:

(a) the rental or instalment due to the financial institution, either directly or via the bank account of the client;

(b) the client's commission as aforesaid, on a monthly basis;

(c) the insurance premiums in respect of the vehicle; and

(d) an administrative fee to itself.

13. The scheme commenced in about 1983. For several years, by and large, Sampson Beck fulfilled its obligations towards the financial institutions and the clients.

14. Gradually, Sampson Beck fell into arrears with

the payment of rentals and instalments, which progressed to a stage where Sampson Beck was no longer able to meet its financial commitments.
15. The agreements hereinafter referred to, between the Plaintiff and the Second and Third Defendants, were, unbeknown to the Plaintiff, part of the aforesaid Sampson Beck scheme."

The agreed facts relating to the case of Standard Credit Corporation Ltd v Oosthuizen were the following:

"16. The Plaintiff is STANDARD CREDIT CORPORATION LIMITED a company duly incorporated and registered in accordance with the laws of the Republic of South Africa, which has its principal place of business at Standard Bank House, 6 Simmonds Street, Motortown, Johannesburg, and which carries on business as a registered general bank through various branch offices.
17. The Second Defendant is ESIAS PHILLIPPUS OOSTHUIZEN, an adult male senior sales representative for Metro Cash and Carry, of Plot 55, Eljeesee, Tarlton, Krugersdorp.
18, On the 14th May 1985 the Second Defendant signed a document called a 'Finance Application', a copy of which is annexed hereto, marked 'B1'. The said application was considered and approved by the Plaintiff.

19. On the 15th May 1985 the Second Defendant signed a document termed a 'Lease Agreement', as lessee in the space provided therefor on the face of the document. A copy of the agreement is annexed hereto, marked 'B2'.

20. The terms and conditions are printed on the reverse side of the lease agreement and are incorporated herein by reference.

21. Simultaneously with the signing of the lease agreement, the Second Defendant signed a debit order form, which formed part of the lease agreement, authorising the lessor and/or its cessionary to draw against his bank account the amounts due in terms of the lease agreement.

22. The lease agreement relates to a 1985 Toyota Hi-Ace micro-bus 16 seater motor vehicle.

23. The lease agreement, incorporating the debit order form, duly signed by the lessee, was in fact delivered to the lessor and was thereafter signed by the lessor and the lease agreement was accordingly duly concluded between the parties.

24. The lessor performed its obligations in terms of the agreement of lease by giving delivery of the vehicle to a person nominated by the Second Defendant's agent and the parties are agreed that such delivery constituted performance of the lessor's obligations.

25. The initial rental in terms of the agreement was paid by the Second Defendant to the lessor and/or the Plaintiff and the initial rental was refunded to the Second Defendant by

Sampson Beck.

26. On the 21st May 1985 the lessor ceded to the Plaintiff, which accepted such cession, all right, title and interest in and to the agreement of lease.

27. Various rentals were paid to the Plaintiff, either by way of a debit order or in some other form, under the account number allocated to the transaction, and were in fact received by the Plaintiff. The Second Defendant's account was accordingly debited each month with the appropriate amount representing the rentals, and Second Defendant was reimbursed in some of these payments by Sampson Beck. At some stage after the commencement of the lease agreement Sampson Beck paid the rentals directly to the Plaintiff either by way of debit order or in some other form.

28. The Second Defendant was entitled to receive a monthly commission from Sampson Beck of R75,00 per month for the first two years and R100,00 per month thereafter, in terms of the Second Defendant's oral contract with Sampson Beck, the terms of which were approximately the same as 'A1' and 'A2'. He in fact received R75,00 per month for the first two years and R100,00 per month thereafter until October 1988.

29. In breach of the lease agreement the Second Defendant failed to pay certain rentals on due date and consequently fell into arrears, entitling the Plaintiff (subject to the contentions set out below) to an acceleration of payments.

30, The outstanding balance in terms of the lease agreement is R9 944,66.

31, The Second Defendant is entitled to a reduction of finance charges in the amount of R997,82.

32. In the premises the Second Defendant is indebted to the Plaintiff (subject to the contentions set out below) in the sum of R8 946,84, together with interest thereon at the rate of 27% per annum compounded monthly from the 24th October 1989 to the date of payment and costs of suit on the attorney and client scale."

The questions of law in dispute were stated to be -

"49. Whether the aforesaid lease agreements are governed by the provisions of the Credit Agreements Act No. 75 of 1980.

50. Whether a contravention of Section 6(6) of the Credit Agreements Act No. 75 of 1980 renders an agreement subject to the provisions of the said Act invalid or merely constitutes a criminal transgression.

51. Whether the exemption created by Regulation 4 of the Regulations promulgated under Government Notice No. R401 dated 27th February 1981, as amended, is applicable in the case of the Second and Third Defendants."

The question in para 49 is basic to the decision of the appeal. For present purposes it may be reformulated as follows:

> "Whether the provisions of the Act applied to the lease agreement which is Annexure B2 to the stated case."

(Annexure B2 is hereinafter referred to as "the Lease Agreement." The various annexures to the stated case are not attached to this judgment.)

S 2(1) of the Act provides:

> "2. (1) The provisions of this Act shall apply to such credit agreements or categories of credit agreements as the Minister may determine from time to time by notice in the Gazette: Provided that the Minister shall not have any power to apply such provisions to credit agreements in terms of which -
> (a) a person purchases or hires goods for the sole purpose of selling or leasing them or using them in connection with mining, engineering, construction, road building or a manufacturing process;
> (b) the State is the credit grantor."

S 3(1) of the Act provides that the Minister may by regulations in the Gazette inter alia

> "(a) prescribe the maximum period within which the full price under a credit agreement shall be paid; (b) prescribe the portion of the cash price or any other consideration which shall be paid or delivered as an initial payment or initial rental in terms of a credit agreement."

There are accordingly three parts to the enquiry:

(a) Whether the lease agreement is "a credit agreement" within the meaning of the Act;

(b) Whether it is an agreement in a category as determined by the Minister by notice in the Gazette; and

(c) Whether it is an agreement referred to in para (a) of the proviso to s 2(1).

The answers depend on the application of the relevant statutory provisions to the facts existing at

the time of the conclusion of the agreement. The question whether the provisions of the Act apply to a particular credit agreement must be ascertainable before it is concluded, for it is only when that question has been determined that the parties are in a position to decide whether it is necessary that the agreement should comply with any regulations made by the Minister under s 3(1) of the Act. It follows that it is only those facts which are available to both parties which can be relevant. Facts known to one party only and not disclosed to the other do not enter the picture.

I deal in turn with each of the limbs of the enquiry.

(a) One of the meanings of "credit agreement" in s 1 of the Act is "(a) a credit transaction or a leasing transaction", and "leasing transaction" is

defined as meaning:

> "...a transaction in terms of which a lessor leases goods to a lessee against payment by the lessee to the lessor of a stated or determinable sum of money at a stated or determinable future date or in whole or in part in instalments over a period in the future, but does not include a transaction by which it is agreed at the time of the conclusion thereof that the debtor or any person on his behalf, shall at any stage during or after the expiry of the lease or after the termination of that transaction become the owner of those goods or after such expiry or termination retain the possession or use or enjoyment of those goods."

Plainly the Lease Agreement was a credit agreement as defined.

(b) There were published in the Government Gazette of 27 February 1981 Government Notices Nos R401 and R402. In No R402, the Minister, acting in terms of s 2 of the Act, prescribed that the provisions of the Act should apply to any -

> "(2) leasing transaction in respect of any of the goods listed in Annexure A (to the Notice)."

In No R401, the Minister promulgated regulations in terms of s 3 of the Act. They provided in Regulation 2 that all credit agreements entered into in respect of the goods listed in column 1 of Annexure A should comply with the provisions in regard to -

> "(a) the maximum period within which the full price under such credit agreements shall be paid, as prescribed in column 3 of that Annexure;
> (b) the portion of the cash price or any other consideration which shall be paid or delivered as an initial payment or initial rental in terms of such credit agreements as prescribed in column 2 of that Annexure."

The lists of goods in Annexure A to No R402 and in Annexure A to R401 were identical. The following is an extract from Annexure A.

Column 1	Column 2	Column 3
Goods	Portion of the cash payment price Per cent	Period of payment Months from date of delivery
19. Mechanically propelled motor vehicles not subject to the provisions of paragraph 20 including any commercial vehicle irrespective of whether such motor vehicle is subsequent to the manufacture thereof equipped, constructed or adapted for the conveyance of persons, but excluding tractors, harvesting machinery, agricultural machinery and imple-ments and irrigation machinery...	30	36
20. Mechanically propelled road passenger motor vehicles designed to seat not more than 15 persons including motor-cycles and motor-tricycles	20	42

The subject-matter of the Lease Agreement, a "Toyota Hi-Ace Micro Bus 16 seater", is covered by item

19 of Annexure "A" to the regulations in Notice R401. It is a mechanically propelled motor vehicle designed to seat more than 15 persons, and is hence not subject to the provisions of item 20.

(c) On this limb of the enquiry, Standard Credit's contention is that the Act did not apply to the Lease Agreement because it fell within proviso (a) to s 2(1) of the Act. The trial judge agreed with this contention (at 652 B), and accordingly found that the lease agreements concluded by the respective defendants were not subject to the provisions of the Act. The appellants challenge this finding.

The narrow question is whether the Lease Agreement is a credit agreement <u>in terms of</u> which Oosthuizen hired the vehicle for the sole purpose of leasing it (in the Afrikaans version "<u>ingevolge</u>

waarvan").

The phrase in terms of is one which is in common use. It was argued on behalf of Standard Credit that in addition to its ordinary meaning it has a wide meaning - namely, pursuant to or in accordance with, and that in the proviso it bears the wide meaning. In my opinion, the three phrases in terms of, pursuant to, and in accordance with are synonyms with slightly different shades of meaning. One or other may be appropriate depending on the context, but essentially they do not differ in meaning. The dictionary meaning of the phrase pursuant to is "consequent on and conformable to", and that of in accordance with is "in conformity with". Similarly in terms of contains the idea of "in conformity with".

The difficulty in the present case as I see

it, is not in regard to the meaning of the expression, but in regard to what are the possible sources of information for determining whether the purpose stated in s2(l)(a) is in terms of a credit agreement. One obvious source is the agreement itself. Another possible source is evidence of circumstances prevailing at the time of the conclusion of the agreement from which a tacit or implied term may be inferred. There may be other possible sources, but it is manifest that evidence as to a purpose of the lessee which was unexpressed and unknown to the lessor at the time of the contract, cannot be a source of information relevant to the question whether there was a purpose in terms of the agreement. Similarly evidence relating to the post contractum conduct of one of the parties would be irrelevant. Compare what VAN DEN HEEVER JA said in Van

der Merwe v Viljoen 1953(1) SA 60(A) at 65 C-E:

> "Dit is...duidelik dat 'n hof geregtig is om ['n stilswyende beding] te presumeer slegs indien hy vrywel noodgedwonge dit moet doen om die ooreenkoms vatbaar te maak vir 'n redelike vertolking in die omstandighede. Die uitdrukking 'stilswyende beding' dui reeds daarop dat dit iets moet wees wat die partye bedoel net, of geag moet word te bedoel net, maar waaraan hulle geen uiting gegee het nie. Gevolglik moet so 'n beding afgelei word van die kontrak self en die omstandighede wat geheers het by sy sluiting. Om dit af te lei van wat na die kontraksluiting plaasgevind het sou wees om aan die partye profetiese gawes toe te skrywe."

In the judgment a quo CLOETE AJ referred (at 652 C-D) to para 7 of the stated case, from which, he said, it appeared that the sole purpose of the defendants in concluding the lease agreements was in order to give possession and control of the mini-buses to Sampson Beck so that they could be utilized in the Sampson Beck scheme. That scheme involved the leasing of the vehicles. The learned judge said that in his view

it did not matter whether each agreement between the defendant and Sampson Beck was itself an agreement of lease or whether Sampson Beck was to conclude an agreement with a taxi driver in respect of each vehicle as agent of each defendant or as a principal - in other words, it did not matter whether the vehicles were leased by the defendants directly or indirectly.

Standard Credit did not at any relevant time have knowledge of the details or even the existence of the Sampson Beck scheme. And I do not think that any agreement concluded after the credit agreement, to which Standard Credit was not a party, and to which it did not consent and of which it had no knowledge, can have any relevance in the ascertainment of the question whether the purpose to rehire the vehicle was <u>in terms of</u> the credit agreement. So far as Standard Credit was

concerned any subsequent agreement was not only post contractum but also res inter alios acta.

The stated case does not contain anything to support a finding that the purpose stated in s 2(1)(a) was in terms of the Lease Agreement. Indeed, so far from being in conformity with it, the carrying out of such a purpose would contravene one of the express terms of the agreement. Clause 6 of the terms and conditions printed on the reverse side of the Lease Agreement provided that the lessee should not part with the possession of the leased goods. Clause 12.1.2 provided that "An event of default shall occur if Lessee ... commits any breach of any of the terms or conditions hereof..." Clause 12 provided further that upon the happening of any event of default the Lessor was entitled to immediately cancel the agreement, obtain

possession of the goods and recover from the lessee payment of all "payables" which were in arrear at the date of cancellation. The effectuation of a purpose by the lessee to relet the goods would necessarily involve parting with the possession of them and hence a breach of the agreement.

The conclusion is that the Lease Agreement was subject to the Act.

CLOETE AJ made only passing references to the other two questions: it was unnecessary for him to deal with them because of his finding on the first question. It is now necessary to consider them.

As it stood before the substitution of a new subsection (6) by s 5(b) of the Credit Agreements Amendment Act 9 of 1985 (which came into operation in December 1985), ss (6) of s 6 of the Act provided:

"(6) No person shall be a party to a credit

> agreement in terms of which the period within which the full price is payable, exceeds the appropriate prescribed period."

In terms of the Lease Agreement, the "total collectable" was payable -

> "In 58 rentals of R572.25 each falling due at monthly intervals commencing 15/6/1985 and with a final rental of R572.25 payable on 15/4/1990."

Under item 19 of Annexure A to the regulations promulgated in No R.401, the prescribed period appropriate to the vehicle which was the subject-matter of the Lease Agreement was 36 months. There was therefore a contravention of s 6(6) of the Act which rendered the parties liable to the penalty laid down in s 23, in terms of which -

> "Any person who contravenes or fails to comply with the provisions of this Act [which by definition includes any regulation or notice made or issued thereunder], shall be guilty of an offence and liable upon conviction to a fine not exceeding R5 000 or to imprisonment for a period not exceeding two years or to both such fine and

imprisonment."

The question then is whether this had the result that the Lease Agreement was unenforceable.

The Act does not expressly say that the effect of a contravention of s 6(6) is to invalidate the transaction concerned. There is, however, "a well-known rule of construction" to which FAGAN JA referred in Pottie v Kotze 1954(3) SA 719(A) and which, he said at 724-5 -

> "... is formulated as follows in Halsbury's Laws of England (Hailsham ed.), vol. 31, par. 748, pp. 555, 556:
>
> 'Every transaction forbidden by a statute and carried out in violation of it is prima facie illegal and therefore void. An act for the doing of which a penalty is imposed is a thing forbidden.'"

The learned judge of appeal also quoted (at 725 B-D) the following passage from the judgment of SOLOMON JA in Standard Bank v Estate van Rhyn 1925 AD 266 :

> "The contention on behalf of the respondent is that when the Legislature penalises an act it impliedly prohibits it, and that the effect of the prohibition is to render the act null and void, even if no declaration of nullity is attached to the law. That, as a general proposition, may be accepted, but it is not a hard and fast rule universally applicable. After all, what we have to get at is the intention of the Legislature, and, if we are satisfied in any case that the Legislature did not intend to render the act invalid, we should not be justified in holding that it was. As Voet (1.3.16) puts it - 'but that which is done contrary to law is not ipso jure null and void, where the law is content with a penalty laid down against those who contravene it.' Then after giving some instances in illustration of this principle, he proceeds: 'The reason for all this I take to be that in these and the like cases greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act itself done contrary to the law."

The proper approach to the problem was described by MILLER JA in Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd 1978(2) SA 872(A) at 885 D-G:

> "The prohibitions contained in para 5(1) [of conditions of establishment of a township] are reasonably clear. Moreover, they are couched in negative terms ('no erf...shall be sold,

> transferred or built upon...') which is generally a factor strongly indicative of an intention that anything done in breach of the prohibition will be invalid. (See Steyn Uitleg van Wette 4th ed at 201.) This, however, is no rule of thumb; the subject-matter of the prohibition, its purpose in the context of the legislation (or any provisions having the force of law), the remedies provided in the event of any breach of the prohibition, the nature of the mischief which it was designed to remedy or avoid and any cognizable impropriety or inconvenience which may flow from invalidity, are all factors which must be considered when the question is whether it was truly intended that anything done contrary to the provision in question was necessarily to be visited with nullity..."

There can be no doubt as to the purpose of the Hire-Purchase Act 36 of 1942 ("the 1942 Act") which the Act repealed and replaced. Judges who have referred to it speak with one voice.

In his introduction to the first (1942) edition of Diemont's Law of Hire-Purchase, Mr Justice A Centlivres, then a judge of appeal, said:

> "The Hire-Purchase Act, 1942, is an example of the many attempts made by the Legislature to protect

those whom it regards as incapable of protecting themselves. The Chairman of the Civil Imprisonment Committee, in giving evidence before the Select Committee of the House of Assembly in 1939 on the subject of the Hire-Purchase Bill introduced during that year, said:

'There can be no question that the evidence put before us shows very clearly that very many people are tempted to buy goods that they cannot afford at all, because of the easy terms of payment offered to them, or they are tempted to buy goods at a far higher purchase price than they can afford to pay', and the spokesman for the Government at the same Select Committee said that certain people -

'are losing money which they cannot afford to lose and this is the fundamental reason for the introduction of this hire-purchase legislation. Something must be done to protect the poorer people from the consequences of these transactions.'

The desire on the part of the Legislature to protect the purchaser may therefore be regarded as the principal reason for passing the Act but, although this is so, the Act contains. . .some provisions protecting the seller as well."

In Smit & Venter v Fourie & Another 1946

WLD 9 MILLIN J said at 13,

"It is very easy to see what mischief it was which the Legislature intended to remedy. It was the

> mischief of poor persons being enticed into shops and being sold goods of more or less value at prices which they can ill-afford to pay and on terms which are harsh and unconscionable, and it was intended to give protection to such persons against their own improvidence and folly."

In Rex v Ellinas 1949(2) SA 560(T) RAMSBOTTOM J referred at 566 to s 7 of the 1942 Act, which provided that no agreement should have any force or effect unless a minimum deposit was paid, and said,

> "That provision clearly had in view an object of public policy, namely, to discourage people from buying goods for which they cannot afford to pay. I have no doubt that if 1/10th of the purchase price is not paid at the time an agreement is entered into the agreement is null and void..."

In National Motors v Fall 1958(2) SA 570 (E), DE VILLIERS JP said at 571 G-H:

> "I think it is clear that the Hire-purchase Act, 36 of 1942 and the clauses therein, relevant to the present enquiry, were passed with the view to protecting purchasers of goods under hire-purchase agreements against their own misplaced optimism in their ability of keeping up with the payments of the instalments and so becoming owners of the

goods..."

Finally, in Coetzee v Impala Motors (Edms) Bpk 1962(3) SA 539(T), BOSHOFF J made a statement (at 542 B-C) which was approved and applied by this Court in Hire-Purchase Discount Co (Pty) Ltd v Maqua 1973(1) SA 609(A) at 614E, namely,

> "Die hoof oogmerk van die Huurkoopwet is om kopers wat kontrakte sluit wat deur die Wet geraak word, teen hulself en teen uitbuiting te beskerm."

This remains an important purpose of the Act. That being so, it is in the highest degree unlikely that the Legislature in enacting s 6(6) was content with the criminal sanction as sufficing to ensure compliance with it.

The penalties provided in s 23 may deter some who are minded to contravene s 6(6). The present case, however, is one where the credit-giver was not deterred,

and the question is whether the Legislature could have contemplated that in such a case the transaction would have legal force. In my opinion it could not. Recognition of the Lease Agreement by the court would give legal sanction to the very situation which s 6(6) was designed to avoid. (Cf Pottie v Kotze (supra) at 726 in fin.) It would leave the lessee bound to a transaction which the law prohibited. It is only if the transaction is invalidated that a lessee in such a case is protected from the consequences of entering into the contract.

Counsel for Standard Credit referred to s 7(1) of the 1942 Act, which provided:

> "7(1) No agreement in respect of the sale of a movable shall be of any force or effect -(a) Until at least the appropriate prescribed portion of the cash price of such movable or, if no such portion has been prescribed, at least one-tenth of such price has been paid, and

> (b) unless the period within which the full price is payable, does not exceed the appropriate prescribed period (if any)."
>
> (My emphasis.)

He submitted that in enacting s 6(6) of the Act in terms which unlike s 7(1) did not expressly nullify the transaction, the legislature showed a change of intention; and that, whereas s 7(1) of the 1942 Act rendered the transaction of no force or effect, the prohibition in s 6(6) of the Act was directed against persons, who if they contravened it committed an offence, and not against the transaction, which remained valid.

I do not think the submission well-founded. There is no change in purpose or policy manifest in the Act, and there does not appear to be any reason why the Legislature should have wished to make any change from

the position under the 1942 Act. A possible explanation for the difference in wording may be the fact that the Act is differently structured. The 1942 Act itself dealt with the minimum deposit and the period within which the full price was payable. Under s 2(1) of the Act these matters were left to be dealt with by regulation. In these circumstances a provision in the same terms as s 7 of the 1942 Act would have been inappropriate.

An indication that the Legislature's purpose was unchanged is provided by the wording of s 5(2), in terms of which -

> "5(2) No person shall be a party to a credit agreement which does not comply with a requirement referred to in subsection (1): Provided that a credit agreement which does not comply with any such requirement shall not merely for that reason be invalid." (My emphasis)

(Ss (1) sets out requirements regarding the form and content of credit agreements). The absence of such a proviso in ss 6(6), which begins with the same words as s 5(2) ("No person shall be a party to a credit agreement...") indicates an intention that an agreement which contravenes its requirements shall merely for that reason be invalid.

On behalf of the respondent reliance was placed cm a statement in De Jager, Credit Arrangements & Finance Charges, at 32 that "Greater injustice would probably flow from nullification than from allowing the term or contract to remain valid." The learned author does not provide any justification for this statement, and none suggests itself.

The conclusion in regard to the second question is therefore that a contravention of s 6(6) of

the Act renders invalid an agreement to which the Act applies.

The third question is whether the exemption created by regulation 4(2) of the regulations promulgated under Notice No R 401 is applicable to the Lease Agreement. That regulation provides:

> "4(2) In the case of a leasing transaction in respect of any of the goods listed in items 19 and 20 of column 1 of Annexure A, the conditions laid down in regulation 2 shall not apply to such leasing transaction -
> (a) if payments in terms of the transaction are amounts allowed to be wholly or partly deducted from or set off against the taxable income of the credit receiver under Part I of Chapter II of the Income Tax Act, 1962 (Act 58 of 1962)."

Counsel for Standard Credit accepted the correctness of the judgment in Santam Bank Ltd v Voigt 1990(3) SA 274(E) at 279 B-D, where it was decided that, in a case where a party seeks to rely on the exceptions

contained in reg 4, such party bears the onus of proof.

The Lease Agreement is a "leasing transaction" as described in reg 4(2), and the question is whether the condition set out in para (a) was satisfied. The "payments" referred to in the regulation are payments in terms of the Lease Agreement. As at the date of the agreement those payments were to be made in the future, and the question whether they would be deductible also related to the future. Nevertheless, counsel accepted (correctly, in my view) that the date for determining whether regulation 4(2) does or does not apply is the date of the transaction. In consequence, evidence of any facts which occurred, or any situation which arose, after that date is irrelevant.

It is common cause that for the purpose of applying reg 4(2) the Lease Agreement must be considered

not in isolation, but in its setting as a transaction which was part of the Sampson Beck scheme.

It is apparent from the stated case that it was contemplated in the Sampson Beck scheme that "the client" would not make payments to the financial institution. See para 7 of the stated case ("...Sampson Beck undertook to make all payments due in terms of the credit agreement... to the financial institution"); and para 12 ("Sampson Beck would receive payment of rentals from the taxi operator in terms of the aforesaid agreement, from which it would pay: (a) the rental or instalment due to the financial institution, either directly or via the bank account of the client..."). It was also agreed that if the client did make payments he would be reimbursed by Sampson Beck, and that he would be indemnified by Sampson Beck in respect of liabilities

incurred by him under the Lease Agreement.

S 11 of the Income Tax Act 58 of 1962

provides:

> "11. For the purpose of determining the taxable income derived by any person from carrying on any trade within the Republic, there shall be allowed as deductions from the income of such person so derived -
> (a) expenditure and losses actually incurred in the Republic in the production of the income, provided such expenditure and losses are not of a capital nature."

S 23(c) provides that -

> "23. No deductions shall in any case be made in respect of the following matters, namely -
>
> (c) any loss or expense, the deduction of which would otherwise be allowable, to the extent to which it is recoverable under any contract of insurance, guarantee, security or indemnity."

Counsel for Standard Credit sought to rely on the statement in Caltex Oil (SA) Ltd v Secretary for Inland Revenue 1975(1) SA 665 (AD) at 674 D-F that

> "The expression 'expenditure actually incurred' in

> section 11(a) does not mean expenditure actually paid during the year of assessment, but means all expenditure for which a liability has been incurred during the year, whether the liability has been discharged during that year or not. (Port Elizabeth Electric Tramway Co v Commissioner of Inland Revenue, at p. 244)".

Regulation 4(2)(a) refers, however, to "payments", which connotes payments actually made and does not include unpaid liabilities. Payments of rentals due under the Lease Agreement made by a third party would not be deductible from the taxable income of the credit receiver. And if any payments should in fact be made by the lessee, they would not be deductible if they were "recoverable under any contract...of indemnity". There was some debate during the argument as to the meaning of "recoverable". In its ordinary sense the word means "capable of being sued for". (cf Shell Southern Africa Pension Fund v Commissioner for Inland Revenue 1982(2)

SA 541(C) at 545). It was argued on behalf of Standard Credit, however, that in the context of s 23(c) of the Income Tax Act it means in fact recoverable. It was submitted further that the appellants bore the onus of proving that any payments made by them were in fact recoverable from Sampson Beck or Van Dyk in that sense; and that they failed to place any facts in this regard before the court a quo.

It is unnecessary to decide whether in the context of s 23(c) "recoverable" bears the meaning for which counsel for Standard Credit contended. I shall assume that it does.

In regard to the onus, it was submitted that because the effect of s 23(c) is to create an exception to the general rule stated in s 11(a), it was for the appellants to prove it. This submission rests on a

misconception of the relation between s 11 and 23 of the Income Tax Act. S 11(a) provides positively and in general terms in the case of a person deriving income from the carrying on of a trade within the Republic, what expenditure and losses shall be allowed as deductions from income so derived in order to determine his taxable income. S 23 prescribes what deductions may not be made in the determination of taxable income. It is generally appropriate to consider whether or not a deduction is permitted by s 11 (a) and whether or not it is prohibited under s 23(c). (Cf CIR v Nemojim (Pty) Ltd 1983(4) SA 935(A) at 946 E - 947 A). This is the appropriate procedure to follow in considering whether the condition set out in para (a) of reg 4(2) has been satisfied. This refers to payments which are allowed to be deducted under Part I of Chapter II of the Income

Tax Act. Part I includes both sections 11 and 23. Standard Credit therefore bears the onus of showing not only that a deduction is allowable under s 11(a), but that it is not prohibited under s 23(c).

The facts set out in the stated case afford no basis for a finding that as at the relevant date Sampson Beck would not honour its indemnity or that the contemplation that it would do so was unfounded. It is irrelevant that Sampson Beck was ultimately unable to meet its financial commitments.

I am accordingly of the view that the condition in para (a) of reg 4(2) was not satisfied.

Thus, all three of the questions raised in the stated case are answered in favour of the appellants and the appeal will accordingly be upheld.

The following order is made:

(a) The appeal is allowed with costs.

(b) The order of the court a quo is set aside and the following order is substituted:

"The Plaintiff's claims are dismissed with costs."

NICHOLAS, AJA

SMALBERGER, JA – CONCURS

E N T

KUMLEBEN, JA:

I have had the advantage of reading the judgment of Nicholas AJA. I shall refer to it, with abiding respect, as the "other judgment". As it states, the

question to be decided in the first place is whether the provisions of the Act apply to the Lease Agreement. It is common cause that this agreement, being a "leasing transaction", was a "credit agreement" as defined in the Act; that the agreement failed to comply with the regulations prescribing the maximum period within which full payment under the Lease Agreement was to be made and the portion of the total rental which was to be paid initially; that, but for proviso (a) to s 2(1), the provisions of the Act would apply to the Lease Agreement and that, if they applied, there was a contravention of s 6(6) of the Act.

For ease of reference I quote s 2(1):

> "The provisions of this Act shall apply to such credit agreements or categories of credit agreements as the Minister may determine from time to time by notice in the Gazette: Provided that the Minister shall not have any power to apply such provisions to credit agreements in terms of which -(a) a person purchases or hires goods for the

> sole purpose of selling or leasing them or using them in connection with mining, engineering, construction, road building or a manufacturing process; (b) the State is the credit grantor."

(The words I have underlined I shall refer to as the "phrase".)

The enquiry, involving the interpretation and application of proviso (a), is whether Oosthuizen in terms of the Lease Agreement hired the vehicle for the sole purpose of leasing it to someone else.

The court a quo answered this question affirmatively and held that the Lease Agreement was not subject to the provisions of the Act. The essential reasoning leading to this conclusion may - with some amplification on my part - be thus summarised. (i) The purpose for which the goods, the subject of a credit agreement, are purchased or hired is an objective fact. (ii) It is the sole purpose at the time the agreement

was concluded that is to be determined. (This is naturally on the assumption that a specific purpose had at that stage been decided upon and, since it is to be the "sole" purpose, that such purpose was the exclusive one.) (iii) It is the intended purpose of the purchaser or lessee, and none other, which is pertinent. (iv) S 2(1) does not import the requirement that, before or at the time of the conclusion of the credit agreement, such purpose is to be conveyed to the seller or lessor, or agreed to by him.

The other judgment joins issue on (iv) above. In it the view is taken - by virtue of or with reference to the words "in terms of [the credit agreement]" - that the purpose of the purchaser or lessee which is unexpressed or unknown to the seller or lessor is irrelevant and cannot be taken into account: such purpose must feature as an express or tacit term of the

credit agreement or must be evident from other facts ("possible sources") known to the seller or lessor.

The phrase construed and applied in its strictest connotation would require the purpose to be an express or tacit term in the agreement itself. I have difficulty with such a construction in reference to s 2(1). Ordinarily the purpose for which a thing, say a motor vehicle, is purchased or hired has no bearing upon the formation or validity of the contract and is of no interest or concern to the other contracting party. This the legislature must be taken to have known. Thus, had it intended that there should be mutual agreement as to such purpose as a term of the contract, one would have expected this requirement to have been explicitly laid down. A term of any contract relates to its exigible content: see Design and Planning Service v Kruger 1974 (1) S A 689 (T) 695 C - D. But in proviso

(a) it was never the intention that this requirement should constitute or amount to a contractual obligation. The legislature had entirely different objectives in mind one of which was to ensure that a purchaser or lessee acquiring goods for his own use should be protected from the temptation and hazards of extensive credit terms but not a person thus contracting with the sole aim of reselling or reletting. Thus, in my view, it would be incorrect to conclude that the "sole purpose" is to be agreed upon as a term of the Lease Agreement.

Nor to my mind can the lesser requirement be inferred from the wording of s 2(1), namely, that the seller or lessor must at least have knowledge of the intended purpose before or at the time of the conclusion of the credit agreement. If this were the intention, one would have expected the proviso to read: "for the

sole purpose ['to the knowledge of the seller or lessor' or 'disclosed to the seller or lessor'] of selling or leasing the goods." Such an interpretation would facilitate proof of any sole purpose which might have existed, and perhaps reduce the likelihood of a dispute in this regard, but this is insufficient reason for giving the phrase a meaning which in my view is unwarranted. I say this since proof of the presence of such a purpose, in the absence of any such requirement, does not appear to me to present a novel or insuperable problem. In other fields of our law, both civil or criminal, intention is to be proved on the available evidence by the party on whom the onus rests. In this case the party seeking to rely on the proviso would be required to prove the purpose for which the Lease Agreement was concluded. In this regard the post contractum conduct of Oosthuizen, depending upon its acceptability and cogency, could be material just as say

in a criminal trial subsequent conduct may contribute to proof of intent. For its evidential value, as remarked in the judgment of the court a quo, the parties would act with foresight if, in the knowledge that certain regulatory requirements are not satisfied in their credit agreement, they were to include in it a statement disclosing the purpose for which the goods are purchased or hired. But this is not the same as saying that such a step, or that knowledge of the intended purpose on the part of the seller of lessor, is a statutory requirement implicit in proviso (a) to s 2(1) of the Act. Such a construction - one that does not require knowledge of the purpose on the part of the seller or lessor - does not place him at a disadvantage. In the normal course without such knowledge there would be compliance with the provisions of the Act. However, if there is not and such purpose is proved, it would conform to the intention of the legislature if the seller or lessor is

entitled to sustain the agreement.

The meaning of the phrase in the context of s 2(1)(a) presents no difficulty. In the Afrikaans text, which is the official one, "ingevolge" is its counterpart. Dictionary definitions confirm that "ingevolge" means "na aanleiding van" : HAT page 445; Die Afrikaanse Woordeboek vol iv page 554. This word was used in its ordinary connotation in order simply to relate or connect the intended purpose to the transaction concerned: it refers to the proposed use of the goods consequent upon their being acquired by sale or lease. The phrase "in terms of" is to be given the same meaning.

Certain dicta in Slims (Pty) Ltd and Another v Morris NO 1988(1) SA 715 (A) lends support to this view. The conclusions in two of the three judgments - those

delivered by Corbett JA and Botha JA - were based on a consideration of the provisions of s 37(5) of the Insolvency Act no 24 of 1936: more particularly the words "any right under the lease", and in the Afrikaans text "kragtens die huurkontrak", appearing in this section. The issue, broadly stated, was whether a liquor licence acquired by a lessee in conjunction with the lease of the business and premises was a right "under the lease". It cannot be questioned that the words "under" and "kragtens", on the one hand, and "in terms of' and "ingevolge", on the other, have similar meanings but the former expressions can more readily be given the meaning ascribed to them by Corbett JA. In his judgment they were held to mean "a right which owes its existence to the lease; in other words, a right created by the lease." (744 G - H). (Nestadt JA concurred in this judgment.) Botha JA, on the other hand, after emphasising that the meaning of a word

depends upon the subject-matter and the context in which it appears, said in his judgment at 733 B - G:

> "In my view the word 'kragtens' is clearly capable of bearing different shades of meaning. Used as a link word, connecting two concepts, it is capable of connoting varying degrees of closeness between the one concept and the other. In the narrow sense, at the one end of the spectrum, it may be used to denote a direct and immediate connection between the two concepts linked by it ('uit krag van', 'luidens'). In a wide sense, at the other end of the spectrum, it may connote no more than a loose and indirect relationship between the two concepts ('ten gevolge van', 'uit hoofde van') .... In this sense the word could, I consider, be rendered appropriately as 'voortspruitend uit'. It is of interest to note that in the Afrikaans-English dictionaries the word 'kragtens' is given inter alia the following equivalents (apart from 'under'): "by virtue of', 'in consequence of', and 'pursuant to' (see eg Bosman, Van der Merwe and Hiemstra Tweetalige Woordeboek, and Hiemstra and Gonin Drietalige Regswoordeboek). Similarly, the English word 'under' has different shades of meaning. Some of the meanings ascribed to it in the cases are: 'in terms of, 'in accordance with', 'in compliance with', 'in pursuance of', 'by virtue of', and 'pursuant to' ....

(Van Heerden JA concurred in this judgment. Nicholas AJA reached the same conclusion as regards the result of the appeal but along a different route. He however agreed at 729 C - D with the construction Botha JA placed upon s 37(5).) Similarly in this case the phrase "in terms of" is in my view to be taken to mean "by virtue of" or "in consequence of". It then bears the same meaning as "ingevolge" and would reflect the intention of the legislature in its use of the phrase in reference to proviso (a).

For these reasons therefore I differ from what is said in the other judgment as to the manner in which the sole purpose of the purchaser or lessee may be established. However, on a somewhat different approach to the question whether the proviso applies to the Lease Agreement, I agree with the conclusion that it does not.

The relevant facts describing the "Sampson Beck Scheme" are set out in the other judgment. For convenience - and emphasis - I repeat certain of them:

> "The general purport of the scheme operated and administered by Sampson Beck involved the using of creditworthy clients in order to obtain finance for mini-buses from financial institutions, which mini-buses were intended for use by black taxi operators. Sampson Beck either approached [clients] or was approached by the clients to use the clients' names for the financing of mini-buses. The client would conclude a contract with Sampson Beck in terms whereof the client would give possession and control of the mini-bus to Sampson Beck in order that Sampson Beck could make it available for use by a taxi operator nominated by Sampson Beck and Sampson Beck undertook to pay to the client a monthly commission and to make all payments due in terms of the credit agreement to the financial institution. [Oosthuizen] was entitled to receive a monthly commission from Sampson Beck of R 75,00 per month for the first two years and R 100,00 per month thereafter, in terms of [his] oral contract with Sampson Beck...."

On these facts can it be said that there was ever

any genuine - let alone sole - intention on the part of Oosthuizen to relet the vehicle to Sampson Beck? This question was raised for the first time by the court during the hearing of the appeal. In paragraph 2.7 of the respondent's heads of argument it was submitted that:

> "It is common cause that the sole purpose (although unexpressed) for the appellants' concluding their lease agreements with the respondent was in order to give possession and control of the mini-buses to Sampson Beck (Pty) Ltd in terms of lease agreements between them and Sampson Beck". (I emphasise)

This submission validly flowed from a concession in the appellants' heads of argument that:

> "[D]ie ware aard van die ooreenkoms wat hulle met Sampson Beck gesluit het en die transaksie wat tussen Sampson Beck en die taxi-operateur gesluit is, al die karaktertrekke van 'n huurooreenkoms bevat."

(One infers that this concession was expressly or implicitly also made in the court a quo.) When this

issue was raised by the court during the argument on appeal, Mr Roestorf, who appeared for the appellants, withdrew the concession. His opponent, Mr Gautschi, agreed that he could do so.

As Wessels JA observed in De Jager v Sisana 1930 AD 71 at 81:

> "The only tenancy that we know of is under the contract locatio conductio, or letting and hiring. To establish such a contract the defendant must show that there was a particular res or thing let for a specified time, and that in return for the use or use and occupation of the res the lessee undertook to pay the rent (merx)."

It may be that the commission payable to Oosthuizen can be regarded as the merx serving as a consideration for the use - in the broad sense - of the res, the vehicle. But having said that, the transaction was not a genuine lease and bears no other resemblance to one. There was no intention that the vehicle would actually revert to

Oosthuizen, or that he or Sampson Beck would exercise any of the rights normally accruing by virtue of a lease. The true nature of the transaction as a whole - the Lease Agreement and the further agreement with Sampson Beck - was that Oosthuizen would lend his creditworthiness to the scheme in order to obtain the vehicle, for which deception he would be paid the agreed "commission". It was for this sole purpose that the agreement was concluded. This being the case, any subterfuge would be disregarded and the maxim plus valet quod agitur quam quod simulate concipitur would apply. As a matter of fact though, the oral agreement concluded between Oosthuizen and Sampson Beck (the "commission contract") does not even purport to be one of lease. It manifests no such intention. According to the statement of agreed facts this contract was "approximately the same as annexure A1". This document is a copy of a commission contract in the form of a

letter concluded with another "client" and reads as follows:

Gewaardeerde Klient,

i/s Toyota Hiace: 10 Sitplek - Stannic.

Met verwysing na bogemelde ooreenkoms, wil ek u dank dat die voertuig daarin vermeld aan hierdie firma beskikbaar gestel is vir administrasie namens uself.

1. U ontvang met ondertekening van hierdie kontrak 'n aanvangskommissie van Drie Honderd en Vyftig Rand, en daarna maandeliks 'n kommissie van Een Honderd en Vyftig Rand vir die oorblywende periode van gemelde ooreenkoms, nl, 58 maande, t.o.v. die padvaardige voertuig daarin vermeld.

2. Hierdie firma onderneem om toesig te hou namens u oor betalings aan die finansiele instansie, Stannic, alternatiewelik sal ek, C C Van Dyk, dit self doen.

3. Die drywer van die voertuig is verantwoordelik vir onderhoud, reparasies en instandhouding van die voertuig, asook vir betaling van lisensies, permitte, verkeers-fooie-en-boetes.

4. Alle versekering op die voertuig, asook oproer-en-onlusdekking, is vir rekening van die drywer. Hierdie firma sal egter toesig hou dat gemelde premies betaal word.

5. Indien gemelde voertuig vernietig word in 'n brand, of in 'n ongeluk onherstelbaar beskadig word, of gesteel word en nie teruggevind word nie, sal hierdie ooreenkoms tot 'n einde kom. Enige tekort tussen die bedrag verskuldig aan die finansiele instansie en die bedrag uitbetaal deur die Versekeringsmaatskappy sal deur hierdie firma of alternatiewelik deur myself, c C Van Dyk, aan die finansiele instansie betaal word.

6. Die drywer van die voertuig is:
Johannes Putsoeli 42
Maphanga Section Kathlehong. Germiston. 1401. Registrasie: KZC 817 T Permithouer: T. G. Mvelase.
1080 Tshongwene Section Kathlehong. Germiston.

[Signature] [Signature]

C C Van Dyk C W Landsberg
SAMPSON BECK

Turning to the third agreement, the contract between Sampson Beck and the taxi operator, in the statement of agreed facts it is said that:

> "Sampson Beck would enter into some agreement with the taxi operator in terms whereof Sampson Beck would make the mini-bus available to the taxi operator. A copy of a typical agreement is annexed hereto, marked 'A3'."

In this agreement the parties are referred to as lessor and lessee and one may assume that it did amount to a genuine lease. However, as pointed out in the other judgment, this subsequent agreement is res inter alios acta as far as Oosthuizen's purpose is concerned. It cannot be said that in concluding it Sampson Beck acted as Oosthuizen's agent and that this agreement therefore reflects his intention when obtaining the vehicle under

the Lease Agreement. It is not clear for what reason it was stated in the opening paragraph of the commission contract that Sampson Beck would "administer" the vehicle on behalf of the client. But this is of no consequence since it certainly does not reflect the true position: Oosthuizen had no further interest or control over the vehicle once it was handed over to Sampson Beck and the latter did not thereafter "administer" it as his agent or conclude the agreement with the taxi operator on his (Oosthuizen's) behalf.

As regards the two further questions calling for decision I respectfully agree with the conclusion in the other judgment and accordingly also with the proposed order allowing the appeal.

KUMLEBEN JA