Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE NORTH WEST HIGH COURT, MAHIKENG

CASE NO: 930/2015

In the matter between:

OFFICE NATIONAL DU DUCROIRE Plaintiff

and

THE NEW NUT COMPANY (PTY) LIMITED 1st Defendant

GERHARD JOHANNES DREYER 2nd Defendant

DATE OF HEARING AND ORDER : 15 SEPTEMBER 2016

DATE OF REASONS FOR JUDGMENT : 15 DECEMBER 2016

COUNSEL FOR APPELLANT : ADV. STANDER

COUNSEL FOR THE 1ST AND 2ND DEFENDENT : NO APPEARANCE

REASONS FOR ORDER

HENDRICKS J

[1] On the 15th September 2016 I granted an order in this unopposed exception application in the following terms:

> *"1. THAT: The Plaintiff's two exceptions, namely Exception A and Exception B, dated the 30th day of MARCH 2016 be upheld.*
>
> *2. THAT: In consequence of Exception A, paragraphs 6.4 to 6.6 inclusive of the Defendant's plea dated the 22nd day of JANUARY 2016 be and are hereby struck out.*
>
> *3. THAT: In consequence of the Exception B, Paragraphs 5.2, 5.4 and 6.2 of the Defendant's pleas dated the 22nd day of JANUARY 2016 be and are hereby struck out, and that the Defendant's counterclaim of the same date be struck out in its entirety.*
>
> *4. THAT: The First and Second Defendants, jointly and severally, pay the Plaintiff's costs of the exception proceedings, the one paying the other to be absolved."*

[2] On 12th October 2016 a notice in terms of Rule 49 (1) (c) requesting reasons for the order made on 15th September 2016 was filed with the office of the Registrar of this Court. This notice ultimately found its way to my chambers on 14 November 2016. Here follows the reasons for the order I made.

[3] The Plaintiff company instituted an action against the First and Second Defendants for payment of the amount of (EURO) €160 923.80 plus interest *a tempera morae* based upon an acknowledgement of debt that the First and Second Defendants executed at Mahikeng on 10 September 2014.

[4] The Defendant filed pleas to the Plaintiff's summons and the Frist Defendant also filed a counterclaim. The Plaintiff duly notify the Defendants about the intended exception to their pleas and counterclaim. The Plaintiff then filed the exception and set it down for hearing on the 15th September 2016. The notice of set down was properly served on Defendants corresponding attorneys on 25 May 2016. Despite this, the matter was unopposed on the date of hearing.

[5] There are two exceptions: the first ("exception A") is against one of the defences (a defence based on the alleged applicability of the National Credit Act) raised in the plea on behalf of the second defendant only; whereas the second exception ("exception B) is against the defences on the merits raised in the plea and in the counterclaim on behalf of both defendants. In respect of both exceptions raised, each is explicitly directed at no defence or no cause of action (insofar as the counterclaim is concerned) being made out.

[6] The particulars of claim are based on a written agreement concluded between the excipient (on the one hand) and the two defendants (on the other hand). The written agreement is admitted and the first defendant has admittedly made a partial payment of €10 000 in its terms.

[7] The following, among other things, appears *ex facie* the written agreement as having been recorded between the parties:

- In terms of "the sale agreement", the first defendant became indebted to a company called Visys in the principal amount of €197 636.9;

- "The sale agreement" is defined as the written agreement concluded on or about 20 March, between Visys and the first defendant for the sale of a Linx digital laser sorter;

- Visys' rights to claim payment from the first defendant in terms of the sale agreement were subrogated to the plaintiff (excipient) as a consequence of "the forfeiting agreement", concluded on 26 April 2012;

- Payment under the sale agreement was to have been done by the first defendant to Visys by means of eight bills of exchange, the second to fourth bills having been dishonoured; and

- The first defendant remained unable under the sale agreement to honour the fifth to eighth bills of exchange.

[8] On the strength of these principal recordals contained in clause 2 of the agreement, the following was agreed (among other things) as appears *ex facie* the document:

- The second defendant was interposed to guarantee "as principal debtor and not merely as surety"; the due, punctual payment and performance of all the obligations of the first defendant to the excipient under the sale agreement, forfeiting agreement and second, to pay the excipient immediately upon written demand and without delay all sums or other amounts due and payable by the first defendant, as specified in the sale agreement and forfeiting agreement.

- The first defendant undertook to make payment of the outstanding balance by paying an amount of €10 000 to the excipient within seven days of signature of the agreement, and thereafter by means of similar payments of €10 000 on or before the last day of each succeeding month, until payment of the outstanding balance in full.

- If the first defendant were to breach any material provision of the agreement, the excipient would be entitled to proceed forthwith for the recovery of the full outstanding balance.

- The first and second defendants irrevocably and unconditionally acknowledged the first defendant's indebtedness under the eight bills of exchange and that the first defendant has no claims of whatsoever nature and howsoever arising against the excipient.

[9] In paragraphs 7 to 11 of the particulars of claim, it is alleged that after the first payment of €10000 having been made in terms of the agreement (which the defendants admit), no more payments were forthcoming and so the outstanding balance became due in terms of the agreement. The defendants' defence to this is simply that they admit refusing to make any further payments, allegedly because the first defendant has a counterclaim 'which exceeds alternatively reduces the claim of the plaintiff'. The counterclaim, in turn, is for damages occasioned by the Linx digital laser sorter's defectiveness, and that this amounts to a defence *in rem* which is therefore also available to the second defendant.

[10] The particulars of claim then go on to assert that the provisions of the National Credit Act 34 of 2005 ("the Act") do not apply to the first defendant which the defendants admit. The defendants plead, however, that the provisions of the Act do apply to the second defendant "insofar as it may be found that the second defendant signed the agreement annexed to the particulars of claim as "co-principal debtor".

[11] It follows that the defendants' defences are two-fold:

11.1. A failure by the excipient to have complied with the provisions of the Act as regards the second defendant;

and

11.2. A counterclaim which extinguishes (partially or totally) the excipient's claim, available to both defendants.

[12] The test for deciding an issue on exception is well-known. The excipient has the duty to persuade the Court that upon every interpretation which the pleading in question and, in particular, the document on which it is based, can reasonably bear, no cause of action or defence is disclosed.

See: **Lewis v Oneanate (Pty) Ltd** 1992 (4) SA 811 (A)

Picbel Groep Voorsorgfonds (in liquidation) v Somerville and Related matters 2013 (5) SA 496 (SCA)

I will now deal with each exception in turn.

EXCEPTION "A"

[13] This exception is raised against the alleged defence that, although it is admitted that the Act does not apply to the first defendant, the Act nevertheless applies to the second defendant "insofar as it may be found that the second defendant signed annexure POC 1 to the particulars of claim as co-principal debtor".

[14] These submissions are premised, as they must be for purposes of deciding this issue on exception, on a finding at any stage that the second defendant did indeed sign as co-principal debtor. Indeed, it may most fairly be argued that the second defendant certainly did sign as co-principal debtor because clause 3.1 of annexure "POC 1" states expressly that the second defendant signed it as "principal debtor". It follows that the only defence based on the Act raised by

the defendants is that although its provisions do not apply to the first defendant, they do apply to the second defendant.

[15] The Act applies to a numerus clausus of agreements, namely credit agreements consisting of four different kinds identified in section 8, being:

(1) A credit facility, as described in section 8(3), thus:

> *"(3) 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 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 not paid within the time provided in the agreement"

(2) A credit transaction, as described in section 8(4), thus:

"(4) 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 provider in respect of-

(i) the agreement; or

(ii) the amount that has been deferred."

(3) A credit guarantee, as described in section 8(5), thus;

"(5) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), 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 a credit facility or a credit transaction to which this Act applies"

(my underlining)

or

(4) A combination of these.

[16] The question is whether the agreement evidenced as "POC 1" constitutes any one of these four different kinds of credit agreements insofar as the second defendant is concerned on the assumption that he concluded it "*as co-principal debtor*".

Ex facie the agreement evidenced as "POC 1", the second defendant is introduced into it and described in it in clause 3. The clause is headed "*guarantee"* and it is clear from a reasonable reading and construction of clause 3.1 that the second respondent is introduced for the purposes of guaranteeing the first respondent's

Obligations to pay under the agreement and to do so "*as principal debtor and not merely as surety" for "the due, punctual payment and performance of the obligations; and to pay [the excipient] immediately upon written demand and without delay... all sums or other amounts which are due and payable in respect of the obligations-".*

In turn, "the obligations" are defined in clause 1.2.11 as "all obligations (actual, contingent, current and future) of [the first defendant] to [the excipient] under the Sale Agreement, Forfeiting Agreement and ["POC 1"]".

[17] It is apparent *ex facie* annexure "POC 1" as a whole, and clause 3 in particular, that the second defendant is, on any reasonable construction, a surety and co-principal debtor of the first defendant in respect of its obligations to make payment to the excipient. Mindful of this, and returning to the provisions of section 8 of the Act, it is apparent that the second defendant's jural role in the contractual arrangement with the excipient is, at best, one of credit guarantor of the first defendant's obligations to make payment to the excipient. It follows, therefore, that the second defendant's contract with the excipient is a credit guarantee, as contemplated by section 8(5) of the Act. Mindful, further, of the underlined portions of section 8(5) above, the provisions of the Act only apply to a credit guarantee when the obligation it contains is to guarantee the obligation of a consumer (the first defendant) "*in terms of credit facility or credit transaction to which this Act applies."*

[18] It has already been noted that the defendants accept that the Act does not apply to the first defendant. It follows, accordingly, that the Act similarly does not apply - because of the underlined words in section 8(5) - to the credit guarantee evidenced *ex facie* annexure "POC 1" between the excipient and the second defendant. Therefore, the second defendant's attempted reliance on the provisions of the Act to avoid liability in my view is wholly misplaced. In this regard, it makes no difference whether the second defendant concluded annexure "POC 1" as surety or as co-principal debtor or as both, because *"[a] surety who has bound himself as surety and co-principal debtor remains a surety whose liability arises wholly from the contract of suretyship. Signing as surety and co-principal debtor does not render a surety liable in any capacity other than a surety who has renounced the benefits of excussion and division".*

See: **Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another** 2009 (3) SA 384 (T) at paras [19]-[24];

Nedbank Ltd v Wizard Holdings (Pty) Ltd and Others 2010 (5) SA 523 (GSJ) at paras [9]- [11];

RMB Private Bank a Division of Firstrand Bank (Ltd) v Kaydeez Therapies CC (in liquidation) and Others 2013 (6) SA 308 (GSJ);

Structured Mezzanine Investments (Pty) Ltd v Bestvest 153 (Pty) Ltd and Others (22698/2009) [2013] ZAWCHC 61 (31 January 2013) at paras [23] – [26], [33] [unreported];

Ribeiro and Another v Slip Knot Investments 777 (Pty) Ltd 2011 (1) SA 575 (SCA).

[19] The Act applies to *"consumers"* of credit. A *"consumer"* is defined in section 1 of the Act as, essentially, various categories of listed persons "*in respect of a credit agreement to which this Act applies*". For the above reasons, the Act does not apply to the second defendant because he is not a party to any credit agreement to which the Act applies. He is therefore not a *"consumer"*; and accordingly the Act does not apply to him (including the provisions in section 80 and following concerning reckless credit). Accordingly, the contention in the plea that the Act applies to the second respondent is misplaced and incorrect and therefore Exception A directed at this contention as disclosing no defence and must be upheld with costs.

EXCEPTION "B"

[20] This exception is directed at the defendants' counterclaim. As stated previously, the counterclaim is to the effect that the first defendant has the defence that the Linx digital laser sorter was allegedly defective and that this defence, being allegedly *in rem*, is also available to the second defendant. For the purposes of these proceedings on exception, and mindful of the test on exception, it is assumed for present purposes that the alleged defence is indeed one *in rem* which is notionally available to the second defendant.

[21] As appears expressly *ex facie* annexure "POC 1" and as repeated in paragraphs 4-5 of Exception B:

(i) The first defendant is truly and lawfully indebted to the excipient for - payment of the capital amount plus interest, in terms of

the sale agreement and in respect of the second, third and fourth bills;

(ii) The first defendant remains liable for the fulfilment of its obligations to the excipient for payment of all amounts owing in respect of the fifth, sixth, seventh and eighth bills;

(iii) The first defendant has no claims of whatsoever nature and howsoever arising against the excipient;

(iv) Payment of the outstanding balance shall be made without deduction, withholding or set-off;

(v) The first defendant's undertaking to make payment of the outstanding balance is irrevocable and unconditional;

(vi) Neither the first defendant nor the second defendant has been influenced or induced by the excipient, or, any other third party, into signing annexure "POC 1" and that no representations, promises or undertakings have been made by the excipient or any other third party, to induce it to conclude annexure "POC 1";

(vii) All provisions of annexure "POC 1", and the restrictions contained in it, are fair and reasonable to all parties in all circumstances and are a part of the overall intention of the parties in connection with annexure "POC 1"; and

(viii) The tenor and intent of clauses 4.1.6 and 4.1.7 are further reinforced in clause 13.

[22] There is no issue of interpretation and none can meaningfully arise, as the clauses are clear. In this regard, the following has been said by the Supreme Court of Appeal in the matter of **Picbel Groep Voorsorgfonds (in liquidation) v Somerville and Related Matters** 2013 (5) SA 496 (SCA):-

> *"[26) It is necessary first to say something about the proper approach to issues such as these on exception. In Lewis v Oneanate (Pty) Ltd and Another Nicholas AJA stated that an excipient bears the burden of persuading the court that 'upon every interpretation which the particulars of claim' and any agreement on which they rely 'can reasonably bear, no cause of action is disclosed'. And, in Sun Packaging (Pty) Ltd v Vreulink, Nestadt JA confirmed that there is no hard and fast rule that the interpretation of agreements is to be avoided on exception. He said:*
>
> > *'As a rule, Courts are reluctant to decide upon exception questions concerning the interpretation of a contract. But this is where its meaning is uncertain. . . In casu, the position is different. Difficulty in interpreting a document does not necessarily imply that it is ambiguous.*
> >
> > *Contracts are not rendered uncertain because parties disagree as to their meaning.'"*
>
> and
>
> *"[39] The only outstanding issue is whether the settlement agreement contemplated a full settlement, as required by s 2(12), as this is not expressly pleaded. In order to determine this, it is necessary (and permissible) to*

interpret the settlement agreement that is relied on in the particulars of claim, and which is 'a link in the chain of [the funds'] cause of action'. In Dettmann v Goldfain and Another this court stated that courts are, in some instances, reluctant to 'decide upon exception questions concerning the interpretation of a contract'. Those circumstances are, first, where the entire contract Is not before the court; and secondly, where it appears from the contract or the pleadings that 'there may be admissible evidence which, if placed before the Court, could influence the Court's decision as to the meaning of the contract' provided that this possibility is 'something more than a notional or remote one'."

[23] The Supreme Court of Appeal thus confirmed and reiterated the circumstances in which caution should be exercised when deciding issues of contractual interpretation on exception. The two circumstances are; first, when the entire contract is not before the Court; and second, where it appears from the contract or the pleadings that there may be admissible evidence which could influence the Court's decision as to the meaning of the contract, provided that this possibility is "something more than a notional or remote one". It is clear that on any reasonable interpretation of annexure "POC 1" and the clauses referred to above in particular - the purported defence raised in the plea and converted into a claim in the counterclaim is expressly excluded.

[24] The defendants have, in paragraph 17 of the counterclaim, endeavored to contend that annexure "POC 1" allegedly records that

"such document does not constitute a novation, compromise or replacement of the sale agreement between first defendant and Visys". It is understood that the defendants may be referring to the provisions of clause 14.1 of annexure "POC 1" which is in the following terms:

> *"14.1 This Agreement is merely an indulgence granted by [the excipient] to [the first defendant], and does not compromise, novate, supersede or replace any other cause of action by [the excipient] against [the first defendant], including but not limited to any cause of action arising from and in terms of the subrogated Sale Agreement and/or the bills of exchange".*
>
> *(my underlining)*

[25] It follows from the underlined portion of the clause above that the preservation of potential existing causes of action contemplated by the clause applies only in favour of the excipient against the first defendant. There is expressly no such preservation of any existing, potential rights of action in favour of any of the defendants against anybody else. The contention contained in paragraph 17 of the plea is, accordingly, without merit on any reasonable construction of annexure -"POC- 1".

In my view Exception B too should be upheld and the defendants' plea and counterclaim struck out with costs.

CONCLUSION

It is for the aforementioned reasons that I granted the order as contained in paragraph [1], *supra.*

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R D HENDRICKS

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG