IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO.: 4002/2014

In the matter between:

SIDNEY BONNEN BIRCH t/a LF BIRCH AND SON **Applicant**

And

WINTERBERG VEEVOERE CC **Respondent**

JUDGMENT

BESHE, J:

[1] This is an application for the upliftment of a bar and an order allowing the applicant herein to file his plea in the action brought against him by the respondent.

[2] It is common cause that respondent issued summons against the applicant on the 20 September 2014 for payment of the amount of R767 142.00 for goods sold and delivered to the applicant. Such goods being ostrich feed. The summons was duly served on the 13 October 2014. Applicant entered a notice of intention to defend the action of the 28 October 2014. He however failed to file his plea by the 25 November 2014 as required.

[3] It appears to be common cause that the parties engaged in attempts to settle the matter relating to payment of amounts claimed by the respondent. It is also common cause that respondent supplied the

applicant with ostrich feed from January 2014 to April 2014. No payment was made by the applicant in respect of invoices for March 2014 and April 2014. It would appear that attempts to settle the matter did not yield any positive results. This prompted the respondent to address a letter to applicant's attorneys inviting the applicant to file his plea by Friday the 6 February 2015 failing which a bar will be placed by the respondent. In other words he will be barred from pleading. Applicant did not file his plea as requested. Respondent proceeded to cause a Notice to Bar to be served on the on the applicant on the 16 February 2015. Still no plea was forthcoming from the applicant. This prompted the respondent to apply for default judgment which application was served on the 2 March 2015.

[4] It is the aforementioned bar that applicant seeks to have uplifted.

[5] *Rule 27 (1) of the Uniform Rules of this Court* provides that:
"(i) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging and time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet".
It is trite that for an application in terms of this sub-rule to succeed, the applicant must −
(a) Satisfactorily explain the delay / default or show good cause;
(b) Must also show that the application is *bona fide* and not made with the intention of delaying the respondent's claim; and
(c) Show that granting the indulgence will not prejudice the respondent in a way that cannot be compensated by a suitable order as to postponement and costs.

See also ***Du Plooy v Anwes Motors (Edms) Bk 1983 (4) SA 210 (O)***.

[6] In his founding affidavit, applicant who is acting in person, states that upon receipt of the summons he forwarded same to his attorneys in order that it may be defended. Attempts to settle the matter continued though.

[7] It appears to be common cause that had it not been for cash flow problems experienced by the applicant at the time, he was prepared to settle the amounts due to the respondent. According to the applicant, there was an agreement in place that since the ostrich feed supplied by the respondent would be utilized to feed ostriches he was raising on behalf of Mosstrich (Pty) Ltd, payment from Mosstrich would be used to pay respondent for the feed. However Mosstrich did not make the necessary payments.

[8] Respondent denies that there was such agreement between them.

[9] Applicant further states that the notice of bar which was served on the 16 February 2015 only came to applicant's attention on the 19 February 2015. When he consulted with his erstwhile attorney regarding the notice of bar, he was advised that he did not have a defence. At that stage he believed that he had a number of *bona fide* defences to resist respondent's claim. He however could not persuade his attorney that he could successfully raise these defences due, (according to his erstwhile attorney) to the fact that he had tendered payment and had made certain payments in October and November 2014. Upon receipt of the application for default judgment, he once again enquired from his attorney as to whether there was anything they could do to avoid default judgment being taken against him and have the matter to proceed on trial.

He was advised there was nothing he could do. It was later that he learnt from a different attorney that he could apply to court for the upliftment of the bar.

[10] Applicant contends that the following, broadly stated, are his *bona fides* defences to respondent's claim:
(i) Payments cannot be enforced by the respondent because the agreement between him and the respondent falls foul of the provisions of the *National Credit Act 34 of 2005* (NCA).
(ii) Respondent is not registered to sell the product he sold to him being "Volstruis Afrond Pille" in terms of the *Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947*. And that by selling the said product, respondent committed a criminal offence and is not entitled to benefit from such criminal act.

[11] As regards the first defence, applicant contends that the transaction entered between him and the respondent cannot be regarded as an incidental credit agreement. This in view of the fact that he did not agree to a fee, charge or interest for late payment on or before the supply of the ostrich feed as provided in *Section 5 (3) (b) of the National Credit Act*. He further contends that the agreement / transaction is to be regarded as a credit agreement (not incidental credit agreement) and therefore subject to the provisions of the National Credit Act. Because respondent was not Registered Credit Provider the credit agreement is unlawful – (*Section 89 (2) (d) and 89 (5) of the NCA*).

[12] Applicant does not dispute that there was a credit agreement between him and the respondent in terms of which payment would be thirty (30) days from statement.

[13] In *Section 1 of the National Credit Act*, incidental credit agreement in defined as meaning *"an agreement, irrespective of its form, in terms of which an account was tendered for goods or services that have been provided to the consumer, or goods or services that are to be provided to a consumer over a period of time and either or both of the following conditions apply:*

(a) a fee, charge or interest became payable when payment of an amount charged in terms of that account was not made on or before a determined period or date; or

(b) ……".

In terms of *Section 5 (2) of the Act*, the parties to the incidental credit agreement are deemed to have made that agreement on the date that is twenty (20) days after –

"(a) The supplier of the goods or services that are subject of the account, first charges a late payment fee or interest in respect of the account". *Section 5 (3) (b)* is the section relied upon by the applicant as stated above at paragraph 11, and it provides that *"a person may only charge or recover a fee, charge or interest –*

(b) in respect of an unpaid amount contemplated in paragraph (a) of the definition of "incidental credit agreement" only if the credit provider has disclosed, and the consumer has accepted, the amount of such fee, charge or interest, or the basis on which it may become payable, on or before the date on which the relevant goods or services were supplied."

[14] Respondent is opposing the granting of the relief sought by the applicant. It is submitted on behalf of the respondent that the defences raised by the applicant are not *bona fide* and are dilatory in nature. Respondent argues that applicant's debt with the respondent falls within

Section 5 (3) (a) of the National Credit Act. *Section 5 (3) (a)* provides that:

"(3) A person may only charge or recover a fee, charge or interest –

(a) in respect of a deferred amount under an incidental credit agreement as provided for in Section 101 (d), (f) and (g) subject to any maximum rates of interest or fees imposed in terms of section 105; or

(b) in respect of an unpaid amount contemplated in paragraph (a) of the definition of "incidental credit agreement" only if the credit provider has disclosed, and the consumer has accepted, the amount of such fee, charge or interest, or the basis on which it may become payable, on or before the date on which the relevant goods or services were supplied." − This is the provision applicant relies upon for contending that the agreement in question is not an incidental credit agreement.

[15] The significance of whether the agreement in question is an incidental credit agreement or not lies is the fact that, if it is, the National Credit Act is of limited application thereto. In the case of an incidental credit agreement, the credit provider is exempt from compliance with provisions dealing with *inter alia* registration as a credit provider, reckless credit, unlawful credit agreements and unlawful provisions in credit agreements. According to the respondent, the statements that were issued by them state the terms of payment as being thirty (30) days with 2% interest (paragraph 13.2 of answering affidavit). And that applicant did not take issue with this, but accepted deliveries of the goods in question from the respondent. Applicant does not deny that respondent's statements contain the details mentioned above. In my view in this way he became aware of the fee that would be levied for late payment.

[16] Based on this and a reading of *Section 5 (3) (a) and (b)* I am of the view that the agreement in question is an incidental credit agreement. See also ***JMV Textiles (Pty) Ltd v De Chalaim Spareinvest 14CC and Others 2010 (6) SA 173***.

[17] In light of my finding above, it is unnecessary to deal with the question whether respondent is registered as a credit provider.

[18] Regarding applicant's second defence that relates to the registration of the ostrich feed namely "Volstrus Afrond Pille":
It is indeed so that *Section (1) (a) of Act 36 of 1947* provides that *"no person shall sell any fertilizer, farm feed, agricultural remedy or stock unless it is registered under the Act"*.
Applicant's complaint in this regard is that, "it seems as if certain products are registered in the name of **Mr Henk Linde** trading as Winterberg Veevoere but not in the name Veevoere Bk (the respondent). However it appears from annexure HL 13 to the respondent's answering affidavit that the registration of listed farm feeds was renewed and registration is valid until 31 March 2016.
The applicant for the renewal of the registration is **H Linde** and the company name is listed as Winterberg Veevoere CC.
There can therefore be no merit in the applicant's complaint in this regard.

[19] The upshot of what is stated in the preceding paragraphs is that the applicant does not seem to have any *bona fide* defences to respondent's claim.

[20] Applicant has proffered an explanation as to why he did not respond to first the letter advising that if he does not file his plea a notice to bar will be issued and why he did not respond to the said notice. He did not however explain why he did not file his plea within twenty (20) days of filing his Notice of Intention To Defend.

[21] Correspondence exchanged between the parties shows that the applicant acknowledged that he owed the respondent and until about February 2015 requested that he be given time to endeavour to settle amounts owing to the respondent. Citing certain quarters from which he expected payment. The lodging of this application seems to give credence to respondent's contention that applicant is merely seeking to delay settling the amount owed to the respondent.

[22] I am unable to find that applicant has succeeded in showing good cause why he is entitled to the relief that he seeks.

[23] For all the reasons stated above, the application is dismissed with costs.

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N G BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant	:	Sidney Bonnen Birch
Instructed by	:	APPLICANT IN PERSON African Hunt Tannery 1 Houghton Road Grahamstown Industrial GRAHAMSTOWN Ref.: Mr Birch Tel.: 082 490 2209
For the Respondent	:	ADV: Van der Merwe
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Date Heard	:	25 June 2015
Date Reserved	:	25 June 2015
Date Delivered	:	21 July 2015