Case number 1200 of 2021

In the Magistrate's Court for the district of Msukaligwa sitting at Ermelo

In the matter between

The Standard Bank of South Africa Limited **Plaintiff**

and

Dumisani Joshua Ndhlovu **Defendant**

Reasons for judgment

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[1] The plaintiff is a credit provider duly registered with the National Credit Regulator. The plaintiff's claim against the defendant allegedly arises from a written credit agreement in respect of monies lent and advanced.[1] The provisions of the National Credit Act, 2005 (as amended) (NCA) applies to the agreement. Summons was issued on 3 August 2021 and served by the sheriff on 21 August 2021 by affixing it to the principal door/ main gate at a premises in Ermelo purported to be defendant's residential address. The action was instituted to recover an amount of R158 738.28 which plaintiff alleges is owed to it. The defendant failed to enter an appearance to defend the action. The plaintiff lodged a request for default judgment with the clerk of the court. The request was duly referred to court in terms of Rule 12(5) of the Rules. The court refused the request for default judgment. The plaintiff has now filed a notice in terms of Rule 51(1) of the Rules. These are my reasons for refusing the request for default judgment.

[2] A plaintiff shall, if a claim is founded a cause of action arising out of or regulated by legislation, file together with the request for default judgment evidence confirming compliance with the provisions of such legislation to the satisfaction of the court.[2] The words *file … evidence* merely means to file an affidavit.[3] Plaintiff's request for default judgment was accompanied by an affidavit in terms of Rule 12(6) & 12(6A) of the Rules regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa, 2010 (as amended) (the Rules) attested to by plaintiff's official, Roney Wagner (hereinafter referred to as Wagner).

[3] Furthermore, a plaintiff shall, where the action is based on an agreement in writing, file together with the request for default judgment the original of such agreement or an affidavit setting out reasons to the satisfaction of the court why such original cannot or should not be filed.[4]

In **Dyobiso *v* Dyobiso and others**[5] the learned judge Govindjee stated:

> *The original of a document is the best evidence of its contents. The rationale for requiring original documentary evidence is precisely to avoid error and falsification, and has been associated with the best evidence rule in cases where the content of a document is directly in issue.* (At par. [6]) (Footnote omitted)

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[1] Par. 4 of the particulars of claim
[2] Rule 12(6A) of the Rules
[3] Jones & Buckle: The Civil Practice of the Magistrates' Courts in South Africa; Juta Law Online Publications (hereinafter referred to as J & B): RS 29, 2022 Rule-p12-13; Under the heading: Subrule (6A)
[4] Rule 12(6) of the Rules
[5] Case No.: EL1848/ 2022 Eastern Cape Division, East London Circuit Court

The learned author Van Loggerenberg[6] correctly explains the meaning of the words *an affidavit setting out reasons to the satisfaction of the court … why such original cannot or should not be filed* as follows:

> *In the case of loss of the original agreement through destruction or otherwise the contents of the document may (and, it is submitted, should) be proved by secondary evidence.*

In the current matter Wagner explained that the original agreement was stored at an offsite secure storage facility and that after a diligent search the original could not be located by the plaintiff. [7] It appears that the only copy of the credit agreement *has become lost/ misplaced.*[8]

[4] Furthermore, a credit provider has a statutory duty to maintain copies of the consumer's application for credit; credit agreements and credit accounts.[9] Such records must be maintained for a period of three years from the date of the termination of the agreement.[10] Credit providers also have a statutory duty to maintain, amongst others, the pre-agreement statement and quote; documentation in support of steps taken in terms of section 81(2) of the NCA; record of payments made and documentation in support of any steps taken after default by the consumer.[11] These records must be kept for a period of three years from the earlier of the date on which the registrant created, signed or received the document.[12]

The credit provider must maintain the records either in paper or electronic format for it to be readily accessible for the prescribed period.[13]

The requirement of records to be kept and preserved are also to be found in other statutory provisions. So, for instance, there is also a statutory duty on a person in charge of a health establishment to *ensure that a health record containing such information as may be prescribed is created and maintained at that health establishment for every user of health services.*[14]

In **Khoza v MEC for Health and Social Development, Gauteng**[15] hospital records relating to the birth of a child allegedly got lost. The learned judge Spilg commented as follows:

> *It is apparent on a reading of section 17 of the National Health Act that the legislature has taken a very serious view on the failure to keep medical records and on their disappearance, falsification or being tampered with. Stiff penalties are prescribed under section 17(2).* (At par. 35)

and

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[6] J & B; RS 29, 2022 Rule-p12-13; Under the heading: Subrule (6)
[7] Par. 3.3 of the affidavit of Roney Wagner
[8] At par. [5] of the Particulars of Claim
[9] Section 170 of the NCA
[10] Reg. 56*(a)* of the National Credit Regulations, 2006 (as amended) (NCReg.)
[11] Regulation 55(1)*(b)* of the NCReg.
[12] Regulation 55(5) of the NCReg.
[13] Reg. 55(2) read with Reg. 56(a) of the NCReg.
[14] Section 13 of the Health Care Act, 2003
[15] 2015 (3) SA 266 (GJ)

… Unless there is a satisfactory explanation as to why the original documents are not available, a court is entitled to treat such 'secondary' evidence with caution or even refuse to allow it into evidence. … (At par. 37)

[5] In the current matter the applicant's failure to produce the original agreement or a copy thereof is exacerbated by the fact that the plaintiff failed to comply with its statutory duty to preserve the records. The plaintiff did not give any reasons why the court should allow secondary evidence in lieu of the original agreement.

[6] Schwikkard *et al* explains the admissibility of secondary evidence as follows:

Nevertheless, the original remains a requirement in South African law, a consequence of which is that secondary evidence may not be used to prove the contents of a document. However, if the secondary evidence is the only means of proving the document, it may be admitted.

and

Secondary evidence may be exceptionally used to prove the contents of a document in the following circumstances: (1) the document is lost or destroyed; or (2) the document is in the possession of the opposing party or (3) a third party; or (4) it is impossible or inconvenient to produce the original; or (5) it is permitted by statute.[16]

[7] In **Tshabalala**[17] the learned Judge Wessels stated:

Na my mening, gesien die belangrikheid van die dokument wat ter sprake is, bied die getuienis wat namens die Staat afgelê is nie `n behoorlike grondslag vir die voorlegging van die gewraakte sekondêre getuienis nie. Vir die doeleindes van hierdie uitspraak aanvaar ek ten gunste van die Staat dat Olivier self oortuig was dat die oorspronklike dokument "heeltemal weg" was en nie opgespoor kon word nie. Dit blyk, egter, nie uit sy getuienis wat die aard en deeglikheid van sy ondersoek na die vermiste dokumente was nie. Die vraag is nie of Olivier oortuig was dat die vermiste dokument nie gevind kon word nie, maar of die voorsittende Regter, na aanleiding van getuienis betreffende die aard en omvang van die ondersoek na die vermiste dokument, oortuig is dat, ondanks `n deeglike ondersoek, dit nie gevind kon word nie. (on p. 104 D-E)

[In my opinion, given the importance of the document in question, the evidence given on behalf of the State does not provide a proper basis for the presentation of the disputed secondary evidence. For the purposes of this judgment, I accept in favour of the State that Olivier himself was convinced that the original document was "completely gone" and could not be traced. However, it does not appear from his testimony what the nature and thoroughness of his investigation into the missing documents was. The question is not whether Olivier was convinced that the missing document could not be found, but whether the presiding Judge, following evidence

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[16] Schwikkard *et al* Principles of Evidence (5th Ed) Jutastat e-publications (2023) ch20-p465
[17] 1980(3) SA 99 (A)

regarding the nature and scope of the investigation into the missing document, is convinced that, despite a thorough investigation, it could not be found.][18]

[8] In **Singh *v* Govender Brothers Construction**[19] the learned judge Leon stated:

The general rule of the law of evidence is that, when the purpose is to establish the terms of a writing, the writing itself must be produced but that secondary evidence may be given of the contents when the original has been destroyed or lost and proper search has been made for it. It is necessary to prove that proper search has been made for the original and that it could not be found. (at p 616I)

[9] In ***Ex parte Roche et Uxor***[20] **(Roche)** the learned judge Milne stated:

No doubt a document may properly be said to be lost when, although its existence is presumed, the precise place of its existence cannot be remembered by anyone who can reasonably be expected to have known it, and it cannot be found despite adequate search. (at 683)

[10] In **Barclays Western Bank Ltd *v* Creser**[21] **(Creser)** the Plaintiff attached a copy of the original agreement to its request for default judgment. The request was also accompanied by an affidavit sworn to by one Coetzee, an employee of the appellant. He stated therein that appellant had, due to a lack of office space, embarked upon a process of systematically recording its documentation by a microfilm process and thereafter destroying the originals. The original agreement, on which the action was based, was one of those which were destroyed, and he sought acceptance of the photocopy of the original.[22] The clerk of the court referred the matter to the magistrate. The magistrate declined to enter judgment holding that the original agreement was destroyed through the appellant's own deliberate act. On appeal it was held that the magistrate should have admitted secondary evidence of the agreement.

[11] In **Transnet Ltd *v* Newlyn Investments (Pty) Ltd**[23] a defendant, in opposing its eviction from certain premises, relied, *inter alia,* on a written addendum to the lease agreement. The defendant did not annex the addendum to its plea, alleging that a copy of the addendum was not in its possession and was last in the possession of the plaintiff. The original addendum was not adduced in evidence. The question whether an addendum had ever been concluded was hotly disputed. The court decided that the respondent was entitled to give whatever evidence it could in respect of the contents of the missing addendum.

[12] In **ABSA Bank Ltd *v* Zalvest Twenty (Pty) Ltd and others**[24] **(Zalvest Twenty)** the learned judge Rogers commented as follows:

In regard to the substantive law of evidence, the original signed contract is the best evidence that a valid contract was concluded, and the general rule is thus that the

[18] My translation
[19] 1986(3) SA 613 (N)
[20] 1947(3) SA 678 (D)
[21] 1982(1) SA 104 TPD
[22] Quoted verbatim from the judgment
[23] [2011] JOL 26946 (SCA)
[24] [2015] JOL 33579 (WCC)

> *original must be adduced. But there are exceptions to this rule, one of which is where the original has been destroyed or cannot be found despite diligent search. In such a case, the litigant who relies on the contract can adduce secondary evidence of its conclusion and terms (see Singh v Govender Brothers Construction 1986(3) SA 613 (N) at 616J – 617I). There are in modern law no degrees of secondary evidence (i.e. one does not have to adduce the "best" secondary evidence). While a copy of the lost original might be better evidence than oral evidence regarding the conclusion and terms of the contract, both forms of evidence are admissible once the litigant is excused from producing the original.* (at par. [10])

[13] It is clear from the above-mentioned case law that secondary evidence of a document may only be admitted if failure to produce the original document can and has been condoned. In **Ceser** *(supra)* the plaintiff explained in an affidavit why it could not produce original document and *sought acceptance of the photocopy of the original.* Condonation to file secondary evidence in lieu of the original document is not just for the asking. The party wishing to introduce secondary evidence of a document that is lost, must file admissible evidence as to the nature and thoroughness of its search for the original. This applies *a fortiori* to a matter, such as the present, where a credit provider has a statutory duty to maintain records.

In **Singh v Govender Brothers Construction** *(supra)* the defendant raised a special plea that the court has no jurisdiction to adjudicate the trial. The plaintiff relied on a contractual stipulation between the parties that *the purchaser consents to the jurisdiction of the magistrate's court, of the area in which construction takes place, in the event of any dispute arising between the parties of this contract.*[25] However, the plaintiff could not produce the original contract. Only a facsimile thereof was available. When the plaintiff attempted to lead oral evidence as to the contents of the agreement counsel for the defendant, Mr Kathuravaloo, came in opposition thereto, stating:

> *… the position is that before oral evidence is called to prove the terms of contract …, your worship, the plaintiff must explain sufficiently the reason for the absence of the documents upon which he relies. Until he has done that, oral evidence will not be called, your worship.* (At page 615I)

However, the learned magistrate permitted the plaintiff to adduce secondary evidence in lieu of the original.

On appeal and upon considering the evidence adduced by the plaintiff the court commented:

> *There is nothing in the evidence of Govender or Pillay which suggests that the document given to Vista Estates was destroyed nor can it be inferred therefrom that the document was lost or that a search was ever conducted for it. Pillay does not deal with the topic at all while Govender's evidence goes no further than to show that at one stage Vista Estates had a copy of the contract and that despite demand it had*

[25] It is not necessary to deal with the wrong wording of this stipulation for the purposes of the current judgment.

failed to produce it. There is nothing in his evidence which suggests that any search had been made for the document let alone a thorough one. (At page 617 E-F)

In the end the court of appeal found that the Magistrate should have upheld the special plea and the appeal was upheld.

[14] The court also finds it necessary to compare the current matter with the decisions in **Zalvest Twenty** *(supra)* and **Van Baalen and another *v* Absa**[26] **(Van Baalen)**. For this purpose only I will refer to the parties as the credit provider (in both cases the credit provider was ABSA Bank) and the consumers.

In both **Zalvest Twenty** and **Van Baalen** the consumers took exception to particulars of claim in that it did not disclose a cause of action because of the failure by the credit provider to attach the original credit agreements.

In **Zalvest Twenty** the court commented as follows:

Confining myself to the original particulars of claim and the complaint in the exception, I have no doubt whatsoever that the exception is misconceived. Rule 18(6) states that a party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded; and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading. In the present case the plaintiff has alleged that the mortgage loan agreement was a written contract and has made allegations as to when, where and by whom it was concluded. What the plaintiff has not done is to annex a copy of the agreement. The plaintiff has explained in its particulars of claim that it is unable to annex a copy because the document was destroyed in a fire and no other copy can be found. (At par. [7])

In **Van Baalen** *(supra)* the learned judge Kubushi commented as follows:

In Zalvest Twenty, the Court dismissed the exception even when the agreement had been destroyed by fire and would never have been made available. In the present matter, the allegation is that the Credit Agreements have been misplaced, and as at the time of the issue of Summons, they had not been procured. The documents are not lost or destroyed, they have simply been misplaced and they may be found. At this juncture, it is not known whether by the time the matter gets to trial the agreements would have been procured and made available to the Court. … (At par. [19])

The current matter is distinguishable from both **Zalvest Twenty** and **Van Baalen**. In the current matter the court is satisfied that, although the credit provider was *not in possession of a copy of the written agreement as same has become lost/ misplaced*[27] and that the original agreement *could not be located by the plaintiff,*[28] the averments in the particulars of claim are sufficient to disclose a cause of action.

Wagner stated in his affidavit that the original agreement was stored at an off-site secure storage facility and that, after a diligent search the original agreement could not be

[26] Case No. 22652/ 2022; Gauteng Division, Pretoria
[27] Par. 5 of the particulars of claim.
[28] Par. 3.3 of Wagner's affidavit

located.[29] This averment was sufficient for the purposes of instituting the action as there was still a possibility that the credit provider might locate the original credit agreement to produce it for the purposes of the trial. However, the mere inability of the credit provider to locate the original agreement is not even one of the five grounds mentioned in par. [5] *(supra)* for seeking to introduce secondary evidence.[30] Therefore, the credit provider may not seek to introduce secondary evidence merely on the basis that the original agreement cannot be located. The matter before me has now reached the stage where the credit provider is seeking default judgment and is now obliged to produce the original agreement.

Even if I am wrong to say that the original document cannot be said to be lost,[31] then the plaintiff merely alleged that there was a diligent search for the original document. Obviously, this search must have been conducted by an official of the plaintiff at the *off-site secure storage facility* and not by Wagner himself. Consequently, Wagner's evidence that the original document cannot be located, amounts to inadmissible hearsay. Furthermore, the plaintiff failed to adduce any evidence as to the name(s) of the person(s) who conducted the search or of the nature and thoroughness of their search. It also failed to adduce supporting affidavits of the officials who conducted the search.

The credit provider also submitted that it *would be unfairly prejudiced should the court not condone the Plaintiff's inability to file the original agreement or a copy thereof.*[32] However, the prejudice that the credit provider may suffer as a result of its failure to comply with its statutory duty to maintain the records, is also not one of the five grounds mentioned in par. [5] *(supra)* for seeking secondary evidence to be admitted.

The court is therefore of the view that the credit provider in the current matter failed to make out a case for secondary evidence to be admitted in lieu of the original document.

[15] The fact that the current credit agreement may or may not be subject to a debt restructuring order complicates matters further. Wagner stated in his affidavit:

> *To the best of my knowledge there has been compliance with the applicable provisions of Section 129 and Section 130 of the Act in that the notice was dispatched to the Defendant as per the averments contained in the Plaintiff's Particulars of Claim supported by the requisite proof.*[33]

I will assume that Wagner is referring to the notice in terms of section 129(1)*(a)* of the NCA. If my assumption is correct, then there is a discrepancy between his statement and plaintiff's particulars of claim. The only notice referred to in the particulars of claim is a notice in terms of section 86(10) of the NCA. This notice is given by a credit provider to terminate a debt review under certain circumstances. Although Wagner indicated earlier in his affidavit that he is *fully conversant with the facts and circumstances relating to the action instituted against the Defendant by the Plaintiff,*[34] he appears to be oblivious

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[29] Paragraphs 3.2 & 3.3 of Wagner's affidavit
[30] It should be noted at this stage that the original agreement cannot be said to be lost as there is no evidence as to the nature and thoroughness of the search for it. See **Roche** (supra) at par. [8]
[31] See footnote 29
[32] See par. 6 of the plaintiff's affidavit in terms of Rule 12(6) & (6A) of the Rules
[33] Par. 5 of his statement
[34] Par. 2 of his statement

regarding any debt review application by the consumer. Section 129(1)*(a)* does not apply to a credit agreement that is subject to a debt restructuring order.[35] On the other hand sections 129(1) and 130 do apply if the credit agreement is not subject to a debt restructuring order. It is not the court's duty to sort out the plaintiff's problems. It suffices to say that the court is left in the dark as to whether or not the credit agreement was the subject of a debt review order and whether or not the plaintiff complied with all the legal requirements in this regard.

Furthermore, the use of the words "to the best of my knowledge" by Wagner, in the context in which he used it, is a cause for concern. One definition of these words is:

> **"To the best of my knowledge"** is an idiom that means you believe something is true based on the information you have, but you might not know all the facts. It acknowledges that there may be other information you are unaware of. For example, you might say "To the best of my knowledge, no one had called all morning"[36]

Wagner stated in his affidavit –

- that he is the *Manager, Personal Lending Collections & Personal & Private Banking Credit,* a Division of the Plaintiff;
- that by virtue of his position held with the plaintiff he has control and access to the records of the plaintiff regarding its relationship with the defendant; and
- that he has familiarised himself with such records and is fully conversant with the facts and circumstances relating to the action instituted against the defendant by the plaintiff.

However, it is clear that Wagner **did not familiarise himself with the plaintiff's pleadings** in this matter and **that he is not fully conversant with the facts of the case**. Therefore, his affidavit does not comply with the requirements of **Regulation 2(1)*(a)* of the Regulations Governing the Administering of an Oath or Affirmation of GNR. 1258 of 21 July 1972.** It begs the question whether there is perhaps anything else that Wagner ought to have disclosed to the court which he is not aware of.

[16] Even if, for a moment, it is presumed that the plaintiff is allowed to submit secondary evidence, then the court is of the view that the secondary evidence introduced by the Plaintiff is insufficient to support its claim.

According to its particulars of claim the plaintiff attached *a copy of the blank terms and conditions identical to the written agreement*.[37] This is not correct. Plaintiff only attached a copy of the terms and conditions for personal loans and overdrafts. A blank form identical to the written agreement was not attached. Furthermore, Wagner makes no mention thereof it in his affidavit.

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[35] Section 129(2) of the NCA
[36] AI overview
[37] Par. 5 of the Particulars of Claim.

Wagner furnished the following evidence as secondary evidence in lieu of the original:

a. confirmation that the plaintiff and the defendant entered into credit agreement for monies lent and advanced under a stipulated account number; and
b. a quarterly bank statement reflecting –

- the stipulated account number;
- the name of the account holder;
- the nature of the agreement namely a revolving credit plan loan;
- that the overdraft limit is R135 000;
- that the interest rate is 22%; and
- that the monthly repayment instalment is R1500.

This brings the court to another distinction between **Zalvest Twenty** *(supra)* and **Van Baalen** *(supra)* on the one hand and the current matter on the other hand.

In **Zalvest Twenty** *(supra)* the plaintiff annexed to its particulars of claim a copy of the standard mortgage loan agreement. The court commented as follows at par. [3]:

> *[c] The best available evidence of the terms and conditions contained in the mortgage loan agreement are provided by the standard mortgage loan agreement regularly used by the plaintiff at the time it concluded its agreement with the first defendant, those terms and conditions being the same as the ones contained in the agreement concluded with the first defendant. The plaintiff annexes to its particulars of claim as 'A' a copy of the standard mortgage loan agreement, and seeks condonation as far as needs be of its failure to annex a true copy of the agreement.*
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> *[d] In terms of the mortgage loan agreement, the loan was secured by mortgage bond SB17497/2005 passed at Cape Town on 30 September 2005. Further particulars of the mortgage bond are provided and a copy thereof is annexed to the particulars of claim as 'B'.*
>
> *[e] Various material terms of the mortgage loan agreement were incorporated in the mortgage bond. The plaintiff sets out the particular terms on which it relies.*

In **Van Baalen** *(supra)* the learned judge Kubushi, commented as follows:

> *The Respondent is unable to attach true copies of the three Credit Agreements to its Particulars of Claim, as required in terms of Rule 18(6), but instead, has attached copies of the Standard Terms and Conditions applicable to Credit Agreements the Respondent enters into with all its debtors, alleging that the original Credit Agreements were misplaced and, after diligent search, could not, as at the time of issuing of the Summons, be procured. Together with the Standard Terms and Conditions, the Respondent has attached copies of the Mortgage Bonds registered in its favour as security for the monies it lent and advanced to the Excipients in respect of the three Credit Agreements. The contention being that the respective Mortgage Bonds confirm both the conclusion of the respective Credit Agreements between the parties and the Excipients' indebtedness to the Respondent.* (At par. [5])

The court is of the view that, compared to **Zalvest Twenty** and **Van Baalen**, the plaintiff's case to introduce secondary evidence of the original contract suffers from a paucity of facts upon which to find in its favour.

[17] Whereas the credit limit of the current agreement is R135 000.00, the credit agreement is categorised as an intermediate credit agreement.[38]

Now, a credit provider is expressly prohibited from entering into an intermediate agreement unless the credit provider has given the consumer –

(a) a pre-agreement statement –

(i) in the form of the proposed agreement; or

(ii) in another form addressing all matters required in terms of section 93; and

(b) a quotation in the prescribed form, setting out the principal debt, the proposed distribution of that amount, the interest rate and other credit costs, the total cost of the proposed agreement, and the basis of any costs that may be assessed under section 121(3) if the consumer rescinds the contract.[39]

There is no evidence that the plaintiff in the current matter complied with this statutory duty.

[18] There is no evidence that the plaintiff complied with its statutory duty to conduct a pre-agreement assessment as provided for in section 81(2) of the NCA.

[19] It is trite law that a bipartite contract only comes into operation once it is signed by both parties.[40] Where the party relying on the contract adduced the original contract or perhaps a copy thereof, it will appear *ex facie* the document itself whether or not this requirement was complied with. However, where the original agreement is lost or destroyed and the party relying on a contract submitted secondary evidence other than a copy of the contract, one would not be able to see whether or not the contract was signed. In such instance the party relying on such secondary evidence must also submit evidence that the original contract was signed by the parties.

In the current matter the plaintiff did not submit any evidence that the agreement was signed by both parties.

[20] To summarise, the plaintiff:

- failed to produce the original credit agreement;
- failed to make out a case to introduce secondary evidence in lieu of the original;
- failed to show whether or not the provisions of section 129(1)*(a)* and 130 of the NCA applies to this matter;
- failed to comply with its statutory duties to maintain the records of the agreement between it and the defendant;
- failed to adduce evidence that it gave the defendant a pre-agreement statement and quotation as required by section 92(2) of the NCA;

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[38] Section 9(3)*(a)* read with section 7(1)*(b)* of the NCA

[39] Section 92(2) of the NCA

[40] Minister of Justice and Constitutional Development v CJC Myburgh and others; Case No. JA 46/ 15; Labour Appeal Court of South Africa, Johannesburg.

- failed to adduce evidence that it conducted a pre-agreement assessment as provided for in section 81(2) of NCA;
- failed to adduce evidence that the credit agreement was signed by both parties. In other words, the plaintiff failed to show that there is a valid and enforceable agreement between the parties.

In the light of the above-mentioned considerations the court is of the view that the plaintiff failed to make out a case for default judgment to be granted in its favour. Therefore, the court refused the request for default judgment.

S.A. Gräbe
Additional magistrate Ermelo

PS
The law of contract in South Africa; R.H. Christie; 5th edition, 2006; LexisNexis:

> "Once the parties have decided that they will reduce their contract to writing and that they will bound by their written contract but not by any earlier informal contract, then the contract comes into existence when, and only when the written document containing it has been signed by both parties." [page 107]
>
> 'Act 75 of 1980 s 5(1)(a) requires that any credit agreement shall "be reduced to writing and signed by or on behalf of every party thereto." …
> The object of s 5(1)(a) is … the protection of purchasers under credit agreements as a class by ensuring that when the purchaser signs he should have before him in black and white the terms of the agreement he is letting himself in for.' [page 128]