

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2008/41609

DATE:30/08/2010

In the matter between:

GEODIS WILSON SOUTH AFRICA (PTY) LTD

Plaintiff

and

ACA (PTY) LTD

First Defendant
(In Liquidation)

LEWITTON, ANDREW ARTHUR

Second Defendant

STEINBERG, COLIN

Third Defendant

J U D G M E N T

MBHA, J:

INTRODUCTION

[1] The plaintiff sued all three defendants jointly and severally, for payment of the amount of R4 520 611,65 plus interest and costs.

[2] The claim against the first defendant is a contractual claim ("*the main agreement*") for payment for services rendered and disbursements made on its behalf, by the plaintiff.

[3] The second and third defendants bound themselves as sureties and co-principal debtors *in solidum* with the first defendant, for all debts that the first defendant owed to the plaintiff. The plaintiff's claim against the second and third defendants is, accordingly, based on a contract of a suretyship.

[4] The matter became defended and all three defendants subsequently served their pleas. However, on 31 March 2009 the first defendant was finally placed in liquidation and is accordingly no longer involved in the present litigation.

[5] The third defendant raised, *inter alia*, a special plea alleging:

5.1 That the main agreement and the suretyship, as pleaded by the plaintiff constituted, both individually and cumulatively, as against the third defendant, a credit agreement for the purposes of the National Credit Act No. 34 of 2005 ("*the Act*");

5.2 The third defendant was a consumer in default under a credit agreement for purposes of the Act;

5.3 That prior to causing summons to be issued, the plaintiff failed to deliver a notice contemplated in section 129(1) of the Act to the third defendant; and that

5.4 Accordingly, the plaintiff was not entitled to commence any legal proceedings to enforce the credit agreement against the third defendant.

[6] The matter was enrolled for trial on 4 August 2010. However, the plaintiff launched a substantive application asking for a separation of certain issues that existed on the pleadings. These issues flowed from the allegations or denials in the pleadings regarding the applicability of the Act, to the proceedings against the second and third defendants.

[7] This application served before Lamont J on 1 June 2010 who, after hearing argument, made an order that the issues regarding the applicability of the Act, are to be determined separately from all other issues in the action between the parties on 4 August 2010. The determination of all the other issues between the parties was postponed *sine die*.

ISSUES FOR DETERMINATION

[8] The issues that must be determined are twofold, namely:

8.1 Whether or not the provisions of the Act are applicable to the proceedings between the plaintiff and the defendants in the main action;

8.2 Whether or not the plaintiff was obliged to give notice to the second and third defendants in terms of section 129 of the Act, prior to the institution of the action.

[9] I should mention that on 30 July 2010 the third defendant, who raised the issues, delivered a notice that he abides the decision of this Court.

[10] There are two contracts that have to be considered in this matter, namely the main agreement between the plaintiff and the first defendant, in terms of which the plaintiff undertook to render certain services and make disbursements on behalf of the first defendant, and the suretyship agreement between the plaintiff and the second and third defendants in terms of which each of them bound themselves as surety and co-principal debtor, jointly and severally with the first respondent, for payment of all the debts of the first respondent.

[11] The plaintiff submitted that the provisions of the Act are not applicable to either the main agreement or the suretyship for the following reasons:

11.1 The first defendant is a juristic person whose annual turnover at the time the agreement was concluded, equalled or exceeded

the threshold value of R1 million determined by the Minister in terms of section 7(1) of the Act.

11.2 By virtue of the provisions of section 4(1)(a)(i) of the Act, the provisions of the Act do not apply to the main agreement.

11.3 By virtue of the provisions of section 8(5) of the Act, the provisions thereof do not apply to the suretyship.

[12] Section 129(1) of the Act requires a credit provider to comply with certain procedures before commencing legal proceedings against a defaulting consumer. The credit provider is specifically required to give the defaulting consumer a written notice advising him or her to refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intention that the parties resolve any dispute under the agreement, or develop and agree on a plan to bring the payment under the agreement up to date.

[13] It is common cause that the plaintiff did not give a notice in terms of section 129(1) of the Act to any of the defendants.

[14] Section 4(1) of the Act provides that the Act applies to every credit agreement between parties dealing at arm's length and made within, or

having any effect within the Republic. Exceptions are created in respect of certain agreements which are specified as follows:

“(a) *A credit agreement in terms of which the consumer is –*

(i) *a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7(1);*

...

(b) *A large agreement, as described in section 9(4), in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below the threshold value determined by the Minister in terms of section 7(1) ...”*

[15] In terms of section 7(1) of the Act, the threshold value that has been determined by the Minister, as on the effective date, is the monetary asset value or annual turnover of not more than R1 million.

[16] Furthermore, a “*large agreement*” refers, *inter alia*, to instances where the principal debt under a relevant transaction or guarantee, falls at or above the higher of the thresholds established in terms of section 7(1) of the Act.

[17] It is common cause that:

17.1 The terms of the main agreement between the plaintiff and the first defendant, and as specifically pleaded by the plaintiff, is a credit agreement as defined in the Act.

17.2 The existence of the debt as alleged by the plaintiff, is accepted by the defendants.

17.3 Annexure "C" to the particulars of claim is a true copy of the suretyship on which the plaintiff relies.

17.4 Both the second and third defendants signed the suretyship and it is valid in all respects.

17.5 The first defendant was at all material times a juristic person as defined in section 1 of the Act.

17.6 The first defendant's annual turnover exceeded R1 million per year.

[18] As the first defendant was a juristic person whose annual turnover was not less than R1 million per year, it follows that the provisions of section 4(1)(a)(i), the Act do not apply to the main agreement.

[19] Section 8(5) of the Act provides that an agreement, save for the type of agreement specified in subsection (2), for example, a policy of insurance, a

lease of immovable property or a transaction between a stokvel and a member of that stokvel, 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*”.

[20] I do not have the slightest doubt that the obligations under a contract of suretyship, fall squarely within the definition of a credit agreement which encompasses a credit guarantee. However, section 8(5) specifically requires the credit guarantee to apply to the obligations of another consumer in terms of a credit transaction to which this Act applies.

[21] As I have already found that the Act does not apply to the main agreement between the plaintiff and the first defendant, the obligations of the first defendant to the plaintiff were not incurred in terms of the credit transaction to which the Act applies.

[22] Accordingly, it follows that the second and third defendants cannot claim that the Act applies to them on the basis that their obligations arise in terms of a credit guarantee as set out in section 8(5) of the Act. Section 8(5) specifically requires the guarantee to apply to the obligations of another consumer in terms of a credit transaction to which this Act applies.

[23] The third defendant has apparently placed reliance on the fact that he is “*a consumer in default*” under a credit agreement for the purposes of the

Act. In my view, the third defendant seeks to assert the independent status of debtor, as opposed to being a surety, and then to argue that the Act applies to him and his credit agreement.

[24] The Appellate Division (as it then was) dealt conclusively with this reasoning in the case of *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) at 471, where Trollip J A held that credit was in fact not granted to the second respondent, who was a surety, and that the loan finance granted and the mortgage bond agreement existed between the appellant and the first respondent, the principal debtor. The learned Judge held that the credit was not advanced to the second respondent, that the second respondent did not become a party to the contract between the appellant and the first respondent, and therefore did not contract with the appellant to acquire any credit himself.

[25] Clearly, *in casu*, the third defendant signed as surety and co-principal debtor. The plaintiff's right of enforcement against him arises from the contract of suretyship. The main agreement is separate and distinct from the suretyship agreement. See further in this regard *Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another* 2009 (3) SA 384 (T) at paragraphs [20] to [23].

[26] It follows that the third defendant was sued as a guarantor to the first defendant's obligations, in terms of a credit transaction to which the Act does not apply. He was accordingly not entitled to receive notice in terms of section 129 of the Act. The suretyship clearly falls outside the ambit of the Act.

[27] I accordingly, make an order as follows:

1. It is declared:
 - 1.1 That the provisions of the National Credit Act 34 of 2005, are not applicable to the proceedings between the plaintiff and the defendants in the action under Case No. 2008/41609.
 - 1.2 That the plaintiff was not obliged to give notice to the second defendant and third defendant in terms of section 129 of the National Credit Act 34 of 2005, prior to the institution of the action under Case No. 2008/41609.
2. The third defendant's special plea is dismissed.
3. The third defendant is ordered to pay the plaintiff's costs incurred in connection with the determination of the issues regarding the applicability of the National Credit Act 34 of 2005

to the proceedings under Case No. 2008/41609 (including the costs incurred in connection with the special plea but excluding the costs of the application for the separate determination of issues brought before Lamont J on 1 June 2010.)

**B H MBHA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG**

COUNSEL FOR PLAINTIFF	: CJ GROBLER
INSTRUCTED BY	: V WERTH & ASSOCIATES
COUNSEL FOR SECOND DEFENDANT	: S STEVENSON
INSTRUCTED BY	: REITZ ATTORNEYS
DATES OF HEARING	: 04 AUGUST 2010
DATE OF JUDGMENT	: 30 AUGUST 2010