

REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. 25078/2011

REPORTABLE

In the matter between:

INVESTEC BANK LIMITED

Applicant

and

ANTHONIE WELMAN

Respondent

JUDGMENT

MEYER, J

[1] The applicant seeks payment from the respondent on four deeds of suretyship in the total sum of R10, 260, 716.81, interest, and costs of the application on the scale as between attorney and own client.

[2] The respondent has for the past fifteen years been speculating with immovable properties, mainly in and around Cape Town. He often utilised 'shelf' close corporations as vehicles for his speculation activities. It is, I think, safe to accept that he did so in

order to gain the various advantages of being a juristic person. He is the sole member of Marcelle Props 193 CC (Marcelle 193) and Marcelle Props 194 CC (Marcelle 194). The acquisition by each close corporation of two apartments in a development known as Harbour Bridge at the Victoria and Alfred Waterfront was financed by the applicant in terms of four loan agreements, two of which were concluded between the applicant and Marcelle 193 and two between it and Marcelle 194. The respondent in each instance bound himself in favour of the applicant as surety and co-principal debtor with the principal debtor – Marcelle 193 or Marcelle 194 - in respect of its liability arising from each loan agreement.

[3] The applicant has made out a proper case in support of the relief it claims in terms of its notice of motion against the respondent. The amounts presently due and payable to it by Marcelle 193 and by Marcelle 194 and the respondent's liability as surety for the payment of such amounts have been established. In my view Adv GB Rome, who appeared for the respondent, correctly conceded that the respondent has not raised any defence valid in law to the applicant's claims in his answering affidavit. The matter, however, does not end here.

[4] A belated notice in terms of Rule 16(A) was filed on behalf of the respondent regarding the raising of a constitutional issue in these proceedings, and condonation for the late filing thereof is sought. The respondent now wishes to challenge the constitutionality of s 4(2)(c) of the National Credit Act, 34 of 2005 (the NCA). The contention on behalf of the respondent is that s 4(2)(c) of the NCA is inconsistent with the principle of equality enshrined in s 9 of the Constitution since it 'arbitrarily' differentiates between natural persons who bind themselves as sureties for the

obligations of natural persons and natural persons who bind themselves as sureties for the obligations of juristic persons as defined in s 1 of the NCA. The respondent's constitutional challenge rests on the principal contention that he would have been entitled to the various protection measures afforded to a debtor under the NCA had the principal debtors, Marcelle 193 and Marcelle 194, for which he stood surety been natural persons and not juristic persons.

[5] The same constitutional challenge, however, was rejected in *Standard Bank of South Africa Ltd v Hunkydory Investments 194 Ltd and Another (No 1)* 2010 (1) SA 627 (C), paras [5.2] and [13] *et seq.* Leave to appeal was refused, and such refusal was confirmed by the Supreme Court of Appeal and thereafter also by the Constitutional Court, both courts finding that there were no reasonable prospects of success. See: *Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd and Others (No 2)* 2010 (1) SA 634 (WCC), para [3]. The same constitutional challenge was also rejected in this division in the as yet unreported judgment of my brother Van Oosten, J in the matter of *SLP Knot Investments 777 (Pty) Ltd v Coronado Trading 150 CC and Others* (case no. 16108/2009), paras [11] – [17], which was delivered on 3 November 2010.

[6] Adv Rome submitted that the constitutional challenge that was rejected in *Hunkydory (1)* only concerned ss 4(1)(a) and 4(1)(b) and not s 4(2)(c) of the NCA. There is no merit in this submission. It is based on a selective reading of that judgment. The first defendant in that case was a juristic person principal debtor and the second defendant a natural person surety. They opposed that application *inter alia* on the basis that ss 4(1)(a), 4(1)(b) and 4(2)(c) of the NCA are unconstitutional insofar as those

provisions exclude juristic persons from the application of the NCA in the circumstances referred to in s 4. See: *Hunkydory (1)*, para [5]. The submission on behalf of the second defendant in that case was also that ‘... s 4(2)(c) should be so interpreted as to afford him, as the ‘alleged surety’, the same protection as any other natural person who signed surety for the debt of another natural person.’ See: *Hunkydory (1)*, para [15]. It is clear from a contextual reading of the judgment that the interpretation contended for and the defence of the unconstitutionality of ss 4(1)(a), 4(1)(b) and 4(2)(c) of the NCA were rejected. It is important to note that an order was made also against the second defendant (the natural person surety), jointly and severally with the first defendant (the juristic person principal debtor), for payment of the amounts that were claimed.

[7] A similar argument that the decision and refusals of leave to appeal in *Hunkydory (1)* did not decide the constitutional validity of the NCA’s ‘... exclusion of natural persons having bound themselves as sureties to entities from the protection of the NCA...’ was rejected in *Slip Knot Investments 777*, para [12]. I respectfully agree with Van Oosten, J in finding that

‘[t]he argument resulted from a misreading of the judgment in *Hunkydory* as this aspect was specifically addressed by the learned Judge in relation to the second defendant in that matter. The circumstances and principles applicable in both matters are identical.’

[8] I, in any event, endorse and adopt the reasoning in *Hunkydory (1)* and that in *Slip Knot Investments 777*, which, in my view, applies equally to the constitutional challenge which the respondent wishes to raise against s 4(2)(c) of the NCA in this matter. The differentiation presently relevant is tailored to arise only in instances when a credit agreement is concluded by a juristic person whose asset value or annual turnover exceeds the prescribed threshold or when the credit agreement concluded by it

is a 'large' one as described in s 9(4) of the NCA. There is, in my view - for the reasons given in *Hunkydory (1)* and in *Slip Knot Investments 777* - a rational connection between the exclusion from the application of the NCA of such juristic person principal debtors and those who *inter alia* stand surety for them and the legitimate governmental purpose behind its enactment. Such limited exclusion is evidently aimed at furthering the object of protecting individual consumers '... while avoiding the imposition of regulatory burdens which may limit the availability of credit to small businesses.' *Per* Van Oosten, J in *Slip Knot Investments 777*, para [16].

[9] I am accordingly of the view that the constitutional challenge which the respondent wishes to raise is 'ill-founded' or 'appears to be hopeless'. The ineluctable inference is therefore, as was in my view correctly submitted by Adv DC Fisher SC who appeared on behalf of the applicant, that the respondent's application for condonation is made with the object of delaying the applicant's claim. See: *Smith N.O. v Brummer N.O.* 1954 (3) SA 352 (O), at pp 357 – 358B.

[10] In the result, I make the following order:

1. The respondent's application for condonation of the late filing of his Rule 16(A) notice in terms of the Uniform Rules of Court is refused with costs.
2. The respondent is ordered to pay to the applicant:
 - 2.1. the sum of R1, 724, 734.36, and interest thereon at the rate of 12.15% per annum from 27 May 2011 to date of payment compounded monthly;

- 2.2. the sum of R1, 724, 612.67, and interest thereon at the rate of 12.15% per annum from 27 May 2011 to date of payment compounded monthly;
- 2.3. the sum of R3, 854, 194.27, and interest thereon at the rate of 12.15% per annum from 27 May 2011 to date of payment compounded monthly;
- 2.4. the sum of R2, 957, 175.51, and interest thereon at the rate of 13% per annum from 27 May 2011 to date of payment compounded monthly; and
- 2.5. the costs of this application on the scale as between attorney and own client.

P.A. MEYER
JUDGE OF THE HIGH COURT

15 December 2011

Date of hearing: 27 October 2011
Date of judgment: 15 December 2011
Counsel for applicant: Adv DC Fisher SC
Counsel for respondent: Adv GB Rome
Attorneys for applicant: Blakes Maphanga Inc

Randburg

Ref: Mr Sanchez

c/o Breytenbach Mostert Skosana Inc

Braamfontein, Johannesburg

Attorneys for respondent: Herold Gie Attorneys

c/o Read Hope Phillips Thomas & Cadman Inc

Melrose Arch, Johannesburg

Ref: S Read