THE SOUTH GAUTENG HIGH COURT (JOHANNESBURG)

JUDGMENT

Case no: 2012/00783

In the matter between:

RMB PRIVATE BANK A DIVISION OF	**Applicant**
FIRST RAND BANK LIMITED	
and	
KAYDEEZ THERAPIES CC (IN LIQUIDATION)	**First Respondent**
DOBSON, KAREN DIANA	**Second Respondent**
PARKINSON, HELEN CATHERINE	**Third Respondent**

Neutral citation: *RMB v Kaydeez Therapies CC & 2 others* 2012 SA (GSJ)

Coram: SATCHWELL J

Heard: **17 May 2012**

Delivered: 30 May 2012

Summary: Only Parliament can determine whether or not the National Credit Act 34 of 2005, in its entirety or in part, is applicable to an agreement between creditor and debtor – common mistake between contracting parties cannot require third parties or the courts to hold a Statute applicable to an agreement which does not fall within the purview of the Statute.

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
29/5/12
DATE SIGNATURE

JUDGMENT

SATCHWELL J

INTRODUCTION

[1] This judgment raises the interesting question whether specific legislation can be held applicable to an agreement between private parties when the Statute is not factually applicable but the contracting parties erroneously thought the agreement was subject thereto. The creditor sues sureties where it is common cause that the principal credit agreement was not subject to the provisions of the National Credit Act 34 of 2005 ('NCA'). The sureties insist that the creditor follows the procedures provided for in the NCA because, at the time of signing the suretyships, both parties erroneously thought that the NCA was applicable thereto.

[2] The applicant ('the creditor') seeks judgement in an amount of R 1 470 277,85 against the second and third respondents ('the sureties') ('Dobson' and 'Parkinson') as surety and co-principal debtors for and on behalf of the first respondent ('Kaydeez') in liquidation. It is common cause that the NCA is not applicable to the principal agreement. Nevertheless, the sureties claim the NCA is applicable to the suretyship agreements and that the creditor failed to comply with the relevant provisions thereof. In addition, Parkinson disputes that she knew that she was signing and committing herself to a suretyship.

AGREEMENT

[3] The creditor and Kaydeez concluded a written facility agreement on 24th October 2007 in terms of which the creditor lent and advanced funds in an amount in excess of one million rand (R1 000 000) to Kaydeez which has failed to effect repayments and went into liquidation in September 2009.

[4] On the same date as the signing of the facility agreement, 24th October 2007, each surety signed a suretyship agreement binding herself as surety and co-principal debtor

together with Kaydeez for the repayment of any sum owed by Kaydeez to the creditor and for due fulfilment of all obligations of Kaydeez to the creditor in respect of such indebtedness. In addition, Dobson, caused a covering mortgage bond to be registered over certain immovable property in favour of the creditor.

[5] The creditor now seeks judgment against both sureties, jointly and severally, for an order of payment of the capital plus interest, for an order declaring the immovable property specially executable and the costs of the application.

APPLICABILITY OF THE NATIONAL CREDIT ACT

The NCA and the sureties

[6] The principal agreement entered into between the creditor and Kaydeez was a 'credit facility' and therefore a 'credit agreement' as defined by the NCA. The NCA applies to every such agreement unless specifically exempted in terms of the Act.

[7] It is common cause that this agreement between the creditor and Kaydeez is exempted from the provisions of the Act by reason of the provisions of section 4(1)(b) which exempts a 'large agreement' where the 'consumer is a juristic person whose asset value or annual turnover is below the threshold value determined by the Minister.' The credit facility was a 'large agreement' as defined because the principal debt exceeded the sum of R250 000. Kaydeez is incorporated as a close corporation and had, at the time of entering into the agreement, neither asset value nor turnover. Accordingly, on all four grounds set out in section 4(1)(b) of the NCA, the NCA cannot apply to the principal agreement between the creditor and Kaydeez.

[8] These particular suretyship agreements would, on the face of it, be 'credit guarantees' and subject to the NCA. However, the definition of a 'credit guarantee' in section (8)(1)(c) requires the guarantor to 'undertake or promise to satisfy...any obligation of another consumer in terms of a credit facility or credit transaction'. Since the sureties are furnishing undertakings in respect of Kaydeez' obligations which are not in terms of a 'credit facility or credit transaction' as defined in the NCA, these suretyships cannot be 'credit guarantees' as provided for in the NCA. Furthermore, as I pointed out in *Firstrand Bank Ltd v Carl Beck*

Estates (Pty) Ltd.[1] section 8(5) of the NCA requires the credit guarantee to apply to the obligations of another consumer in terms of 'a credit agreement to which this Act applies'. The NCA does not so apply.

[9] Accordingly, the NCA cannot apply to these particular sureties since their surety obligations were not incurred in terms of a credit transaction to which the NCA applies.

Wording of the suretyships

[10] However, the creditor and its legal representatives appear to have operated under a misunderstanding as to the applicability of the NCA. That mistake caused the creditor to annex a document to each suretyship agreement advising the sureties that: '[k]indly note that the National Credit Act, 34 of 2005 ('the NCA') provides you, in your capacity as co-principal debtor (although still a surety) with a number of rights' and also caused the applicant to claim compliance with the NCA in its founding affidavit.

[11] This introduction to the annexure has no heading and is of the nature of a notice or announcement of an existing state of affairs. There is no recordal that these are terms to which the contracting parties are agreeing.

[12] The issue to be determined is the import of this mistaken notification at the time of concluding the suretyship agreement. Each party signed an agreement which is not subject to the provisions of the NCA. Yet, each party also signed the annexure to the suretyship agreement which noted that the NCA provided the sureties with a number of rights in terms of the NCA.

The Legislature determines to which contracts the NCA applies

[13] The NCA is a Statute passed by the Legislature which has determined to whom and in respect of which agreements the Statute shall apply and to what extent and with what result.

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[1] 2009 (3) SA 384 TPD.

[14] The Act is very detailed. It is very careful to specify exactly what constitutes a 'credit agreement',[2] to spell out precisely when the Act does not apply by identifying the exceptions and further amplifying thereon[3] and to indicate where the Act is of full or only limited application.[4] Clearly, the Legislature was determined to ensure that there was no uncertainty as to the purview of the Act and that parties would have certainty as to whether or not their agreement was subject to the NCA.

[15] It is clear from the Constitution of the Republic of South Africa, Act 108 of 1996 that it is not available for any individual or entity other than Parliament to determine when and where legislation shall apply.[5] A Statute applies ex lege – by Parliamentary enactment and decree of the President. Legislation obtains its force by reason of the will and decision of the Legislature, not because individuals or entities elect to be subject thereto.

[16] Against that background, the 'notice' given in the addendum to the suretyship agreements is incorrect. The Legislature did not provide that the NCA would be applicable to the surety agreement into which the parties had entered. The NCA did not 'provide you...with a number of rights'.

[17] Nevertheless, the sureties assert that they are entitled to the benefits of the NCA by reason of this addendum.

The parties can incorporate certain terms into their agreement

[18] The parties are, of course, entitled to include in their agreement anything which is not contra bonos mores.[6] The parties could have stated in their agreement 'notwithstanding that the NCA does not apply, the parties agree that each shall enjoy the following rights and observe the following obligations' and then set out all or some of those rights and obligations

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[2] Sections 9, 10 and 11.
[3] Subsections (a) – (d) of Section 4 (1) and further in subsections (2), (5) and (6) of section 4.
[4] Sections 5 and 6.
[5] Section 44 of the Constitution confers the legislative power on Parliament and reads in subsection (a) 'The national legislative authority as vested in Parliament confers on the National Assembly the power (ii) to pass legislation with regard to any matter...'
[6] The then Appellate Division in *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 at 9E-F held '...it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammeled by restrictions on that freedom. "Public policy demands in general full freedom of contract: the right of men freely to bind themselves in respect of all legitimate subject-matters." (per Innes CJ in *Law Union and Rock Insurance Co Ltd v Carmichael's Executor* 1917 AD 593 at 598)'

which are found in the NCA. These would be terms and conditions of the suretyship and binding on all parties.

[19] However, the contracting parties could not bind statutorily created third parties – such as the National Credit Regulator which is established in terms of the NCA[7] with powers and functions set out in the NCA. Nor could the parties ever utilise the services of such a third party because the National Credit Regulator has no jurisdiction over the agreement between the parties or any dispute arising therefrom.

[20] If the parties had reached such an agreement that certain terms, which also happen to be provisions of the NCA, would be applicable to the suretyships then one would have regard to those provisions which had been included in their agreement.

[21] In the present instance, the addendum 'notice' refers to '[s]ome of the most important rights' and seven paragraphs follow dealing with credit profiles, termination by the principal debtor, settlement of the outstanding amount, suspension of the agreement, prepayment, resolution of complaints by alternative dispute resolution and the use of debt counsellors. Each paragraph either refers to a section of the NCA, an entity established in terms of the NCA or refers to a 'credit agreement'. Certainly, this addendum envisages an agreement to which the NCA is applicable and which is subject to the provisions of the NCA.

[22] The question is what the parties intended and understood by this 'notice'.

[23] Firstly, in explicitly announcing that the NCA was of application, the creditor was incorrect and could not so determine.

[24] Secondly, it would have been possible for those 'rights' set out in the addendum to be implicitly incorporated into the agreement. But in the present case none of the 'rights' referred to in the addendum are those upon which the sureties seek to rely. Phrased differently, none of the rights which the sureties seek to invoke are referred to in the addendum 'notice'.

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[7] Section 12.

[25] The sureties argue that the creditor was required to conduct an assessment as provided for in section 81 and 82 the NCA prior to the conclusion of the agreement and, failing such assessment, the granting of credit was 'reckless'. The sureties also argue that they were each entitled to be sent a notice in terms of section 129(1) giving the surety written notice of the default and proposing referral to an entity which may resolve any dispute or result in agreement on a plan for payment. Yet, this addendum contains no reference to either an 'assessment' or 'section 129 notice' as provided for in the NCA. Such 'rights' were therefore not implicitly incorporated into the agreement.

[26] The sureties therefore cannot succeed in their argument that they are entitled to the benefit of certain 'rights' contained in the NCA because they were erroneously and explicitly referred to the benefits of rights in the NCA which are different from those upon which they now seek to rely.

Mistake as to the legislative environment

[27] In the present case there is no recordal that the parties agreed between them that the NCA or certain terms thereof were of application to their agreement. The document made an announcement – it called upon the sureties to 'note' that the NCA provided the sureties 'with a number of rights' – which was incorrect. This was a statement of the legislative environment within which the suretyships agreements would operate – which was incorrect.

[28] The NCA did not provide the sureties with any rights. They had only those rights set out in their agreement. In effect, the creditor was asking the sureties to take cognisance of a legislative state of affairs which did not exist. The sureties may or may not have taken such cognisance.[8]

[29] Clearly, the creditor (and perhaps the sureties) were operating under the mistaken belief that the Statute was applicable to their agreement. Both parties made the same erroneous supposition about the legislative environment. There is no lack of consensus about the content or import of the agreement but a mistaken common assumption about the applicability of the NCA.

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[8] Parkinson claims that she did not know that she was signing a suretyship agreement – she thought she was applying to have access to the bank account of Kaydeez Therapies.

[30] The Supreme Court of Appeal recently discussed the impact of common mistaken assumptions in *Van Reenen Steel (Pty) Ltd v Smith NO and another*[9] and confirmed that which was said in *Wilson Bayly Holmes (Pty) Ltd v Maeyane and others*[10] that:
'a common mistake relating to the existence of a particular state of affairs will not render the contract void unless it can be said that the parties expressly or tacitly agreed that the validity of the contract was conditional upon the existence of that state of affairs.'[11]

[31] There is nothing in the affidavits or in the suretyship agreements themselves to suggest that the agreement was made dependent upon the assumption that the NCA would apply to any of the agreements.

[32] Importantly, there is no reference whatsoever in either the suretyship agreement or the addendum to either the assessment referred to in sections 81 and 82 of the NCA or the issuing of a notice in terms of section 129 of the NCA. This suggests that the parties had not agreed that the validity of the contract would depend upon the applicability of the NCA. The absence of any reference to those provisions indicates that these provisions of the NCA were not vital or fundamental to the transaction between the parties.

[33] In addition to the lack of materiality of this misunderstanding or misrepresentation, there is nothing in the papers to suggest that the sureties were induced to enter into the suretyship agreements by reason of this notification that the NCA gave them certain rights.

[34] In any event, the sureties are not seeking and have not argued that the agreements are void. They continue to rely upon the contracts. They persist in claiming that they are entitled to certain benefits of the NCA – more specifically a statutory section 81 and 82 assessment prior to conclusion of and implementation of the agreement, failing which it should be found that the creditor was 'reckless' in granting credit, and receipt of the statutory section 129 notice.

[35] This is not the first time that a party has expressed an erroneous understanding as to the legal effect of a term in an agreement. Where the party, which has expressed that

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[9] [2002] JOL 9515 (A).
[10] 1995 (4) SA 340 (W).
[11] 344I.

erroneous opinion, attempts to enforce the contract then that party must abide by the assurance given and cannot deny the correctness of the erroneous construction. However, in the present case, it is not open to either party to abide the assertion that the NCA applies to the suretyship agreements. The sureties cannot insist that the NCA does or must apply by reason of any common mistake or representation. There are simply not the jurisdictional facts to render the Statute of application.

[36] Two examples come to mind which exemplify the difficulty in trying to bring this agreement within the purview of the NCA. Firstly, if parties had entered into an agreement for the sale of immovable property during the years of apartheid and the white seller agreed with the black purchaser that the provisions of the Group Areas Act would not apply to their sale and purchase, thereby purporting to give the black purchaser the right to live in a white group area – it would immediately be seen that the parties could not inter se contract in or out of the applicability of legislation thereby granting to one of them that which they would not normally acquire ex lege. Secondly, if a landlord and lessee agreed that their lease agreement was subject to the provisions of the Prevention of Illegal Eviction Act (PIE) when it was not subject to such legislation and the landlord went to court seeking orders for service of notices and orders for eviction – the court would refuse to grant such orders since the necessary jurisdictional facts did not exist to found such orders, notwithstanding that the parties had agreed PIE to be applicable to their agreement.

CONCLUSION

[37] I can only but conclude that the NCA is not applicable to either the principal agreement or the suretyship agreements. The NCA cannot be rendered applicable by agreement. The parties have not expressly agreed to include in their agreement certain terms which reflect or parallel certain provisions of the NCA. The parties have not tacitly agreed to include in their agreement any term that the creditor must conduct an assessment prior to entering into the agreement failing which the granting of any credit would be reckless. The parties have not tacitly agreed to include in their agreement any term that the creditor must give the sureties notice of default which also refers them to an entity to resolve any dispute or result in agreement on a payment plan.

SECOND SURETY DID NOT KNOW SHE WAS SIGNING A SURETYSHIP AGREEMENT

[38] Dobson avers in her answering affidavit that Parkinson has 'no recollection of having signed' the suretyship agreement and, if she did, 'she did not appreciate the significance of her actions in doing so'. All Parkinson intended to do was 'to provide a limited amount of assistance to me as her daughter' and she intended to signed documentation to 'make herself a joint or second signatory' on the credit facility. Parkinson signed the documents 'without reading them or appreciating their significance'.

[39] This is a curious set of averments.

[40] Neither Dobson nor Parkinson claim that any employee of the creditor made any wrongful or untruthful representations to Parkinson which induced her to sign the suretyship. It is merely claimed that she signed without reading the document. She relies upon her own mistake.

[41] Parkinson was neither an ingénue with no experience of the world nor a disabled and very senior citizen. At the time of signing the suretyship agreements she was (according to her identity number) fifty nine years old. Dobson is her daughter. She must have known that her daughter was borrowing money from the bank and that her daughter was required to both furnish a suretyship and mortgage her immovable property. Dobson certainly envisaged, when she first applied for a credit facility from the creditor, that she would have to furnish security. In what she calls her 'business plan' she concludes 'I have in my own rights a house worth R1,100.000 fully paid. I have off shore accounts that exceed R1,200,000. I am requesting a business loan of R800,000'.

[42] Dobson must have approached her mother to provide the additional suretyship. Dobson does not state in her answering affidavit that she deceived her mother, concealed the need for the suretyship or misled her mother as to the nature of the document which she was signing. She does state that she was present when her mother signed the documents.

[43] Certainly someone, either Dobson or Parkinson, furnished the bank with the full names and identity number of Parkinson. If indeed, Parkinson believed that she was going to be a second signatory on the banking account of her daughter's business, why does Dobson say that this 'was a close corporation in which she [Parkinson] held no interest whatsoever'? I can appreciate that Parkinson had no interest in her daughter's business but she certainly had an interest in her daughter.

[44] The document signed by Parkinson indicates its status on the first page in bold and in a larger font than the rest of the document: in the centre of the page is the word 'SURETYSHIP'. Immediately above that word in bold is a box with: 'NOTICE: We encourage you to obtain independent legal advice to ensure that you understand your commitment in terms of this suretyship and the potential consequences of your decision to stand surety'. This too, is in a larger font than the rest of the document. Immediately above Parkinson's signature is the word 'surety' which could not have been missed because she placed her signature in the space provided. Immediately below Parkinson's identity number is the word ('the surety'). The total document signed by Parkinson is (including the addendum) five pages. On none of these is she required to place exemplars of her signature for purposes of signing on a bank account.

[45] The documentation signed is neither misleading nor deceptive. It clearly proclaims that which it is and it clearly identifies to the signatory who she will become. Parkinson does not claim to have been incapacitated in any way requiring special assistance – over and above the notice given to her that independent legal advice may be advisable.

[46] I can find no basis on which she can avoid the consequence of her actions.

ORDER

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[47] In the result an order is made as follows on behalf of the applicant against the second and third respondents jointly and severally, the one paying the other to be absolved:

1. Payment of the sum of R1 470 277.85 (one million four hundred and seventy thousand two hundred and seventy seven rand and eighty five cents);

2. Payment of interest on the above amount at the rate of 10.25% (ten point two five per centum) per annum from 6 September 2011 to date of final payment calculated daily and compounded monthly;
3. An order declaring the following property specially executable, being certain:
    a. A unit consisting as shown and more fully described as Section Plan no: SS218 in the Scheme known as La Motte in respect of the land and building or buildings situate at Rynfield Extension 42 Local Authority: Ekuruleni Metropolitan Municipality of which section the floor area, according to the said sectional plan is 168 (one hundred and sixty eight) square metres in extent; and
    b. An undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan.

    Held by Deed of Transfer no: ST 2279/2007; and
4. Costs on the attorney and client scale.

DATED AT JOHANNESBURG ON THIS 30TH DAY OF MAY 2012

SATCHWELL J

APPEARANCES

APPLICANTS:	L Van Tonder Instructed by Lowndes Dlamini Attorneys, Johannesburg
RESPONDENT:	J C Viljoen Instructed by Dewey de Souza, Johannesburg