

**REPUBLIC OF SOUTH AFRICA****IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG****CASE NO: 2020/27881**

- (1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED: NO

  
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**SIGNATURE**

**DATE:** 25 February 2022

In the matter between:

**ATLANTA SUGAR (PTY) LTD**

Plaintiff

And

**ZANDE AFRICA (PTY) LTD**1<sup>st</sup> Respondent**SIYABONGA PRINCE NTUTELA**2<sup>nd</sup> Respondent

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**JUDGMENT**

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**MANOIM J**

1. The plaintiff in this matter entered into a contract with the first defendant on 29 June 2020, to supply goods and services to the first defendant.
2. The contract was partly written and partly oral. The terms were simple. The first defendant would pay for the goods and services within 30 days of date of invoice. On 30 June 2020 the second defendant a director of the first, entered into an agreement as surety and co-principal debtor for the first defendant in terms of its obligations to the plaintiff.
3. On 22<sup>nd</sup> July 2020 the plaintiff rendered services and or delivered goods to the first defendant. The plaintiff then rendered what it termed a running account for these to the first defendant, but it never got paid.
4. The plaintiff brought an action against both defendants for payment of R 439 500.00. The defendants filed a plea, denying liability, but the plea was so void of detail it is difficult to comprehend what the defence was based on.
5. Unsurprisingly in response to this plea, the plaintiff then applied for summary judgment in January 2021. The essence of this application was to state that despite the plea, none of the material facts had been put in dispute. The terms of the agreements, the delivery to the first defendant and the price were not challenged.
6. But in February 2021 the plaintiff was advised by a Business Rescue Practitioner (the 'BRP') that the first defendant had been placed in business rescue.
7. In May 2021 the second defendant, now represented by a new attorney filed an affidavit to oppose the summary judgment. The second defendant raised two defences in his opposing affidavit: (i) that the plaintiff could not validly claim against him whilst the first defendant, for whom he stood surety was still in business rescue and; (ii) that the plaintiff did not comply with the National Credit Agreement Act, 34 of 2005 (the 'NCA') when enforcing the surety against the second defendant. (It is common cause that the plaintiff did not.)
8. However, since the filing of the heads of argument, the first defendant's business rescue has been terminated. The remark made by the BRP in the notice of termination was that the company had no assets to pay for liquidation and no assets to wind down.

9. In a joint practice note prepared in January 2022, the two parties' legal representatives reached an agreement, that there was now only one point to decide and that was the NCA point. Further, they agreed that I could decide the matter without an oral hearing but solely on the basis of the affidavits and the heads of argument.<sup>1</sup>
10. Due to the evolution of the events since the litigation began, the sole point for me to decide now in relation to the summary judgment application, is whether the plaintiff was obliged to comply with the terms of the NCA, in particular section 129. Section 129 is a section that provides for the creditor to give notice to the debtor of the amount owing and provides the debtor certain procedural protections.
11. It is common cause that the NCA did not apply to the principal agreement with the first defendant; as its turnover and asset size at the time exceeded the requisite threshold for the application of the NCA.
12. In these circumstances, if the main agreement is not subject to the NCA, then, as the plaintiff correctly contends, the NCA does not apply to an ancillary agreement like a surety. This has been decided in the case of ***First Rand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another 2009 (3) SA 384 (T)*** where the court on facts similar to those in this matter explained as follows: -

*[21] "The second respondent signed as surety and co-principal debtor. The right enforceable by applicant against second respondent arises from the contract of suretyship. The contract between applicant and second respondent is separate and distinct from the bond agreement between applicant and first respondent, although it is accessory to it. The second respondent is not a consumer and did not receive credit. He is a guarantor of a consumer's obligations to a credit giver. Second respondent's contractual relationship with the applicant remains ancillary to the main agreement between the applicant and the first respondent.*

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<sup>1</sup> This appears from the joint practice minute . See Case lines pages 007-1 to 007-5. This minute states: "As at the time of filing this practice note, the defendants oppose the summary judgement application on one ground, namely that the plaintiff was obliged yet failed to serve a section 129 (of the CPA) notice on the first defendant, whereas the plaintiff submits that compliance with section 129 was / is not required in this instance." The reference to the CPA is erroneous. The Act relied on is the NCA.

*[22] The authorities on this point are clear. A surety who has bound himself as surety and co-principal debtor remains a surety whose liability arises wholly from the contract of suretyship. Signing as surety and co-principal debtor does not render a surety liable in any capacity other than a surety who has renounced the benefits of excussion and division. As De Villiers CJ stated, 'the use of the words "co-principal debtor" does not transform the contract into any other than suretyship'.*

*[23] Second respondent could not be and was not sued in his capacity as co-principal debtor, since his liability to the bank remains that of surety who has renounced certain rights. This position is correctly referred to by the applicant in its summons.*

*[24] In the result, the second respondent is sued as a guarantor to the obligations of the first respondent in terms of a credit transaction to which the NCA does not apply. He cannot claim that he is entitled to have received a notice in terms of s 129 of the NCA.”<sup>2</sup>*

13. This then resolves the only issue between the parties which is a point of law. The plaintiff was not obliged to comply with the NCA to enforce the surety. It was an ancillary agreement to a main agreement which did not require NCA compliance. There are no longer any factual disputes, so no triable issues arise. The second defendant has no *bona fide* defence on the only legal point that remained to be considered. For this reason, the plaintiff is entitled to summary judgment.
14. I am not inclined to give a special award of punitive costs as was sought for by the plaintiff. I recognise that, by entering into the joint practice note to restrict the issues and agreeing that the matter could be decided on the papers, the second defendant has sought to minimise costs. He should not be mulcted with punitive costs. It will suffice to award the plaintiff party and party costs.

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<sup>2</sup> This approach was also followed in *First Rand Bank Limited v Roux and Another* [2018] JOL 39760 (GP) at paragraph 25

## ORDER


Having considered the papers filed of record, and having read the heads of argument of both counsel in this matter: -

[1] Summary judgment is granted against the 2nd Defendant for: -

[1.1] Payment of the sum of R439,530.00;

[1.2]. Interest on the aforesaid amount calculated at 2.5% (two-and-a-half percent) above the prime rate per annum, from the date of the summons to date of payment;

[2] The costs of the plaintiff on a party and party scale.



**N MANOIM**

JUDGE OF THE HIGH COURT  
GAUTENG LOCAL DIVISION, JOHANNESBURG

*This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 25 February 2021.*

Date of hearing: 8 February 2022

Date of judgment: 25 February 2022

### Appearances:

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