IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED

2014.05.15
DATE

SIGNATURE

CASE NUMBER: 13913/13

DATE: 20/5/2014

SCANIA FINANCE SOUTHERN AFRICA (PTY) LTD — APPLICANT

V

GEORGE PETRUS MULLER — RESPONDENT

JUDGMENT

MABUSE J:

[1] The applicant, Scania Finance Southern Africa (Pty) Ltd, a private company with limited liability, duly registered as such in accordance with the company statutes of the Republic of South Africa, claims payment of a sum of R1,068,045.30 plus interest at a rate of 15.5% per annum and other ancillary

relief from the respondent, George Petrus Muller, a major businessman and member of Mullrec CC (" Mullrec"). The applicant's claim is based on a written Acknowledgement of Debt which the applicant contends has its genesis in two lease agreements.

[2] The applicant's cause of action arises from the following set of facts. On 27 May 2008 and at Fochville and Alrode the applicant and Mullrec CC, who were during such material times duly represented, entered into two lease agreements on the following terms that:

2.1 the applicant would lease to the respondent who would hire from the applicant two (2) Scania Tippers;

2.2 that the lease would endure for a period of (sixty) 60 months determined from the commencement date to the termination date;

2.3 that the total amount payable in respect of each vehicle would be R1, 661, 656.68 of which a deposit of R103, 006,98 in respect of each motor vehicle would be payable and that the balance would be paid thereafter by way instalments.

[3] In pursuance of the aforementioned agreements, the applicant delivered to Mullrec the two Scania Tippers. Mullrec breached a material term of the said lease agreements in that it failed to make payment of the instalments as set out in the lease agreements. As a consequence of such failure on or about 7 March 2009 the applicant cancelled the aforementioned lease agreements in

terms of clause 63.2 of the agreements. This is not in dispute. Following the cancellation of the said lease agreements, the applicant then escalated payment of the full amount of R2, 496, 240.54. The said amount that was due in respect of the lease agreements became payable by Mullrec to the applicant.

[4] On 23 October 2009, the respondent, in writing, personally acknowledged his indebtedness in the sum of R2,496,256.54 to the applicant. This amount represented the total balance that Mullrec owed to the applicant in terms of the cancelled lease agreements. The said acknowledgement of debt constitutes the bedrock of the applicant's case against the respondent. In the said acknowledgement of debt, the respondent undertook to pay the amount of R2,496,256.54 in monthly instalments of R95, 843.53 each commencing on 17 September 2009 and thereafter on or before the 17th day of each and every succeeding month until the whole amount of R2,496,256.54 was fully paid. The respondent had furthermore agreed that in the event of him defaulting with his instalments as set out in the Acknowledgement of debt and the applicant taking legal action on the basis of such failure he would pay the applicant's costs on attorney and client scale. The respondent had agreed to the term that if he defaulted with the payment of anyone instalment, the whole amount due would become immediately payable.

[5] The respondent or Mullrec on his behalf, made certain payments. The applicant has, in paragraph 16 of the founding affidavit, provided a list of all the various payments that the respondent made or that were made on behalf of the respondent and the dates on which such payments were made after the

respondent had signed the acknowledgement of debt in question. It is crucial at this stage to point out that, although the respondent had, in the acknowledgment of debt, undertaken to make payment of the monthly instalments of R95, 843.53 commencing on 17 September 2009, he failed in some respects not only to make the said payment but also to make regular payments.

[6] As a consequence of the respondent's default, on 11 February 2013 the applicant sent to the respondent by registered post a letter of demand. In terms of paragraph 3 thereof the said letter constituted a demand in terms of s. 129(1) of the National Credit Act 34 of 2005 ("NCA"). The same letter was also sent by electronic mail to the respondent. In the same letter the applicant demanded from the respondent, payment of a sum of R1, 233, 592.32 being the balance in respect of the Acknowledgement of Debt signed by the respondent on 23 October 2009 and warned the respondent that if he failed to make payment of the said amount within ten (10) business days of receipt of the said letter, further legal action would be taken.

[7] It is contended by the respondent firstly that when the lease agreements were concluded by and between the applicant and Mullrec in May 2008, the applicant failed to assess either him or Mullrec as required by the provisions of the NCA; secondly, that the applicant had failed to register as a credit provider as required by the provisions of the NCA; thirdly, that the applicant failed to explain the meaning of the legal terms as set out in s. 8 of the relevant Acknowledgments of Debt; fourthly that that the conclusion of the lease

agreement between Mullrec and the applicant fell within the ambit of the NCA; and fifthly that the acknowledgement of debt itself also falls within the ambit of the NCA.

[8] In developing his grounds of resisting the applicant's claim, the respondent contends that as the applicant did not assess him before it extended unlawful credit to him such extension of credit to him was reckless. Consequently the Acknowledgment of Debt constituted a reckless credit. In developing a second ground the respondent contends that as a result of the applicant's failure to register as a credit provider, the Acknowledgement of Debt and the credit the applicant provided in terms thereof are respectively void and unlawful in terms of the provisions of the NCA. On this basis the respondent contends that the applicant should refund to him all the money paid by him under the Acknowledgment of Debt; thirdly, that following the applicant's failure to explain to him the meaning of the legal terms as set out in paragraph 8 of the Acknowledgment of Debt he did not generally understand or appreciate the risks or his obligations arising from the Acknowledgment of Debt and resultantly entered into an agreement that led to his over indebtedness. That he was over-indebted, so contended the respondent, flowed directly from the applicant's failure to properly assess him.

[9] It is important to note that the respondent had initially also challenged the applicant's status as credit provider in terms of the NCA. This the respondent did after the applicant had, upon a written request dated 25 April 2012 by the respondent, stated in an electronic mail dated 6 May 2013 that it was not a

registered credit provider in terms of the provisions of the NCA. For explicable reasons the applicant had persisted with this statement in its founding affidavit. Subsequently it turned out that indeed the applicant was a registered credit provider. This situation was corrected, firstly, by the replying affidavit. In paragraph 9 thereof, it was pointed out that the applicant had, in a subsequent letter dated 15 May 2013 addressed to the respondent, rectified the misunderstanding. A copy of the relevant letter was attached as annexure "RA1" to the replying affidavit. Attached to annexure "RA1" was a copy of the applicant's registration certificates as a credit provider issued in terms of the provisions of NCA and covering also the period in question.

[10] In his heads of argument, the respondent's counsel had persisted that the applicant had not furnished proof that it was a duly registered credit provider. This necessitated the delivery by the applicant of supplementary affidavit in which the applicant pointed out that it was a registered credit provider and in which furthermore it confirmed that it had provided proof of such registration as a credit provider. The respondent has conceded that the applicant has provided proof of its registration as a credit provider. I am accordingly satisfied that at all material times referred to in this application, that is, the conclusion of the lease agreements and the Acknowledgement of Debt the applicant was a duly registered credit provider as set out in the NCA. This is therefore no longer an issue between the parties.

[11] In his heads of argument, counsel for the respondent conceded that the original lease agreements did not fall within the ambit of the NCA. Consequently the

respondent's second ground of opposition to the application falls by the wayside too.

[12] THE ACKNOWLEDGMENTS OF DEBT FALLS WITHIN THE AMBIT OF NCA

The respondent contends that the acknowledgement of debt constituted a credit agreement as envisaged by the NCA and that accordingly, there was, in terms of the provisions of the Act, an obligation on the applicant to assess the respondent before extending credit to him. It was contended furthermore by the respondent that if the applicant failed to conduct the relevant assessment of the respondent, that the respondent entered into a reckless credit agreement which this court is, on such ground, entitled to set aside or to set aside parts of the respondent's rights and obligations flowing from the Acknowledgments of Debt or in the alternative to suspend the operation of Acknowledgments of Debt.

[13] Before dealing with the applicant's approach, it is, in my view, only crucial to state the following admissions by the respondent. The respondent admits that the total amount payable for the lease period in respect of each tipper was a sum of R1,661,656.65; the applicant's general terms and conditions with regard to the lease agreements; that as at 23 October 2009, Mullrec was indebted to the applicant in the amount of R2,496,246.54; that when Mullrec defaulted with its payment obligations flowing from the lease agreements, the respondent concluded, on such terms and conditions as set out therein, the Acknowledgment of Debt: that he himself, and not Mullrec, made all the payments from 15 October 2009 to 10 February 2012, as reflected in paragraph 16 of the founding affidavit and that the balance, alternatively the respondent's

indebtedness in terms of Acknowledgment of Debt, amounted to R1,428,198.23.

[14] The applicant disputes the respondent's contention that the Acknowledgment of Debt constitutes a reckless credit agreement. It contends in its replying affidavit that the Acknowledgement of Debt concluded between the applicant and the respondent was merely a confirmation of the amount due by the respondent to the applicant arising from the respondent's obligations towards the applicant in terms of the Deed of Suretyship concluded by the respondent in favour of the applicant in which he bound himself as surety and principal debtor with the applicant in respect of Mullrec's indebtedness to the applicant. It was argued furthermore on behalf of the applicant that because the lease agreement was not subject to the NCA, neither was the suretyship by which the respondent came to be bound to the applicant was subject to the NCA.

[15] In his heads of argument, counsel for the applicant argued, that the acknowledgement of debt merely recorded in express terms that it was not a novation and that it merely operated to strengthen an existing obligation of the respondent's liability as surety for Mullrec debts. The Acknowledgment of Debt is not a fresh source of obligation. It merely supported the respondent's existing obligation. According to counsel for the applicant, it is the underlying obligation that should be considered to determine whether the subsequent obligation was also subject to the NCA. Accordingly if the underlying obligation is not subject to the provisions of the NCA the Acknowledgment of Debt that arises from the underlying debt will not be subject to the NCA.

[16] As a starting point it is common cause between the parties that an Acknowledgement of Debt *per se* falls within the ambit of the NCA. What this court is called upon to decide is whether the Acknowledgment of Debt in question arises from the original lease agreement or not. It is common cause between the applicant and the respondent that the original debt arose from the lease agreements that had been concluded between the applicant and Mullrec and not the respondent. It is also common cause that Mullrec defaulted with its obligations arising from the said lease agreements. It is furthermore common cause between the applicant and the respondent that on 23 October 2009, the respondent acknowledged in writing himself to be truly and lawfully indebted to the applicant and that subsequently on the strength of the acknowledgement of debts, commencing on 15 October 2009 up to 10 February 2012 certain payments totalling R1, 428,198.23 were made. It is now known, after he admitted it, that it was the respondent, and not Mullrec, who made all the further payments, in respect of the debt arising from the lease agreements, after he signed the acknowledgement of debt.

[17] The question now is does the Acknowledgment of Debt in question arise from the lease agreement as contended by the applicant? In support of his view that the Acknowledgement of Debt in this instant matter emanates from a lease agreement, counsel for the applicant referred the Court to the authority of **Ribeiro and Another v Slip Knot Investments 777 (Pty) Ltd 2011(1) SA 57 (SCA)** where it is stated in the headnotes that:

"The appellants were sureties in terms of the loan agreement between the principal debtor and the respondent. This agreement, to which the NCA did not apply, was later cancelled by agreement and replaced with a new agreement between the same parties, in terms of which the principal debtor was discharged and the appellants agreed to obligations and undertakings that were specifically acknowledged to have originated in their suretyship obligations in terms of the initial agreement. The obligations under the initial loan agreement and those under the new agreement were thus interdependent, and this could only mean that the new agreement was in substance an agreement to guarantee the principal debtor's obligations under the initial loan agreement, and was therefore a credit guarantee to which the NCA did not apply."

[18] It is clear from the said authority that:

(1) the appellant's in Ribeiro's authority were sureties of a loan agreement between the principal debtor and the respondent;

(2) the loan agreement to which the NCA did not apply was later cancelled by agreement and replaced with a new agreement between the same parties;

(3) in terms of the new agreement the principal debtor was discharged and the appellants agreed to the obligations and undertakings that were specifically acknowledged to have originated in their suretyship obligations in terms of initial agreement;(my own underlining)

(4) the obligations under the initial loan agreements and those under the new agreement were thus interdependent;

(5) that the new agreement must in substance be an agreement to guarantee the principal debtor's obligations under the initial loan agreement. All these qualities would make such an agreement a credit guarantee to which the NCA did not apply. What happened in Ribeiro's authority did not happen in the instant case. The facts of this matter differ from the facts of the Ribeiro matter. The material difference between the two matters lies in the fact that in this instant matter there were no obligations and undertakings that were specifically acknowledged to have originated in any suretyship agreement. Simply put there was no suretyship.

[19] ANALYSIS OF ACKNOWLEDGMENT OF DEBT

Firstly, the written agreement of debt which was signed by the respondent on 23 October 2009 does not have its provenance in the lease agreements that had been concluded between the applicant, as the lessor, and Mullrec, as the lessee, nor is there any reference in the said Acknowledgment of Debt to the said lease agreement. The terms of the Acknowledgment of Debt do not contain any connection between the lease agreement and the Acknowledgment of Debt. Secondly, although the applicant contended that the basis of the respondent's reliability was suretyship, no such agreement of suretyship was placed before the Court.

[20] In contending suretyship the applicants relied, according to its counsel's heads of argument, on the provisions of clause (vii)(b) of the Financial Lease

Agreement concluded by and between the applicant and Mullrec on 16 April 2008 and which was cancelled in a letter dated 17 May 2009. The said clause (vii)(b) stated that:

"*The lessee understands that this agreement is conditional upon –*

(vii) The lessor being provided with the following security in respect of all amounts payable by the lessee in terms of this agreement.

(a) .....

(b) personal suretyship in favour of the lessor in the form and substance satisfactory to it, from all shareholders / members of the lessee or such other person as may be required by the lessor."

Secondly, the applicant contended in paragraph 12 of the replying affidavit that:

"*The acknowledgement of debt concluded by the respondent was merely a confirmation of the amount due by the respondent to the applicant arising from the respondent's obligations towards the applicant in terms of the deed of suretyship concluded by the respondent in favour of the applicant wherein he bound himself as surety and co-principal debtor with the applicant in respect of Mullrec's* indebtedness *to the applicant."*

[21] It is as clear as crystal that the applicant's cause of action is not suretyship but the acknowledgement of debt. Nowhere in the applicant's founding affidavit did the applicant allege that the respondent was in breach of any term of suretyship. Secondly, as I have already pointed out, no suretyship was placed

before the Court. Suretyship is a written agreement between the surety and the creditor of the principal debtor in terms of which the surety holds himself liable for the due performance of the principal debtor's obligations. Mullrec would not have been party to the agreement of suretyship. The agreement of suretyship has to be in writing and signed by the surety or his representative. Sec. 6 of the General Law Amendment Act No. 50 of 1956 as amended by sec. 84 of Act 80 of 1964 ("GLAA") deals with the formalities in respect of contract of suretyship. It provides as follows:

"*No contract of suretyship entered into after the commencement of this Act shall be valid unless the terms thereof are embodied in a written document assigned by or on behalf of the surety.*"

The said GLAA commenced to operate on 22 June 1956. It is also clear that the applicant and the respondent, as the representatives of Mullrec had contemplated, an agreement envisaged in sec. 6 of GLAA when the agreed to the suretyship "*in a form and substance satisfactorily to it*". Clause (vii)(b) of the Financial Lease Agreement does not constitute an agreement of suretyship nor did the lease agreements themselves constitute such an agreement of suretyship. The said agreement merely referred to suretyship in the said clause. In the absence of agreement of suretyship referred to in sec. 6 of the GLAA I conclude that there was no suretyship before the Court. Although I agree with the argument of the applicant's counsel that the Acknowledgment of Debt is not subject to the provisions of the NCA, it is however on the facts of this case, not on the grounds argued by Mr. Van der Merwe. Except for any

contention that the Acknowledgement of Debt arises from any surety, I accept Mr van der Merwe's argument as set out in paragraphs 15 and 16 supra.

[22] In my view, in order for the acknowledgement of debt to constitute a credit guarantee, there must first be a proper agreement as set out in s. 6 of the GLAA of suretyship, followed by the conclusion of the relevant acknowledgment of debt. Secondly, an Acknowledgement of Debt itself must contain a clause that the initial obligations and undertakings, as accepted by the sureties in terms of agreement, have their origin in the initial undertakings and obligations attributable to the sureties in the initial loan agreements. These are the requirements, according to **Ribeiro and Another vs Slip Knot Investments 777 supra**, that characterise an acknowledgment of debt as a credit guarantee.

[23] In my view, the acknowledgment of debt on which the applicant relies and which the applicant refers to as a credit guarantee does not, for three reasons, satisfy the definition of a credit agreement. In the first place, and for reasons that I already have pointed out, especially in paragraph 19 supra, it does not satisfy the requirements for a credit guarantee as set forth in **Ribeiro and Another vs Slip Knot Investments** supra. Secondly, it does not satisfy the requirements of sec. 8(5) of the NCA where it provides as follows:

"*An agreement, irrespective of its form but not including an agreement contemplated in subsection (2) constitutes a credit guarantee if, in terms of that agreement, a person undertakes or promises to satisfy upon demand any*

obligations of another consumer in terms of a credit facility or credit transaction to which this Act applies."

[24] An acknowledgment of debt though a bilateral juristic act is a unilateral agreement in terms of which one contractant is required or undertakes to perform certain obligations. Such an agreement will, in terms of sec. 8(5) of the NCA only be regarded as a credit guarantee under the following circumstances:

(1) a person undertakes or promises to satisfy;

(2) upon demand;

(3) any obligation;

(4) of another consumer in terms of a credit facility or credit transaction;

(5) to which this Act applies.

The document which the applicant called acknowledgment of debt does not constitute a credit guarantee because it does not satisfy the requirements of sec. 8(5). The respondent's contention that the Acknowledgement of Debt is a credit Agreement and that it should be considered in accordance with the provisions of the NCA is therefore without merit.

[25] Finally the respondent contended that the acknowledgment of debt constitutes a credit agreement as envisaged. I am satisfied that the applicant has established that an Acknowledgment of Debt on which it relies in this matter is not a credit guarantee as envisaged by the provisions of sec. 8(5) of the NCA. Accordingly, I found no merit at all in that argument.

[26] In paragraph 13 supra I pointed out that the respondent was aware that Mullrec was indebted to the applicant in the sum of R2, 496, 246.54; that the said debt arose from lease agreements which were not subject to the provisions of the NCA and that it was only after Mullrec had defaulted with its payments that the respondent personally took over the responsibilities of Mullrec to continue with the payments. It is as clear as crystal that the said debt did not arise from any financial assistance extended to the respondent by the applicant herein within the ambit of the NCA. The fact that the original lease agreement did not attract the provisions of the NCA means that the acknowledgement of debt connected to such lease agreement will in equal measures not attract the provisions of the said Act. It is also clear that the sum of R2, 496, 240.54 which he undertook to pay to the applicant was equal to the outstanding balance due by Mullrec to the applicant. The applicant certainly knew that he took over the responsibility of Mullrec to pay to the applicant the amount which was due and payable by Mullrec to the applicant by virtue of the lease agreements that were not subject to the provisions of the NCA. His sudden reliance on the provisions of the NCA after he had acknowledged his indebtedness to the applicant and after he had, as he also admitted, made payments of the debt to the applicant in accordance with the terms of the acknowledgement of debt without protest and without complaining that he had not been properly assessed is, to say the least, opportunistic. In the result his defence that the said acknowledgment of debt was subject to the provisions of the NCA has no substance.

[27] I am satisfied therefore that the applicant has shown that the acknowledgment of debt in question is not subject to the provisions of the NCA and that the respondent has not raised any valid defence against the applicant's claim. Having said that I find it unnecessary to deal with all the other respondent's defences based on his contention that the provisions of the NCA applied to the acknowledgement of debt.

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

1. Judgment is hereby granted in favour of the applicant against the respondent for payment of the sum of R1, 068, 045.30 plus interest on the said amount at 15.5% per annum reckoned from 10 February 2012 to the date of full payment.

2. The respondent is hereby ordered to pay the costs of this application on attorney and client scale.

P.M. MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicant:	*Adv. HA van der Merwe*
Instructed by:	*Senekal Simmonds Inc.*
Counsel for the respondent:	*Adv. JAH May*
Instructed by:	*Britz Attorneys*
Date Heard:	*13 November 2013*
Date of Judgment:	*2014 May 20*