

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NO: A779/10

CAPX FINANCE (PTY) LTD

Appellant

versus

FW EDWARDS

1st Respondent

FREDERICK WOEST EDWARDS

2nd Respondent

JUDGEMENT DELIVERED ON THIS 13TH DAY OF MARCH 2012

FORTUIN, J:

A. INTRODUCTION

[1] This is an appeal against a judgement of Magistrate Claassen in the Vredenburg Magistrate's court, dismissing with costs an exception that the appellant took against a special plea of the respondents.

[2] For ease of reference the appellant will be referred to as the plaintiff and the respondents will be referred to as the defendants.

[3] On or about 25 July 2007, the plaintiff, Capx Finance (Pty) (Ltd) advanced to Suntele, who was a client of the defendants, a Law and Conveyancing firm and the director of that firm respectively, bridging finance in the amount of R78 400-00 pending the registration of a mortgage bond by Suntele over a certain property in favour of Nedbank. The respondents gave a written undertaking in their capacity as conveyancers to pay the loan amount, fees and interest to the plaintiff upon registration of transfer of the property. The nature of the relief that the plaintiff sought against the defendant in the magistrate's court, is the rectification of the undertaking and the repayment of the amount advanced to Suntele, together with interest thereon and legal costs.

[4] The undertaking was given on a standard form which pertains to the transfer of property and not to the registration of a bond. Plaintiff sought to rectify the undertaking by replacing the word "transfer" with the words "the bond".

[5] The bond was not registered and it was the plaintiff's submission that they would not be able to recover any money from Suntele.

B. THE DEFENDANTS' SPECIAL PLEA

[6] The defendants filed a special plea to the plaintiff's particulars of claim on the following grounds:

6.1. The agreement for bridging finance between plaintiff and Suntele falls within the application of the National Credit Act 34 of 2005 (the NCA) by virtue of complying with s4(2)(c) and s8(5) of the NCA; and

6.2. the undertaking is a credit guarantee as envisaged in terms of s8(5) of the NCA, accordingly, the provisions of s129 of the NCA are applicable.

6.3. The plaintiff has failed to comply with the provisions of s129(2) of the NCA and the proceedings are accordingly void.

C. EXCEPTION TO RESPONDENTS' SPECIAL PLEA

[7] The plaintiff raised an exception against the plea on two alternate grounds:

7.1. The plaintiff's cause of action is a claim for damages arising from negligent misrepresentations and not on the enforcement of the undertaking and, allegedly, regardless of whether the undertaking is regulated by the NCA, the NCA is not applicable.

7.2. The undertaking is not a credit agreement as defined in s8 of the NCA and accordingly s129 is not applicable; and

[8] It was argued on behalf of the plaintiff that either of the grounds of exception is sufficient to sustain the exception.

D. THE LAW ON EXCEPTIONS

[9] It is trite that, in order to determine the excipiability of a pleading, regards must be had to the pleading itself and no facts may be adduced to make such a determination. In this regard see **Viljoen v Federated Trust Limited**¹.

[10] The facts set out in the pleadings must be accepted as correct unless they are "palpably untrue".² It is further trite that:

*"... if evidence can be led which can disclose a course of action alleged in the pleading that particular pleading, is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action."*³

[11] Further, the excipient must

*"satisfy the court that the conclusion of law pleaded by the appellant cannot be supported by any reasonable interpretation of the particulars of claim."*⁴

¹ 1971(1) SA 750 (O) at 754.

² **Voget and others v Kleynhans** 2003(2) SA 148(C) at par 9.

³ **McKelvey v Cohen** NO 1980 (4) SA 525 Z at 526D.

⁴ **Steward and Another v Botha and Another** 2008 (6) SA 310 (SCA), at para 4.

A. THE LAW ON THE DIFFERENT GROUNDS OF EXCEPTION

1. **Claim is a claim for damages**

[12] On behalf of the plaintiff it was submitted that their claim is a claim for damages and, therefore, the NCA is not applicable. I am of a different view. This claim is based on the breach of an agreement i.e. the undertaking by the defendants. Accordingly, I am of the view that the claim is indeed based on contract.

2. **The undertaking is not a credit agreement as defined in section 8 and therefore section 129 is not applicable.**

[13] Section 8(5) of the NCA reads 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 obligation of another consumer in terms of a credit facility or a credit transaction of which this Act applies.”

[14] Section 129 of the NCA reads as follows:

“(1) If the consumer is in default under a credit agreement, the credit provider --

- (a) *may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and*
- (b) *subject to section 130(2), may not commence any legal proceedings to enforce the agreement before-*
 - (i) *first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and*
 - (ii) *meeting any further requirements set out in section 130."*

[15] Section 130(1) reads as follows:

" ... a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and –

- (a) *at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9), or section 129(1), as the case may be;*

(b) in the case of a notice contemplated in section 129(1), the consumer has –

- (i) not responded to that notice; or
 - (ii) responded to the notice by rejecting the credit provider's proposals ; and
- ...

[16] The relevant part of the undertaking reads as follows:

"We confirm, to the best of our knowledge, that the transaction is unconditional and there is no outstanding requirement or impediment to the registration of transfer. We expect transfer to be registered on or about 31 August 2007. As irrevocably and unconditionally instructed by the client, we undertake to pay the loan amount, fees and interest to yourselves upon registration of transfer.

We reserve the right, prior to registration of transfer, to withdraw this undertaking should we cease to control funds in the transactions, or should any circumstances arise which would render it impossible for us to continue acting as transfer attorneys in this transaction. We undertake to advise you immediately of any circumstances which would entitle us to withdraw this undertaking."

3. Conditional undertaking

[17] In considering the plaintiff's exception, it further needs to be determined whether the fact that the payment was coupled to a future event, places it outside of the definition in section 8(5). The defendants rely on the matter of **Ribeiro & Another v Slip Knot Investments 777 (Pty) Ltd**⁵ in support of its argument that such payment indeed still falls under section 8(5) of the NCA. In this particular case, the SCA found that the agreement in question was a credit guarantee despite the fact that the respondents, who granted the guarantee, would duly become liable to pay the balance after the occurrence of two future events.⁶

[18] The plaintiff in *casu* appears to be of the view that an agreement will only constitute a credit guarantee for the purposes of the NCA if, in terms of that agreement, the undertaking is unconditional. In support of this view he raises s 8(5) and the discussion thereof as in **FirstRand Bank Ltd v Carl Beck Estates (Pty) Ltd**.⁷:

"There is no doubt that the suretyship obligations of the second respondent theoretically fall within the definition of a credit agreement which encompasses a credit guarantee in terms whereof –

'A person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction.' "

It is submitted by the plaintiff that this points to the unconditionality of the undertaking.

⁵ 2011(1) SA 575 (SCA).

⁶ Para 3, 10 and 11.

⁷ 2009(3) SA 384 (T) at para 18B.

[19] In my view, this argument is flawed in more than one respect. The plaintiff's argument appears to be based on the conditionality of the undertaking. It should, however, be noted that it has been held obiter in **FirstRand Bank**, *supra*, that a suretyship agreement falls within the definition of a credit agreement for the purposes of the Act, this despite the fact that the surety's obligation to pay will only arise should the debtor fail to perform its obligations in terms of its agreement with the creditor. In other words, the surety's undertaking to pay is conditional upon the debtor's non-performance.

[20] Furthermore, in my view there is nothing in the wording of the provision that suggests that an undertaking to pay conditional upon a future event could never constitute a "credit guarantee" for the purposes of the NCA.

[21] Section 8(5)⁸ should not be read in isolation but should be read together with the other subsections of section 8, in particular section 8(1)(c) which reads as follows:

"(1) Subject to subsection (2), an agreement constitutes a credit agreement for the purpose of the Act if it is –

...

*(c) a credit guarantee, as described in subsection (5); ..."*⁹

⁸ See wording of section at para 12, *supra*.

⁹ For the wording of s8(5), see para 13, *supra*.

[22] Further, it was held in **Firtsrand Bank**, *supra* that it should firstly be determined whether the principal agreement, i.e. the agreement between Suntele and the plaintiff, is an agreement to which the Act applies. Where the Act does not apply to the principal agreement, as was the case in the **FirstRand Bank** matter, it would also not apply to the undertaking. In *casu*, the Act applies to the principal agreement and therefore also applies to the undertaking.

[23] In my view, s8(5) is clear that, irrespective of the conditionality of an undertaking, and, since the credit transaction between Suntele and the plaintiff is a credit transaction to which the NCA applies, the undertaking by the defendants in *casu* falls within its definition, i.e. it constitutes a credit guarantee.

F. CONCLUSION

[24] In the circumstances, the plaintiff's exception that the claim is for damages and that the NCA is therefore not applicable, is unfounded.

[25] Furthermore, I am of the view that the undertaking is a credit agreement as defined in sec 8 of the NCA and accordingly, section 129 is applicable. The exception by the plaintiff that section 8 and section 129 of the NCA is not applicable is therefore also unfounded.

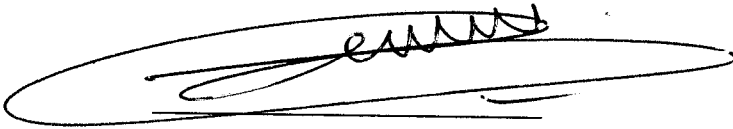
G. ORDER

[25] In the circumstances, I would dismiss the appeal and confirm the magistrate's finding.

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FORTUIN J

I agree and it is so ordered.

A handwritten signature in black ink, appearing to be 'ERASMUS', enclosed within a large, horizontal oval shape, positioned above a horizontal line.

ERASMUS J