

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 31462/2008

In the matter between:

14/10/08

BUSINESS PARTNERS LTD

APPLICANT

AND

SIMPLY FISH-ECO BOULEVARD

FIRST RESPONDENT

ELAINE BARR

SECOND SPONDENT

AMENDED JUDGMENT

MAVUNDLA, J.,

- [1] The applicant applies for summary judgment against the second respondent for payment of the amounts of R595 662.01 and R457 433.90 together with interest at the rate of 15% calculated as from 2nd June 2008 on each respective aforesaid amounts.

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
08-10-14	
DATE	SIGNATURE

[2] The second respondent had bound himself as a surety and co-principal, in respect of the amount of R595 662.01 arising from a written loan agreement¹, and in respect of the second amount R457 433.90 arising from a written royal agreement².

[3] The second respondent in resisting the summary judgment has stated in her affidavit, *inter alia*, that she denies that the agreement forming the subject matter does not fall within the purview of NPA. She contends on the contrary that the national Credit Act is applicable and that the applicant was obliged to comply with the provisions of section 129 and or 130 of the NCA³. The second respondent further states that the first respondent has since been liquidated and its assets in respect of which the applicant had advanced funding, have been sold by the liquidator and that the proceeds there from should have been deducted from the amount owing to it⁴.

¹ Annexure "BP1" to the particulars of claim.; paginated page 12-39

² Annexure "Bp3" to the particulars of claim; paginated page37-39.

³ Paragraphs 4.6-4.9 of her affidavit paginated page72:

"4.6 The first defendant borrowed funds from the applicant. These funds were used as partial funding for the setting up of the turnkey operation; 4.7 The asset value of the first defendant at the time the agreement was entered into between applicant and the 1st defendant, exceeded R1m. The direct costs of setting up the turnkey operation exceeded R1m.; 4.8 Under the circumstances, it is denied that the agreement, is exempt from the provisions of the NCA. On the contrary the, it is asserted that the NCA is indeed applicable."

⁴ Paragraphs 5, 6 and 8 of the second respondent's affidavit:

"5 The 1st defendant was placed under provisional liquidation on 30 July 2008. It has come to my attention that the liquidator has sold the assets over which the applicant had registered a notarial bond. It is to be noted from the laon that ana amount of R600 00. 00adavced in terms of the laon agreement that of the amount R600 000. 00 in terms of the loan agreement, an amount of R476 933. 00 was applied for the purchase of equipment. The applicant registered a notarial bond over such equipment. It has come to my attention that the liquidator has sold the assets, in respect of which applicant advanced funding.; 6 It is submitted that the net proceeds of the assets should be taken into account towards reduction of the amount allegedly owing to the applicant pursuant to the credit sanction.; 8 I submit that the affidavit in support of

[4] In order to successfully resist summary judgment, the second defendant in casu, must show that she has a bona fide defence and she must disclose fully the facts upon which she relies for her defence; vide *Breitenbach v Fiat SA (Edms) Bpk*⁵.

[5] In the unreported matter of *Firststrand Bank Ltd. And Carl Beck Estates (Pty) Ltd and Carl Beck*⁶ Satchwell J, stated as follows:

Sureties and NCA

16. The second respondent sought to rely on the argument that he, as a co-principal debtor, was a consumer to whom a notice in terms of section 129 was required to be given.
17. The second respondent entered into a surety agreement whereof he undertook to bind himself in favour of the plaintiff for all debts

the application for summary judgment deposited by Van Heerden is inherently incorrect, because the applicant does not reduce the amount owing to it by the amount which the goods have been sold by the liquidator. This is grossly and inherently unfair towards me as surety."

⁵ 1976 (2) (TPD) at 227 G-H where Colman J said:

"One of the things clearly required of a defendant by Rule 32(3)(b) is that he set out in his affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim. If he does not do that, he can hardly satisfy the Court that he has a defence."; vide also *Barclays Western Bank v Bill Jonker and Another* 1980 (1) SA (SECLD) 929 at 933B-C where the Court said: "Rule 32 (3)(b) requires that the defendant's affidavit

'shall disclose fully the nature and grounds of the defence and the material facts relied on therefore.'

This means that the defendant is at least required

'om die Hof breedvoerig in te lig omtrent sy verweer, en die feite waarop dit berus ten minste so volledig uiteen te sit dat die Ho'n oordeel kan vel of 'n bona fide verweer teen die eis by die verhoor uitgemaak kan word.'

Traut v Du Toit 1966 (1) SA 69 (O/N) at 70-71. The Court cannot pay regard to general and vague allegations which do not contain specific facts on which the purported defence is based. Cf *Central News Agency Ltd v Cilliers* 1971 (4) SA 351 (NC) at 353. See *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A)."

⁶ An unreported judgment under Case No.:56174/2007 (TPD)

of the first respondent in unlimited amount. He signed that suretyship undertaking as 'surety and co-principal debtor'.

18. 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..." However, section 8(5) requires the credit guarantee to apply to the obligations of another consumer in terms "a credit transaction to which this Act applies". I have already found that the NCA does not apply to the mortgage agreement between the applicant and the first respondent. Accordingly, the obligations of the first respondent to the applicant were not incurred in terms of a credit transaction to which the NCA applies. The second respondent therefore cannot claim that the NCA applies to him on the basis that the obligations arise in terms of a credit guarantee as set out in section8(5) of the NCA."
19. ...
20. ...The following reasoning of Trollip JA IN *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 at 471, credit was, in fact, not granted to the second respondent. The loan finance granted and the mortgage agreement is and was between the applicant and first respondent. The second respondent was not advanced credit and did not become party to the contract between the applicant and the first respondent He did not contract with the applicant to acquire himself or be a party to the agreement between applicant and the first respondent.
21. The second respondent signed as surety and co-principal debtor. The right enforceable by the applicant against the second respondent arises from the contract of suretyship. The contract

between applicant and second respondent is separate and distinct from the bond agreement between the applicant and second 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 obligation 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.

22. The authorities on this point are clear. A surety who bounds 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 renounced the benefits of exclusion 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".

[6] In casu, the second respondent's indebtedness arises from the fact that she signed as surety for the payment of both the loan agreement and the royalty agreement. I find the words of Trollip JA⁷ apposite in casu and find that the second respondent is not a consumer and did not receive any credit from the applicant.

⁷ Vide *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* (supra) at 471: "credit was, in fact, not granted to the second respondent. The loan finance granted and the mortgage agreement is and was between the applicant and first respondent. The second respondent was not advanced credit and did not become party to the contract between the applicant and the first respondent. He did not contract with the applicant to acquire himself or be a party to the agreement between applicant and the first respondent."

I also find that the NCA does not apply in casu and it was therefore not necessary for the applicant to give any notice to the second respondent in terms of section 129⁸.

[7] I consider it not necessary to deal with the rest of the points raised by the second respondent, inter alia, the allegation that the first respondent has been liquidated and that the royalty agreement constitutes a penalty stipulation in terms of section 3 of the Conventional Penalties Act 15 of 1962⁹.

[8] In the premises, I am not satisfied that the defence or defences raised by the second respondent are being raised *bona fide*. I am of the view that the second respondent does not have any defence to the application. I am conscious of the fact that summary judgement process is a drastic remedy. However, it does not mean that the a court must refrain from granting a summary judgment purely on the draconian nature of such a process. The provisions of section 32(3) (b) must be satisfied.

⁸ Vide *Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd and Carl Beck* (supra) at paragraph: "5 Section 129 of the NPA requires a credit provider to comply with certain procedures before commencing legal proceedings against a defaulting consumer. These procedures require, *inter alia*, that the credit provider give the consumer written notice of the default and propose referral to an entity which may resolve any dispute or result in agreement on a plan for full payment. Any approach by the credit provider to court must comply with certain time periods linked to the giving of such notice."

⁹ *Da Mata v Otto* 1972 (3) SA 858 (A) at 871 A.

[9] In the result summary judgment is granted in favour of the applicant against the second respondent, jointly and severally with the first respondent against whom summary judgment has already been granted under the same case number, the one paying the other to be absolved, in this action for:

1. Payment in the sum of R595 662. 01;
2. Interest on the amount of R595 662. 01 at the rate of 15% per annum calculated from the 2nd of June 2008 to date of payment;
3. Payment in the sum of R457 433. 90;
4. Interest on the amount of R457 433. 90 at the rate of 15% per annum calculated from the 2nd of June 2008 to date of payment;
5. an order declaring specifically executable in favour of the applicant/ Plaintiff, the following immovable property registered in the name of the second respondent:
ERF 1013 CLUBVIEW EXTENSION 80 TOWNSHIP
REGISTRATION DIVISION JR, PROVINCE OF
GAUTENG MEASURING 357 (THREE FIVE SEVEN)
SQUARE METRES HELD BY DEED OF TRANSFER NO.
T91561/2005.
6. Cost on the scale as between attorney and own client, together with Value Added Tax thereon, to be taxed.

~~N.M. MAVUNDLA~~

~~JUDGE OF THE COURT~~

HEARD ON THE : 09 OCTOBER 2008
DATE OF JUDGEMENT : 14 OCTOBER 2008
PLAINTIFF'S ATT : MORRIS POKROY ATT
PLAINTIFF'S ADV : MR H VERMAAK
2nd DEFENDANTS' ATT : MR. M W NIXON
2nd DEFENDANTS' ADV : MS L PRETORIUS