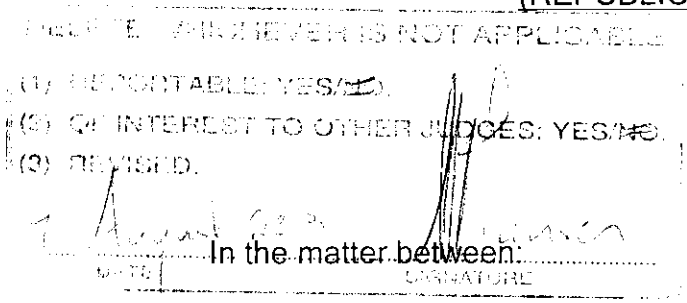
IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)



CASE NO: 39029/2011

19/8/2013

In the matter between:

ABSA BANK LIMITED — Plaintiff
(Registration Number: 1986/004794/06)

and

LOWTING, LANTIS EGAN NOEL — First Defendant
(Identity Number: 640114 5159 08 7)

WILSON, DANN — Second Defendant
(Identity Number: 520324 5085 08 4)

JACOBS, WILLIAM AUDIE — Third Defendant
(Identity Number: 560919 5136 08 3)

JUDGMENT

JANSEN AJ

[1] The trial related to an amount of R444 734.38 at an interest rate of 12% per annum alleged to be due and owing to the plaintiff, ABSA Bank Limited by the defendants in terms of deeds of suretyship. The deeds of suretyship were also signed by a Mr William Audie Jacobs, the third defendant, who did not defend the action, because it transpired that he was insolvent. Hereinafter, where a reference is made to the "defendants", it is a reference to the first defendant and second defendant only. The defendants signed surety for a close corporation, namely PRADZ TRADING 24 CC, of which they were members and which close corporation had been

created with the sole purpose of carrying on the business of the transportation of goods. It was, to this end, that the three defendants purchased the 2007 Nissan UD 440 T/T C/C truck, in issue in this trial, from the plaintiff. There was a fourth member of the close corporation, a Mr Windell Donevon Mount who was deceased when these proceedings were instituted.

Preliminary issues

[2] At the pre-trial meeting of 4 December the 2012 the issue to be decided by the court was agreed to be the enforceability of the suretyship agreements.

[3] The court was informed that agreement had been reached regarding the quantum payable. Mr Kehrhahn, when questioned by the court stated that he had only been briefed in respect of the merits and not in respect of the quantum

[4] Notice was given by the plaintiff that at the trial, an amendment would be sought in terms of which the particulars of claim would be amended to amend the amount alleged to be owing and "to supplement the original annex "D" with another annex "D"". These amendments are granted and the plaintiff ordered to pay the wasted costs. Similarly, the first and second defendants sought to amend two paragraphs of their plea, which amendments are

granted and the defendants ordered to pay the wasted costs occasioned by the amendment.

[5] Mr Maritz, on behalf of the plaintiff, took the court through the plea and indicated that it consisted of bald denials and "taking note" of the contents of paragraphs. However, the defendants pleaded that: "*After the vehicle was purchased and after the vehicle was handed to the Principal Debtor, the third Defendant took control over the Principal Debtor. The third Defendant unlawfully and fraudulently removed the second Defendant as a member of the Principal Debtor. There after the first Defendant removed himself as a member of the principal Debtor. Thereafter the third Defendant had the total control over the Principal Debtor.*"

[6] They further pleaded as follows: –

"*18.*

18.1 First defendant denies that he bound himself as surety and co-principal debtor jointly and severally, in favour of the Plaintiff for the repayment of all and any amounts, which may become due by the Principal Debtor to the Plaintiff.

18.2 First Defendant admits signing the document annexed to the Particulars of Claim, but: –

18.2.1 denies that the nature of the document was explained to him prior to the signing of the document;

18.2.2 denies that the consequences of the document were ever explained to him;

18.2.3 declares that Earl Roger Daniels, who was the representative of the Plaintiff, indicated to the first Defendant that the signing of the document was mere formalities;

18.2.4 denies that he had the intention to bind himself as surety and co-principal debtor jointly and severally in favour of the Plaintiff for the repayment of all and any amounts which may become due by the Principal Debtor to the Plaintiff.

18.3 The first Defendant specifically pleads that if the true nature of the document was disclosed to him he never would have signed same as he had no intention bind himself as surety and co-principal debtor jointly and severally in favour of the Plaintiff for the repayment of all and any amounts which may become due by the Principal Debtor to the Plaintiff.

18.4 At all relevant times it was the agreement between the first, second and third Defendants that the third Defendant would put his second dwelling as the surety for the property. The first Defendant therefore believed that it was not necessary for him to sign any surety."

[7] The second defendant's plea was identical to the first defendant's plea in this respect. It is pointed out that the pleas do not,

pertinently, raise a defence of *iustus error*, although such a *iustus error* plea can be inferred from the facts pleaded. This is mentioned as the argument presented at the end of the trial in the form of written heads of argument which were prepared and handed to the court a week later, dealt extensively with the defence of *iustus error*. Yet further heads of argument were called for on the following issues: whether the Credit Act 43 of 2005 was applicable to the facts of the case; and what the ramifications were of signing a credit agreement at a place other than the credit provider's place of business. The rationale behind these questions is dealt with below.

[8] It further bears mention that the plaintiff brought an application for summary judgment which was dismissed. On the pleadings as they currently stand, the court which heard the summary judgment, thus believed that the defendants had shown that they had a *bona fide* defence to the plaintiff's cause of action which, similarly, did not mention a defence of *iustus error* by name.

[9] The court is mindful of Corbett J's dictum in *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) –

> "*Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the*

sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be." [emphasis added]

[10] However, both defendants pertinently state in their respective answering affidavits in the application for summary judgment: "*Daar bestaan 'n wesenlike dwaling oor die dokument wat ek onderteken het. Daar is ook geen wilsooreenstemming ten aansien van dit wat ek onderteken het nie.*"

[11] It was further pleaded by the first defendant that: –

"19.

19.1 The first Defendant is also married in community of property with JUDY ROSALINE LOWTING, with identity number 670703 0158 012.

19.2 The plaintiff and/or its representatives were at all relevant times aware of the fact that the first Defendant is married in community of property JUDY ROSALINE LOWTING, with identity number 670703 0158 012.

19.3 JUDY ROSALINE LOWTING, with identity number 670703 0158 012, did not co-signed (sic) *the Surety at is required.*

19.4 The surety was not signed in the execution of the normal duties of the first Defendant.

19.5 JUDY ROSALINE LOWTING, with identity number 670703 0158 012 never agreed that the first Defendant may bind the joint estate as surety to the principal debtor.

19.6 The surety is therefore not a valid surety."

[12] The second defendant's wife, Ingrid Wilson, did sign a document consenting to her husband signing "**onbeperke borgskap (sessie van leningsrekening ingesluit)**".

The applicability or otherwise of the National Credit Act 34 of 2005

[13] The question arises as to whether the National Credit Act 34 of 2005 (hereinafter referred to as the "**National Credit Act**") finds application in respect of the said suretyship agreements.

[14] As stated, the court called upon the advocates to furnish further heads of argument on the issue of the applicability or otherwise of the National Credit Act. Such heads were not forthcoming due to a miscommunication but were provided promptly when the issue was followed up by the court. In both sets of heads of argument the conclusion was reached that the National Credit Act does not apply to the facts of this matter. The question arises whether these submissions are accurate.

[15] A credit guarantee to which the National Credit Act applies is defined with reference to section 8(5) of the National Credit Act as follows: –

> "*8(5) 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 to which this Act applies.*" [emphasis added]

[16] A consumer in respect of a credit agreement to which the Act applies is defined in section 1(g) as the "*guarantor under a credit agreement*" and also in section 1(h) as "*the party to whom or at whose direction money is advanced or credit granted under any other credit agreement;*". [emphasis added]

[17] In the particulars of claim, the following allegations are made in paragraph 6 thereof: –

"*6. APPLICATION OF THE NATIONAL CREDIT ACT*

6.1 The National Credit Act 34 of 2005 is not applicable to the agreements in view of the fact that the Principal Debtor is a juristic person and its principal debt exceeds R250 000.00 on the credit agreement.

6.2 The National Credit Act is not applicable to the Suretyship Agreements in accordance with Sec 4(2)(c) of the abovementioned Act."

[18] This allegation is admitted in the plea.

[19] The question arises whether this admission of a legal issue is correct or can bind a court. The National Credit Act places a duty on a court hearing a matter to give effect to its provisions thereof and its objectives as set out in sections 2 and 3, particularly subsections 3(c), (d), (e), (g), (h) and (i). An erroneous legal admission cannot absolve a court from its duty. A credit provider cannot sidestep the provisions. Section 90 of the National Credit Act, *inter alia*, stipulates that any clause in a credit agreement, the purpose of which is to defeat the policies or purposes of the act, or to deceive the consumer or to subject the consumer to fraudulent

conduct, is unlawful. The importance of the objectives of the National Credit Act was emphasised by Levenberg AJ in the matter of *SA Taxi Securitisation (Pty) Ltd v Mbatha and two similar cases* 2011 (1) SA 310 (GSJ) at paragraph [30] *et seq.*

[20] The point that a court is not bound by a legal concession was trenchantly made in *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and others* 1994 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) at paragraph 16.

[21] It would appear that the provisions of the National Credit Act might find application in this matter. The reason for this is that not only did the defendants sign the deeds of suretyship as guarantees; they also signed it as co-principal debtors.

[22] Furthermore even legal entities are bound by the National Credit Act and only certain sections thereof do not find application, as set out in section 6 thereof. However (subject to sections 4 and 5) the National Credit Act excludes the application of the National Credit Act *in toto* where the legal entity's assets exceed a certain value or in the case of a large credit agreement, as defined. In the instant case, the credit agreement entered into was a large credit agreement - namely an agreement the value of which exceeded R250 000.00 (section 4(1)(a) of the National Credit Act).

[23] In terms of section 8(1) of the National Credit Act, such credit guarantees constitute credit agreements for purposes of the Act. Section 8(1) reads as follows: –

> "*8 Credit agreements*
>
> *(1) Subject to subsection (2), an agreement constitutes a credit agreement for the purposes of this Act if it is –*
>
> *(a) a credit facility, as described in subsection (3);*
>
> *(b) a credit transaction, as described in subsection (4);*
>
> *(c) a credit guarantee, as described in subsection (5); or*
>
> *(d) any combination of the above.*" [emphasis added]

[24] The exemptions set out in section 9 of the National Credit Act find application because the credit guarantees (the suretyships signed by the defendants) related to a large credit agreement entered into by a juristic person, namely PRADZ TRADING 24 CC. This is so even though credit guarantees are exempted from the definition of a large credit agreement, because of the provisions of section 4(2)(c). This is pertinently dealt with in the article by Corlia van Heerden "The impact of the National Credit Act 34 of 2005 on standard acknowledgements of debt" at pages 647-652 and PN Stoop and M

Kelly-Louw "The National Credit Act regarding Suretyships and Reckless Lending" PER/PELJ 2011 Volume 14 No 2 at pages 67-85.

[25] However, the defendants bound themselves as sureties and co-principal debtors. The term co-principal debtors cannot be read as *pro non scripto*, as was done in the past before the advent of the National Credit Act (even though its precursors had certain elements in common with the National Credit Act).

[26] The law relating to suretyships is fairly complex. One of the defences (sometimes called exceptions or benefits) that sureties are required to waive is the ***beneficium ordinis seu excussionis*** (the benefit of excussion). It is an exception open to a surety by which he can compel the creditor to proceed against the principal debtor first and to obtain all he can from such debtor's estate before proceeding against the surety. The renunciation of the 'benefit' has the effect of permitting the creditor to proceed directly against the surety, before excussing the principal debtor, should he so wish. It should be noted that in law a surety who binds himself as co-principal debtor is taken to have tacitly renounced this benefit. Notwithstanding this, and possibly as evidence of the ignorance of the draftsman, it will be found in almost all suretyships, irrespective of the way in which the surely binds himself.

[27] In the matter of *Trans-Drakensberg Bank Ltd v The Master and Others* 1962 (4) SA 417 (N) the court held that where a person binds himself as "surety and co-principal debtor" this results in joint and several liability along with the principal debtors and the person stands in the same relation to the creditor as the principal debtor. It therefore follows that the co-principal debtor is entitled to receive the same notice as that to which the principal debtor would have been entitled.

[28] In contrast the judgment of *Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another* 2009 (3) SA 384 (T) at paragraphs 22-24 the contrary was held. In the opinion of this Court, this judgment is wrong because the National Credit Act defines a credit provider in terms of section 1(g) as "*the party to whom an assurance or promise is made under a credit guarantee*." As stated above, a consumer is also defined as a guarantor in section 1(g).

[29] By binding the sureties as co-principal debtors, the credit provider obtains certain rights. The corollary of this fact, is that the credit provider is also saddled with certain obligations. One cannot, in this Court's opinion, read the phrase "co-principal debtor" as *pro non scripto*.

[30] In *Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another supra* at pages 390-391 pars [20]-[24], Satchwell J, followed the reasoning of Trollip JA in *Neon and Cold Cathode Illuminations*

(Pty) Ltd v Ephron 1978 (1) SA 463 (A) who, at page 471 of the said judgment held that because credit was not, in fact, granted to the surety even though he had signed as a surety and co-principal debtor, the addition of the words "co-principal debtor" did not transform the contract into any other species of agreement other than that of suretyship, and concluded that the consumer was liable as a co-debtor, but not as a co-buyer, only a surety. Trollip JA's said dictum reads as follows: –

> "*Now the right enforceable by appellant against respondent arises from the contract of suretyship. That is a contract between appellant and respondent, separate and distinct from the lease between appellant and Benam, although it is accessory to it (see Van der Merwe's case, supra, 1921 T.P.D. at p. 321). Although respondent bound himself, not only as surety, but also as co-principal debtor with Benam, that did not render him liable to appellant in any capacity other than that of a surety who has renounced the benefits ordinarily available to a surety against the creditor.*"

[31] However, when this dictum was uttered, the National Credit Act did not exist and a consumer was not defined as including a guarantor under a credit agreement, nor was a credit provider defined as a person to whom an assurance or promise is made under a credit guarantee, a point which Satchwell J seems to have overlooked in

the *Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another* 2 *supra* case.

[32] Satchwell J in *Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another* 2 *supra* also held as follows in paragraphs [21] and [22]: –

"*[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.*

[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.[1] *As De Villiers CJ stated, 'the use of the words "co-principal debtor" does not transform the contract into any other than suretyship'.*[2]" [emphasis added]

[33] As pointed out above, a co-principal debtor and a surety is considered to be a consumer (guarantor) in terms of the National Credit Act. Section 8(5) does not detract there from.

[34] In this regard the learned authors PN Stoop and M Kelly-Louw *op cit.* pertinently state the following at page 85/225 paragraph 2.5: –

"*It should be noted that where the words "co-principal debtor and surety" are used in a suretyship agreement, the National Credit Act should apply to the surety and co-principal debtor to the same extent that the Act applies to the principal debtor and the principal debt. If someone has bound himself as co-principal debtor his obligations are co-equal in extent with those of the principal debtor and of the same scope and nature and he is liable together with the principal debtor jointly and severally, which means that a co-principal's debt becomes enforceable at the same time as the principal debt.*[3]" (emphasis added)

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[1] *Maasdorp v Graaff-Reinet Board of Executors* (1906 - 1909) 3 Buch AC 482 at 490; *Du Plessis v Estate Teich Brothers* 1914 CPD 48 at 50; *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) at 471.

[2] *Maasdorp supra* at page 490.

[3] *Union Government v Van der Merwe* 1921 TPD 318 *322; Mahomed v Lockhat Bros & Co Ltd* 1944 AD 230 *238; Business Buying and Investment Co Ltd v Linaae* 1959 3 SA 93 (T) *95-96; Trans-Drakensberg Bank Ltd v The Master* 1962 4 SA 417 (N) *422; see also Caney Suretyship 51; Lotz "Suretyship" 203.*

[35] However, the learned authors make it clear that if the National Credit Act does not apply to the principal debtor's debt, it will also not apply to a co-principal debtor's debt (*loc.cit.* paragraph 2).

[36] Furthermore, as set out above section 8(2)(d) of the National Credit Act stipulates that a combination of various agreements stipulated in section 8 constitutes a credit agreement.

[37] The co-principal debtor and suretyship agreements which the defendants were required to sign are draconian of nature. In this regard reference is made to clauses 8 and 9 thereof. No cap was placed on the amount in respect of which the defendants bound themselves as co-principal debtor and sureties, and their liability was therefore limitless.

[38] It is trite that once a principal debt has been extinguished a surety agreement no longer has any force or effect. It was common cause that the vehicle had been returned and that the close corporation had been liquidated. Furthermore, Mr Jacobs had apparently set up his second house as security and the first defendant loaned the close corporation (and ceded this loan account to the bank) in an amount of R117 000.00. However, the court was informed that had the issue of quantum having been settled. (That the quantum had been settled was expressly stated by the Plaintiff's counsel in his heads of argument. Upon a query by the court the Defendant's counsel stated that he could make the contribution regarding this

submission as he had been briefed to argue the merits only, and not the quantum). However, given what the courts experience daily in the unopposed motion court and the many errors that banks make, (a fact which the plaintiff's witness Mr WHE Gertenbach conceded and which mistakes are often overlooked, it is deemed necessary to highlight certain aspects.

[39] Furthermore, no evidence was tended by Mr WHE Gertenbach (the plaintiff's sole witness) that there was any compliance with section 92(2) of the National Credit Act, as far as the defendants are concerned, which section provides in relevant part as follows: –

> *92 Pre-agreement disclosure*
>
> *(1) ...*
>
> *(2) A credit provider must not enter into an intermediate or large credit agreement unless the credit provider has given the consumer-*
>
> *(a) a pre-agreement statement-*
>
> *(i) in the form of the proposed agreement; or*
>
> *(ii) in another form addressing all matters required in terms of section 93; and*
>
> *(b) a quotation in the prescribed form, setting out the principal debt, the proposed distribution of that amount, the interest rate*

and other credit costs, the total cost of the proposed agreement, and the basis of any costs that may be assessed under section 121 (3) if the consumer rescinds the contract."[emphasis added]

[40] In this regard, due regard should be had to the fact that the National Credit Act does find application in respect of juristic persons and that such application is merely limited by Chapter 1 Part B section 4 of the National Credit Act. Sections 92 and 93 find application regardless of whether the consumer is a juristic person. It is only when the provisions of section 4(1)(a) or 4(1)(b) find application, as in the present case, that the National Credit Act finds no application.

[41] In addition, the National Credit Act assists consumers in prohibiting reckless credit grants. Section 80 of the said Act provides as follows: –

"*80 Reckless credit*

(1) A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119(4) –

(a) the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time; or

(b) the credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that –

(i) the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement; or

(ii) entering into that credit agreement would make the consumer over-indebted.

(2) When a determination is to be made whether a credit agreement is reckless or not, the person making that determination must apply the criteria set out in subsection (1) as they existed at the time the agreement was made, and without regard for the ability of the consumer to –

(a) meet the obligations under that credit agreement; or

(b) understand or appreciate the risks, costs and obligations under the proposed credit agreement,

at the time the determination is being made.

(3) When making a determination in terms of this section, the value of –

(a) any credit facility is the credit limit at that time under that credit facility;

(b) any pre-existing credit guarantee is –

(i) the settlement value of the credit agreement that it guarantees, if the guarantor has been called upon to honour that guarantee; or

(ii) the settlement value of the credit agreement that it guarantees, discounted by a prescribed factor; and

(c) any new credit guarantee is the settlement value of the credit agreement that it guarantees, discounted by a prescribed factor."

(Section 80 is not applicable to a juristic entity but to consumers other than juristic entities.)

[42] Section 83 specifically provides as follows: –

"*83 Court may suspend reckless credit agreement*

(1) Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, the court may declare that the credit agreement is reckless, as determined in accordance with this Part.

(2) If a court declares that a credit agreement is reckless in terms of section 80(1)(a) or 80(1)(b)(i), the court may make an order –

(a) setting aside all or part of the consumer's rights and obligations under that agreement, as the court determines just and reasonable in the circumstances; or

(b) suspending the force and effect of that credit agreement in accordance with subsection (3)(b)(i).

(3) If a court declares that a credit agreement is reckless in terms of section 80(1)(b)(ii), the court –

(a) must further consider whether the consumer is over-indebted at the time of those court proceedings; and

(b) if the court concludes that the consumer is over-indebted, the court may make an order –

(i) suspending the force and effect of that credit agreement until a date determined by the Court when making the order of suspension; and

(ii) restructuring the consumer's obligations under any other credit agreements, in accordance with section 87.

(4) Before making an order in terms of subsection (3), the court must consider –

(a) the consumer's current means and ability to pay the consumer's current financial obligations that existed at the time the agreement was made; and

(b) the expected date when any such obligation under a credit agreement will be fully satisfied, assuming the consumer makes all required payments in accordance with any proposed order."

(Similarly, this section is not applicable to a juristic person, but in respect of other consumers.)

[43] Part D of the National Credit Act only became effective on 1 June 2007. The instalment sale agreement was entered into thereafter on 10 November 2007, when Mr Daniels signed the agreement.

[44] Furthermore, the cancellation letters which were sent to the defendants do not comply with the provisions of section 129 of the National Credit Act. Furthermore, the cancellation letter which related to the co-principal and suretyship agreement signed by the second defendant, was not sent his *domicilium citandi et executandi*, and he denied in evidence that he knew that the instalment sale agreement had been cancelled until he received the summons in this matter. (It is emphasised once again that section 129 of the National Credit Act applies to juristic persons. In fact, the entire Chapter 6 of the National Credit Act applies to juristic persons.)

[45] Furthermore, prima facie the plaintiff's conduct is in breach of section 130(2)(b) of the National Credit Act, because the net proceeds of the sale of the Nissan truck which could be realized were, apparently, in accordance with the certificate of balance not taken into account in ascertaining the defendants' financial obligations under the agreement. In this regard, the certificate of Balance, which was annexed to the Particulars of Claim, demonstrates that no amount realised or value gained as a result of the return of the Nissan truck, was deducted from the defendant's financial obligations.

[46] Furthermore, an aspect which has not received judicial scrutiny is whether section 4(1) of the National Credit Act is constitutional. Section 4(1)(a) and (b) provide as follows: –

"*4 Application of Act*

(1) Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except-

(a) a credit agreement in terms of which the consumer is –

(i) a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7 (1);

(ii) the state; or

(iii) an organ of state;

(b) a large agreement, as described in section 9(4), in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below the threshold value determined by the Minister in terms of section 7(1);"

[47] Neither has the constitutionality of section 4(2)(c) been tested by the courts.

[48] The purpose of the National Credit Act is, as stated in sections 2 and 3 of the Act, and, in particular the preamble of section 3 thereof, is the following: –

> "*3 Purpose of Act*
>
> *The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by –*
>
> *(a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;*
>
> *(b) ensuring consistent treatment of different credit products and different credit providers;*
>
> *(c) promoting responsibility in the credit market by –*
>
> *(i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and*

(ii) *discouraging reckless credit granting by credit providers and contractual default by consumers;*

(d) *promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;*

(e) *addressing and correcting imbalances in negotiating power between consumers and credit providers by –*

(i) *providing consumers with education about credit and consumer rights;*

(ii) *providing consumers with adequate disclosure of standardised information in order to make informed choices; and*

(iii) *providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;*

(f) *improving consumer credit information and reporting and regulation of credit bureaux;*

(g) *addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;*

(h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and

(i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements."

[49] Section 9 of the Constitution of the Republic of SA, 1996 is set out below: –

"*9 Equality*

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual

orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[50] This right has an internal limitation namely section 9(3) and the general limitation of rights are set out in section 36 of the Constitution: -

"*36 Limitation of rights*

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[51] The circumstances of this case demonstrate that the specific goals of the National Credit Act are not achieved when sureties, in the position of the defendants set out below, are not protected by its provisions. In the opinion of the court, this issue should enjoy judicial scrutiny.

[52] There is no reason why the defendants should not have been fully informed of their rights, full disclosure made to them and section 129 notices sent to them.

[53] The applicant made no endeavour to inform the sureties of their rights, the documentation signed by them, and also entered in an instalment sale agreement with them which exceeded a million rands. Given the paltry means of the defendants, such conduct, *prima facie* is unconscionable.

[54] Reference is also made to the case of *Standard Bank of South Africa Ltd v Dlamini* 2013 (1) SA 219 (KZD) where the following was stated in paragraphs [77] and [78]: –

"*[77] In passing I note that the CPA, assented to on 24 April 2009, commenced on 31 March 2011. Although the agreement in this case was terminated before the general effective date of the CPA, ie 31 March 2011, the Bank, like most large corporations that invest in corporate social responsibility projects, had to be aware of the purposes of the CPA which was already in the public domain. The purposes of the CPA are:*

> *'. . . to promote and advance the social and economic welfare of consumers in South Africa by –*
>
> . . .
>
> *(c) promoting fair business practices;*
>
> *(d) protecting consumers from –*
>
> *(i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and*
>
> *(ii) deceptive, misleading, unfair or fraudulent conduct;*
>
> *(e) improving consumer awareness and information and encouraging responsible*

and informed consumer choice and behaviour; . . . .[4]

[78] Institutions such as the Bank should welcome the framework proffered by the NCA and the CPA for bridging socio-economic inequalities substantively, and for reforming the credit industry, if for no reason but that sustained inequalities and need lead to unrest and social instability, which are not good for business. Even though the CPA was not in effect when the Bank sold the vehicle to Mr Dlamini, it should have voluntarily acknowledged that, as goods sold in terms of a credit agreement, s 5(2)(d) of the CPA would have applied to the sale. It should have been clear when the Bank issued summons on 3 March 2011 that consumer relations were no longer business as usually practised over its 150-year history in South Africa. Disappointingly, the Bank remained unresponsive to the CPA and its aspirations before it became enforceable. My interpretation and application of the provisions of the NCA above are fortified by the CPA."

[55] The court is bound by the dictum by Trollip JA set out above. However, the court makes these observations as it deems to defeat the objects of the National Credit Act when sureties and co-principal debtors, who are natural persons, have no protection when a bank

[4] Section 3(1) of the Consumer Protection Act 68 of 2008.

enters into a large agreement with a juristic entity which is a mere shell (as in this case). In such circumstances, where the sureties and co-principal debtors, more often than not are natural persons, the banks may see a loophole to advance exorbitant amounts of credit to juristic entities such as close corporations and have the members sign suretyship and co-pricipal debtor agreements in the full knowledge that they will not be able are to repay the credit granted. The court takes judicial notice of the fact that close corporations are often the vehicle utilised to conduct business by individuals with small businesses and limited means. This is an issue which should clearly be investigated further by courts.

The effect of the first defendant's wife not consenting to him signing a suretyship

[56] Section 15(2)(h) of the Matrimonial Property Act 88 of 1984 read with section 15(5) thereof, stipulates that a spouse shall not without the written consent of the other spouse, bind himself as a suretyship. This consent must be given separately in respect of each act and shall be attested to by two competent witnesses. However, section 15(6) provides that such consent is not required where the signing of the surety is performed by the spouse in the ordinary course of his profession, trade or business. The *locus classicus* in the case of *Amalgamated Banks of South Africa v De Goede en 'n Ander* [1977] 2 All SA 427 (A), wherein the terms

"business" and in the ordinary "course" were interpreted. The "business" of a member of a close corporation was held to be that of the management of the close corporation's business.

[57] In the instant case, it is significant that the first defendant' wife was asked to go to the residence of Mr Daniels in order to sign a consent, but given the less than ideal circumstances in which the relevant documentation was signed, it somehow transpired that she did not sign any documentation. This was also, as stated earlier, the first defendant's first foray into a business venture, whilst he was in the fulltime employ of Amalgamated Beverages.

[58] The test is if the surety agreement was signed in the ordinary course of the spouse's business and not in the ordinary course of the close corporation's business. The facts of the present case are on all fours with the facts in the *Amalgamated Banks of South Africa v De Goede en 'n Ander supra* case. For purposes of deciding this issue it is clear that the defendants signed the co-principal debtor and suretyship agreements in their capacity as members of PRATZ TRADING 24 CC. Although, as set out below, they were apparently not aware of the instalment sale agreement, they knew that the documents that they were signing pertained to the business of the close corporation and on their version, a loan application. That, in itself, renders the signing of the co-principal debtor and suretyship agreements akin to the once off signing by a teacher and a clerk of suretyship agreements in their capacities as

members of a close corporation as happened in the case of *Amalgamated Banks of South Africa v De Goede en 'n Ander supra* at pages 77F-GH.

[59] In the interpreting the Matrimonial Property Act 88 of 1984 the court in *Amalgamated Banks of South Africa v De Goede en 'n Ander supra* noted that the reason for the Act was to amend the common law to give spouses married in community of property equal abilities, albeit with an exception not to place too heavy a burden on the trade industry.

[60] Most importantly, the court looked at the definitions and how the same words were used in other legislation and how the courts interpreted the said legislation in that respect.

[61] The court held that the word "business" could mean "even a single, isolated activity, enterprise, or pursuit of serious importance that occupies a person's time, energy or resources". The court in Amalgamated Banks of South *supra*, also, with reference to the use of the words "business" and "ordinary course" in the Insolvency Act, decided that it referred to an agreement normally entered into between solvent business men (at pages 77I-78D).

[62] The Supreme Court of Appeal matter *Strydom v Engen Petroleum Ltd* 2013 (2) SA 187 (SCA) also deals with this issue. In this matter, Mr Strydom, who had stood surety for the Engen garage in

Soutpansberg's company, worked at the very core of the company's business. However, this case does not detract from the principle laid down in the case of *Amalgamated Banks of South Africa v De Goede supra.*

[63] It is trite that a member of a close corporation is entitled to co-mange a close corporation. However, because of the fact that the first defendant's defence is that he did not realise that he was standing surety for the close corporation, and because he did not realise that an instalment sale agreement had been entered into, the question as to whether he was acting in the ordinary course of business of PRATZ TRADING CC is inextricably interwoven with the defence of *iustus error.* The question is: to what did the first defendant's wife believe that she was consenting?

[64] Nonetheless, on the first defendant's own version, he was applying for a loan for the close corporation which falls within the concept of managing a close corporation's business. Furthermore Mr Lowting's wife did not testify for unknown reasons although she was clearly available to give evidence. The court draws a negative inference from this fact and this defence of the first defendant fails.

The certificate of balance

[65] Although the court was not requested to assess the quantum payable by the defendants, as the court was informed in the Plaintiff's heads of argument that agreement had been reached on this issue, it is still deemed obligatory for the court to set out certain observations.

[66] Clause 14 of the suretyship agreements signed by the defendants reads as follows: –

> "14 SERTIFIKAAT
>
> 'n Sertifikaat onderteken deur enige bestuurder van die Bank sal voldoende bewys wees van enige toepaslike rentekoers en van die bedrag hierkragtens verskuldig of van enige ander feit met betrekking tot die borgstelling vir doeleindes van vonnis, insluitende voorlopige en summiere vonnis, bewys van eise teen insolvente en bestorwe boedels of andersins en indien ek/ons die korrektheid van sodanige sertifikaat betwis, sal die bewyslas op my/ons rus om die teendeel te bewys. Dit sal nie nodig wees om in sodanige verrigtinge die aanstelling of bevoegdheid van die ondertekenaar te bewys nie." [emphasis added]

[67] Clause 9 *sub. Cap.* "INSOLVENSIE, LIKWIDASIE, ENS" the following is stated: –

"9.1.2 sal die Bank geregtig wees om alle opbrengste of betalings wat van die Skuldenaar, kurator, likwidateur of uit enige ander bron ontvang word, aan te wend ter vermindering van die verskuldigde bedrag, sonder dat my/ons aanspreeklikheid hierkragtens vir die bedrag wat uiteindelik na ontvangs van sodanige opbrengste of betalings deur die Skuldenaar aan die Bank verskulding mag wees, geraak of verminder word;" [emphasis added]

[68] Hence, the amount due and owing by the co-principal debtor and surety shall be the amount remaining after the deduction of any monies received from the main debtor or another source. It is common cause that the plaintiff has taken possession of the vehicle and that PRADZ TRADING CC has been liquidated.

[69] It is wholly unsatisfactory that *ex facie* the detailed certificate of balance attached to the particulars of claim, no amounts were deducted from the amount allegedly still owing by the defendants, because it is trite that when the principal debt is reduced, or paid *in toto*, so is that of a co-principal debtor and surety. In the column entitled "MINUS" the "SELLING PRICE OF THE ARTICLE" is stated to be "R0.00".

[70] Letters drawing the defendants' attention to the fact that their credit agreement had been cancelled and that the defendants as co-principal debtors owed the bank R479 037.42 were addressed to

them on 24 May 2011. These letters were referred to in evidence (there was thus *interpellatio*) but the one letter to the second defendant and his spouse was addressed to the incorrect address, as it was not addressed to the *domicilium citandi et executandi* in the co-principal debtor and surety agreement. *Interpellatio* thus only occurred when the summons was served on the second defendant and his spouse.

[71] The state of affairs is wholly unsatisfactory. No details regarding the sale of the vehicle and the amount obtained by the plaintiff, nor any amount realised as a result of the liquidation of the close corporation, or subtraction of the loan accounts ceded to the bank, have been included in the detailed certificate of balance, attached to the particulars of claim.

[72] The end result is that the court is left in doubt as to the accuracy of the alleged amount due and owing to the plaintiff.

[73] Should the amounts received as a result of, *inter alia*, of the sale of the vehicle, the loan account, etc not have been deducted from the amount allegedly due and owing, which appears to be the case, then it is important that this *lacuna* be addressed. It is the duty of the bank to mitigate its losses as was reiterated in the case of *Standard Bank of South Africa Ltd v Dlamini* 2013 (1) SA 219 (KZD) as follows: –

"*[73] Once the agreement was terminated, for whatever reason, the Bank had to sell the vehicle to mitigate losses. Its decision not to sell the vehicle pending this action is also unexplained. If the losses were for Mr Dlamini's account the Bank would have seriously prejudiced him by not reselling the vehicle for more than two years.*" (emphasis added)

The evidence for the defendants

[74] The plaintiff's sole witness was a Mr William Henry Edward Gertenbach. The plaintiff did not call Mr Jacobs to testify, and neither did the defendants. No reason was proffered by any of the parties as to why Mr Jacobs was not called as a witness. Mr Gertenbach had no personal knowledge of the actual instalment sale agreement which was entered into by the defendants, nor of the suretyships signed by them. However, he testified that his job description was that of an asset finance manager and that his position entailed him overseeing accounts of any nature whatsoever in the commercial legal department pertaining to legal entities only. He testified that he had twenty-five years' experience and had held his current position as manager for three years. Mr Earl Roger Daniels, who had handled the instalment sale agreement, had entered into the said agreement with the close corporation, and who had obtained suretyships from the defendants and one from Mr Jacobs (presumably in the form of a mortgage

bond over Mr Jacobs' second house as set out above), did not testify as he has relocated to Australia and is currently in the employ of the Bank of Queensland in Australia.

[75] Upon being questioned as to how the instalment sale agreement and the suretyship agreement would have been cancelled, he said by way of notice per registered post and by sending a debt collector to the defendants. However, this statement was made within the context of the general *modus operandi* of the plaintiff, and not with specific reference to the defendants.

[76] Mr Gertenbach confirmed that ABSA Bank Limited can only sign an instalment sale agreement once it has sufficient security, and will under no circumstances grant the loan without sufficient security.

[77] He also testified that Mr Daniels would have breached his responsibilities had he not explained the contents of the documents to the first defendant and second defendant.

[78] The instalment sale agreement was only signed by ABSA Bank Limited on 10 November 2007. (Note should be taken that the vehicle was already delivered on 28 September 2007.)

[79] In cross-examination Mr Gertenbach also conceded that there was no resolution to allow Mr William Jacobs to sign the said instalment sale agreement on behalf of PRATZ TRADING 24 CC.

[80] Mr Gertenbach further conceded that the bank made many errors, especially regarding signatures and dates.

[81] He also confirmed that one of the letters calling on the sureties to pay the outstanding amounts was sent to the incorrect address.

[82] As set out above, the suretyship agreements, which were signed by the defendants, were signed not only as sureties but also as co-principal debtors with PRADZ TRADING 24 CC.

[83] As shall appear from what is stated below, Mr Jacobs (who was not called upon to testify by the defendants, and against whom the second defendant testified that he had laid a criminal charge for forging his signature and unilaterally removing him as a member of the close corporation) was, on the defendants' version, the person who had persuaded them to purchase the truck and to incorporate the close corporation.

The evidence for the defendants

[84] Both defendants testified. The wives for reasons which were not disclosed, did not testify.

[85] As a general statement, the court observes that much of the evidence proffered by the defendants, was hearsay evidence.

[86] The first defendant testified that he was in the employ of Amalgamated Beverages Industries, Coca-Cola and had a standard ten qualification. He testified that the wife of the second defendant (who was not called as a witness) also worked at the same business, and suggested to him that he and the second defendant, third defendant, and one Mr Windell Donevon Mount (the latter two working at Siemens Engineers) register a close corporation for transport purposes. She had met the third defendant who informed her of the possibility of starting a transport business and her husband, the second defendant was working for a transport company. The second defendant would be the driver of the truck that the close corporation would acquire. (As stated, the reason why Mr Mount was not sued was because he was deceased when the action was instituted.) The first defendant testified that he would retain his day job but assist (after hours) with the day to day running of the close corporation. Each member of the close corporation would hold a 25% stake in the close corporation.

[87] The first defendant testified that the third defendant stated that he had connections and would be able to obtain a loan for the close corporation but he later told the first defendant that the loan had been refused because the second defendant's name showed up on a credit defaulter list. Yet later the third defendant told the first defendant that a provisional loan had been approved and that they had to go to the house of a Mr Earl Roger Daniels, whom the first

defendant knew to be a bank official because he lived in Eersterus (a suburb of Pretoria), the same suburb in which the first defendant resides. The court takes judicial cognisance of the fact that Eersterus is not an affluent suburb. The third defendant told the first defendant that he, the second defendant and their wives had to go and sign certain documents for purposes of obtaining the provisional loan. He testified that on the evening of the 26th September 2007 between 20h00 to 20h30 he, his wife and the Wilsons (the second defendant and his wife) drove in one motor vehicle to the home of Mr Daniels and Mr Jacobs in his own motor vehicle.

[88] He further testified that they had a transport agreement in the "pipe-line" for PRATZ TRADING 24 CC called Flam.

[89] The first defendant further testified that Mr Jacobs was standing next to Mr Daniels on the grass when Mr Jacobs said that they are signing an application form for a loan and that it is a mere formality. Mr Daniels did not invite them into his house and had three Rottweiler dogs in his garden. He came out with a bundle of documents and flipped through the pages, requesting the defendants to sign at certain stipulated places marked with an "x". The stipulated places marked with an "x", indicating where the defendants should sign, are visible on the documents signed by them which were made available to the court. He testified that Mr

Daniels did not explain the terms of the agreement to them and that he did not read the documents.

[90] In the haste to get the documents signed Mrs Lowting, did not sign the form granting her consent to the first defendant signing a suretyship agreement.

[91] Mr Jacobs informed the first defendant that he, Mr Jacobs, has two houses in Eersterust (one house in Crawford Street and the other house in Roots Avenue). Mr Jacobs informed the first defendant that he gave the house in Roots Avenue as security for the purchase of the vehicle. (All of this is hearsay as Mr Jacobs did not testify.) The first defendant testified that he would never have signed a suretyship agreement had he known what it was that he was signing, namely a suretyship and co-principal debtor agreement.

[92] The first defendant testified that Mr Jacobs also signed the documentation and that the instalment sale agreement was never shown to him. He stated that his wife requested whether they would receive copies of the documents that they had signed and that Mr Daniels stated that they would get copies of the documentation, being a loan application and mere formality, the next day - which never transpired. He stated that Mr Daniels explained nothing to them and that they signed the documentation on the roof of the motor vehicle in which they had all travelled to Mr

Daniels' residence (save for Mr Jacobs who travelled in his own motor vehicle). The first defendant further testified that he was under the impression that he was signing an application for a loan for the truck and would never have signed a suretyship agreement. (He conceded during cross-examination that banks require some form of security, but that Mr Jacobs had told them that he, Mr Jacobs, had put up his second home in Roots Avenue as security.)

[93] He further testified that the vehicle was already delivered on the 28th of September 2007.

[94] The first defendant further testified that the signing of the documentation took only about five minutes, and that Mr Daniels was in a hurry as he was entertaining visitors.

[95] During cross-examination it was put to the first defendant that the instalment sale agreement had already been allocated a number, and that all the relevant financial information had already been inserted into the said agreement. It was unclear as to when and at what time the third defendant had signed this agreement on the 26th of September 2007. This clearly did not happen when meeting with Mr Daniels at his residence and it was never suggested to the defendants in cross-examination. (The plaintiff's representative, Mr Daniels, only signed it on 10 November 2007.) The first defendant testified that he was not even aware that there was an instalment sale agreement amongst the documents. No resolution had been

taken by the members of the close corporation for the signature of such an agreement by Mr Jacobs. They took resolutions, in general, however, so the first defendant testified, by way of a "round robin" of phone calls.

[96] Much was made, in cross-examination that the defendants allegedly knew that a loan would not be granted without security, by a bank, and that the "loan agreement" had already been completed. However, this point is self-destructive. Mr Gertenbach testified that a loan would never be granted before a bank had sufficient security. Hence, the fact that the first defendant thought they were still at a stage before the loan agreement had been approved, was correct.

[97] It bears mention that the instalment sale agreement is barely legible and printed in a miniscule font to such an extent that a "legible" copy of its terms and conditions was discovered. The first defendant stated that Mr Daniels merely asked him to sign certain documents without explaining them to him.

[98] The first defendant's involvement in the close corporation started to decrease. Mr Jacobs asked him to step down in order for Mr Jacob's son to become a member of the close corporation. The first defendant stated that he resigned. That the son of Mr Jacobs did, in fact, become a member was proved with an extract from a company search. The first and second defendants asked the bank

to be removed from its records and the first defendant testified that the wording of the document requesting the same had been given to him by Mr Daniels as he did not know which wording to use. There were two documents - one with the wording given to them by Mr Daniels, and the other on the close corporation's letterhead, on which Mr Wilson's (the second defendant) daughter typed the said wording furnished by Mr Daniels. Under cross-examination, when asked why he had referred to the "security records" of the company in the said letter, he stated that he simply wished his name to be removed from any bank documentation pertaining to the close corporation and that the wording, to inform that they were no longer members of the close corporation, had been furnished to them by Mr Daniels when they went to the bank to tell him what had happened and asked him what to do, as set out above. He also stated that as he was no longer a member of the close corporation, his name clearly had to be removed from the bank documentation. The bank promised to revert to them but never did. In this regard, a defence of *iutus error* could also have been raised by the defendants as they, through Mr Daniels'conduct, believed that they were absolved from any obligation to, and right in, the close corporation. This avenue was, however not pursued by the defendants.

[99] The first defendant testified that Mr Williams Jacobs was standing next to Mr Daniels on the grass when Mr Jacobs said that they

were signing an application form for a loan and that it was a mere formality. (Once again, this allegation is hearsay.)

[100] The first defendant conceded that he made a loan of R107 000.00 to the close corporation. This was a loan made by him to the close corporation. He confirmed that the plan with the close corporation was to earn an extra income and the plan was to make a profit.

[101] The second defendant testified that he was unemployed, had a standard eight qualification and tax debts and did not have the financial means to sign a suretyship agreement. He testified that the close corporation, as he understood, had to demonstrate that it had transport contracts. He testified, as had the first defendant, that a woman by the name of Flam had given them a transport contract.

[102] The second defendant also testified that he was under the impression that he was signing documents to obtain a loan. He testified, as did the first defendant, that the papers were given to them by Mr Daniels outside Mr Daniels' residence. He said that the lighting was good and that they never entered the property as there where dogs - one of which, a bullterrier, came out with Mr Daniels and which caused Mrs Lowting (the first defendant's wife) to get back into the motor vehicle. This, of course, would explain why she did not sign a consent form and supports the defendants' version that the signing procedure was rushed.

[103] The second defendant testified that he was in no position, financially, to sign a suretyship agreement.

[104] It was put to the first defendant during cross-examination that he could have asked to take the document home to read and he conceded that he could have done so, but testified that Mr Daniels had requested him to sign the documentation there and then and that Mr Daniels had categorically informed him that he was signing an application form. (Once again, this testimony is hearsay.)

[105] The second defendant further testified that the first time that he realised that what he had signed was a suretyship was upon receipt of the summons. He testified that he had asked Mr Daniels what the purpose of the documentation was and that he was told that it constituted a mere formality. He further testified that they were not given copies of the documents. He also testified that they waited for about twenty minutes for Mr Daniels to come out of his residence and that the signing of the documents did not take longer than five minutes.

[106] The second defendant testified that he was, without his knowledge and consent, fraudulently removed as a member of the close corporation by the third defendant who forged his signature, as a result of which he laid a complaint with the police against the third defendant. He stated that Mr Mount's name was removed and his

signature forged (presumably by the third defendant) a week after his death, and that he and the first defendant went to speak to Mr Daniels about this at the bank.

[107] The second defendant testified that the close corporation had been liquidated.

[108] The second defendant conceded that PRATZ TRADING 24 CC traded for a profit.

[109] Under cross-examination, the second defendant also testified that he was unaware that he was signing a suretyship and that he had trusted the third defendant who had told him to go to the home of Mr Daniels to apply for a loan. He confirmed that he never read the documents but believed that it was unnecessary as it was a mere formality. Mr Daniels never asked him to read the documentation.

[110] Both defendants testified that the first defendant's wife did not co-sign the surety, but that the second defendant's wife did.

[111] The second defendant admitted, under cross-examination, that the lighting was good and that he could have asked to take the documents home but that he did not wish to hold up the procedure.

[112] The second defendant confirmed that he did not take his spectacles with him on the night he was asked to sign the documents as it was a mere formality. He stated that he would not have been able to

read the documents even if he wanted to. Under cross-examination he confirmed that he was still using spectacles of the same strength and that his eyesight had not deteriorated.

[113] The second defendant further stated that the writing was so small that he decided not to seek to read it. However, in cross-examination he conceded that he could read without his glasses. This was not surprising. It was during daytime, in a court with proper lighting and where his attention was pertinently drawn to the caption termed SURETYSHIP.

[114] The second defendant testified that there was a streetlight ten to 12 metres away and that the house of Mr Daniels had exterior lights. He further confirmed never reading the documentation and only signing the parts marked with an "x" by Mr Daniels. However, he stated that he trusted Mr Daniels who told them that they were signing an application form for a loan and that the women had to give their permission for such a loan.

[115] The second defendant confirmed that he and the first defendant visited Mr Daniels, when they were no longer members of the close corporation to have their names removed. He testified that he was unaware of the legal implication of being a member of the close corporation as opposed to a person in his personal capacity and that he wanted to ensure that ABSA Bank Limited was aware that

he was no longer a member and that they would not hold him liable for the debt of the corporation.

[116] Clearly the defendants were unaware of their legal position and believed that they had been released of any legal obligations and right arising from being members of a close corporation. However, it is trite that a surety remains bound even though he is no longer a member of a close corporation.

Legal principles

[117] The case of *Standard Bank of South Africa Ltd v Dlamini* 2013 (1) SA 219 (KZD) is instructive. In that matter the National Credit Act did apply but it was held that the common law pertaining to *iustus error* was still relevant. In that case Mr Dlamini was completely illiterate and it was held that there was a positive duty on the bank and its representatives to inform him of all relevant facts. It was also held that the credit agreement itself must spell out all Mr Dlamini's rights and obligations.

[118] In *Home Fires Transvaal CC v Van Wyk and another* 2002 (2) SA 375 (W) at 381 the full bench held–

> "*A party will not be held bound by his signature to a contract which he has not read, where the other party knew that he had not done so, was not misled by the signature and only had*

himself to blame for the other's ignorance of the contents of the document. (See Van Wyk v Otten 1963 (1) SA 415 (O) at 418A - 419H; Payne v Minister of Transport 1995 (4) SA 153 (C) at 159G - 160I.)'

[119] The question to be answered is: what is the position of a party who signs an agreement without reading it? In the instant case, the suretyship that the defendants signed, boldly declared at the top of the document that it is a suretyship. However, the uncontested evidence of the defendants was that the nature of the documents that they were signing was never explained to them by Mr Daniels and that he simply asked them to sign where crosses had been inserted by him on the documents.

[120] According to both defendants, the third defendant had informed them that the signature of the document was a mere formality and the first defendant testified that Mr Daniels stated the same. However, neither Mr Jacobs nor Mr Daniels testified - Mr Daniels because he is overseas and Mr Jacobs, presumably because he would have been a hostile witness. However, no objection was made to the leading of hearsay evidence and some of it was solicited in cross-examination. Mr Jacobs and Mr Daniels were also not called by the plaintiff who merely argued on the probabilities.

[121] It is common cause that the circumstances in which the documentation was signed were not ideal and that Mr Daniels did

not inform the defendants what the precise nature of the documents was that they were asked to sign. Given these facts, can the defendants be held to the suretyships that they signed?

[122] In the matter of *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) the defence of *iustus error* was upheld. It contains a very useful summary of the circumstances in which the *caveat subscriptor* rule will not apply.

[123] In paragraph [2] thereof, reference was made to the *locus classicus* on the doctrine of quasi-mutual assent, namely the case of *George v Fairmead (Pty) Limited* 1958 (2) SA 465 (A) 470B-E where the following was stated: –

> "*When can an error be said to be justus for the purpose of entitling a man to repudiate his apparent assent to a contractual term? As I read the decisions, our Courts, in applying the test, have taken into account the fact that there is another party involved and have considered his position. They have, in effect, said: Has the first party - the one who is trying to resile - been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself? . . . If his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound.*"

[124] Even an innocent misrepresentation by the other party suffices.[5]

[125] In *Brink v Humphries & Jewell (Pty) Ltd supra* at paragraph [3] it was held that in deciding whether a misrepresentation was made, all the relevant circumstances must be taken into account.

[126] On the defendant's version of the events, they did not expect any suretyship agreement or any clause that related to a suretyship agreement in the documents presented to them by Mr Daniels, as he never told them that he was asking them to sign suretyships. This could not be gainsaid by the plaintiff, as Mr Daniels was not available to testify as he is currently working in Australia. When all hearsay evidence is discounted, the fact remains that the documents were given to them without any explanation from Mr Daniels with crosses (which were still clearly visible on the court's copies) indicating where they had to sign. It is also a fact that the signing procedure took only about five minutes and that the defendants did nor read the documents.

[127] To some extent the circumstances in which the defendants signed the suretyship agreements are reminiscent of the circumstances in *Brink v Humphries & Jewell (Pty) Ltd supra* at pages 422-423

[5] See also *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A) at 316I - J

paragraph [6]. The evidence of the defendant in chief was as follows: –

"...

Did you expect any suretyship agreement or any clause that relates to a suretyship agreement in this document? - No.

Why not? - It has been years that I have been filling in application forms, specifically for banks and bonds. You fill in application form, it always without exception they come back to you, they tell you we need A, B, C, D and one of them to be a surety. It was then prepared and make an appointment with you, you sign the surety form.

...

They did not include any suretyship agreement? - Yes.

But they granted the, did the credit, without a suretyship agreement? - Yes.

. . .

Just finally, was it ever your intention to enter into a suretyship agreement? - No.

And, in your opinion, did you enter into a suretyship agreement? - No.

What is your opinion, what did you sign here in this document in this document? - Application for credit, as I did with numerous banks and institutions, they will look at it and come back to you and tell you if they need any further documentation.'

The following passages appear in cross-examination:

'Would you not agree that the paragraph at the bottom is most conspicuous, one of the first things you recognise on this document, since it is different print and it is in bold and it is in capital letters? - Well, to be quite honest, the first thing I saw was credit application form. . . ."

[128] In the instant case, both defendants did not have a matriculation qualification and were clearly unaware of bank procedures even though they were members of a close corporation. It was their first foray into any business enterprise and their evidence was that they relied wholly on the expertise of Mr Jacobs, the third defendant. The third defendant was considered to be knowledgeable about bank procedures. It was the third defendant who told the first and second defendants that the signing of documentation was a mere formality. As stated, Mr Daniels omitted to say anything about the nature of the documents to them which he handed to the defendants to sign (when the hearsay evidence that he stated that it was a mere formality is excluded). They were aware of the fact that the bank would require some form of security but the third defendant had assured the first defendant and second defendant that he had put up his second house as security.

[129] As stated, the third defendant was not called as a witness, neither by the first and second defendants nor by the plaintiff. Both defendants, however, made a favourable impression on the court.

[130] They were present when the other defendant gave evidence but it struck the court that the detail that they gave could not have been fabricated and that, although their versions were similar, small details were added by each of the defendants to their own versions which was indicative of a true recollection of what transpired and which would be difficult to fabricate. For example, the second defendant recalled that a dog had accompanied Mr Daniels when he exited from the gate of his residence. The Court found them to be honest and credible witnesses. Their versions accorded with the probabilities, given their level of education and lack of knowledge of business transactions. They did not contradict themselves or each other.

[131] On an analysis of the probabilities, the preponderance of probabilities favour the defendants' version, and could not be gainsaid by the plaintiff. It was clear that both defendants did not have the funds to sign any suretyship agreement, and they were adamant that they would never have done so. No cogent evidence was advanced to counter the defendants' version.

[132] However, there is a second leg to the inquiry as to whether a signatory's mistake is justifiable because it was induced by the other contracting party, which is not a subjective enquiry. This enquiry is objective, namely: would a reasonable person have been misled in the circumstances as was held in the matter of *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty)*

Ltd) v Pappadogianis 1992 (3) SA 234 (A). Harms JA at pages 239I-240B summarised the enquiry in cases such as the one in issue: –

> "*In my view, therefore, the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? Compare Corbin on Contracts (one volume edition) (1952) at 157. To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby? See also Du Toit v Atkinson's Motors Bpk 1985 (2) SA 893 (A) at 906C-G; Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd 1986 (1) SA 303 (A) at 316I-317B. The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled? Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd 1983 (1) SA 978 (A) at 984D-H, 985G-H.*"

[133] It is trite that a misrepresentation can be made by way of an *omissio* or a *commissio*. In the instant case, the misrepresentation was made by way of an omission on the part of the bank representative to fulfil his duty to inform the defendants as to what the documents were which they were required to sign. In this

regard, reference is made to the case of *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 at page 318 where the Appeal Court quoted from the matter of *Du Toit v Atkinson's Motor Bpk* 1985 (2) SA 893 (A) at 906C-G where the essential facts and the legal consequences were succinctly stated by Van Heerden JA: –

"*Samevattend is die posisie dan soos volg: Die advertensie was daarop gerig om die indruk te verwek dat die voertuig 'n bepaalde attribuut gehad het, en om aanbiedinge vir die aldus omskryfde koopgoed uit te lok. Op sterkte van die indruk, waarvan die respondent bewus was, het die appellant die voertuig gekoop. Deur niks te sê aangaande die effek van para 6 van die dokument nie, het die respondent se werknemers...die vertroue by die appellant verwek dat die dokument nie strydig met die advertensie was nie en derhalwe nie aanspreeklikheid uitgesluit het nie ten opsigte van voorstellings daarin vervat. Handelende in hierdie vertroue het die appellant die dokument geteken, onbewus van die inhoud of effek van para 6.*

Na my mening het die respondent dus deur stilswye die appellant mislei, en is sy dwaling aangaande die dokument wel justus error. Of die appellant as gevolg daarvan hoegenaamd nie aan die bepalings van die dokument gebonde is nie, is nie tersake nie en kan tersy gelaat word. Op sy beste vir die respondent is die appellant nie gebonde nie aan para 6

insoverre dit aanspreeklikheid uitsluit vir voorstellings vervat in die advertensie." (However, the facts of this case differ from the facts of the current case as the advertisement referred to contained a representation which ran contrary to the document that was signed - a fact which the appellant in that case could not foresee.)

[134] Goudsmit Pandecten-Systeem I para 52 at 119 states in this context: –

"*Dolus malus kan ook zwijgen zijn, waar spreken plicht is.*"

[135] Given the circumstances in which the defendants were requested to sign the documents, it cannot be stated that a reasonable man would have acted differently. It is human nature not to read contracts (specifically when set out in miniscule font) in circumstances where the signatories are under the impression that the document can have no serious ramifications and particularly in circumstances less then ideal, after 20h00, outside a residential house, on the roof of a car within the time span of approximately five minutes. Even though it was put to both defendants during cross-examination that credit would not be granted to a legal entity without some form of security, which the defendants conceded, they stated that they were under the impression that such security had been granted by the third defendant.

[136] Even though the defendants could have insisted on reading the documentation carefully, the circumstances under which the defendants were asked to sign the documentation, were far from ideal. It lent itself to a rushed signing of the parts marked with an "x", which is precisely what the defendants did, and what Mr Daniels requested them to do.

[137] In the matter of *Brink v Humphries & Jewell (Pty) Ltd supra* at page 426 paragraph [11] the following was held: –

> "*It is not reasonable for a party who has induced a justifiable mistake in a signatory as to the contents of a document to assert that the signatory would not have been misled had he read the document carefully; and such a party cannot accordingly rely on the doctrine of quasi-mutual assent.*" (emphasis added)

[138] While courts should come to the rescue of parties who have been misled or induced to enter into agreements of the kind under discussion, they should be mindful of what was stated in *National & Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) at 479G - H:

> "*Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of*

acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (error) would have to be reasonable (justus) and it would have to be pleaded. In the present case the plea makes no mention of mistake and there is no basis in the evidence for a contention that the mistake was reasonable."

[139] In this regard, the question arises as to whether the defendants' pleas are defective in that they have not expressly pleaded a defence of *iustus error*. However, the facts which they pleaded indicate that they signed the suretyships without knowing the nature thereof because it was not explained to them by Mr Daniels. Once this is so, the defendants have pleaded an *omissio* which led them to misunderstand the nature of the documentation being signed. These factors were also fully canvassed in evidence and cross-examination.

[140] However, the question can legitimately be posed is whether it was not the third defendant who caused the first and second defendants to be misled as he told them that they had to go to Mr Daniels to sign applications for credit. In this regard the matter of *Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011 (4) SA 72 (SCA), discussed in the article authored by CJ Pretorius entitled Third Party Fraud Inducing Material Mistake *Slip Knot Investments 777 (Pty) Ltd V Du Toit* 2011 4 SA 72 (SCA) PELJ/PER 2011 Volume

14 No 7, is instructive. The Supreme Court of Appeal was not prepared to uphold a plea of *iustus error* where the mistake in question was caused by third parties and not the contract assertor.

[141] In the instant case, the third defendant could be stated to have acted as Mr Daniel's agent when he was tasked to tell the first and second defendants to go to Mr Daniel's residence. However it is clear that he was, *de facto,* the close corporation and the defendants' agent. The evidence was to the effect that Mr Daniels, himself, did not ask the defendants to come to his home but that he clearly expected them, and had the documentation available for them to sign. Why they were requested to sign documents outside Mr Daniels' home after 20h00 at night, as testified by the defendants, is unclear. Mr Daniels never sought to clarify to the defendants what the nature of the documents were that they were signing. The court is entitled to take into account that he did not explain the nature of the documentation and merely asked the defendants to sign it (if it is accepted that everything else he might have said is hearsay.)

[142] In the article by CJ Pretorius entitled Third Party Fraud Inducing Material Mistake *Slip Knot Investments 777 (Pty) Ltd V Du Toit* 2011 4 SA 72 (SCA) at page 190/261 paragraph 3.2 the following is stated:

"*In delivering the judgement of the Supreme Court of Appeal, Malan JA affirmed that generally a contractual party is not obliged to inform the other party of the terms of the proposed agreement,*[6] *unless there are provisions that could not reasonably have been expected to be part of the contract.*[7]

(emphasis added)

[143] In the instant case, given the unfamiliarity of the defendants with bank documentation and the circumstances under which they were requested to sign the documentation, it can be said that the suretyship agreements were "hidden" amongst the documents. However, where parties are directors of companies, trustees of trust or, for example, members of a close corporation, a stricter test is applied (page 201/261 of the said article by CJ Pretorius): –

"In this regard Slip Knot perhaps suggests a stricter approach than was adopted in Brink to instances where directors of companies, members of close corporations, trustees of trusts and the like sign contractual documents relating to the dealings of the entity represented."

[144] *Sub cap.* Commentary in the said article Third Party Fraud Inducing Material Mistake *Slip Knot Investments 777 (Pty) Ltd V Du Toit*

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[6] With reference to *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 4 SA 345 (SCA) para 19.

[7] With reference to *Afrox Healthcare Bpk v Strydom* [2002] ZASCA 73; 2002 6 SA 21 (SCA) para 36; see also *Fourie v Hansen* 2001 1 All SA 510 (W) 516. See also *Potgieter v British Airways plc* 2005 3 SA 133 (C) 140.

2011 4 SA 72 (SCA) the following is stated at page 191/261 paragraph 4: –

> *"There is authority for both the decision in the court a quo and the Supreme Court of Appeal. It is, however, suggested that the approach of the Supreme Court of Appeal is preferable, but the question that begs is if in all instances where the material mistake of a contractant has been caused by the fraud of a third party contractual liability nevertheless should lie as a matter of strict principle. After all, one is potentially dealing with two innocent parties.[8] the contract denier's mistake has been induced by the fraudulent conduct of a third party, while the reliance of the contract assertor has been caused by the contract denier. Why should the contract assertor necessarily be in a preferential position to the contract denier? As will be suggested, much depends on which approach to material mistake weighs heavier as a matter of legal policy,[9] but that in itself should not preclude exceptions to the general rule in appropriate circumstances."*

[145] At page 193/261 of the same article, the following is stated: –

> *"Moreover, virtually in all instances of material mistake induced in this manner the negligence of the contract denier has in the main consisted of not reading a contractual document before signing it.[10]*

[8] See Christie and Bradfield *Christie's The Law of Contract* 184; Floyd and Pretorius 1992 *THRHR* 673.

[9] Christie and Bradfield *Christie's The Law of Contract* 184 emphasise "the value, especially in commercial matters, of being able to assume that the signatory is bound by his signature".

[10] The resulting mistake is usually one regarding the nature of the juristic act in question or rather an *error in negotio* (see Joubert *General Principles of the Law of*

The courts vary in their interpretation of such conduct, at times labelling it negligent, while at other times not.[11] *Focusing on negligence simply does not seem to take the matter any further: if the contract denier was not negligent and actually read the contractual document before signing it, then surely there would have been no mistake to speak of. Rather, the point is that the fraudster has managed to lull the mistaken party into not bothering to read a contractual document before signing it. Should the latter be penalised simply because the deceiver has succeeded in perpetrating the fraud?*[12] *It is suggested that in the light of the apparent difficulties surrounding negligence within this context it seems best to leave it out of the enquiry altogether.*[13]"

[146] However, the *causa causans* of the defendants' being misled, was the conduct of their own chosen representative whom they initially trusted implicitly. The court is bound, in the circumstances of this case, by the Supreme Court of Appeal judgment *Slip Knot Investments 777 (Pty) Ltd* supra.

CONCLUSION:

Contract 73, 77; Van der Merwe *et al Contract: General Principles* 26; Hutchison and Pretorius *Law of Contract* 88).

[11] Contrast e.g. *Standard Credit Corporation Ltd v Naicker* 1987 2 SA 49 (N) 51 and further with *Kok v Osborne* 1993 4 SA 788 (SE) 799-800.

[12] See Kerr Principles of the Law of Contract 278-279.

[13] See further Pretorius 2011b *THRHR* 190-191; Lewis 1987 *SALJ* 376.

[147] In the premises, it is held that the defendants are liable to pay the amount due and owing to the Plaintiff. That Mr Jacobs contributed to their ignorance is clear because he caused the defendants to sign any documents presented to them willy nilly, in the faith that he knew what he was doing, and in the belief that they were only going to sign loan applications and that it was a mere formality. Although, as set out above, it can be stated that he acted as Mr Daniels' agent, he was, at all relevant times, primarily acting as well as the defendants' agent and the close corporation's agent and, to the knowledge of the defendants, was applying for a loan to finance a truck. Hence, for example, he bound the other members when signing the instalment sale agreement with their consent.

[148] The suretyship agreements contained a clause that the defendants would pay attorney and client costs in the event of breach of contract.

[149] Given the fact, the defendants did not read the suretyship agreements, the court is not willing to grant a costs order on the attorney and client scale. Given the ignorance of the defendants, their attention should have been drawn specifically to this clause by Mr Daniels.

[150] However, the plaintiff has failed to prove which amount is due and payable to it. As set out above, it is clear from the certificate of

balance annexed to the pleadings that no amount was subtracted for the value of the Nissan truck, and in the absence of such evidence, the court is in no position to ascertain what amount the defendants allegedly owe the plaintiff. It matters not that this issue has allegedly been settled. Prima facie it appears to the court, on a reading of the detailed certificate of balance that there was no settlement. The plaintiff is asking for exactly the amount still allegedly owing in terms of the instalment sale agreement without any regard being had to at least the ceded loan account to the bank, and the value of truck, which, it is common cause, was returned to the plaintiff. Were it not for the allegation that the quantum had been settled, which counsel for the defendants' cannot confirm, absolution of the instance would have been granted. (From documents which were discovered, but for obvious reasons not dealt with in evidence, the truck was sold for a higher amount than that which is alleged to be due and owing by the first and second defendants).

Order

In the event, the following order is made: –

[1] The plaintiff is ordered to state, on oath, within 5 court days from the date of this order and judgment, whether the returned truck has been sold, and if so, for which amount. If it was not sold, the plaintiff is ordered to state why it did not mitigate its losses.

[2] It should also be clarified why interest has been levied on this amount from the 1st of June 2011, whereas the letters of demand gave the first and second defendants ten business days within which to react and in circumstances where the letter of demand to the second defendant was sent to the wrong *docicilium citandi et executandi.* Furthermore, in the minutes of the pre-trial, it is specifically sated: "No settlement could be reached on the disputes".

[3] The plaintiff is further ordered to make full disclosure of all amounts received by it in respect of the instalment sale agreement entered into with PRATZ TRADING CC which forms the subject matter of this litigation.

[4] Upon receipt of such an affidavit, a final order will be made by the court. Counsel may approach the judge in chambers.

MM JANSEN AJ
ACTING JUDGE OF THE HIGH COURT

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