

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 2009/51978

DATE: 30/03/2010

In the matter between:

NEDBANK LTD

Plaintiff

and

WIZARD ASSET HOLDINGS (PTY) LTD

First Defendant

FRANTZESKAKIS, JOHN

Second Defendant

MICHELOUDAKIS, JOHN

Third Defendant

MICHELOUDAKIS, MICHAEL

Fourth Defendant

JUDGEMENT

VAN DER MERWE, AJ

1. The applicant (plaintiff) seeks summary judgement against the second, third and fourth respondents (defendants). The causes of action against the defendants are based on suretyships entered into in respect of *inter alia* overdraft facilities granted by the plaintiff to the principal debtor, which

has been liquidated. Leave to defend had been granted by agreement to the first defendant, who was also a surety in respect of the principal debt.

2. Judgement is also sought against the second defendant and the third defendant by virtue of continuing covering mortgage bonds granted by the second and third defendants over certain immovable property in favour of the plaintiff for all and any sums of money owing to the plaintiff by the second and the third defendants respectively, from any cause of debt whatsoever.

The defence based on the provisions of the National Credit Act

3. The first defence raised in the opposing affidavit filed on behalf of the second, third and fourth defendants (hereinafter referred to as "the defendants") is that the plaintiff did not comply with the provisions of the National Credit Act, 34 of 2005, in that the plaintiff did not give notice to the defendants in terms of section 129(1) of the Act prior to the commencement of legal proceedings.
4. It must firstly be considered whether the National Credit Act applies to the principal debt. This will in turn determine whether the National Credit Act applies to the deeds of suretyship entered into in respect of the principal debt. It is not disputed by the defendants that the National Credit Act does not apply to the principal debt. It is common cause between the parties that the principal debtor is a juristic person, Anichi Trading CC, now in liquidation.

5. In terms of section 4(1)(a) of the National Credit Act, read with Government Notice 713 of 1 June 2006, published in Government Gazette no 28893, the Act does not apply to a credit agreement in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time the agreement is made, equals or exceeds the threshold value (currently R1 million) determined by the Minister responsible for consumer credit matters, in terms of section 7(1) of the Act. In terms of section 4(1)(b) of the National Credit Act, the Act does not, *inter alia*, apply to a credit agreement:
 - 5.1 which is a large agreement as envisaged in section 9(4)(b) read with section 7(1)(b) of the National Credit Act (i.e. the “principal debt” under the transaction equals or exceeds the amount of R250,000, as determined in government notice 713 of 1 June 2006); and
 - 5.2 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 (currently R1 million) determined by the Minister in terms of section 7(1) of the Act, read with Government Notice 713 of 1 June 2006.
6. For purposes of determining whether the credit facility, which constitutes the principal debt (in the context of the suretyship agreement) in the current matter, is a large agreement, the “principal debt” (as defined in section 1 of the Act) of the credit facility (as defined in section 8(3)), is the

credit limit under that facility. (See section 7(2) of the Act.) It is alleged in the particulars of claim that the principal debt as defined in the Act exceeds the threshold of R250,000. This is not disputed in the opposing affidavit.

7. The effect of the foregoing is that:-

7.1 The National Credit Act does not apply where the consumer is a juristic person whose asset value or annual turnover, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister (currently R1 million);

7.2 The National Credit Act does not apply where the consumer is a juristic person which enters into a large agreement, irrespective of the value of its asset value or annual turnover;

7.3 The only instance where the National Credit Act applies to a consumer who is a juristic person is where the juristic person's asset value or annual turnover is below the threshold value determined by the Minister (currently R1 million) and the juristic person enters into a small agreement or an intermediate agreement as envisaged in sections 9(2) and 9(3), read with section 7(1)(b) of the Act;

7.4 Even where the National Credit Act applies to a consumer who is a juristic person, the Act only finds limited application. (See section 6 of the Act.)

8. Since it is not disputed in the answering affidavit that the principal debt was entered into with a juristic person and that the principal debt arose from a large agreement, either the exemption in section 4(1)(a) of the National Credit Act or the exemption in section 4(1)(b) of the National Credit Act must find application. Since the principal debtor is a juristic person, the application of the National Credit Act is excluded in terms of section 4(1)(a) if the asset value or annual turnover of the principal debtor was equal to or exceeded the threshold value of R1 million. Even if the asset value or annual turnover of the principal debtor was below the threshold value of R1 million, the credit agreement giving rise to the principal debt is exempted from the application of the National Credit Act in terms of section 4(1)(b), because the principal debt arose from a large agreement. (See also Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd 2009 (3) SA 384 (T), para 13; Scholtz and others Guide to the National Credit Act par 4.4.2.) It is accordingly evident that the National Credit Act does not apply to the principal debt.
9. The defendants contend, however, that the National Credit Act does apply to sureties who are natural persons. This approach is incorrect, as section 4(2)(c) of the National Credit Act provides expressly that the Act "applies to a credit guarantee only to the extent that this Act applies to a credit facility or credit transaction in respect of which the credit guarantee is granted." It is accordingly evident that the National Credit Act does not apply to a suretyship if the principal debt does not arise from a credit agreement which falls within the scope of the Act.

10. This conclusion is also confirmed by the provisions of section 8(5) of the National Credit Act, to the effect that a credit guarantee constitutes a credit agreement for purposes of the Act, only if in terms of the credit guarantee a person undertakes or promises to satisfy an obligation of another consumer in terms of a credit facility or a credit transaction to which the Act applies. Since the National Credit Act does not apply to the credit transaction which gave rise to the principal debt, the suretyships in the present matter do not constitute credit agreements for purposes of the Act. (See also Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd 2009 (3) SA 384 (T). para 18.) The plaintiff was accordingly not obliged to give notice to the defendants as required by section 129 of the Act in respect of credit agreements which are subject to the National Credit Act.
11. The first issue relied upon in the opposing affidavit consequently do not constitute a defence to the plaintiff's claims.

The blank space defence

12. The next defence raised by the second, third and fourth defendants is that when they signed the deeds of suretyship, *"the indebtedness of the sureties did not appear in any of the deeds of suretyship. In other words, the word 'unlimited' did not appear and was only inserted by the plaintiff after we have signed the deeds of suretyship."* Clause 1 of each deed of suretyship provides *inter alia* that the surety binds himself

"as surety and co-principal debtor ... for the repayment on demand of all amounts which the principal debtor may now or at any time hereafter owe Nedbank Ltd, ... provided that the total amount to be recovered from me shall not exceed in aggregate, the sum of:

UNLIMITED

(‘my obligation’) plus interest, discount commission, commission, legal costs on the attorney and client scale and all other necessary and usual charges and expenses." (Underlining inserted.)

13. It is accordingly the contention of the defendants that the space where the word "UNLIMITED" currently appears in clause 1 of each of the deeds of suretyship was left blank at the time when each of the respective suretyship documents were signed by the respective defendants. Consequently, the defendants content that the suretyships are unenforceable but virtue of the provisions of section 6 of the General Law Amendment Act , 50 of 1956, which reads as follows:

"No contract of suretyship entered into after the commencement of this Act [22 June 1956] shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the sureties: provided that nothing in this section contained shall affect the liability of the signer of an aval under the laws relating to negotiable instruments."

14. An analysis of the case law dealing with the issue of blank spaces in written documents where it is required by statute that the terms of the

agreement must be reduced to writing (i.e. agreements for the alienation of land and suretyship agreements), reflects that the cases dealing with such blank spaces fall, broadly speaking, into two categories. In the first category of cases dealing with blank spaces, the courts disregarded the blank spaces on the basis that it can be accepted that the parties did not intend to incorporate the provision containing the blank space into the agreement and enforced the remainder of the agreement. In the second category, the courts held that the existence of a blank space in the written document had the result that the agreements in question were invalid for failure to comply with the statutory formalities.

15. In the first category of cases, the courts were able to make a finding that the signed document containing a blank space (in respect of a non-essential term) had been accepted by the other contracting party, thereby indicating that the agreement was to be entered into on the basis that the provision containing the blank space would not find application or on the basis that the entitlement to fill in the blank space was waived. On this approach a finding could be made in each instance that the written document reflected all the terms agreed upon between the parties and that the clause containing the blank space should be regarded as *pro non scripto*. Consequently, the written document complied with the statutory requirement that the terms of the agreement should be reduced to writing, provided the essential terms of the agreement had all been recorded in the written document.

16. The essential terms of the contract of suretyship are the identity of the creditor, the identity of the debtor, the identity of the surety and the nature and amount of the principal debt. Failure to complete the essential terms of the suretyship agreement means that the contract is invalid for failure to comply with the statutory formalities. It cannot be assumed that the parties intended one of the essential terms not to apply. In such event one of the essential requirements for the coming into existence of a binding suretyship agreement is not present. (See eg Sapirstein v Anglo African Shipping Co (SA) Ltd 1978 (4) SA 1 (A) at 12 B-D.) The limit to the surety's liability is not one of the essential terms for the coming into existence of a surety relationship, although it may obviously be a significant and material term in the view of the parties to the surety agreement. (See e.g. Standard Bank of SA v Jaap de Villiers Beleggings 1978 (3) SA 955 (W) at 959D-E.)

17. This does not mean that only the essential terms of the suretyship agreement need to be recorded in the deed of suretyship in order to comply with the requirements of section 6 of the General Law Amendment Act. All the terms of the agreement of suretyship are required to be in writing by section 6 of the General Law Amendment Act. (See e.g. Plascon Evans Paints (Transvaal) Ltd v Virginia Glass Works. (Pty) Ltd 1983 (1) SA 465 (O) at 470; Van Leeuwen Pipe and Tube (Pty) Ltd v Mulroy 1985 (3) SA 396 (D).) On the approach reflected in the first category of cases, as dealt with above, the mere fact that a blank space pertaining to a non-essential, albeit material, term of the suretyship agreement was not

completed, does not necessarily have the consequence in all instances that the agreement is void for non-compliance with the statutory formalities.

18. Thus, in Blundell v Blom 1950 (2) SA 627 (W) it was held that a written contract for the purchase of immovable property was valid notwithstanding the fact that the amount of the deposit payable in terms of the agreement had been left blank. This conclusion was reached on the basis that the meaning to be attached to the blank was *"that the parties had agreed that no deposit was to be paid on the signing of the contract."* (At 632.)
19. Cases where a similar approach was followed include Oosthuizen v Wentzel 1957 (1) SA 653 (W) at 655B-E; Miller and Miller v Dickinson 1971 (3) SA 581 (A); First Consolidated Holdings (Pty) Ltd v Bissett 1978 (4) SA 491 (W) at 496D-H; Pizani v First Consolidated Holdings 1979 (1) SA 69 (AD); Botha v Nedbank 1981 (4) SA 949 (NC) at 954H -955G and Commercial Bank of Namibia Ltd v Trans Continental Trading (Namibia) 1992 (2) SA 66 (Nm HC) at 74A-77G. See also Forsyth & Pretorius (5th ed) Caney's The Law of Suretyship 73-74.)
20. This approach was applied by the Appellate Division in Pizani v First Consolidated Holdings 1979 (1) SA 69 (AD). The judgement is instructive for current purposes because it is comparable to the defence raised by the defendants in the current matter. In the Pizani judgement, an exception to a plea based on non-compliance with the formalities required by section 6 of the General Law Amendment Act, 50 of 1956, was upheld. Clause 9 of the deed in the Pizani matter read as follows: *"Notwithstanding the*

foregoing, the amount of this guarantee will be limited to R ... " and then followed a blank space. Clause 9 was marked with an asterisk which was to be read at the foot of the printed deed, which indicated that the clause was "to be deleted if the amount is not to be limited". The blank space was not completed, nor was clause 9 deleted. (See the Pizani judgement at 80F-G.) The Appellate Division dealt with the issue as one of construction of the document and considered whether, from the mere omission to complete the clause, the inference can be drawn that the intention of the parties was that the maximum amount for which the sureties were to be liable was still to be agreed.

21. Recognising that the printed words in clause 9 were of significant import as it goes directly to the extent of the surety's liability, the Appellate Division concluded as follows at 81G-H of the report:

"It is true that the incomplete clause was not deleted, but it does not follow therefrom that not only the draughtsman of the printed form contemplated the possible fixing of a limit to the extent of the surety's liability by whomsoever might use such form, but that also the parties to these particular deeds intended or contemplated the fixing of such a limit. ... As it stands, clause 9 is meaningless. In the circumstances which I have described the inference is irresistible ... that the signing and delivery, without qualification, of the deeds in their existing form signified, in lieu of deletion of the clause, its inapplicability to the transactions thereby concluded."

22. In the cases dealt with above it was accordingly accepted that leaving blank spaces relating to non-essential terms of the agreement blank, did not affect the validity of the suretyship agreement. The non-completion of blank spaces pertaining to non-essential terms was interpreted to mean that the clause was not intended to apply to the contractual arrangement between the parties. (See the discussion of this approach in Johnston v Leal 1980 (3) SA 927 (AD) at 939H-941D.)

23. In the second category of cases pertaining to blank spaces in respect of non-essential but material terms, the courts came to the conclusion that the agreements in question were (or may be - see Johnston v Leal (above)) invalid for failure to comply with the statutory formalities. In these instances, it was found that the parties had indeed intended the clause containing the blank space to form part of the agreement but had either not reached agreement in respect thereof at the time of signature or had failed to complete the blank space in question, notwithstanding the fact that agreement had been reached in respect thereof. Under these circumstances it cannot be held that the terms of the agreement were reduced to writing and the written document does not reflect the intention of the parties. Reported cases falling in this category include King v Potgieter 1950 (3) SA 7 (T); Johnston v Leal 1980 (3) SA 927 (AD); Raven Estates v Miller 1984 (1) SA 251 (W); Ellis v Trust Bank of Africa Ltd 1981 (1) SA 733 (N); Just Names Properties 11 CC v Fourie 2008 (1) SA 343 (SCA).

24. In the second category of cases, the matter of Johnston v Leal (above) is instructive, not only because it is Appellate Division authority, to which I am bound to the extent that it is applicable in the current matter, but also because the factual circumstances thereof are comparable (but not similar) to those in the present matter and also to the factual circumstances in the Pizani judgement. The latter judgement was reported one year earlier than the Johnston judgement. Whilst the Pizani judgement deals with blank spaces in a deed of suretyship, the Johnston judgement deals with blank spaces in a contract for the sale of land. In both instances, pleas were filed by the respective defendants in which the alleged invalidity of the written agreement in question for lack of compliance with the relevant statutory formalities was pleaded as a defence. In both instances an exception to the plea in question was upheld by the court of first instance. In the Pizani judgement, the appeal was dismissed. In the Johnston judgement, the appeal was upheld.
25. The main reason for the difference in approach in the two Appellate Division judgements can be found in the documents which served in each instance before the court. In the Johnston judgement it was found that there were conflicting *indicia* in the written document itself as to the question whether the parties intended the blank spaces in question to be disregarded or not. For instance, it was evident *ex facie* the document that the parties were particularly careful to specifically delete portions of the printed document which they did not regard applicable. There were also other references in the document to the clause containing the blank space

which suggested that the clause was intended to be applicable. (See page 941D-H of the judgement, where an analysis of the conflicting *indicia* in the agreement was made.) Consequently, the Appellate Division in the Johnston judgement held that extrinsic evidence was required (and would be admissible) in order to determine whether the parties intended the blank spaces to be regarded as *pro non scripto* or not. Hence judgement should not have been granted on exception and the appeal was upheld.

26. On the other hand, in the Pizani judgement, the Appellate Division came to the conclusion that there were no indications in either the plea or the written deed of suretyship that the parties intended the clause containing the blank space to be applicable. Hence the appeal against the decision upholding the exception was dismissed.
27. It remains to apply the above analysis of the principles established in the case law to the facts and circumstances of the present matter. In particular, it must be considered whether the factual circumstances of the current matter or the difference in the wording and the structure of the suretyship agreements which form the subject matter of the present application for summary judgement, distinguish the current matter from the Pizani judgement and the cases which fall in the first category referred to above. In the current matter, the blank space in the deed of suretyship was subsequent to the signature and delivery thereof completed by the insertion of the words "UNLIMITED" in the blank space where provision was made for the limitation of the surety's liability. It also needs to be

considered whether a different approach is called for because the current matter is one for summary judgement whilst the Pizani judgement dealt with the issue on exception to a plea. The answer to both issues must in my view be in the negative, for the reasons that follow.

28. In the present matter, the defence pertaining to the alleged blank space in the deed of suretyship was raised in the affidavit opposing summary judgement and not in a plea. The defendants accordingly had the opportunity to place evidence on oath before the Court to substantiate their defence and to demonstrate their *bona fides* in this regard. The defendants did not challenge the relief sought on the basis that it was not the intention of the parties to have entered into an unlimited suretyship. The irresistible inference is that the suretyships, providing for unlimited liability on the part of the sureties, correctly reflected the intention of the parties. The affidavit opposing summary judgement by necessary implication confirms that no limitation was intended. Under these circumstances, it matters not whether the space that makes provision for the limitation of the suretyship was left blank or whether it was subsequently completed, as is contended by the defendants, to expressly reflect that there was no limit on the liability of the sureties. In both instances, the document would have reflected the true and correct intention of the parties. Under these factual circumstances, it was not material to the binding nature of the suretyship agreement whether the parties left the relevant space blank at the time of signature to indicate its inapplicability or whether the word "UNLIMITED" was subsequently inserted, as contended by the defendants.

29. Accepting the veracity of the evidence presented on oath in the opposing affidavit (similar to the approach in the event of an exception in respect of the contents of a plea or the particulars of claim), the only defence raised in this regard is the fact that the word "UNLIMITED" was inserted after the deeds of suretyship had been signed and removed from the defendants by the plaintiff's representative. Nowhere in the answering affidavit can an express or implied contention that the suretyships were intended to be limited or that they do not correctly reflect the intentions of the parties, be found. Consequently, the opposing affidavit places the current matter firmly in the first category of cases dealt with above, where the existence of the blank space did not affect the validity of the agreements in question.
30. It can accordingly be concluded that where a deed of suretyship does not expressly reflect at the time of signature that the liability of the surety was unlimited, the validity of the suretyship is not affected, in the event where an unlimited suretyship was intended. In such a case, the legal position will be that there is no limitation on the surety's liability for the principal debtor's indebtedness. The legal consequences will be different in a situation where the parties had agreed that the surety's liability was to be limited to a maximum amount but failed to reflect such limitation in the blank space providing for such limitation in the deed of suretyship. In such an event the limitation cannot *ex lege* be implied and the deed of suretyship does not reflect all the agreed terms thereof as required by section 6 of the General Law Amendment Act. (It need not be decided in the current matter whether parole evidence in this regard will be admissible even where there are no

blank spaces and consequently no ambiguity regarding the intention of the parties *ex facie* the document itself.)

31. It follows that the defendants have failed to disclose a *bona fide* defence in the opposing affidavit, which, if it is proved at the trial, will constitute a defence to the plaintiff's claim. It would not be appropriate to exercise my residual discretion to refuse summary judgement in favour of the defendants in the present instance, as the facts deposed to in the affidavit opposing summary judgement do not suggest a reasonable possibility that the defendants may have a defence against the monetary claim of the plaintiff.

32. In the particulars of claim, the plaintiff also seeks judgement against the second and the third defendants on the grounds of two covering mortgage bonds granted by the second and the third defendant respectively to the plaintiff over certain immovable properties held by the second defendant and the third defendant respectively. The plaintiff also seeks an order in the particulars of claim declaring the properties in question executable. The plaintiff failed to comply with the practice directive laid down in Standard Bank of SA Ltd v Saunderson 2006 (2) SA 264 (SCA) at 277D-E, in that the summons did not include the notice drawing attention to section 26(1) of the Constitution of the Republic of South Africa, which accords to everyone the right to have access to adequate housing. In the circumstances, leave to defend will be granted in respect of the orders declaring the properties executable.

33. The notice of application for summary judgement did not seek a cost order against the defendants. Counsel appearing in the matter did not address me on this issue. I will accordingly, in the exercise of my discretion, reserve the question of the costs of the application for summary judgement, for determination at the hearing of the matter.

34. I make the following order.

34.1 Judgement is granted against the second, third and fourth defendants, the one paying the others to be absolved, for:

34.1.1 Payment of the sum of R621,338.54;

34.1.2 Interest on the said sum of R621,338.54 at the rate of 5.5% above the prevailing prime lending rate, as applicable from time to time and calculated from 28 November 2009, to date of final payment, both days inclusive;

34.2 Leave to defend is granted in respect of prayers (c) and (d) of the application for summary judgement dated 18 January 2010, in respect of the orders declaring the immovable properties specially executable;

34.3 The costs of the application for summary judgement are reserved.

LJ VAN DER MERWE, AJ
ACTING JUDGE OF THE HIGH COURT
26 March 2010.

Counsel for plaintiff: R Robinson
Counsel for defendants: SS Cohen

Attorneys for plaintiff: Kim Warren Rambay & Associates
Attorneys for 2nd, 3rd and 4th defendants: Gishen-Gilchrist

Date of hearing: 10 March 2010.
Date of judgement: 30 March 2010.