IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
1) REPORTABLE: ~~YES~~/NO.
2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
3) REVISED.

26/04/2010 .... DATE SIGNATURE

Case No: 65764/2009
Date heard: 22/04/2010
Date of judgment: 26/04/2010

In the matter between:

Magalieskruin Mall Investments	Plaintiff
and	
Izandra Trading 16 (Pty) Ltd	First Defendant
Linda-Ann Mynhardt	Second Defendant

JUDGMENT

DU PLESSIS J:

This is an application for summary judgment against the first and the second defendants.

The claim against the first defendant arises from a written lease agreement in terms whereof the first defendant rented from the plaintiff a business premises in the Magalieskruin Shopping Centre. The claim is based thereon that the first defendant is in arrears with the payment of monthly rentals, the arrears amounting to R182 496,04. The plaintiff alleges that, due to the first defendant's default, it was entitled to cancel and cancelled the agreement. Against the first defendant, who has entered an appearance to defend the action, the plaintiff claims summary judgment for the cancellation of the agreement, eviction of the first defendant from the premises, payment of the R182 496,04, interest thereon and, in terms of the agreement, costs to be taxed as between attorney and own client. The first defendant did not oppose the application for summary judgment, and it will be granted as prayed.

The claim against the second defendant, who has also entered an appearance to defend the action, arises from a written suretyship in terms whereof the second defendant bound herself as surety and co-principal debtor for the due and proper fulfilment of the first defendant's obligations under the lease agreement. Against the second defendant the plaintiff seeks summary judgment for payment of the amount of R182 496,04, interest and costs. In her affidavit opposing summary judgment the second defendant raises essentially two defences. I shal! deal with each one in turn.

In the first place, the second defendant contends that the written lease and the suretyship on which the plaintiff's claim against her is founded, "constitute liquid documents as contemplated" in rule 32(2) of the Court Rules. Accordingly, the second defendant contends that the plaintiff should in terms of rule 32(2) have annexed the documents to the application for summary judgment. The failure to do so, the second defendant further contends, renders the application fatally defective.

The defence is premised thereon that the two documents constitute liquid documents. The defence can only succeed if the documents that referred are liquid documents. The learned author Harms (**Civil Practice in the Supreme Court**, B8.3) describes a liquid document as: A "written instrument ... signed by the defendant or his agent ... evidencing an acknowledgement of indebtedness which is unconditional and ... for a fixed amount in money". Although, as the learned author points out, there are exceptions to the definition they are not now relevant. The definition accords with the authorities and I respectfully adopt it. (See also the discussion in **Harms** *op. cit.* B8.25)

The two documents that the second defendant refers to are not liquid document. They do not evidence "an acknowledgement of indebtedness which is unconditional and for a fixed amount". The second defendant's first defence cannot succeed.

In the second place the second defendant contends that the deed of suretyship constitutes a "credit transaction" and therefore a "credit agreement" under the **National Credit Act, 34 of 2005** ("the NCA"). Based on that starting point, the second defendant then raises the defence that the suretyship constitutes an instance of reckless credit under the NCA and also that she is over-indebted as envisaged in the NCA. These defences are dependant thereon that the suretyship is a "credit transaction" and thus a "credit agreement" under the NCA. In terms of section 83(1) of the NCA a court can only grant relief based on the grant of reckless credit "in any court proceedings in which a credit agreement is being considered". The same applies, in terms of section 85 of the NCA, to relief based thereon that the defendant is over-indebted. I now proceed to consider whether the suretyship constitutes a "credit agreement" under the NCA.

Section 8(1) of the NCA provides as follows:

> "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);
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> (c) a credit guarantee, as described in subsection (5); or
>
> (d) any combination of the above."

As I understand her, the second defendant does not contend that the suretyship is a "credit guarantee", as described in section 8(5) of the NCA. In terms of section 8(5) a suretyship is a "credit guarantee" only if it constitutes surety for an obligation "in terms of a credit facility or a credit transaction to which" the NCA applies. In her affidavit opposing summary judgment the second defendant concedes, rightly so, that the lease agreement between the plaintiff and the first defendant is not a "credit agreement"[1] under the NCA: Under section 8(2)(b) of the NCA an "agreement, irrespective of its form, is not a credit agreement if it is ... a lease of immovable property". It follows that the suretyship cannot constitute a credit guarantee.

The second defendant, however, contends that the suretyship is a "credit transaction" in its own right. She relies on section 8(4)(f) of the NCA that provides that an "agreement, irrespective of its form ..., constitutes a credit transaction if it is" an "agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of—

(i) the agreement; or

(ii) the amount that has been deferred."

The suretyship, schedule B to the lease agreement, is annexed to the summons. In terms thereof the second defendant binds herself as surety and co-

[1] And therefore neither a "credit facility" nor a "credit transaction".

principal debtor in favour of the plaintiff "for the due and proper fulfilment of all the obligations of" the first defendant "arising from or out of or in terms of" the lease between the plaintiff and the first defendant". In terms of the suretyship no "payment of an amount owed by one person to another is deferred". The suretyship is in its terms purely accessory to the lease agreement. It was held in **First Rand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another 2009 (3) SA 984 (T)**[2] and in **ABSA Bank Ltd v Silver Meadow Trading 169 (Pty) Ltd and Others** (NG, Case no. 65777/2009) that in such a case the suretyship cannot constitute a "credit agreement" if the principal agreement to which it is accessory is not a credit agreement under the NCA. That is so, it was further held, also when the defendant bound himself as a co-principal debtor. The latter fact does not change the accessory nature of the suretyship. I respectfully agree with those judgments and I am bound by them.

In her affidavit opposing summary judgment the second defendant contends that payment of an amount owed by the first defendant to the plaintiff is deferred in terms of the lease agreement. I shall point out in due course that that is not so. Even if it were, that would not have meant that the suretyship became a "credit agreement" in its own right: The suretyship remains an agreement accessory to the lease. The former cannot become a "credit agreement" in its own right by virtue of the terms of the lease agreement that is not a "credit agreement".

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[2] Paragraphs 18 to 24.

For her contention that payment is deferred in terms of the lease agreement, the second defendant relies on clause 4.1 of the lease agreement. The clause provides that the plaintiff is entitled "... to charge interest on due amounts at a rate of 2% ... per annum higher than the prime rate that the LESSOR'S bankers charge on overdraft facilities". Because, so the second defendant contends, such interest could also be charged against her as surety and co-principal debtor, the clause in effect provides for a deferral of her payment obligations to the plaintiff. In my view the reasoning if fallacious: Clause 4.1 does not defer payment of any amounts but provides for interest on amounts that are already due.

In the result I conclude that the second defendant has no defence to the plaintiff's claim.

In terms of the lease agreement that the first defendant undertook to pay costs on the scale as between attorney and own client. The first defendant, however, did not oppose the application for summary judgment and its obligation to pay costs relates only to the costs of the action, excluding the costs of the opposition to the application for summary judgment.

The deed of suretyship does not contain an undertaking to pay costs on the scale as between attorney and own client. Only the second defendant opposed the application for summary judgment and only she is liable for the costs thereof, but not on the scale as between attorney and own client.

It might be argued that the second defendant is by virtue of her suretyship liable for the first defendant's obligation to pay costs on the scale as between attorney and own client. In view thereof that the first defendant did not oppose the summary judgment and that the second defendant did not in her own right undertake to pay costs on the scale as between attorney and own client, I deem it just to order the defendants to pay costs but not on the scale as between attorney and own client.

The following order is made:

A Summary judgment is granted against the first defendant as follows:

1 Cancellation of the lease agreement.

2 Eviction of the first defendant and/or any other company, close corporation, trust or entity of whatsoever nature claiming occupation of the leased premises through the first defendant.

B Summary judgment is granted against the first and second defendants jointly and severally, the one paying the other to be absolved for:

1 Payment of the amount of R182 796,04.

2 Interest on the amount of R182 796,04 at a rate of 15,5% per annum from 1 October 2009 to date of payment.

C The first and second defendants are ordered, jointly and severally, the one paying the other to be absolved, to pay the plaintiff's costs, excluding the costs of opposing the application for summary judgment.

D The second defendant is ordered to pay the costs of opposing the application for summary judgment.

B.R. du Plessis

Judge of the High Court

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