IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO [redacted]
D te: 20/06/2024	Signatur [redacted]

CASE NO: 2021/24058

In the matter between:

VIKA INVESTMENTS TRUST	First Applicant
VILAKAZI, KEKE SYDWELL N.O	Second Applicant
VILAKAZI, SAMUEL MOTSAMAI N.O	Third Applicant
VILAKAZI, VUSI N.O	Fourth Applicant
VILAKAZI, KEKE SYDWELL N.O	Fifth Applicant
VILAKAZI, SAMUEL MOTSAMAI N.O	Sixth Applicant
VILAKAZI, VUSI N.O	Seventh Applicant

and

NEDBANK LIMITED	Respondent

JUDGMENT – LEAVE TO APPEAL

MAHOMED AJ

The applicants, seek leave to appeal a judgment I handed down on 17 January 2024. In their notice of appeal[1], the applicants set out four grounds appeal, in the main they argue that in casu, sureties who sign as co-principal debtors MUST enjoy the same protections as consumers in the National Credit Act 43 of 2005 ("NCA"). The application is opposed on the grounds that the applicants have no prospects of success and have failed to satisfy the requirements in s17(a)(i) of the Superior Courts Act 10 of 2013 for leave to be granted.

1. Mr Nxumalo conceded that the first applicant has not defended the respondent's claim for summary judgment, and that the respondent is entitled to a judgment. Furthermore, he conceded that the principal established by the Appellate Division since 1978[2] remains good law, *"use of the word co principal debtor in a suretyship agreement did not transform the contract of suretyship into some other type of contract*."

2. Notwithstanding, counsel argued that having regard to the preamble and ethos of the NCA, the court is obliged to exercise judicial scrutiny over all contracts and I ought to have referred the matter to trial which is the more appropriate forum to determine the position of a co principle debtors in relation to the credit agreement. It was argued that the sureties must enjoy

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[1] CL

[2] CL 0-9 (1978 1 SA 463)

the protections afforded in the NCA, if one reads the purposes and intent of the NCA.

3. Advocate Boshomane, appeared for the respondent and submitted that because the main agreement is not subject to the NCA, it being a large agreement, above the threshold of R250 000, neither is the suretyship agreement. The sureties exist through the agreement, and they only serve as guarantees to the respondent. It was submitted the argument on reckless credit lending has no merit. Furthermore, that the applicants have not sought to declare any provisions of the Act unconstitutional.

4. Counsel for the respondent referred the court to Shaw and Another v Mackintosh and Another[3], where the SCA rejected the argument that a co-principal debtor in terms of a credit guarantee is subject to the NCA when the main agreement is not, the court stated:

> *"if the NCA does not apply to the credit transaction, it cannot apply to the credit guarantee."*

5. The applicants, served as a credit guarantee, the transaction was in respect of a mortgage bond where the credit advanced was above the threshold as set out in the NCA is R250 000.

[3] [2018] JOL 40207 (SCA) at [8]

6. Mr Boshomane referred to the decision in **Absa Bank Ltd v Lowting and Others**,[4] and submitted that Mr Nxumalo relies on pronouncements made obiter and he referred me to FirstRand Bank Limited v JDA Research (Pty) Ltd and Others[5], where the court stated that *"the issue of individuals signing suretyships for banks, "is an issue which should be investigated further by courts. … that issue is one which the legislature may want to take up*." Mr Boshomane submitted that it is not for this court to pronounce on the position and besides the applicants' submissions are vague and they have no prospects of success, leave should be refused.

7. I agree with Mr Boshomane, the applicants' as co-principal debtors act only as guarantee for the debt, they exist only through the principal debt and cannot claim protections as consumers in terms of the NCA,[6] the principal debt falls outside the provisions. There are no prospects of success in their defence for reckless credit, the applicants have failed to meet the requirements for leave and accordingly leave is refused.

8. Counsel for the respondent in his heads of argument[7] required clarification of my judgement regarding whether the money judgment against the trust

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[4] (39029/2011) [2013] ZAGPPHC at 21

[5] [2023] ZAGPJHA 573 (21 April 2023) at 19

[6] CL judgment para 25 and 26

[7] CL 018-2 para 3

was dismissed or postponed. The judgment against the trust is dismissed, the court is guided by the applicant's order in the notice of motion.

Accordingly, I make the following order

1. Leave to appeal is refused.

2. The applicants are to pay the costs of the application on an attorney client scale.

[redacted] ______________

MAHOMED AJ
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 20 June 2024.

Date of hearing: 17 May 2024

Date of Judgment: 20 June 2024

Appearances:

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