



IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NUMBER: 6968/2023P

In the matter between:

STANDARD BANK OF SOUTH AFRICA LTD

PLAINTIFF

Versus

ALLEN JOHN IMMELMAN

FIRST DEFENDANT

CHRISTINA MARIE IMMELMAN

SECOND DEFENDANT

JUDGMENT

P C BEZUIDENHOUT J:

[1] Plaintiff is claiming from First and Second Defendants jointly and severally the one paying the other to be absolved in respect of claim one payment of the amount of R1 264 411.65 together with interest thereon at the rate of 2,15 % above the prime interest rate from 25 April 2023 to date of final payment and in respect of claim 2 payment of the sum of R2 846 752.71 plus interest at the rate of 3,75 % above the prime interest rate from 25 April 2023 to date of final payment and costs of suit. Claim 1 arises from a business term loan granted to Chiffon Estates Pty (Ltd) on 24 April 2020. The second claim arises from the balance owing on an overdraft facility which was granted to Chiffon Estates on 6 December 2020. In both instances First and

Second Defendants signed unlimited suretyships on which Plaintiff maintains they are liable.

[2] The action is defended by First and Second Defendants who appeared in person. Firstly four special pleas were raised on the papers but at the commencement of the hearing the first and second special pleas were abandoned. The third special plea relates to the allegation that the business term loan was a credit agreement and that Defendants should therefore have been served with a notice in terms of section 129 of the National Credit Act. The fourth special plea is that Defendants as sureties and co-principal debtors fell under the National Credit Act.

[3] One Gugelelo Madikwane employed by Plaintiff as Manager Business Solutions and Recovery in Johannesburg testified. She worked with the file of Chiffon Estates Pty (Ltd) (Chiffon) since 2021 when it became financially distressed. She worked with the file until Chiffon was placed into business rescue. The assets were sold by the business rescue practitioner. Plaintiff was paid a certain amount but there was a shortfall and that is the amounts which Defendants as sureties are now being sued for.

[4] Chiffon bought a farm in 2013 with a loan of R9 500 000.00 from Plaintiff and contributed R5 500 000.00 itself. It was purchased from Barrington Farms who granted a further R9 000 000.00 loan. The purchase price was R23 000 000.00.

[5] The initial agreement was for R9 500 000.00 on 8 May 2013 and was repayable over 180 months. It was termed a medium-term loan agreement and is at page 16 of bundle 1 of Plaintiff's trial bundle. On 28 May 2013 Chiffon was granted an overdraft facility of R500 000.00 as appears on page 32 of volume 1. It was agreed that the R8 000 000.00 loan from the seller will be serviced by the personal income of Plaintiff's as is set out in clause 15.14.4 on page 19 of volume 1 where it states "It is agreed and understood that the R8 000 000.00 loan by the seller (Doctor R N Stephenson) will be

serviced on a monthly basis from your personal income for the duration of the loan and will be settled in full as per the loan agreement from the sale of your foreign assets within a specified time frame.” Barrington Farm also assisted with providing finance but it is not relevant to the present case.

[6] As appears from pages 43 to 49 of volume 1 Defendants bound themselves as sureties and co-principal debtors for the payment of Chiffon Estates obligations to Plaintiff. The farming operation fell into distress in 2021 and a structure was then entered into between Plaintiff and Chiffon to assist the client. On 15 May 2015 Chiffon was granted a further overdraft of R1 000 000.00 which was to be increased to R1 350 000.00 until 15 August 2015 and then revert back to R1 000 000.00. This was in addition to the medium-term loan and the business revolving credit plan granted to Chiffon.

[7] It was recorded that there was a first continue covering mortgage bond of R10 150 000.00 registered over the property namely sub 65 of 3 of the Farm Hebron number 914 in extent 18,9672 and sub 73 of 3 of the Farm Hebron number 914 in extent 111,1924 and an unlimited suretyship from Defendants and life cover policies. The terms and conditions were set out in the said document relating to the overdraft facility as appears at page 187. The business term loan agreement in the amount of R450 000.00 was granted on 3 September 2015. This was to enable the purchase of production assets.

[8] On 6 March 2017 a business term loan was granted to Chiffon in the amount of R2 000 000.00. In terms of the agreement in paragraph 12.1 the guarantee of both Defendants were restricted to R12 000 000.00 each. The debt was restructured at times from 2015 to 2017. On 28 September 2017 the facilities were subject to the terms and conditions set out in the letter where the overdraft was limited to R1 350 000.00. The medium-term loan to R7 020 00.00 and the business term loan to R1 884 000.00. On 13 December 2017 a further banking facility letter was addressed to Chiffon where they were advised that subject to the terms and conditions

in the letter the facilities which would be granted would be an overdraft of R1 350 000.00, a medium-term loan of R6 913 960.00 and a business term loan of R1 808 915.00. On 25 September 2019 a business revolving credit plan agreement was approved in the amount of R600 000.00. This was a new facility. On 24 April 2020 a business term loan agreement was entered into in the amount of R9 700 000.00 which was a consolidation of all the debt into one.

[9] She testified that the overdraft was always at the limit and not supported by any turnover going into the account. The total debt was R9 650 000.00. On 4 February 2022 she addressed a letter to Defendants in respect of the account being in default. There were attempts to sell the farm but this was not successful. This appears from a letter she wrote to them indicating that the purchaser was unable to secure the necessary funding. On page 9 is a letter she addressed to Defendants setting out exactly how they were in arrears and what the shortfall was. On 26 April 2022 a business rescue plan was prepared and provided to Plaintiff after Chiffon went into business rescue. The farm was thereafter sold on an auction. An amount of R9 050 923.00 was received from the business rescue auction. The payment was transferred to the business term loan account. It left a balance in the business term loan account of R1 316 989.00.

[10] Plaintiff voted in favour of the business rescue and that the property was to be sold. The conditions were not met by a prospective purchaser and the business rescue practitioner granted an extension of 2 months but the person could not obtain the necessary finance. An amount of R73 539.00 was later paid to Plaintiff.

[11] During cross examination by First Defendant she testified that Chiffon had been placed on a watch list by October 2021. She was aware that the farming operation was bought for R23 000 000.00 but was unaware of the number of employees. It was stated that it was more than 50. It was put to her that Chiffon was a shelf company when the medium-term loan was granted to it and that the National Credit Act therefore applied. He questioned whether the business loan document and the medium-term

document listed the same borrower and she responded that it was indeed so as they both related to Chiffon. It was put to her that it was in the new agreement that a R12 000 000.00 limit was placed on the suretyship. She testified that most of the terms were the same.

[12] There was a consolidation of the business loan. It was put to her that a new account was opened but there was no physical transfer that took place. The same business and repayment remained after 2020. The medium-term loan was signed before the sale agreement was signed. It was put to her that the amount of the overdraft increased as appears from pages 183 and 210 of bundle 3. Also from page 220 and page 249. He referred to various other pages indicating the amounts that were granted in terms of the overdraft, the medium-term loan and the business term loan. He also put to her that the interest rate increased as could be seen from various documents. It was put to her that the increase in the interest rate reduced the cash flow and increased the payments that had to be made. The sale conditions by the business rescue practitioner did not set any reserve price. It was the practitioner who valued the property. The sale price which was realised was much lower as it was only R10 500 000.00 as no reserve price was set. In re-examination it was stated that the 2020 business term loan consolidated the overdraft of R1 600 000.00 as appears at page 411. That was the case for Plaintiff.

[13] First Defendant testified that the borrower was a shelf company. It had no assets when the loan was signed on 28 May 2013. Plaintiff had no balance sheet to assess their credit. This was contrary to the National Credit Act. Plaintiff did not approve Defendants for verification, nor did Plaintiff request Defendants to provide any information at the time. The medium-term business loan was not a new agreement but a consolidation to finance the purchase of the farm. It was not a new agreement but a restructuring of the existing one. Nothing changed and there was no intention to vary the loan. The suretyship signed for Barrington's loan should have been prevented by the Plaintiff. These conditions were in their agreements. Barrington's bond of R8 000 000.00 was a sub agreement prohibiting Plaintiff from taking legal action against Defendants as it was subordinate.

[14] Amounts were paid to Plaintiff from inception to February 2022. Interest and capital was paid. Plaintiff made a profit out of all these loans. They recovered their capital and interest. Defendants had a home in America, the proceeds of which was to be used to settle Barrington's but it did not sell. They relocated to live on the farm in 2017. Second Defendant joined him during 2017. They lost their American income but the farm started doing better after he took over the management of the farm in 2017. In 2018 their home in the United States which had been on the market for 6 years could not be sold and the bank foreclosed on it. They accordingly lost all their equity in the United States. They invested R5 500 000.00 into the farm. They exhausted all their savings and put in another R6 000 000.00 to keep the farm going. They lost over R25 000 000.00.

[15] The farm was sold during November 2022. Defendants wanted to wind down the piggery but this was not accepted by the business rescue practitioner. They were still living on the farm at the time of the sale but as a result of the auction they had to move. Plaintiff agreed to all of this. A reserve price could have been negotiated. During cross examination by Second Defendant he testified that they wanted to do a wind down of the piggery. Plaintiff knew about it but did not agree. Barrington's had a notarial bond and they reached a settlement with Barrington. The purchaser did not want to run the piggery and therefore ran it into distress.

[16] During cross examination First Defendant testified that none of the agreements were in dispute and that the funds had all been advanced. He also agreed that he placed Chiffon into business rescue and that that was finalised. Standard Bank and Barrington's were paid and the amended certificate of balance was produced. He further agreed that the first and second special plea was no longer an issue. He agreed that the parties were Plaintiff and Chiffon. First Defendant was referred to various of the paragraphs in their plea and admitted that much of it fell away as the business rescue was now completed. He did not dispute that Chiffon fell into arrears. However the special plea that they had to be given notice in terms of the National Credit Act remained in issue.

[17] There was also a counter claim from Defendants that Plaintiff's claim be dismissed due to reckless lending and non-compliance with the relevant provisions of the National Credit Act. Further in the alternative that the credit agreements were void or unenforceable. Further alternative that Plaintiff's reliance on the various documents and the facility letters were *contra bonis mores* and unconstitutional and that the suretyships should be cancelled.

[18] It was put in cross examination that the terms which were pleaded in the counter claim related to the 2013 agreements, that he had signed all of them, that he did not dispute the 2020 agreement which Defendants also signed to rationalise all the debt. He was of the view that not all the agreements were before court. He agreed that the business rescue plan was published and adopted and that the property had to be sold by auction. He testified that the business practitioner did the apportionment and did not allow the winding down of the piggery. It was put to him that Chiffon was a juristic entity which he agreed to and that when the 2020 agreement was signed, the net asset value exceeded the threshold. He however expressed the view that when the 2013 agreements were signed Chiffon assets did not exceed the threshold. The suretyships was in respect of all present and future debt. It was put to him as the amount was more than R250 000.00 it was a large credit agreement and the National Credit Act was therefore excluded. First Defendant was of the view that in 2013 the National Credit Act was not excluded and that position continued. It was put to him that the interests rates were increased, that he signed the agreements and accepted them. It was further put to him that the general terms are the same in all the agreements and that the interest rates were agreed upon. He contended that they were agreed to under duress as he had no choice. That was the case for Defendants.

[19] Defendants in their plea plead that no credit assessment of Defendants were made and pleads that Chiffon was still under business rescue and more would still be paid to Plaintiff. All of this has however now been overtaken by time as the business rescue was concluded and the assets sold and a further amount paid to Plaintiff.

[20] It was submitted on behalf of Plaintiff that there were various agreements entered into between Plaintiff and Chiffon and that Defendants signed suretyship in respect of these loans. After Chiffon was placed into business rescue the sum of R9 050 923.00 was paid to Plaintiff and a further amount of R73 539.17 some time later. It was submitted that the third and fourth special pleas related to the National Credit Act, that there was no compliance with section 129 of the Act in that the requisite notices were not sent and that a failure by Plaintiff to perform an assessment before a conclusion of the suretyship was reckless credit. It was submitted that the provisions of the National Credit Act applied to a suretyship where the National Credit Act applies. It was submitted that the National Credit Act was excluded in that at the time that the agreements were entered into Chiffon was a juristic entity whose asset value or annual turnover exceeded the threshold at the time of R1 000 000.00. Further that if the asset value or annual turnover of Chiffon was below the threshold then it was large agreement. I was referred to the decision of First Rand Bank Ltd v Carl Beck Estates 2009 (3) SA 384 (T) at paragraph 13. It was submitted in light thereof that the special pleas should be dismissed.

[21] It was submitted that on the merits Defendants accepted under cross examination that the only issue that remained was whether Chiffon was given notice of the breach. It was however submitted that there was no such duty on Plaintiff to do so.

[22] It was submitted that as far as the counter claim was concerned that various alternatives were pleaded which placed statutory duties upon Plaintiff which it disputed and denied that there were such legal duties on Plaintiff and could not be relied upon. Further that Defendants failed to discharge the onus in respect of such claims. It was submitted that the agreements entered into in 2013 were not in issue at this stage. It was submitted that Plaintiff was not required to take steps to maximise recovery of the business rescue process. It was submitted that the other alternatives should also be dismissed. This was so because there was no claim in law for these. It was therefore

submitted that judgment should be given as prayed save that the amount in claim 2 had to be reduced and interest to be calculated from 7 August 2023.

[23] It was submitted on behalf of Defendants that the National Credit Act applied in 2013 and that it therefore applied for life and that it continued to apply throughout all the transactions between the parties. It therefore also applied to the loan agreement concluded in 2020. Accordingly it would also apply to the suretyships which were signed. No due diligence had been done to see that their financial position was sufficient and no issue was taken as to the pool of earnings. The key terms remained the same and there was no cancellation clause. The interest rate was increased. It is the same bond. There was no novation and that the variation was reckless to grant the further loans and was therefore not enforceable. Section 129 notices had to be given and this was not done.

[24] During argument First Defendant presented a document headed NCA for the Bench in which various legal issues were raised. None of these were raised in the pleadings. The parties were then granted leave to file additional written arguments on legal issues if they so wished. This had to be filed by 29 August 2025.

[25] The issues in the document with heading NCA for Bench can be summarised as follows. Section 4 of the National Credit Act fixed the threshold at signature. At the time it was zero. Section 10 keeps small business finance in the Act, that the suretyships are always regulated and that the 2020 facility is a variation and the once in always in principle applies meaning that as it was regulated by the National Credit Act in 2013 it was still regulated at that stage. Plaintiff's failure to comply with the requirements of the National Credit Act renders the enforcement of the suretyships unlawful.

[26] Plaintiff lent the money recklessly and ignored its duties under the National Credit Act. It did not perform a due diligence of Defendants financial capacity and that

it increased the debt and the interest rate while the company was in distress. It was submitted that the suretyships should be declared unenforceable. It placed a disproportionate burden on indigent sureties. There was unjust enrichment and constitutional violations. It also referred to various decisions which I am not going to repeat herein as I am of the view that they are not relevant to the present proceedings. It was also submitted that the spirit of Ubuntu should be applied. It was submitted that the decision of Absa Bank v De Beer 2016 JOL 36839 (GD) reinforces the principle of reckless credit that it does not just result from not conducting an assessment but by continuing to lend despite evidence of collapse.

[27] Plaintiff submitted in reply that even if the National Credit Act applied in 2013, which is denied, then it did not apply to the subsequent agreements as Defendants admitted that when the subsequent agreements were concluded the principal debtors assets exceeded the threshold thereby excluding the National Credit Act. It was submitted that the argument that the National Credit Act does not apply to the suretyship agreements does not accord with the decision of in Carl Beck. It is further submitted that Plaintiff had no duty to verify figures provided by the seller to Defendant and the alleged noncompliance with the terms of the agreements. There was no obligation on Plaintiff to force the business rescue practitioner to obtain a higher price during the sale of the property.

[28] It was submitted that the Rule 16A constitutional defence raised by Defendants did not challenge the constitutionality of the contract but merely based it on fairness and enforcement. Defendants accepted in correspondence and in evidence that if they were in a position to pay the indebtedness they would have done so. It would therefore be improper to preclude Plaintiff from enforcing its contractual provisions which are not disputed.

[29] The submissions on behalf of Plaintiff dealt with various of the decisions which Defendants referred to and it was submitted that none of the cases were relevant to

the present proceedings before court. I agree. It would not be of any assistance to deal with each of these cases.

[30] In the present matter it is common cause between the parties that Plaintiff made various loans and overdraft facilities available to Chiffon of whom Defendants were directors and that they signed suretyships. It is not disputed by Defendants that the whole amount owing to Plaintiff was not settled in full. It is Defendants contention that there was no reserve price set for the auction of the farm by the business rescue practitioner. It appears that at first there was a purchaser to whom extra time was given to find the necessary finance but that he was unable to obtain the necessary finance. An auction was then held where the farm was sold. Payments were then made to Plaintiff and after receiving such payment what was still owing to Plaintiff are the amounts which are now being claimed in the particulars of claim.

[31] There is no provision for a reserve price to be set when a property of a company which is under business rescue is sold. Even in cases in terms of section 46A of the Rules of the High Court a reserve price is not a requisite. It is in the discretion of the presiding officer to decide whether a reserve price is to be set or not. Accordingly in the present case there is no case against Plaintiff because they did not demand that a reserve price be set. It would appear that Defendants complaint is more against the business rescue practitioner for allowing the farm to be sold at what it deems a low price rather than against Plaintiff.

[32] Defendants have raised numerous arguments in terms of the National Credit Act referred to above and I have attempted to deal with the most pertinent ones above. However it is not feasible to deal with each one of them and the issues raised in the document marked NCA for Bench. These issues were not pleaded and also are not relevant to the issues which have to be decided in this matter. In considering all the arguments raised on behalf of Defendants it would appear that the main defence is firstly that the National Credit Act applied in 2013 when the agreement was entered into as the company was a shelf company, owned no assets and accordingly fell under

the National Credit Act and section 129 notices should therefore have been sent to them. Secondly that once the National Credit Act applied this continued to apply throughout until the end and therefore still applied in 2020.

[33] As contended by Plaintiff a new agreement consolidating all the different agreements with Chiffon was concluded in 2020. Based on that agreement are the claims which has been instituted by Plaintiff. When that agreement was entered into it is not in dispute that the National Credit Act applied as the company was a juristic person and its assets value exceeded R1 000 000.00. Because the National Credit Act then applied it also applied to the suretyships of Defendants which accompany the said agreement. Accordingly the National Credit Act therefore also does not apply to the suretyships.

[34] From a consideration of all the different agreements which were entered into between Plaintiff and Chiffon over a period of years it is apparent that on each occasion there was a new agreement entered into increasing the amount available to Chiffon and also that due to the risk factor the interest rate was increased on certain occasions.

[35] In the case of *First Rand Bank Ltd v Carl Beck Estates (Pty) Ltd*. 2009 (3) SA 384 (TPD) it was held at paragraph 13:

“In short, whatever the asset value or annual turnover of the first respondent, the provisions of the NCA do not apply to the credit agreement entered into between the parties. As a juristic person, the first respondent has entered into a large credit agreement. One of the exemptions must apply to the first respondent, either the value or turnover exceeds the threshold and subsection (a) exempts the applicants of the NCA to the agreement or the value or turnover is below the threshold and subsection (b) exempts the application of the Act.”

It continued in paragraph 15:

“In the result the provisions of the NCA cannot and do not apply to the agreement entered into between the applicant and first respondent and accordingly the applicant was not obliged to provide the first respondent with the notice in terms of section 129 before instituting legal proceedings.”

[36] Accordingly as set out clearly in paragraph 13 above the fact that Chiffon was a shelf company did not matter as, it was a juristic person and it entered into a large agreement as the original amount was for R9 000 000.00 in which case a bond was also registered over the farm property. Accordingly there was no need for Plaintiff to provide any notice in terms of section 129 of the Act as the National Credit Act did not apply.

[37] In the matter of Sifiso Ndiya Mbombi and Another v BMW Financial Services South Africa 2025 (ZAFSHC) 98 (28 March 2025) the Free State High Court referred with approval to what was said in the Carl Beck case. It held in paragraph 22:

“Since the Act does not apply to the credit transaction which gave rise to the principle debt, the suretyship in the present matter does not constitute a credit agreement for purposes of the Act.”

It further held that it was not necessary for the applicant in that matter to give notice in terms of section 129 as it was a large credit agreement.

[38] The counter claim which has been instituted by Defendants has no basis and does not make out any case for the agreements to be set aside. The issues therein are similar to that which appear in the defence to the main action and therefore on the same basis the counter claim can also not succeed.

[39] The various legal defences raised by Defendants unfortunately, in my view, do not constitute any grounds to set aside the agreements nor the suretyships. As already stated it is not disputed that the agreements were entered into. It is not in dispute that the money was owing. It is not in dispute that it was not paid and is also

not in dispute that the suretyships were signed. Also it is clear from the decisions which I have referred to that the National Credit Act does not apply in the present case. Accordingly that defence cannot succeed and therefore also not the defence that no section 129 notice were received. The spirit of Ubuntu in my understanding also does not provide for the writing off of debt owed.

[40] It may be unfortunate that the business rescue practitioner accepted a price at the auction which was not sufficient according to Defendants. That is however not something for which Plaintiff is responsible. That is something which Defendants should have taken up with the business rescue practitioner at the time. Chiffon was placed into business rescue at the instance of Defendants. It is also apparent from the evidence that this was not done lightly by Defendants and that it would appear that it was a decision which had to be made in an attempt to settle the debts of Chiffon for which they had stood surety. Although one may have sympathy with Defendants the Plaintiff's claims must succeed.

[41] Summons was issued on 15 May 2023. In respect of claim 2 an amount of R2 846 752.77 is claimed. It was conceded by plaintiff that an amount of R73 539.17 was received by them on 7 August 2023. Thus after summons was issued and it was conceded that this should be deducted from the amount in claim 2. If this is done it leaves an amount of R2 773 213.54 (R2 846 752.71 – R73 539.17) thus the amount for which judgment must be granted.

Accordingly the following order is made:

Judgment is granted against First and Second Defendant jointly and severally the one paying the other to absolve for:

1. Claim 1:

(a) Payment of the sum of R1 264 411.65

(b) Interest at the rate of 2.15 % above Plaintiff's prime interest rate (currently 11,25 % from 25 April 2023 to date of final payment both dates inclusive.

2. Claim 2:

(a) Payment of the sum of R2 773 213.54

(b) Interest at the rate of 3,75 % above Plaintiff's prime interest rate from 7 August 2023 to date of payment.

3. Costs of suit.

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P C BEZUIDENHOUT J.

JUDGMENT RESERVED ON:

29 AUGUST 2025

JUDGMENT HANDED DOWN:

17 DECEMBER 2025

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