

SOUTH AFRICA / JUDGMENT

# Changing Tides 17 (Pty) Ltd N.O v Congwane (2015/94919) [2016] ZAGPJHC 128 (30 May 2016)

[2016] ZAGPJHC 128

## COURT

South Gauteng High Court, Johannesburg

## BEFORE

Spilg

## CASE / FILE NUMBER

2015/94919

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## Policy

## GAUTENG

## DIVISION, PRETORIA

## CASE

## NO: 2015/94919

## DATE:

30 MAY 2016

In

## the matter between:

CHANGING

TIDES 17 (PTY) LTD

N.O.....Applicant

And

CONGWANE,

KEFENTSE

MARTHA.....Respondent

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## JUDGMENT

SPILG, J:

## INTRODUCTION

1. This is an application for default judgment in which the plaintiff, described as Changing Tides 17 (Pty) Ltd N.O. ('Changing Tides'), seeks a money judgment for the full outstanding balance owing on a credit agreement signed by the defendant. It also seeks to levy execution on her residential property which was provided as security.
2. As with most, if not all Changing Tides applications of this nature, it is not based on a standard home loan agreement concluded by a financial institution as plaintiff directly with a defendant credit receiver.
3. To simplify the nature of the transactions involved I will refer to the credit provider as the lender and the credit receiver as the borrower.
4. Changing Tides is not the lender. The lender is Blue Banner Securitisation Vehicle RC1 Proprietary Ltd, its successors in title and assigns ("Blue Banner). The South African Home Loans Guarantee Trust (formerly known as the Guarantee Trust) and which will be referred to as "The Trust" stands as guarantor to Blue Banner for the liability of the borrower, ie. the defendant, under the loan. In turn the defendant indemnifies the Trust and provides his or her immovable property as security for due performance of its indemnity.

The defendant accordingly continues to repay the monthly instalment under the loan to Blue Banner. Changing Tides features as the plaintiff because it is the trustee "for the time being"[1] of the Trust.

The suite of agreements required to implement the immediate transaction for the loan comprise the loan agreement between Blue Banner and the defendant, a guarantee given to Blue Banner by the Trust in respect of the specific loan to the debtor on terms which are contained in a main or umbrella agreement, an indemnity given by the defendant to the Trust and an indemnity bond provided by the defendant over her residential property. In all the agreements Changing Tides acts as trustee for the Trust. It is evident therefore that each agreement is dependent on the other and forms an integral part of a larger transaction.

5. The particulars of claim allege that both the Trust and Blue Banner are credit providers under sections 40 and 45 of the National Credit Act 34 of 2005 ("the NCA"). Changing Tides is not alleged to be a credit provider. I leave open whether Changing Tides is a credit provider or whether it is necessary for Changing Tides to allege sufficient facts to show that it is not. I did not raise the issue and will assume that it is not obliged to register as a credit provider.[2]

## THE CAUSE OF ACTION

6. Changing Tides in its capacity as trustee for the Trust sues the defendant on the grounds set out below.
7. It avers that on 31 March 2014 and in writing Blue Banner as lender advanced to the defendant as borrower an amount of R504 000 which was to be repaid together with interest and finance charges in an amount of R5 060.42 per month over a period of 20 years.

At that time the total amount repayable inclusive of finance charges and other costs was estimated to be R1214 501.28.

8. The plaintiff alleges that, as an express condition, the loan was to be guaranteed by the Trust and that an indemnity bond acceptable to the Trust and Blue Banner would be registered over the defendant's residential property in favour of the Trust as security for the indemnities the Trust was to provide to Blue Banner.
9. On 14 April 2014 the Trust issued written guarantees in favour of Blue Banner in terms of which it was obliged "should the Lender so require it (as the Lenders have in this case) to settle such guarantee obligations by effecting recovery from the Defendant in terms of the indemnities as set out below and to pay over such sums to the Lender".
10. A copy of the written Indemnity executed by the Defendant in favour of the Trust and dated 31 March 2014 was attached to the claim.
11. It was alleged in the particulars that, in terms of the indemnity, the defendant indemnified the Trust as a "separate and independent primary obligation from and against any loss, cost, claim, expense or liability of any kind incurred or to be incurred by the Trust as a result of the Defendant failing to duly pay and punctually perform any of his (sic) obligation under the loan and the Trustee is deemed to have suffered a loss and incurred a liability as a result thereof equal to the amount claimable by the Lender" (emphasis added).
12. Furthermore in terms of the indemnity the defendant undertook to pay the amount due to the Trust on written demand upon which the Trust became entitled to enforce its rights under the indemnity in its own name and on its own behalf.
13. As security for her obligations to the Trust under the indemnity the defendant authorised the registration of an indemnity bond.
14. It was a further term of the indemnity that the amount of the defendant's indebtedness could be proven 'prima facie' by "a Certificate signed by any Manager, Trustee or Accountant of the Trust. It shall not be necessary to prove the identity and/or

appointment of the person signing such Certificate."

The certificate was attached. The material portions for present purposes read;

'SA Home Loans (Proprietary) Limited, ... herein represented by Mlamuli Jimmy Duma in his/her capacity as its duly authorised

representative) in its capacity as the duly appointed Manager of SA Home Loans of South African Home Loans Guarantee Trust ... ('the Trust') certifies that Ms Martha Congwana is indebted to the Trust:

(then follows the amounts)

Dated at Durban on this the 29th day of July 2015

SA HOME LOANS (PTY) LTD

(herein represented by Mlamuli Jimmy Duma) in its

Capacity as Manager of SA Home Loans of SOUTH

AFRICAN HOME LOANS GUARANTEE TRUST.... “

15. It is then alleged that the indemnity bond was duly registered and that all the conditions to which the loan agreement was subject were timeously fulfilled and the Lender performed all of its obligations.
16. However it was stated that the defendant failed to fulfil her obligations under the loan by falling into arrears, which were R19 084.53 at 29 July 2015 and which remained unpaid despite demand.
17. Then follow allegations that a written notice complying with section 129(1) (a) of the NCA was duly sent to the address nominated by the defendant in the indemnity and that the defendant remains in default.
18. The plaintiff also avers that as a result of the defendant's default the “Trust is subject to a lawful claim by the Lender requiring it to discharge its guarantee obligations as alleged and in respect of which the defendant is now liable to it in the sum of R513 491.32 together with interest from 15 July 2015 to date of final payment and as determined pursuant to a Certificate.”

The certificate is the one mentioned earlier.

19. It will become apparent that liability by the defendant under the indemnity to the plaintiff is dependent on the terms of the guarantee provided by the plaintiff to Blue Banner. This was not attached. At the hearing I requested it.
20. The court was subsequently provided with a document addressed to Blue Banner “its successors-in-title and assigns” headed “ Guarantee” which recorded that :

*“The Trustee for the time being of the South African Home Loans Guarantee Trust ... (“Guarantor”) and Blue Banner*

Securitisation Vehicle RC1 Proprietary Limited its successors-in-title and assigns (“Creditor”) have entered into a Common Terms Agreement (“the Agreement”) dated 17 September 2001, as amended, novated and/or replaced from time to

time. In accordance with, and subject at all times to, the terms of that Agreement, other than clauses 3.2, 3.4, 3.5 and 3.6 (which shall on execution hereof, form a part of and be deemed to be incorporated herein), in consideration for the Debtor referred to below granting an Indemnity to, and registering an Indemnity Bond in favour of, the Guarantor, and with effect from the date of registration of the relevant Indemnity Bond granted by the Debtor to the Guarantor over the Property, the South African Home Loans Guarantee Trust hereby guarantees the due and punctual payment of all sums which are now and which may subsequently become due by the Debtor referred to below to the Creditor pursuant to the Home Loan Agreement entered into between the said Debtor and the Creditor as amended, novated and/or replaced from time to time.

Unless the context requires otherwise, terms defined in the Agreement shall bear the same meaning when used in this Guarantee.

Name of Debtor:

Kefentse Martha Congwana

Description of Property: [Erf 2..... S..... T.....]

Value of bond to be registered: R570 000

Signed at Pretoria on 14 April 2014.

for or on behalf of The South African Home

Loan Guarantee Trust”

21. It is evident from this document that the full terms of the guarantee were not furnished to the court. The material terms are contained in another document identified as The Common Terms Agreement of 17 September 2001 and its amendments.

Accordingly the court has no knowledge of the terms under which the Guarantee was given, how the consideration was determined, whether Blue Banner called up the guarantee and if so in what amount[3], or what amount exactly would have to be paid by the Trust to Blue Banner if the debtor defaulted.

In this regard it should be borne in mind that it is not the lender who is suing for either the arrears or the full accelerated balance that is outstanding under the loan agreement; it is the trustee of the Trust suing in terms of the indemnity. Furthermore it appears that the indemnity in its terms does not state that the guaranteed amount is equal to the liability of the borrower to the lender. It only refers to loss or liability and the like that has been or might be incurred by the Trust, if the borrower defaults, and which are deemed equivalent to the amount claimable by the lender from the Trust under the guarantee.

22. The defendant’s liability to Changing Tides is dependent on the indemnity. The entitlement to call up the indemnity is dependent on Blue Banner calling up the guarantee. In its terms the indemnity is a separate primary obligation owed by the borrower to the Trust which is in

addition to the obligation such borrower continues to owe to the lender under the loan. This has serious ramifications for the borrower if the Trust or Changing Tides (which is a separate juristic person) is wound-up or placed under business rescue after Changing Tides as plaintiff, has recovered its claim from the defendant under the indemnity or has sold the hypothecated property in execution.

23. Moreover Blue Banner holds itself out as a securitisation vehicle while neither it nor the Trust is a bank since they do not bear the requisite title in their names nor do they appear to be deposit taking institutions.
24. The construction of the terms of the guarantee is further cause for concern if regard is had to the disconnect between the actual amount that the Trust might be liable for under its guarantee to the lender and the amount the borrower remains liable for under the extant loan agreement. It is not the usual form of guarantee for the full amount, nor is the indemnity couched in unequivocal terms. It therefore appears that the guarantee given by the Trust to Blue Banner is not necessarily coextensive with the liability the borrower incurred to the lender on default.
25. Accordingly the Common Terms Agreement should have been produced when requested by the court. The plaintiff has given no explanation as to why this was not done.

Moreover if the plaintiff cannot rely on the deeming provision in the indemnity then it will have to set out in its particulars the actual amount of liability owed by the Trust to Blue Banner and introduce the necessary allegations regarding the calling up of the guarantee and the amount called up. The way it has currently pleaded is equivocal and unacceptable<sup>[4]</sup> for the reasons set out later it cannot rely on the deeming provision.

#### DEFENDANT'S LIABILITY TO THE TRUST AND TO BLUE BANNER

26. The Defendant can only be liable to Changing Tides in respect of the liability that the Trust had undertaken as guarantor for the defendant's obligations to Blue Banner.
27. The structure of the transaction separates the loan from the bond. Furthermore the bond is not provided as security for the loan owed to Blue Banner but as security for the indemnity the borrower provides to the Trust. It is therefore not accessory to the principal obligation owed by the borrower under the loan finance. It is accessory to the indemnity. I did not invite plaintiff's

counsel to address me on the consequences if the borrower, after judgment but prior to a sale in execution is able to pay up the

arrears. Accordingly it is not an aspect that should be dealt with in the absence of full argument and a consideration of section 90 of the NCA against the full suite of agreements<sup>[5]</sup>.

28. The transaction is one where Blue Banner appears to have either factored its debtors' book to the Trust and the Trust holds the bond, or the Trust is used as a special purpose vehicle (SPV) to pool together or bundle the value of the loans into tradable securities which are then on-sold to institutional investors in the capital markets.
29. In consequence the amount that the Trust will be obliged to pay Blue Banner under the guarantee will either be less than the amount under the loan agreement or the Trust will be procuring a profit in trading the loan as part of a package, thereby reducing its own liability under the guarantee, which may or may not be taken into account in the overall set-offs between Blue Banner and the Trust under the main or umbrella guarantee agreement.
30. In short the court is left in the dark in a case where at face value the original loan may have been traded and therefore cannot be produced. The court is also asked to be satisfied with a deeming provision and a certificate relating to the actual liability owed by the Trust to the lender in circumstances where there remains a full right of recourse by the original lender against the borrower (even after the bonded property is sold) for any difference between the amount that the Trust is obliged to pay under its guarantee to the lender on the one hand and the borrower's liability to the lender on the other.

Nowhere do any of the agreements provided to the court indicate that a payment by the Trust under the guarantee will discharge the separate debt owed by the borrower to the lender. This also appears unlikely if regard is had to the way the transactions would have to be structured in order to facilitate securitisation.

31. The indemnity agreement attempts to shore up the discrepancy by reference to a deeming provision. I accept that this position tries to distil the commercial rational for the elaborate loan structure and number of parties. Nonetheless a court would be ignoring the purpose of section 3 of the NCA if it turned a blind eye to the risks inherent to the consumer where the actual terms of the

guarantee and the actual liability of the Trust to the lender are not disclosed, but where the borrower remains potentially exposed to the lender directly.

32. Securitisation has obvious advantages such as potentially reducing the cost of credit and making loans more accessible by spreading, hedging or otherwise discounting risk. In the article "Note on the impact of securitisation transactions" co-authored by N Gumata and J Mokoena, which was published in the South African Reserve Bank's quarterly bulletin of December 2005 at pp60-61, four advantages were mentioned and explained:
  1. More efficient financing and profit maximisation. Securitisation may be used to lower the firm's weighted average cost of funds. This is possible as highly rated debt can be issued into capital markets with strong investor demand driving down financing costs.

2. Improved balance sheet structure and financial ratios. Securitisation can enhance managerial control over the size and structure of a firm's balance sheet. For example accounting de-recognition of assets (i.e. removal from the balance sheet) can improve gearing ratios as well as other measures of economic performance such as return on equity, and in a banking environment can also curtail costs attached to bank intermediation such as those arising from cash reserve requirements.
3. Improved risk management. Securitisation often reduces funding risk by diversifying sources of funds. Financial institutions also use securitisation to eliminate interest rate mismatches.
4. Lower economic and regulatory capital requirements. Securitisation also releases capital for other investment opportunities. This may generate economic gains if external borrowing sources are constrained, or if there are differences between internal and external financing costs.
33. The article identified two types of securitisation; traditional and synthetic. These are described as follows at p60:

*“A traditional securitisation scheme involves the legal and economic transfer of assets to a special-purpose vehicle (SPV) issuing*

asset-backed securities that are claims against a specific asset pool. In such a scheme, different classes of asset-backed securities

may be issued, and each class has a different priority claim on the cash flows originating from the underlying pool of assets. Under a traditional securitisation scheme a true sale takes place and all rights and obligations are transferred to the SPV. This is the type of securitisation scheme that typically affects the measurement of the bank credit aggregates.

A synthetic securitisation scheme, on the other hand, refers to a structured transaction whereby an institution uses a portfolio of credit derivative instruments to tranche and transfer the credit risk and/or market risk associated with a specified pool of assets to the SPV. The resulting credit exposures have different levels of seniority. Under a synthetic securitisation scheme, the underlying assets are not necessarily moved off the originator's balance sheet”

34. . There are however some significant downsides for the consumer. The one surfaced in *Changing Tides 17 (Pty) Ltd NO v Vitex Investments 878 CC and Another* )

[2012] ZAGPJHC 273 where Dodson AJ found that a purported counter-claim against the Trust, based on its failure to provide the

full finance required as allegedly undertaken, could not be sustained against Changing Tides since it was claiming on the indemnity in respect of the portion of finance actually provided by it through Blue Banner (which the defendant alleged represented only 30% of the finance the Trust had undertaken to provide)[6]. Irrespective of the merits of the defence raised, it exposes the difficulty that the borrower may not have recourse against either the Trust or the lender when sued on the indemnity (leaving aside that Changing Tides claims to be the trustee for the Trust).

35. The facts of Vitex also suggest the potentially opaque nature of the transactions since only the loan agreement and the indemnity are provided although, on the allegations made, the Trust itself appeared to be the borrower's first point of contact before the suite of agreements were structured to facilitate both the loan and its securitisation.

Vitex also brings into focus whether Changing Tides is an associated company for the purposes of sections 40(1) to

- (3) of the NCA.

36. Another potential disadvantage is that the borrower remains exposed to the lender since the indemnity agreement is a "separate and independent primary obligation" (see earlier) with no comfort being given to the borrower that payment to Changing Tides under the indemnity agreement will extinguish the borrowers debt to the lender[7].

37. This puts the borrower in jeopardy should Changing Tides or the Trust be placed under winding up or business rescue. Moreover the Trust may replace Changing Tides as the trustee if regard is had to the wording of the Guarantee.

38. Accordingly while there may be sound commercial advantages to securitise and its features may promote the broader availability of loans, which is one of the objectives of the NCA[8], it raises concerns in respect of the deeming provision contained in the Indemnity. In particular it appears to manifest an imbalance in negotiating power (see section 3(e) of the NCA), it may adversely impact on one of the other objects of the NCA (see section

90(2)(a)(i)), it may have the effect of waiving or defeating the borrower's rights under the NCA or the common law (under

sections 90(2)(b) and (c)) and, in light of the facts in Vitex, the deeming provision may have the effect of limiting the liability of both credit providers' for any representation made on their behalf under section 90(2)(g).

39. In the present case it would be remiss of the court to ignore these issues, especially if regard is had to the duty imposed on it under section 90(4) of the NCA[9] .
40. It is therefore necessary that the relevant terms of the Common Terms Agreement and its variations are pleaded and attached. The deeming provision cannot act as the palliative. Aside from appearing to run counter to the basic tenets of the NCA it may also offend sections 48(1)(c )(i),(2)(a) (b) and (d) of the Consumer Protection Act 68 of 2008[10]

41. For the same reason it is necessary that the actual liability incurred by the Trust to Blue Banner is suitably alleged and demonstrated.

#### THE CERTIFICATE

42. Duma signed the certificate. He is also the deponent to the affidavit in support of default judgment. Duma claims in the affidavit that in his capacity as supervisor at SA Home Loans (Pty) Ltd he has possession or control of Changing Tides' files, documents, statement of account and the like relating to the action instituted against the defendant. Duma also states that, in particular, he examined electronic copies of the defendant's application for finance and supporting documents, the indemnity bond, contemporaneous notes of Changing Tides' staff together with system generated remarks concerning the conduct of the defendant's account with Changing Tides and detailed statements of account recording each debit and credit as well as a running record of "the outstanding balance due by the defendant's (sic) from time to time and the defendant's arrears".
43. It is difficult to appreciate how anyone could have a record of the conduct of the defendant's account with Changing Tides, since the defendant conducted its account with Blue Banner. Moreover the defendant's liability to Changing Tides is dependent on the amount which the Trust reflects as owed by the defendant to it under the guarantee.
44. Duma makes the position worse when later in the affidavit he states:
18. The defendant obtained the loan referred to in the Summons from the Plaintiff in order to acquire and/or improve the immovable property.....
45. Aside from the loan not being obtained from Changing Tides another glaringly incorrect statement made by Duma under oath is that the summons seeks judgment against "the First and Second Defendants, jointly and severally, the one paying the other to be absolved for the relief claimed ..." [11]. There is no surety sued.
46. It is evident that Duma could not have made these averments if he had examined the relevant records. Moreover it is evident that as a supervisor he has not been made privy to the basis of the transactions pursuant to which the defendant is sought to be held liable to Changing Tides. Aside from this, the fact that Duma believed that a surety was being sued after having regard to the documents he professes to have examined for the purposes of default judgment also demonstrates his lack of direct access to the actual files and overall records or lack of diligence in the function he was performing.
47. These factors militate against the court accepting the veracity of the certificate of indebtedness for purposes of constituting prima facie evidence of the outstanding amount. and it declines to do so. See generally *Senekal v Trust Bank of Africa Ltd* 1978
- (3) SA 375 (A) at 383A-C.

48. This finding makes it unnecessary to consider whether the decision by Dodson AJ in Vitex at paras 22 to 24 is clearly wrong. In that case it was held that the reference in the indemnity to the certificate being signed by a “manager, trustee or accountant” did not necessarily refer to a natural person. The reason given was that counsel could not point to any textual basis for such an interpretation other than the maxim *noscitur a sociis*.
49. Nonetheless I have certain difficulties with the decision. The history of certificates finds its origin in the acceptance that a natural person holding a senior position at a bank or other financial institution would, by reason of such position, understand the transaction in question and have access to the banks records. This would render the certificate reliable both as to the nature of the liability and its amount[12]. The certificate of indebtedness clause in the indemnity uses the terms “manager”, “trustee” and “accountant” which are consistent with a person who has adequate insight into the nature of the transactions even though he or she may not have personally dealt with the account. The next sentence in the clause (see para 14 above) also indicates that the reference in the first sentence to the certificate being “signed” means signed by an individual.
50. In my view the defendant when contracting could not have envisaged anyone employed by the managing company (whatever that might mean in the present context) or firm of accountants being able to sign the certificate. If that were so then a typist who might

have access to the account on her screen or even an office cleaner can sign the certificate if employed at the time by the Management

Company or firm of accountants.

It could never have been the common intention of the parties that in cases such as this, where the loan has obviously been securitised, a person can sign a certificate when he or she does not have a sufficient understanding of the transaction to know which files or transactional records are relevant. The reliability of the person scrutinising the records in order to sign a certificate is the underlying consideration for the clause, and the only qualifier found in the clause is that the individual signing is someone who holds the position of manager, trustee or accountant. At the least, the clause is ambiguous and the *contra proferentem* rule supported by an interpretation that gives effect to the underlying protection that the NCA is intended to afford consumers ought to prevail.

## ORDER

51. In making this order I do not suggest that the claim is free from any other defects. On the contrary I have alluded to some possible issues. I therefore do not intend this order to limit the hands of another court.
52. The following order covers only those issues I have expressly decided upon.
1. The plaintiff must amend its particulars of claim in accordance with the ratio of this judgment, which includes setting out;

- a. the necessary allegations regarding the terms of the guarantee identified as the Common Terms Agreement (with relevant variations if any) to afford the plaintiff a cause of action against the defendant based on such guarantees together with a copy thereof and any relevant amendments;
- b. the necessary allegations by reference to the Common Terms Agreement (and amendments if applicable) regarding when and in what amount the guarantee was called up by Blue Banner;
- c. precisely how the present amount outstanding is calculated;
2. The amendment together with a copy of this judgment is to be served on the defendant personally through the sheriff by way of a covering notice affording her 15 days within which to oppose the summons as amended;
3. Unless there is a notice of opposition the plaintiff may subsequently enrol the application again for default judgment provided an affidavit for default judgment is deposed to by a person who is suitably qualified and who can swear positively to the facts;
4. No costs are claimable against the defendant, whether directly or indirectly through debiting her account or otherwise, arising from the proceedings as from the date of taking instructions to institute proceedings up to and including the delivery of this judgment; the effect being that costs are only claimable upon the drafting of the particulars of claim in the amended form as directed by this judgment.

SPILG J

DATE OF JUDGMENT: 30 May 2016

FOR PLAINTIFF: Advocate – not noted

Strauss Daly Inc.

FOR DEFENDANT: No appearance

- [1] This is the manner in which the guarantor is described in the Guarantee dated 14 April 2014. See below.
- [2] In terms of the section 1 definition, a credit provider “ in respect of a credit agreement to which this Act applies, means- .... (i) any other person who acquires the rights of a credit provider under a credit agreement after it has been entered into; See also section 8 regarding what constitutes a credit agreement and section 40 regarding the registration of credit providers and the reference to associated companies.
- [2] In terms of the section 1 definition, a credit provider “ in respect of a credit agreement to which this Act applies, means-

....

- (i) any other person who acquires the rights of a credit provider under a credit agreement after it has been entered into;

See also section 8 regarding what constitutes a credit agreement and section 40 regarding the registration of credit providers and the reference to associated companies.

- [3] The allegation found in para 14 of the particulars is inadequate. It is simply a conclusion which in addition is couched in equivocal

terms and reads: “ As a result of the Defendant’s failure referred to above, the Trust is subject to a lawful claim by the Lender requiring it to discharge its guarantee obligations as alleged and in respect of which the Defendant is now liable to it in the sum of R.... and as determined pursuant to a Certificate as particularised below.” It should be mentioned that the Certificate does not purport to determine how the liability arises. It simply states that the defendant “is indebted to the Trust (then follows the amount and the rate of interest claimed on that amount until payment is effected) which indebtedness is presently owing, due and payable”

- [3] The allegation found in para 14 of the particulars is inadequate. It is simply a conclusion which in addition is couched in equivocal

terms and reads: “ As a result of the Defendant’s failure referred to above, the Trust is subject to a lawful claim by the Lender requiring it to discharge its guarantee obligations as alleged and in respect of which the Defendant is now liable to it in the sum of R.... and as determined pursuant to a Certificate as particularised below.”

It should be mentioned that the Certificate does not purport to determine how the liability arises. It simply states that the defendant “is indebted to the Trust (then follows the amount and the rate of interest claimed on that amount until payment is effected) which indebtedness is presently owing, due and payable”

- [4] The allegation is that there is “a lawful claim by the lender requiring it to discharge its guarantee obligations”. This fails to indicate with sufficient clarity whether the reference is to the term in the guarantee creating the obligation or an actual demand made, in which case it should have clearly pleaded this
- [5] See sections 290(3) and (4) of NCA. Section 129(4) (b) was applied in Firststrand Bank Ltd v Nkata 2015
- (4) SA 417 (SCA) at para 44
- [6] Changing Tides v Vitex art paras 7-11
- [7] The loan agreement and indemnity do not contain such a provision. Nor does the guarantee handed up (although the defendant would not be a party to that agreement).
- [8] See section 3 of NCA

[9] Section 90 (4): In any matter before it respecting a credit agreement that contains a provision contemplated in subsection (2), the court must-

- (a) sever that unlawful provision from the agreement, or alter it to the extent required to render it lawful, if it is reasonable to do so having regard to the agreement as a whole; or
- (b) declare the entire agreement unlawful as from the date that the agreement, or amended agreement, took effect,

[9] Section 90 (4):

In any matter before it respecting a credit agreement that contains a provision contemplated in subsection (2), the court must-

- (a) sever that unlawful provision from the agreement, or alter it to the extent required to render it lawful, if it is reasonable to do so having regard to the agreement as a whole; or
- (b) declare the entire agreement unlawful as from the date that the agreement, or amended agreement, took effect,

[10] Section 48 of the CPA: Unfair, unreasonable or unjust contract terms

(1) A supplier must not-

(c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer-

(i) to waive any rights;

(2) Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if-

(a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;

(b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable; ... or

(d) the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49 (1), and-

(i) the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or (ii) the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.

[10] Section 48 of the CPA:

Unfair, unreasonable or unjust contract terms

(1) A supplier must not-

- (c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer-
- (i) to waive any rights;
- (2) Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if-
- (a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;
- (b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;

... or

- (d) the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49 (1), and-
- (i) the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or
- (ii) the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.

[11] See para 12 of the affidavit

[12] See Senekal and the cases referred to. Compare the summary judgment cases which dealt with who could “swear positively to the facts”

such as Maharaj

v. Barclays National Bank Ltd 1976

(1) SA 418 (AD), Barclays National Bank Ltd. v. Love, 1975 (2) SA 514 (D) and more recently Rees and another v Investec Bank Ltd 2014

(4) SA 220 (SCA)

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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/changing-tides-17-pty-ltd-no-v-congwane-unknown-topic-agpjhc-2016>

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