

SOUTH AFRICA / JUDGMENT

Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another (56174/2007) [2008] ZAGPHC 423 (25 September 2008) [2008] ZAGPHC 423

COURT

High Courts - Gauteng

BEFORE

K. Satchwell

CASE / FILE NUMBER

56174/2007

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IN THE
HIGH COURT OF SOUTH AFRICA
(TRANSVAAL
PROVINCIAL DIVISION)
CASE NO: 56174/2007

In the

matter between:

FIRSTRAND
BANK LTD.
Applicant
and
CARL
BECK ESTATES (PTY) LTD
First
Respondent
CARL
BECK
Second
Respondent

JUDGMENT

SATCHWELL J:

Introduction

This application for summary judgment raises previously unexplored issues concerning the application of the National Credit Act, 34 of 2005, ('The NCA) to juristic persons and to credit guarantors. The judgment also deals with the entitlement of the plaintiff (by way of minus petitio) to portion only of the amount claimed. Finally, the issue as to whether notice of variations in interest had to be given in advance or not is decided.

Applicant seeks summary judgment against the respondents, jointly and severally, for the amount of R3 907 904.91 plus interest as well as an order declaring the first respondent's immovable property specially executable. Applicant holds a mortgage bond over first respondent's property by reason of money lent and advanced to first respondent by the applicant and in respect of which loan the second respondent bound himself as surety and co-principal debtor jointly and severally with first respondent for all debts of the first respondent.

The respondents do not aver that "the first defendant did not owe any monies at all in respect of the bond repayments at the time" ¹

In opposing the application for summary judgment, respondents have raised a number of challenges. Firstly, it is contended that the applicant has not complied with the provisions of the NCA which require notice to be given to consumers prior to commencement of legal proceedings. Secondly, they have challenged the knowledge of the deponent to the affidavit supporting the application for summary judgment. Finally, it is complained that no advance warning was given of changes in the variable interest rates agreed to be levied on the capital amount of the first respondent's indebtedness.²

Section 129 of the NCA

Section 129(1) of the NCA requires a credit provider to comply with certain procedures before commencing legal proceedings against a defaulting consumer.³ These procedures require, inter alia, that the credit provider give the consumer written notice of the default and propose referral to an entity which may resolve any dispute or result in agreement on a plan for full payment. Any approach by the credit provider to court must comply with certain time periods linked to the giving of such notice.⁴

It is common cause that the applicant gave no such notice to either of the first or second respondents.

Both respondents claim they were entitled to receive such notice: the first respondent claiming that the NCA applies to the credit agreement entered into between the applicant as credit grantor and the respondent as 'consumer'; the second respondent claiming that the NCA applies to the 'credit guarantee' by which the second respondent is bound.

The answer to these considerations are to be found in careful examination of the provisions of section 4 which regulates application of the Act to credit agreements into which juristic persons have entered.

Juristic Persons and the NCA

Credit agreements are distinguished by their nature and underlying causa as credit facilities, credit transactions, credit guarantees and combinations thereof.⁵ Credit agreements are also categorized by their nature and monetary thresholds as small, intermediate and large agreements.⁶

The NCA applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic,⁷ except for certain agreements specified in section 4 of the NCA⁸ Amongst those agreements to which the NCA does not apply are:

"...4(1)(a) a credit agreement in terms of which the consumer is-

a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related

juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7(1);

...

...

a large agreement, as described in section 9(4), 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 determined by the Minister in terms of section 7(1);

..."

It is common cause that the first respondent is a juristic person. The NCA has determined that the agreement between the applicant and first respondent is a credit agreement.⁹ The NCA has determined that a mortgage agreement is a credit transaction¹⁰ and that it is a large agreement.¹¹ Accordingly, the agreement entered into by the first respondent with the applicant falls under both subsection 4(1)(a) and subsection

(b) - as to which is of application is dependant upon the asset value or annual turnover of the first respondent is concerned.

No evidence has been led as to the asset value or annual turnover of the first respondent and therefore whether or not such value or turnover exceeds or falls below the threshold value determined by the Minister. Obviously, one of two possibilities must apply either the asset value or the annual turnover of the first respondent exceeds the threshold or it falls below the threshold.

If it is equal to or exceeds the threshold then the agreement is hit by the provisions of subsection (a) and the NCA does not apply. If it falls below the threshold then the agreement is hit by the provisions of subsection (b) and the NCA again does not apply.

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 application of the NCA to the agreement or the value or turnover is below the threshold and subsection

(b) exempts the application of the Act.¹²

The argument of Advocate Hindrichsen, who appeared for the applicant, that the asset value of the first respondent emerges from

the papers, is of no assistance since this point can be decided upon a reading of the Act.

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

Sureties and the NCA

The second respondent sought to rely on the argument that he, as a co-principal debtor, was a consumer to whom a notice in terms of section 129 was required to be given.

The second respondent entered into a suretyship agreement in terms whereof he undertook to bind himself in favour of the plaintiff for all the debts of the first respondent in an unlimited amount.¹³ He signed that suretyship undertaking as ‘surety and co-principal debtor’.

There is no doubt that the suretyship obligations of the second respondent theoretically fall within the definition of a credit

agreement which encompasses a credit guarantee¹⁴ in terms whereof “a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction...”¹⁵ However, section 8(5) requires the credit guarantee to apply to the obligations of another consumer in terms of “a credit

transaction to which this Act applies". I have already found that the NCA does not apply to the mortgage agreement between the applicant and the first respondent. Accordingly, the obligations of the first respondent to the applicant were not incurred in terms of a credit transaction to which the NCA applies. The second respondent therefore cannot claim that the NCA applies to him on the basis that his obligations arise in terms of a credit guarantee as set out in section 8(5) of the NCA.

Perhaps aware of this difficulty, the second respondent has submitted that he is a consumer in his own right; "...I am a private individual to whom credit was granted in terms of a credit agreement as contemplated in the Act. The fact that I am a co-principal debtor in respect of the debt in question renders it incumbent upon the Plaintiff to furnish me with the relevant notice and no such notice has been furnished to me".¹⁶ The second respondent appears to assert the status of debtor as apposed to surety and then to argue that the NCA applied to him and his credit agreement irrespective of that of the first respondent.

In this argument, the second respondent is misguided¹⁷. Following the reasoning of Trollip JA in *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) at 471, credit was, in fact, not granted to the second respondent. The loan finance granted and the mortgage bond agreement is and was between the applicant and first respondent. The second respondent was not advanced credit and did not become party to the contract between the applicant and first respondent. He did not contract with applicant to acquire credit himself or be a party to the agreement between applicant and first respondent.¹⁸

The second respondent signed as surety and co-principal debtor. The right enforceable by applicant against second respondent arises from the contract of suretyship. The contract between applicant and second respondent is separate and distinct from the bond agreement between applicant and first respondent, although it is accessory to it. The second respondent is not a consumer and did not receive credit. He is a guarantor of a consumer's obligations to a credit giver. Second respondent's contractual relationship with the applicant remains ancillary to the main agreement between the applicant and the first respondent.

The authorities on this point are clear. A surety who has bound himself as surety and co-principal debtor remains a surety whose

liability arises wholly from the contract of suretyship. Signing as surety and co-principal debtor does not render a surety liable in any capacity other than a surety who has renounced the benefits of excussion and division.¹⁹ As De Villiers CJ stated, "the use of the words 'co-principal debtor' does not transform the contract into any other than suretyship".²⁰

Second respondent could not be and was not sued in his capacity as co-principal debtor since his liability to the Bank remains that of surety who has renounced certain rights. This position is correctly referred to by the applicant in its summons.²¹

In the result, the second respondent is sued as a guarantor to the obligations of the first respondent in terms of a credit transaction

to which the NCA does not apply. He cannot claim that he is entitled to have received a notice in terms of section 129 of the NCA.

Objections to the Supporting Affidavit

The deponent to the affidavit accompanying the application for summary judgment is employed by the applicant as “Operations

Manager Arrears Legal”.²² It was stated that the second respondent never directly dealt with the deponent but with certain “Relationship Managers”.

Accordingly, it was argued that the deponent to the affidavit has no personal knowledge of the facts surrounding the dispute and his affidavit could not and did not comply with the requirements of the provisions of Rule 32.

This submission is without merit. In the present instance the deponent to the founding affidavit is the ‘Operations Manager

Arrears Legal’ which title clearly indicates knowledge of arrears in monies owing to plaintiff and legal responsibility

therefore. In the present case the deponent does not ask the court to rely on inferences to be drawn.²³ He states that the facts contained in the affidavit fall within his personal knowledge and are based on records and documents available to him. He is indeed pre-eminently the person who would have knowledge of the relevant facts.²⁴ It may well be that the “Relationship Managers” with which the second respondent dealt created or accessed the same records and documentation to which the deponent has access and upon which he relied in deposing to the affidavit.

An associated complaint was to challenge the quantum of the claim and then submit that this supported the argument that no reliance

could be placed upon the deponent to the affidavit. The respondents’ complaint is that the amount appearing in a bank statement of 1st November 2007 is R 3 907 904.91; the amount set out in the certificate of balance of 14th November 2007 is for the same amount; the amount claimed in the summons dated 3rd December 2007 was also R 3 907 904.91. However, on 11th December 2007 payment of R 100 000 was made into this account. The submission would appear to be that whatever was owing in terms of the certificate and the summons in November and early December has been reduced by at least R 100 000 and the deponent to the affidavit was therefore incorrect in stating²⁵ that “I verify that the first and second respondents are indebted to the applicant as set out in the summons” because,

when he deposed to this affidavit this amount had been reduced by the sum of R100 000.

The amount claimed in the summons is supported by the certificate of balance. The supporting affidavit was correct insofar as it purported to verify that which was stated and claimed in the summons. However, the amount claimed in the summary judgment

fails to reflect the one payment recorded on the bank statements made after issue of summons and to which the second respondent

refers in his opposing affidavit.

Where the respondent is entitled to defend “as to part of the claim²⁶, the provisions of sub rule 32 (6) require the court to give leave to defend in respect of part of the claim and enter judgment against the defendant in respect of the balance of the claim . In the present case, the respondent has disclosed a defence in respect of part of the applicant’s claim – namely the payment of R 100 000 after issue of summons and before filing of the application for summary judgment. In the present case, the affidavit supporting the application for summary judgment verified the cause of action and the amount claimed in the summons. The deponent can be criticized for failing to refer to the amount by which the indebtedness had been reduced. This would not constitute evidence beyond that required by Rule 32. It would have meant that the court was not misled as to the amount outstanding as at date of deposing to the affidavit in support of the summary judgment application.

I can see no reason why the court cannot itself reduce the amount in respect of which summary judgment is granted where it is apparent from the papers that there has been a reduction in the amount claimed in the summons. There is no prejudice to the respondent. To refuse to grant summary judgment in respect of the balance owing merely because the application failed to reduce the amount claimed in the summons would be, to my mind, to ignore the import of the provisions of sub rule (6). In a number of authorities, our courts have recognized that a plaintiff may be granted less than claimed in the papers because this deviation from that which is claimed in the papers neither adversely affects the defendant’s rights nor is it detrimental to him^{27 28}.

The second respondent has also taken issue that the Certificate of Balance annexed to the Particulars of Claim emanates from “FNB” and “FNB Shared Services” and not from the applicant, namely “FirstRand Bank Limited”. There is no merit in this objection since the document itself makes it clear that “First National Bank” is a division of “FirstRand Bank Limited”.²⁹

Variable Interest Rates

It is not in dispute that the bond agreement entered into between the parties provided for variable rates of interest to be charged on the capital sum.³⁰

The bond agreement requires “written notice” to be given to the mortgagor of such increase in or reduction of interest

rates.³¹ Second respondent has argued the applicant is obliged to give notice to the first respondent each time the applicable interest rate changes. Absent advance notice, any variation in the interest rate is submitted to be contrary to the agreement.

There is no merit in this submission. First, the ordinary meaning of ‘notice’ encompasses “intimation, information,

intelligence, warning” or “formal intimation or warning of something” or “heed, cognizance, note, attention”

or “to make mention of, to remark”.³² Where the notice required is to be more than an intimation or notification and is to be advance or prior warning [my italics] then one would expect the agreement to have made clear which of the possible meanings was intended. Second, clause 4 of the mortgage agreement, in referring only to ‘notice’ without reference to ‘prior’ or ‘advance’ notification, has selected which meaning is envisaged in the document. . Third, clause 5.2 of the mortgage agreement specifically envisages that the parties may conclude an agreement for variation of the interest rate “as distinct from such installments being unilaterally increased by the Bank in terms of 5.1”³³. By contrasting agreed variation in clause 5.2 with ‘unilateral’ variation in clause 5.1, the document makes it clear that the increases envisaged in both clauses 4 and 5 are variations which require neither prior or advance notice nor the concurrence of nor acquiescence in by the defendant. Fourth, the copies of monthly bank statements rendered by the applicant to first respondent clearly indicate that the interest rate is variable (as well as the rate of interest currently being levied on the capital sum).³⁴ In entering into a variable interest agreement, the respondent agreed to the fluctuation of the interest rate. It would be

inconceivable that interest rates could not be varied unless and until each and every mortgagor had received advance notice and assented thereto. If such assent was not given, it would hardly be expected that the Bank would then not be permitted to vary the interest rate and that the mortgagor should be allowed the opportunity to enjoy an interest ‘holiday’ or that the mortgagor should be entitled to look around for other loan facilities, cancel the first mortgage bond and register a new bond whilst not agreeing with the new interest rate levied. The mortgage industry would close down. Finally, those same monthly bank statements indicate the interest rate then being charged. Notice, in the sense of advice, intimation, information was indeed brought to the attention of the first respondent.

I find no merit in the argument that applicant was acting beyond the terms of the bond agreement in varying the interest rate.

Conclusion

In the result orders are made as follows:

The defendants are ordered to pay, jointly and severally, to the plaintiff the sum of R 3 807 904.91;

The defendants are ordered to pay, jointly and severally, to the plaintiff interest on the aforesaid sum at the rate of 12.30% per annum calculated daily and compounded monthly with effect from 1 November 2007 to date of payment, both dates inclusive;

The first defendant’s immovable property described below is declared specially executable:

A Unit consisting of:

Section No 34 as shown and more fully described on Sectional Plan No SS752/06, in the scheme known as MELROSE ARCH APARTMENTS ONE in respect of the land and building or buildings situated at MELROSE NORTH TOWNSHIP, THE CITY OF JOHANNESBURG of which section the floor area, according to the said Section Plan, is 176 (One Hundred Seventy Six) square metres in extent; and

An undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan held by Deed of Transfer No ST112846/06

An exclusive use area described as parking Bay No P39 measuring 13 (Thirteen) square metres being as such part of the common property comprising the land and the scheme known as MELROSE ARCH APARTMENTS ONE in respect of the land and building or buildings situated at MELROSE NORTH TOWNSHIP, THE CITY OF JOHANNESBURG as shown and more fully described on Sectional Plan No SS752/2006.

An exclusive use area described as parking Bay No P56 measuring 14 (Fourteen) square metres being such part of the common property

comprising the land and the scheme known as MELROSE ARCH APARTMENTS ONE in respect of the land and building or buildings situated at MELROSE NORTH TOWNSHIP, THE CITY OF JOHANNESBURG as shown and more fully described on Sectional Plan No SS752/2006 held under notarial deed of cession No SK6463/2006.

An exclusive use area described as storeroom No R12 measuring 5 (Five) square metres being as such part of the common property

comprising the land and the scheme known as MELROSE ARCH APARTMENTS ONE in respect of the land and building or buildings situated at MELROSE NORTH TOWNSHIP, THE CITY OF JOHANNESBURG as shown and more fully described on Sectional Plan No SS752/2006 held under notarial deed of cession No SK6463/2006.

The defendants are granted leave to defend the balance of the claim set out in the notice of application, i.e namely R 100 000 and interest thereon at the rate of 12.30% per annum calculated daily and compounded monthly with effect from 1 November 2007 to date of payment, both dates inclusive;

The defendants are to pay the plaintiff's costs of suit on the attorney and client scale jointly and severally.

DATED AT PRETORIA 22 SEPTEMBER 2008

K. SATCHWELL

Hearing: 15 August 2008. Judgment: 25th September 2008

Applicant's Counsel:

Adv. Hindrichsen instructed by Petzer, Du Toit & Ramulifho Attorneys

Respondents' Counsel:

Mr. Christophorou from Biccari, Bollo & Mariano Attorneys

1 Paragraph 5.5 of Affidavit resisting summary

judgment

2 The examination of the NCA which appears herein as also the position of a surety and co-principal debtor owes much to the research of my registrar, Mr. Angelo Tzarevski.

3 Section 129: Required procedures before debt enforcement- (1) If the consumer is in default under a credit agreement, the credit provider- may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and subject to section 130(2), may not commence any legal proceedings to enforce the agreement before-

first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and meeting any further requirements set out in section 130

3 Section 129: Required procedures before debt enforcement- (1) If the consumer is in default under a credit agreement, the credit provider-

may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and subject to section 130(2), may not commence any legal proceedings to enforce the agreement before-

first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and meeting any further requirements set out in section 130

4 Section 130(1) of the NCA.

5 Sections 8(1) and 8(3)

6 Section 9.

7 Section 4(1)

8 In addition, the application of the Act to incidental credit agreement is limited in section 5, and certain provisions set out in section 6 do not apply when the consumer is a juristic person.

9 A mortgage agreement is a credit transaction (section 8 (4)(d)) and a credit transaction is a credit agreement (section 8(1)(b)).

10 Section 8(4)(d).

11 Section 9(4)(a).

12 The NCA would only apply where the juristic person had entered into a credit agreement which is not a large agreement and the asset value or annual turnover of the juristic person fell below the threshold.

13 Clauses 1 and 2 of the suretyship agreement - Annexure "C"

14 Section 8(1)(c)

15 Section 8(5)

16 Paragraph 7 of the respondent's affidavit resisting summary

judgment

17 I regret that counsel for the applicant did not refer me to the relevant authorities .and that it is was my registrar who performed

the initial research..

18 See page 471 F-H

19 Maasdorp v Graaff-Reinet Board of Executors 3 Buch A.C. 482 at 490; Du Plessis v Estate Teich Brothers 1914 CPD 48 at 50; Neon supra at 471;

20 Maasdorp supra at page 490

21 At paragraph 13 of the simple summons: "In the premises the second defendant is liable as surety, to the Plaintiff for the amount due by the first defendant..." [my emphasis]

22 Paginated page 39 of the application

23 Pinepipe (Pty) Ltd v Nolec (Pty) Ltd 1975 (4) SA W

24 Barclays Western Bank Ltd v Bill Jonker Factory Services (Pty) Ltd 1980 (1) SA 929 (SE) at 937B-E

25 As at 1st July 2008 when he deposed to this affidavit.

26 Rule 32(6)(b) of the Supreme Court Rules.

27 As was said in Trust Bank of Africa Ltd v Hansa and another 1988 (4) SA 102 W "a plaintiff can always claim less than his allegations seem to justify" (at 104j) and "it is possible to give

judgment

for the aforesaidor ... or to ignore all debits of interest and give judgment for the remaining amount....”

(106j)

28 In *Nedcor Bank Ltd v Behardien* 2000(1) SA 307 CPD two payments from defendant were received after service of summons which had been deducted from the amount now claimed by plaintiff and the court granted summary judgment in respect of the balance; in *Frank Keevy (Pty) Ltd v Koos van der Merwe Beleggings (Kroonstad) (Edms) Bpk en n ander* 1970 (3) SA 429 O the amount claimed in the summons was reduced by the payment made by the defendant prior to application for summary judgment and judgment was granted for the balance; in *Trust Bank of Africa Ltd v Hansa and another* 1988(4) SA 102 W there was a dispute as to an amount which had been paid by defendant in respect of the alleged indebtedness. The refusal to

grant summary judgment was based on, inter alia, various challenges to the certificate of indebtedness. In *Jng G Teale & Sons Ltd v Vry*

29 Annexure ‘B’ on paginated page 27 of the application for summary judgment.

30 Clause 4.1.1 provides that “...the Bank may at any time and from time to time on giving written notice to the Mortgagor increase or reduce the aforesaid rates or adjust the amounts at which the different rates become effective”. Clause 5.1 refers to ‘variation of instalments’ where the “rate of interest is increased in terms of 4 the Bank may at any time or times on similar notice increase the instalments payable in terms of this Bond to ensure that the Mortgagor’s

indebtedness is repaid within the same period as it would have been repaid had the rate of interest not been so increased”.

31 See clause 4.1.1 supra.

32 The Shorter Oxford English Dictionary

33 The variations in clause 5.1 are linked to those in clause 4.1.1

34 Annexure CB 1 pages 1-20.

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