THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 267/17

In the matter between:

JOHN ANTHONY SHAW	**1st APPELLANT**
WADE GRAHAM TAYLOR	**2nd APPELLANT**

and

GLENN WILLIAM MACKINTOSH	**1st RESPONDENT**
MABILI SEARCH & SELECTION (PTY) LTD	**2nd RESPONDENT**

Neutral Citation: *Shaw & another v Mackintosh & another* (267/17) [2018] ZASCA 53 (29 March 2018)

Coram: Shongwe ADP and Wallis, Dambuza and Mathopo JJA and Davis AJA

Heard: 22 February 2018

Delivered: 29 March 2018

Summary: National Credit Act 34 of 2005 (the NCA) – co-principal debtors – whether transaction is a credit guarantee in terms of s 8(5) of the NCA – whether credit provider required to register in terms of s 40 of the NCA.

ORDER

On appeal from: The Gauteng Local Division, Johannesburg (Tsoka, Makume & Wepener JJ, sitting as court of appeal):

The appeal is dismissed with costs.

JUDGMENT

Mathopo JA (Shongwe ADP and Wallis, Dambuza JJA and Davis AJA concurring):

[1] This appeal concerns the proper interpretation of s 8(5) of the National Credit Act 34 of 2005 (the NCA). The question is whether the effect of that section is to exclude the transaction between the appellants, Messrs Shaw and Taylor, and the first respondent, Mr Mackintosh (the respondent), which is described below, from the ambit of the NCA. If it does, then the judgment granted in Mr Mackintosh's favour by the Gauteng Local Division, Johannesburg (Georgiades AJ) and upheld on appeal by the full court of that division (Tsoka J, with Makume and Wepener JJ concurring), must stand. If it does not, then the appellants invoke the provisions of the NCA to avoid liability to Mackintosh. The present appeal is with the special leave of this Court.

[2] In about 2009, Mackintosh lent Mabili Search & Selection (Pty) Limited (Mabili) an amount of R2 million. During October 2012 the parties signed a written acknowledgement of debt (the agreement) in terms whereof Mabili as the debtor acknowledged its indebtedness to Mackintosh as the creditor in the sum of R2 million payable over a period of twelve months from the date of advancing the said amount. It was a term of the agreement that the sum of R2 million would attract interest at the rate of R50 000 per month with effect

from October 2012 until the date of final payment. It was further agreed that should the debtor make a part payment of the capital to the creditor (Mackintosh), the interest payable would be pro-rated. Mabili further acknowledged being indebted to Mackintosh in the sum of R100 000 representing interest for the months of August and September 2012.

[3] When Mabili defaulted on its repayments in terms of the agreement, Mackintosh obtained default judgment against it. It is common cause that Mabili was subsequently liquidated. Invoking the provisions of clause 5 of the agreement, Mackintosh sued the appellants as sureties.

[4] In view of the amount involved and Mabili's turnover, it was common cause that, insofar as Mabili was concerned, the agreement fell outside the area of operation of the NCA. The dispute between the parties was whether their relationship was governed by the NCA. Clause 5 of the agreement reads as follows:

'THE SURETYSHIP

Shaw and Taylor hereby:

5.1 Bind themselves jointly and severally unto and in favour of Mackintosh as joint and several co-principal debtors with Mabili for the repayment of any amounts which now are, or which may hereafter become owing by Mabili to Mackintosh from whatsoever cause (including without limitation the Admitted Debt); and

5.2 Waive the benefits of excussion, division and cession of action.'

[5] Mackintosh alleged that the agreement arose as a result of a loan granted to Mabili and not to the appellants during 2009. He submitted that the effect of clause 5 of the agreement was to constitute the appellants as sureties for Mabili's indebtedness. He contended that the agreement between himself and the respondents was a credit guarantee as defined in the NCA and was excluded from the operation of the NCA by s 8(5) thereof, because it was a credit guarantee in respect of an agreement that was not itself subject to the NCA.

[6] The appellants argued that the agreement was a stand-alone credit agreement falling within the ambit of the NCA and that clause 5 did not constitute them as sureties because they became parties to the agreement as co-principal debtors in respect of the Admitted Debt as defined in clause 2.1.1 of the agreement. In support of their argument, they relied on clause 2.1.3 which described them and Mabili as 'the Debtors'. They further contended that the agreement between them and Mackintosh was not a credit guarantee, but a credit transaction as defined in s 8(4)*(f)* of the NCA and that there had been no compliance by Mackintosh with his obligations under the NCA. They alleged that the failure of Mackintosh to register as a credit provider in terms of the NCA rendered the agreement between them void.

[7] The argument in the high court, both at first instance and on appeal, proceeded on the basis that the key issue was whether the effect of clause 5 of the agreement was to constitute the appellants as sureties. Following this approach both courts held that they were. In view of the attitude I take of this matter, it is unnecessary for me to consider whether their conclusion on this issue was correct. For the purposes of this appeal I will accept that the appellants became co-principal debtors with Mabili for the repayment of the admitted debt. The proper question we are called upon to decide is whether the contract between them and Mackintosh was a credit guarantee in terms of s 8(5) of the NCA, in which event it is an agreement to which the NCA does not apply, or a credit transaction in terms of s 8(4)*(f)* as they contended.

[8] The NCA applies in respect of three kinds of agreements, namely a credit facility, a credit transaction or a credit guarantee. A credit guarantee is defined in s 1 as being an agreement meeting the criteria set out in s 8(5). That section reads in material part as follows:

'An agreement, irrespective of its form . . . constitutes a credit guarantee if, in terms of that agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which this act applies.'

If the agreement between the appellants and Mackintosh is a credit guarantee as defined, it does not fall within the NCA because s 4(2)*(c)* provides that:

'…

(c) this Act applies to a credit guarantee only to the extent that this Act applies to a credit facility or credit transaction in respect of which the credit guarantee is granted.'

If the appellants bound themselves in terms of a credit guarantee as defined, the credit transaction in respect of which the credit guarantee was granted was the transaction between Mabili and Mackintosh. If the NCA does not apply to the credit transaction, it cannot apply to the credit guarantee.

[9] It is apparent that the question in this case is answered by determining whether the agreement between the appellants and respondent was a credit guarantee and then whether the credit transaction between Mabili and Mackintosh falls within the NCA. These questions falls to be answered by applying the ordinary provisions of statutory interpretation stated in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18 to s 8(5) and then determining whether the agreement between the appellants and Mackintosh falls within that section.

[10] I turn to consider the relevant provisions of the agreement. An essential precondition to the operation of s 8(5) of NCA is that it applies to the obligations of another. The language of the section, refers both to an undertaking and a promise to satisfy the obligation of another. It makes no reference to a suretyship or guarantee or any similar word. In terms of clause 5 of the agreement the appellants, as joint and co-principal debtors, with Mabili in terms of clause 2.1.3, undertook or promised to pay on demand the Admitted Debt owed by Mabili to Mackintosh as detailed in clauses 3.1, 3.1.1, 3.1.2 and 3.1.3 of the agreement. It must be stressed that Mabili, and only Mabili, was the debtor in respect of the Admitted Debt. The loan was granted pursuant to an oral agreement which was concluded between Mabili and Mackintosh. The purpose of the acknowledgement of debt which the appellants signed, was to arrange how the amount owing to Mackintosh was to be repaid. As debtors the appellants undertook to settle the admitted indebtedness to Mackintosh in terms of the provisions of clause 6 of the agreement which provides as follows:

‘6. The Debtors hereby undertake to settle the admitted indebtedness to Mackintosh as follows:

6.1.1 the Debtors will make payment to Mackintosh of the monthly instalments that becomes due between the signature date and the date upon which the Admitted Debt is discharged in full; and

6.1.2 the Debtors undertake to settle the full Admitted Debt on or before the end of March 2013.’

[11] When Mabili defaulted with its repayments and was subsequently liquidated, Mackintosh invoked the provisions of clause 7 of the agreement and sued the appellants on the basis of clause 5 of the agreement. Clause 7 provides as follows:

‘7. BREACH

7.1 Should the Debtors default in the due performance of any of their obligations in terms of this Agreement, all of which are material, including in particular if any payment is not made on due date, then:

7.1.1 Mackintosh may in is sole discretion proceed against the Debtors on the basis of this Agreement, or on the basis of the underlying causes of action; and

7.1.2 the full balance of the Admitted Debt shall immediately become due, owing and payable by the Debtors to Mackintosh.’

[12] It is clear that the appellants were not granted any loan nor was any credit advanced to them and neither were they parties to the historical agreement between Mabili and Mackintosh concluded in 2009. Their involvement only arose when they undertook or promised to pay on demand the admitted indebtedness of Mabili to Mackintosh. The agreement expressly stated that the sum of R2 million was advanced to Mabili and not the appellants. That brings the obligations of the appellants squarely within the language of s 8(5). However, s 4(2)*(c)* of the NCA provides that this Act applies to a credit guarantee only to the extent that this Act applies to a credit facility or credit transaction. Mackintosh was not a credit provider in terms of s 40 of the Act. He was not in the business of providing credit. The agreement was a once-off transaction and not falling within the ambit of the provisions of the NCA Act. It was rightly not suggested that the arrangement could be both a credit guarantee and a credit transaction in terms of s 8(4)*(f)* of the NCA

(see *JMV Textiles v De Chalain Spareinvest* 2010 (6) SA 173) (KZD). The agreement between appellant and Mackintosh thus falls outside of the scope of the NCA. For these reasons the appeal must fail.

[13] The appeal is dismissed with costs.

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R S Mathopo
Judge of Appeal

APPEARANCES:

For appellant:	J J Meiring Instructed by: Fullard Mayer Morrison Inc, Johannesburg Lovius Block, Bloemfontein
For respondent:	D Mahon T Moretlwe Instructed by: Harris Billings Attorneys, Fourways Honey Attorneys Inc, Bloemfontein