THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 661/09

In the matter between:

J C DA SILVA V RIBEIRO **First Appellant**
L D BOSHOFF **Second Appellant**

v

SLIP KNOT INVESTMENTS 777 (PTY) LTD **Respondent**

Neutral citation: *Da Silva v Slip Knot Investments* (661/2009) [2010] ZASCA 174 (2 December 2010).

Coram: Mpati P, Cachalia, Tshiqi JJA, R Pillay and K Pillay AJJA
Heard: **18 November 2010**
Delivered: **2 December 2010**

Summary: Where an initial loan agreement is a 'credit transaction' to which the National Credit Act 34 of 2005 (NCA) does not apply, and the parties enter into a new agreement to guarantee the obligations under the initial loan agreement, the new agreement is a credit guarantee to which the NCA does not apply.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Van der Walt AJ sitting as court of first instance).

The following order is made:

The appeal is dismissed with costs.

JUDGMENT

CACHALIA JA (Mpati P, Tshiqi JA, R Pillay and K Pillay AJJA concurring):

[1] The respondent sought and obtained an order in the South Gauteng High Court on 18 September 2009 against the first and second appellants jointly and severally for payment of the sum of R10 659 157.18 and certain ancillary relief. The appellants now come before this court with leave of the high court. It will be convenient to refer to the parties as they were referred to in the high court: the respondent was the applicant, the first and second appellants were the first and second respondents to whom I shall refer together as the respondents. It will, however, be preferable to refer to the third respondent (R B Merit Investments (Pty) Ltd), who has no interest in these proceedings, as R.B. Merit.

[2] The applicant's claim is based on a written agreement, which was concluded on 10 January 2008, but which had its genesis in two previous loan agreements. Under the loan agreements, concluded in May 2007 and July 2007, the respondents had bound themselves as sureties for two loans that R.B. Merit had obtained from the applicant for a hotel development. After R.B. Merit and the

two sureties (the respondents) had failed to repay these loans when they became due, and were thus in breach of their obligations under the loan agreements, the parties negotiated a settlement of their dispute by concluding the current agreement.

[3] In terms of this agreement it was recorded that:

(i) the applicant had lent and advanced amounts of R22,5m and R1m to R.B. Merit in terms of the loan agreements;
(ii) the outstanding amount still owing under those agreements was an amount of R35 641 117.69;
(iii) R.B. Merit would, on 11 January 2008, pay R7,6m to the applicant and the balance would be apportioned towards repayment of the outstanding amounts under the two loan agreements;
(iv) R.B. Merit would provide a bank guarantee to the applicant in an amount of R20,4m before 18 January 2008;
(v) the respondents would then be liable to pay the balance of the amount of R28 196 336.48 as follows: by 15 May 2008 an amount of R800 000, and by 1 December 2008, the balance together with any interest.

[4] R.B. Merit met its commitments under the agreement; the respondents were unable to meet theirs. The applicant then demanded payment from them of the total amount due under the agreement, but they paid only R158 754.88 on 24 September 2008. They were thus in breach of their contractual obligations. The applicant sought to enforce the agreement by claiming the outstanding amount in the high court. This comprised the amount of R800 000, which the respondents had failed to pay on 15 May 2008, and the balance, after deducting the 24 September 2008 payment, which had become due and payable as of 25 September 2008.

[5] The respondents opposed the claim by seeking refuge in the National

Credit Act 34 of 2005 (the NCA). Their main ground of opposition was that the agreement constituted a 'credit agreement' as contemplated by s 8 of the NCA. The consequence of this, they contended, was that the agreement was void because it was concluded contrary to s 89(2)(d), read with s 89(5),[1] which requires a credit provider to be registered as such before entering into an agreement to which the NCA applies. It is common cause that the applicant is not a registered credit provider.

[6] The applicant on the other hand asserted that the agreement was concluded because of R.B. Merit's failure to fulfil its undertakings under the initial loan agreements, and the respondents' failure to meet their obligations in terms of their guarantees. So, it contended, the agreement was a 'credit guarantee' and not a credit agreement. And further, that the NCA did not apply to it because, by virtue of s 8(5), read with s 4(2)(c),[2] the NCA is applicable to a credit guarantee only to the extent that it also applies to a credit agreement in respect of which the guarantee was granted. Accordingly, so it contended, because the agreement was nothing more than a continuing guarantee to satisfy R.B. Merit's original obligation under the loan agreements – to which the NCA did not apply – the agreement, properly construed, was a credit guarantee, which also fell beyond the ambit of the NCA.

1Section 89 '**Unlawful credit agreements**

(1) . . .

(2) . . . a credit agreement is unlawful if –

(a) . . .

(b) . . .

(c) . . .

(d) at the time the agreement was made, the credit provider was unregistered and this Act requires that credit provider to be registered.

(5) . . .

(a) the credit agreement is void as from the date the agreement was entered into.'

2 Section 8(5) provides: '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.'

Section 4(2)(c) provides that the NCA: '. . . 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.'

[7] The high court (Van Der Walt AJ) dismissed the respondents' defence and upheld the applicant's contention that the NCA did not apply to the agreement because it was a credit guarantee – not a credit agreement – to which the NCA did not apply. The respondents appeal against this finding. The outcome of this appeal therefore turns on whether the agreement is a credit agreement, as the respondents contend, or a credit guarantee as the applicant asserts.

[8] The respondents do not dispute that the initial loan agreements were credit transactions (credit agreements) as contemplated by s 8(4)(d)[3] of the NCA because they were mortgage agreements or secured loans, which entitled the applicant to register mortgage bonds over the property on which R.B. Merit was to build the hotel and, as further security, the respondents were to guarantee R.B. Merit's obligations. But because the loans were made to a juristic person, ie R.B. Merit, the loan agreements were not subject to the NCA for two reasons: first, by virtue of s 4(1)(b)[4] the loans were large agreements because they were mortgage agreements as contemplated in s 9(4), and secondly, because the principal debts in both loans were above the higher threshold of R250 000 established in terms of s 7(1)(b) under General Notice 713, published in Government Gazette 28893 of 1 June 2006.[5] So, because the NCA did not apply to the loan agreements, by virtue of s 4(2)(c) and s 8(5), it did not apply to the respondents' accessory obligations (guarantees) under those agreements either. This much, as I have said, is common cause.

[9] The respondents contended in the high court, as they did before us, that once R.B. Merit fulfilled its obligations flowing from the agreement, and had no further commitments towards the applicant, they became principal debtors under

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3 Section 8(4)(d): '. . . a mortgage agreement or secured loan.' In terms of s 1 a 'credit transaction' means 'an agreement that meets the criteria set out in s 8(4)'.

4 Section 4(1)(b): '. . . 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).'

5 Section 9(4): 'A credit agreement is a large agreement if it is-

(a) a mortgage agreement; or

(b) any other credit transaction except a pawn transaction or a credit guarantee, and the principal debt under that transaction or guarantee falls at or above the higher of the thresholds established in terms of section 7(1)(b).'

the agreement. This meant that their obligations to the applicant were no longer of an accessory nature. They were now the true borrowers or credit receivers under the agreement. And the fact that they had guaranteed R.B. Merit's loans under the previous loan agreements had no bearing on the current agreement. Accordingly, they contended, the agreement, properly construed, is a credit transaction – not a credit guarantee – as contemplated by s 8(4)(f) of the NCA.[6] This is because it involves the payment of an amount owed by the respondents to the applicant, which has been deferred, and is payable together with interest and an administration fee. We are thus required to consider whether the agreement was merely an undertaking or a promise by the respondents to satisfy R.B. Merit's debts, as the applicant contends, or a new and separate obligation, as the respondents would have it. The answer depends on what the parties intended by the agreement.

[10] The applicant, the respondents and R.B. Merit were all parties to the agreement. In terms of the agreement the following was recorded:

(i) The initial loan agreements were concluded so that R.B. Merit could fund a hotel development;
(ii) in order to complete the development R.B. Merit required additional funding, which has now been secured from certain third parties;
(iii) the additional funding is, however, subject to the lender (the applicant) releasing R.B. Merit and the sureties (the respondents) from their obligations and undertakings in terms of the initial loan agreements;
(iv) at the request of R.B. Merit and the sureties, the lender has, subject to the fulfilment of the terms and conditions of the agreement, agreed to the cancellation of the pledges, cessions and suretyships concluded in terms of the initial loan agreements. It was, however, *specifically recorded* that

6 Section 8(4)(f): '. . . any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of-
(i) the agreement; or
(ii) the amount that has been deferred.'

the agreement *does not constitute a novation of the initial loan agreements*. (Emphasis added.);

(v) it is agreed that the obligations and undertakings as accepted by the sureties in terms of the agreement have as their origin the initial undertakings and obligations attributable to the sureties in the initial loan agreements;

(vi) the agreement shall be the sole record of the subject matter contained in it;

(vii) the outstanding amount owing as at 11 January 2008 under the initial loan agreements would be R35 641 117.69.

[11] The outstanding amount was to be settled by R.B. Merit paying the sum of R7,6m to the applicant on 11 January 2008 and providing a guarantee in the sum of R20,4m before 18 January 2008. Once the sum was paid and the guarantee furnished, R.B. Merit and the respondents would be released from their obligations under the initial loan agreements and R.B. Merit would incur no further obligations under the agreement. The respondents would then be responsible for settling the outstanding balance, together with interest, as provided for in the agreement. It is common cause that R.B. Merit met its obligation to pay the applicant and also provided the guarantee in terms of the agreement.

[12] The high court rejected the respondents' contention that the initial loan agreements were irrelevant to determining the issue in this case. The learned judge pointed out that the agreement specifically referred to the respondents' obligations under the loan agreements and also that at the time the agreement was concluded the respondents still had the obligation to guarantee R.B. Merit's commitments to the applicant. It was therefore not, the judge held, a credit transaction. And if it was not a credit transaction at the time the agreement was concluded, it could not have become one subsequently, after R.B. Merit was released from its obligations. For, if it could have, this would mean that the

agreement was not void at the time that it was concluded, but became so once R.B. Merit had discharged its obligations under the very agreement. This result, said the high court, would be absurd.

[13] I respectfully agree with the high court's reasoning. To this I wish to add that the parties 'specifically recorded' that the agreement 'does not constitute a novation of the initial loan agreements' and that the 'obligations and undertakings as accepted by the sureties in terms of the agreement have as their origin the initial undertakings and obligations attributable to the sureties in the initial loan agreements'. The fact that the parties also recorded that 'this agreement shall be the sole record of the subject matter contained herein' – a point the respondents relied upon to avoid the consequences of the initial agreements – does not detract from the fact that the parties explicitly intended not to extinguish, but rather to confirm, the obligations arising from the initial agreements. The obligations under the loan agreements and those under the new agreement were thus interdependent.[7] This can only mean that the agreement was, in substance, an agreement to guarantee R.B. Merit's obligations under the initial loan agreements – and was therefore a credit guarantee to which the NCA did not apply.

[14] The appeal must therefore fail. The following order is made:

The appeal is dismissed with costs.

A CACHALIA
JUDGE OF APPEAL

APPEARANCES

APPELLANTS: P L Carstensen
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7 Cf *Adams v SA Motor Industry Employers Association* 1981 (3) SA 1189 (A) 1199G-H.

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