



REPUBLIC OF SOUTH AFRICA
**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: **19065/2015**

In the matter between:

PLASTOMARK (PTY) LTD

Applicant /Plaintiff

and

**CK INJECTION MOULDERS CC
WAYNE BRIAN ISAACS**

First Respondent / Defendant
Second Respondent / Defendant

Case No: **10966/2015**

ULTRAPOLYMERS (PTY) LTD

Applicant / Plaintiff

and

CK INJECTION MOULDERS CC

First Defendant / Respondent

WAYNE BRIAN ISAACS

Second Defendant / Respondent

JUDGMENT DELIVERED ON 01 SEPTEMBER 2015

RILEY, AJ

[1] The applicants in the above matters have brought applications for summary judgments against the respondents jointly and severally for payment of the amounts of R221 673-00 and R307 732-00 respectively plus interest.

[2] It is common cause that the first respondent has been placed in liquidation and that the second respondent bound himself as surety and co-principal debtor jointly and severally with the first respondent for all the debts of the first respondent on 31 July 2006 and 14 October 2009 respectively. In both matters the respondents do not aver that they do not owe any money at all in respect of the goods sold by the applicants to the first respondent.

[3] In both matters the second respondent has opposed the relief on the basis that applicant has not complied with the provisions of the National Credit Act 34 of 2005 ('the NCA'). According to the second respondent the applicants are credit providers in terms of the NCA and are required to carry out a financial assessment to determine the extent or amount of credit that an applicant for credit can afford before entering into an agreement with such applicant. That in the present instances, the applicant's failure to perform an affordability assessment of the second respondent at the time of the conclusion of the agreement in 2009 and more so in 2015, has resulted in the applicants making themselves guilty of entering into a reckless credit agreement. According to the second respondent, there was a duty upon the plaintiff *'to consider whether the first defendant's debt repayment history, existing financial means, prospects and obligations, and whether a new credit agreement would cause the first defendant to become over indebted'*.

[4] Mr Fisher who appeared on behalf of the respondents, contended that the extension of credit to the first defendant in 2015 amounted to reckless lending and that the respective debts would therefore either become fully and or partially unenforceable. He contended that once it has been established at trial that applicant had indeed failed to take into account the first defendant's annual turnover, its debt repayment history, and the fact that a new agreement would cause first defendant to become over-indebted, that a court may in all probability set aside all or some of the first defendant's obligations to repay the debt under the '*reckless agreement*'.

[5] Mr Newton contended that neither of the respondents could rely on the NCA for protection as first respondent was a juristic person and that it was not covered by the NCA and that in so far as the second respondent was concerned he had bound himself as surety and co-principal debtor jointly and severally with first respondent for the debts of first respondent and he could therefore not escape liability nor was he entitled to be afforded any protection in terms of the NCA.

[6] The NCA covers a wide variety of credit agreements including direct personal loans, loans secured by mortgage bonds, overdrawn cheque accounts, credit cards, rendering of services, sales and leases of movable goods and credit guarantees. Section 4(2)(b) of the NCA provides that save for certain exemptions, the Act applies to all credit agreements between parties dealing at arm's length and made within or having an effect within the Republic. According to Scholtz *et al*, Guide to the National Credit Act, at para 8.1, the most common examples of contracts between parties who are not at arm's length, are credit agreements between family members who are dependent on each other and loans or other credit agreements between a

juristic person and or a partner who has a controlling interest in that juristic person.

[7] Section 3 of the NCA provides that the purposes of the Act are *inter alia*, to:

- a) provide responsibility in the credit market by encouraging responsible borrowing, avoidance of over-indebtedness and fulfillment of financial obligations by consumers;
- b) discourage reckless credit-granting by credit providers and contractual default by consumers, and
- c) address and prevent over-indebtedness of consumers, and provide mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible obligations.

[8] Accordingly a natural person who enters into a credit agreement governed by the NCA and who at a later stage becomes over-indebted may be granted debt relief in the form of debt restructuring. It is also accepted that when the consumer entered into a credit agreement without a prior credit assessment having been done or when, despite the conduct of such or assessment, the consumer did not understand his risks, costs and obligations under the agreement, the credit may be regarded as having been granted recklessly. Should this be the case such an outcome may lead to the setting aside of the consumer's rights and obligations under the reckless credit agreement or to the suspension of the said agreement.

[9] Section 79(1) of the NCA provides that a consumer is considered over-indebted '*if the preponderance of available information at the time of determination is made indicates that the particular consumer is or will be unable to satisfy in a timely*

manner all the obligations under all the credit agreements to which the consumer is a party'.

[10] When making the determination, regard is had to the consumers:

- a) financial means, prospects and obligations, and
- b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which he is a party, as indicated by the consumer's history of debt repayment. (See Sections 79(1)(a) and 79(1)(6))

[11] The reason for taking into account the factors mention in Section 79(1)(a) and (b) is that a consumer might have been perfectly able to afford the credit when he entered into the credit agreement but become over-indebted at a later stage, as a result of for e.g. being retrenched at work.

[12] It is now generally accepted that over-indebtedness relates to existing inability to satisfy obligations but also extends to future inability. According to Scholtz at AI, Guide to the National Credit Act at para 11.3.2 *'a determination of general over-indebtedness is not made retrospective to the time the credit agreement was entered into, but only at the time at which the issue of over-indebtedness is raised. Over-indebtedness at the time the agreement was entered into is relevant only when reckless credit-granting is being investigated as the course of over-indebtedness'.*

[13] Sections 85 of the NCA empowers the court to declare and relieve over-indebtedness and Section 86 provides for an application for debt review which

review is to be conducted by a debt counsellor. A consumer may also raise the issue of over-indebtedness after the credit provider has proceeded to enforce a credit agreement in respect of which they have defaulted. See **Firststrand Bank Limited v Oliver** 2009(3) SA 353 (SEC) 360D –F.

[14] The NCA further seeks to discourage reckless credit granting by credit providers by introducing peremptory pre-assessment requirements and imposing severe sanctions in certain instances of reckless credit-granting. Section 81(2)(a) and (b) provides that to avoid reckless credit-granting, a credit provider is not entitled to enter into a credit agreement without first taking reasonable steps to assess:

- a) the proposed consumers –
 - (i) general understanding and appreciation of the risks and costs of the proposed credit; and of the rights and obligations of a consumer under a credit agreement;
 - (ii) debt repayment history as a consumer under credit agreements;
 - (iii) existing financial means, prospects and obligations; and
- (b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful if the consumer has such a purpose for applying for that credit agreement.

[15] It is common cause that first respondent is a juristic person. Section 78(1) which falls under Part D, of the NCA (which deals with over-indebtedness and reckless credit), specifically provides that this part does not apply to a credit agreement in respect of which the consumer is a juristic person. It follows that the provisions of the NCA cannot and do not apply to the agreements entered into

between the applicants and the first respondent and accordingly first respondent cannot avail itself of the protection afforded under Sections 78 to 88 of the Act.

[16] Mr Fisher argued strongly that the second respondent should escape liability and be afforded the protection provided under Section 78 to 88.

[17] Section 4(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 in respect of which the credit guarantee is granted, ...'*

[18] In both instances the second respondent entered into the suretyship agreements in terms whereof he undertook to bind himself in favour of the plaintiff for all the debts of the first respondent which may at any time become owing. He signed the suretyships as surety and co-principal debtor. It is trite law that a person who has bound himself as surety and co-principal debtor is, so far as the creditor is concerned, a surety who has undertaken the obligations of a co-debtor, his obligations in the latter respect are co-equal in extent with those of the principal debtor and thus of same scope and nature, he is liable with him jointly and severally. See Caney's, The Law of Suretyship Sixth Ed – C R Forsyth and JT Pretorius p. 56. The surety does not undertake a separate independent liability as a principal debtor. In **Ideal Finance Corporation v Coetzer** 1970(3) SA 1 (A), the AD, in interpreting the meaning of the word '*purchaser*' in a sale under a hire purchase agreement under Section 18 of Act 36 1942, held that a surety is not entitled to the protection afforded by the section to a purchaser. The court held further that although the surety in terms of the usual agreement binds himself as surety and co-principal

debtor, he cannot because of that be regarded as a purchaser or co-purchaser under the contract. In **Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron** 1978(1) SA 463(A) at 472B - C the AD clarified the distinction between liability as a 'surety' and liability as a '*surety and co-principal debtor*'. The court held that '*generally the only consequence ...that flows from the surety also undertaking liability as a co-principal debtor is vis-à-vis the creditor he thereby tacitly renounces the ordinary benefits available to a surety such as those of excussion and division and becomes jointly and severally liable with the principal debtor.*'

[19] In terms of Section 8(5) of the NCA a credit guarantee is an agreement in terms of which a person binds himself to satisfy on demand another consumer's obligation in terms of a credit facility or credit transaction which is subject to the NCA. If it is so that the NCA applies to credit facilities and credit transactions and credit guarantees, then it must be that the definition of credit guarantee covers guarantees relating to all other agreements that fall within the definitions of '*credit facility*' or '*credit transaction*'. Section 8(5) however clearly refers to '*a credit transaction to which the Act applies*'.

[20] In **Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another** 2009(3) SA 384(T) the applicant sought summary judgment in the High Court for the first respondent's arrears on a mortgage bond, as against both the first respondent and its surety (the second respondent), jointly and severally. In resisting the application, the respondents alleged three defences: (1) the applicant had failed to comply with the provisions of the National Credit Act 34 of 2005 (NCA) by failing to give notice to each of them in terms of s 129 of the NCA prior to commencement of

legal proceedings; (2) the amount claimed by the applicant was incorrect in as much as it failed to take into account a single payment made by the first respondent after issue of summons; and (3) the applicant had given no advance warning of changes in the variable interest rates agreed to be levied on the capital amount of the first respondent's indebtedness. With regard to (1), the second respondent contended that he was covered by the NCA, and therefore entitled to notice in terms of s 129(1), on two bases: (i) his obligations arose in terms of a credit guarantee as set out in s 8(5); alternatively, (ii) he was a consumer in his own right. As to (3), it was common cause that the bond agreement entered into between the parties provided for variable rates of interest to be charged on the capital sum and that it required 'written notice' to be given to the mortgagor of any increase in or reduction of interest rates.

In dealing with the defences raised by the second respondent Satchwell J held as follows:

'[21] 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.

[22] 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 a 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. As De Villiers CJ stated 'the use of the word 'co-principal debtor' does not transform the contract into any other than suretyship'.

[23] 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.


[24] 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.'

[21] I agree with the sound principles hereinbefore referred to by Satchwell J and I find that they are equally applicable to the second respondent in the present matters. It is clear that a credit guarantee falls within the ambit of the NCA only when the consumer's obligation in terms of a credit facility or transaction which is secured is subject to the NCA. Since the second respondent is a person who stood surety for a juristic person he cannot argue that the NCA applies to him and he cannot therefore avail himself of the protections afforded by the NCA. There is accordingly no merit in the defences raised by the respondents and they are accordingly dismissed.

[22] Considering that the first defendant has been liquidated and the relief that is sought is only against the second defendant there is no reason not to grant the relief as sought.

[23] In the result the following orders are made against the second defendant only:

1. Under Case No 10965/15 the second defendant is ordered to pay the plaintiff the sum of R221 673-00;
2. Interest on the said amount of R221 673-00 at the rate of 9% per annum (nominal annual compounded monthly in arrears) a *tempore morae* to date of final payment;
3. Costs on the attorney and client scale;
4. Under Case No 10966/15 the second defendant is ordered to pay plaintiff the sum of R307 732-00;
5. Interest on the said amount of R307 732-00 at the rate of 9% per annum (nominal annual compounded monthly in arrears) a *tempore morae* to date of final payment;
6. Costs on the attorney and client scale.



RILEY, AJ