

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 35287/2017

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO

05/09/2024

DATE

SIGNATURE

In the matter between:

SANTAM LIMITED

Applicant

and

SHIKITA TRADING (PTY) LTD

First Respondent

[Registration Number: 2015/096956/07]

SIMELANE, JEROME GIFT

Second Respondent

[Identity Number: 8[...]]

MZIMELA, SIZAKELE PETUNIA

Third Respondent

[Identity Number: 6[...]]

MZIMELA, SALAM IVAN

Fourth Respondent

[Identity Number: 6[...]]

JUDGMENT

McCAFFERTY AJ

Introduction

1. This is an opposed motion in terms of which the applicant seeks a monetary judgment against the second respondent in an amount of R4,000,000.00 (Four Million Rand), plus interest on the aforesaid amount at the rate of 12.5% per annum, calculated from 28 February 2017 until date of final payment, plus costs on an attorney and client scale.¹
2. This application is based upon a deed of suretyship and indemnity executed by the first, second, third and fourth respondents in favour of the applicant.
3. The deed of suretyship and indemnity has its genesis in a guarantee issued by the applicant on behalf of and/or at the behest of Fly Blue Crane (Pty) Ltd ("**FBC**").
4. On 2 September 2021, Segal AJ, granted judgment on an unopposed basis in favour of the applicant against the first, third and fourth respondents, jointly and severally, the one paying the other to be absolved.²
5. The second respondent, however, opposed the application and delivered an answering affidavit.
6. The applicant now seeks judgment against the second respondent.

¹ Notice of Motion, prayer 1.1 and 1.2, CaseLines p. 02-1 to 02-2.

² Court Order, CaseLines p.22-1 to 22-2.

7. The second respondent delivered a supplementary answering affidavit, without obtaining the leave of the court. The applicant argues that as a result of that failure the supplementary answering affidavit should be regarded as *pro non scripto*. The second respondent now seeks leave to permit the filing of his supplementary answering affidavit and also asks for condonation for the late filing thereof. If granted, the applicant seeks to introduce a supplementary replying affidavit.
8. It is convenient to deal first with the issues of the filing of a further affidavit and the application for condonation. The two are inter-related.

LEAVE

The second respondent's case for leave to permit the filing of a supplementary answering affidavit

9. In summary and as appears from paragraphs 5 to 8 of his supplementary answering affidavit³, the second respondent avers that:
 - 9.1 he has been advised that his (first) answering affidavit which was filed in November 2017 is "scanty, lacks sufficient detail and particularity to rebut the case made out by the applicant in the founding papers." He was therefore advised to file a supplementary answering affidavit to augment and elaborate his defence.
 - 9.2 he has a *bona fide* defence to the application and his supplementary answering affidavit raises weighty issues which ought to be considered by the court.
 - 9.3 the supplementary answering affidavit places before the court crucial information that will assist the proper ventilation and adjudication of

³ Supplementary Answering Affidavit, Caselines 02-109-110

the issues raised in the application and that there are reasonable prospects of the application being dismissed.

- 9.4 It is in the interests of justice that he be permitted to file the supplementary answering affidavit.

The applicant's opposition to leave

10. In its supplementary replying affidavit, the applicant avers that:

- 10.1 the second respondent's supplementary answering affidavit was delivered without the leave of the court and should be regarded as *pro non scripto*.
- 10.2 It appears that the second respondent wants to replace his answering affidavit filed in the course of 2017 with the supplementary answering affidavit filed on 22 April 2024.
- 10.3 The second respondent has in addition failed to make out a case for condonation in terms of Rule 27(3) of the Rules.
- 10.4 On both scores, the supplementary answering affidavit should not be taken into account in the adjudication of the application.

CONDONATION

The second respondent's case for condonation

11. In the second respondent's affidavit in support of his application for condonation, he avers, in summary that:

- 11.1 During the period March to April 2022, he appointed Mabuza Attorneys as his attorneys of record and obtained advice from senior counsel.
- 11.2 Settlement negotiations took place during October 2022 between the parties, but these came to an end when the applicant indicated that it was not prepared to agree to stay the proceedings pending their finalisation.
- 11.3 For a period of more than a year (during the period 2023 to 2024) the applicant “went quiet and took no steps to move the matter forward”.
- 11.4 He (therefore) reasonably believed that the applicant was no longer going to proceed against him because it had recovered its money from the first, third and fourth respondents following the judgement that the applicant had obtained against them.
- 11.5 On 18 April 2024, he received the applicant’s heads of argument, practice note and a notice setting the matter down.
- 11.6 Upon reviewing the matter in preparation for the hearing, his legal team discovered that he had other available defences. He was accordingly advised that he needed to file a further affidavit to support his answer to the applicant’s case.
- 11.7 On 17 May 2024, he filed his supplementary answering affidavit raising the defences of *res judicata* and a constitutional challenge.
- 11.8 In the totality of the circumstances, the delay amounts to approximately a month.
- 11.9 he regards the matter to be of great importance to his future and that should condonation be refused it will mean that he will be unable to

respond substantively to the application. There is no prejudice that will be suffered by the applicant because while it may have received the supplementary answering affidavit late, its rights have not been prejudiced thereby. If prejudice has been suffered by the applicant, it is minimal.

11.10 It is in the interests of justice that the supplementary answering affidavit be allowed so that the matter can be fully ventilated.

11.11 The applicant has responded fully to the supplementary answering affidavit. Accordingly, there is no prejudice to the applicant.

12. The court has a discretion to permit the filing of further affidavits. The fundamental consideration is that the matter should be adjudicated on all the facts relevant to the issues in dispute. It is essentially a matter of fairness to both parties⁴. The matters raised in the supplementary answering affidavit are not fact “dense”. The issues raised are, in substance, matters of law, being the defences of *res judicata* and a constitutional challenge. The applicant has in any event dealt with these two defences in its supplementary replying affidavit. The matter has, for various reasons, suffered from a “stop start” process with delays of very lengthy periods of time without substantial progress being made. The explanation put forward by the second respondent is, in the totality of the circumstances of this case, reasonable and does not in my view, evince *mala fides* on his part⁵. Ultimately, I consider it be in the interests of justice to allow the second respondent’s supplementary answering affidavit into evidence. The applicant’s supplementary replying affidavit is also submitted into evidence.

13. As to condonation, again, the court has a discretion. Given my views regarding the granting of leave to introduce the supplementary replying affidavit into evidence and the fact that the applicant did not deliver an answering affidavit

⁴ *Milne NO v Fabric House (Pty) Ltd* 1957 (3) SA 63 (N) at para 65

⁵ *Transvaal Racing Club v Jockey Club of South Africa* 1958 (3) SA 599 (W) at 604 A-E

opposing the second respondent's application for condonation, I consider it to be in the interest of justice to grant the application for condonation.

14. I turn now to consider the merits of the application.

Factual Matrix

15. The facts set out below are either common cause or not disputed or refuted on the papers.

16. On or about 17 February 2016 and at Johannesburg:

16.1 FBC duly represented by the third respondent executed a deed of indemnity⁶;

16.2 The first to fourth respondents executed a deed of suretyship and indemnity in favour of the applicant in terms of which they, as co-indemnifiers with FBC, indemnified the applicant against any loss it may sustain consequent upon the issuing of any guarantee issued by the applicant on behalf of or at the behest of FBC⁷.

17. The terms and conditions of the deed of indemnity executed by FBC and the deed of suretyship and indemnity executed by the first to fourth respondents are in many respects the same. However, for present purposes, I will have regard to the terms and conditions of the deed of suretyship and indemnity.

18. In the deed of suretyship and indemnity it is recorded, amongst other things that:

⁶ Founding Affidavit, para 9.1, CaseLines p. 02-9 as read with Annexure "FA1" CaseLines p. 02-24-02 to 31

⁷ Founding Affidavit, para 9.2, CaseLines p. 02-9 read with Annexure "FA2" CaseLines p. 02-34 to 02-45

- 18.1 the applicant would from time to time provide inter alia certain guarantees, undertakings or suretyships in favour of certain persons or entities, for the due payment by FBC or such entity of any monies now or from time to time thereafter owing by FBC or such entity (Preamble: A);
- 18.2 FBC agreed to indemnify the applicant and to hold it harmless from and against all and any claims, losses, demands, liabilities, costs or expenses of whatsoever nature, which the applicant may sustain or incur, by reason or in consequence of having executed any guarantee (Preamble: B);
- 18.3 the undersigned (first, second, third and fourth respondents) agreed to bind themselves as sureties for and co-principal debtors, jointly and severally, with FBC, *in solidum* for the due payment by FBC to the applicant on demand of any amounts which FBC may be liable to pay to the applicant under the indemnity (Preamble: C);
- 18.4 all four respondents agreed to interpose and bind themselves as sureties for and co-principal debtors, jointly and severally, with FBC, in solidum, for the due payment by FBC to the applicant for all and any amounts which FBC may be liable to pay to the applicant under the indemnity (Clause1);
- 18.5 all four respondents indemnified and held harmless the applicant against all and any claims, losses, demands, liabilities, costs, charges, expenses and/or damages of whatsoever nature, including legal costs as between attorney and client and/or interest, which the applicant may at any time sustain or incur, by reason or in consequence of or in relation to any guarantees (Clause 2);
- 18.6 all four respondents undertook and agreed to pay the applicant on demand any sum or sums of money which the applicant may be called upon to pay under any guarantee, by reason or in

consequence of or in relation to any guarantee/s, whether or not the applicant shall at such date have made such payment and whether or not the respondents admit the validity of such claim against the applicant under the guarantee (Clause 3);

18.7 where the applicant has made payment of any sums under and in relation to the guarantee, the respondents agreed that they will be liable to the applicant for payment of interest at the rate equal to the prime overdraft rate of ABSA Bank Limited plus 2% (two percent) calculated from date of payment by the applicant (to the beneficiary under the guarantee consequence upon a demand) until date of repayment by the respondents (Clause 4);

18.8 the respondents renounced the legal exceptions or benefits of excussion, division, cession of action, and no value received, with which meaning and effect they declare themselves to be acquainted (Clause 7);

18.9 the respondents' obligations and liability shall continue and remain in full force and effect as a continuing covering security until such time as FBC is entirely and finally released discharged from all their obligations, contingent or otherwise to the applicant and the respondents will not be entitled to withdraw until FBC has been so finally released and discharged (Clause 8).

19. On or about 25 February 2016 and at Sandton, the applicant, at the instance and request of FBC, duly represented by the third respondent, issued a guarantee with guarantee number: 13346 ("the guarantee") in favour of Airports Company South Africa SOC Limited ("the beneficiary").⁸

20. In terms of the guarantee:

⁸ Founding Affidavit, para 13, CaseLines p. 02-14 read with Annexure "FA3" and "FA4" CaseLines p. 02-46 to 02- 49

20.1 the applicant undertook to make payment to the beneficiary in an amount of R4,000,000.00 (Four Million Rand) upon receipt of the beneficiary's demand, which demand is to state:

20.1.1 that FBC is in breach of its obligations under the Agreement entered into between FBC and the beneficiary; and

20.1.2 the respect in which FBC is in breach.

20.2 It would expire on 28 February 2017.

21. On or about 19 December 2016, the applicant received a demand from the beneficiary in terms of which the beneficiary demanded payment of the amount of R4,000,000.00 (Four Million Rand), consequent upon the first respondent's breach of its obligations under the agreement.⁹ On or about 16 February 2017, the applicant, through its attorneys of record, issued letters of demand to the respondents.¹⁰

22. On or about 28 February 2017, the applicant made payment to the beneficiary as demanded.¹¹

23. FBC was placed into business rescue and accordingly, the applicant is unable to seek judgment against FBC in consequence of the moratorium placed on a company in business rescue by section 133 of the 2008 Companies Act.¹²

⁹ Founding Affidavit, para 15, CaseLines p. 02-15 read with Annexure "FA5", CaseLines p. 02-50 to 02-51

¹⁰ Founding Affidavit, para 19 and 20, CaseLines p. 02-16 read with Annexures "FA7.1" to "FA7.4" CaseLines p. 02-53 to 02-64.

¹¹ Founding Affidavit, para 17, CaseLines p. 02-15 read with Annexure "FA6", CaseLines p. 02-52

¹² Founding Affidavit, para 18, CaseLines p. 02-16.

24. The respondents failed, refused and/or neglected to make payment of the amount demanded, which resulted in the applicant launching this application on or about 18 September 2017.¹³
25. On 2 September 2021, the applicant obtained judgement on an unopposed basis against the first, third and fourth respondents.

The applicant's case for monetary judgement

26. In the face of the facts set out above which are either common cause or not disputed or refuted on the papers, the second respondent has raised the defences set out in its answering affidavit and then two new defences of *res judicata* and the constitutional challenge in his supplementary answering affidavit.
27. I propose to deal with these in turn.

The second respondent's answering affidavit

28. In his answering affidavit the second respondent avers that¹⁴:

28.1 the demand (Annexure FA5 to the founding affidavit¹⁵) made by ACSA does not comply with the terms of the guarantee as it does not state in which respect FBC was in breach of the main contract, as it was supposed to, as stated in paragraph 13.1.2 of the founding affidavit and the first page of the guarantee being Annexure FA4¹⁶ of the founding affidavit;

¹³ Notice of Motion, CaseLines p. 02-1.

¹⁴ Answering Affidavit, paras 3, 4, 6 and 7. Caselines p. 02-87 to 02-88

¹⁵ Claim on Guarantee, Caselines 02-50-51

¹⁶ Demand Guarantee, Caselines 02-48-49

- 28.2 the founding affidavit does not state whether the claim of the beneficiary (ACSA) is based on a damages claim or a liquidated amount.
- 28.3 Should such claim be based on damages, then the applicant was not entitled to proceed by way of motion proceedings.
- 28.4 he has never met Mr de Jager, the deponent to the founding affidavit, and he denies that Mr de Jager has any personal knowledge of the facts deposed to by him.
- 28.5 He has not been advised by anybody in precisely what respects FBC was in breach. He also never received FA7.3¹⁷.

The applicant's replying affidavit

29. In its replying affidavit, the applicant avers that¹⁸:

- 29.1 It is clear from the contents of paragraph 2 read with sub paragraphs a, b and c of annexure FA5¹⁹ that the breach of FBC was in relation to amounts due and owing to the beneficiary.
- 29.2 The applicant is not required to state the basis of the beneficiaries claim under a guarantee when regard is had to the provisions of the indemnities executed by the respondents, FA2²⁰ read with FA1²¹.
- 29.3 The second respondent misconstrues the nature of the applicants claim.

¹⁷ Letter of demand by applicant's attorneys addressed to second respondent, Caselines 02-50-61

¹⁸ Replying Affidavit, paras 5, 6, and 7, Caselines 02-83-84

¹⁹ Claim on Guarantee, Caselines 02-50-51

²⁰ Deed of Suretyship and Indemnity, Caselines 02-34-45

²¹ Deed of Indemnity, Caselines 01-24-33

29.4 The second respondent has failed to disclose any defence to the merits of the claim.

30. I agree with the contentions made by the applicant. There is no merit in any of the defences raised by the second respondent for the following reasons:

30.1 As to the first defence, the demand states the following:

30.1.1 *"2. The Principal is in breach of its obligations in the following respects;*

a. The Principal is indebted to ACSA in the amount R8,442,530.50.

b. The Principal is in breach of its obligation under the Agreement, in that the Principal has failed, neglected or refused to make payment of the amount due, owing and payable to ACSA, in respect of airport charges.

c. The Principal's failure to pay is a breach of the Agreement."

30.2 As to the second defence, it is clear that the applicant's claim against the second respondent is based on the deed of suretyship and indemnity.

30.3 As to the third defence, the applicant was clearly entitled to proceed by way of notice of motion.

30.4 As to the fourth defence, assuming that it is true that the respondent did not receive the demand addressed to him, he has since become aware of it by virtue of the service of the application upon him. The second respondent does not say what he would have done if he had

received the demand earlier. I note, too, that the demand was addressed to the second respondent at the *domicilium citandi* which he had chosen.

30.5 As to the fifth defence, the deponent to the applicant's founding affidavit, Mr De Jager, avers that he is the manager of the "claims specialist and liability unit of the applicant", that he has at his disposal all of the records of the applicant as it related to this matter, that he has duly perused same and that he has acquainted himself with the content thereof.²² He is, in my view, able to properly depose to the founding affidavit:

30.5.1 In the matter of Shackelton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another 2010 (5) SA 112 (KZP) at paragraph 13 the court said: *"(F)irst-hand knowledge of every fact which goes to make up the applicant's cause of action is not required, and that where the applicant is a corporate entity, the deponent may well legitimately rely on records in a company's possession for their personal knowledge of at least certain of the relevant facts and the ability to swear positively to such facts."*

30.5.2 In the matter of Rees and Another v Investec Bank Ltd 2014 (4) SA 220 (SCA) the court again reaffirmed that the deponent to the applicant's affidavit need not have first hand knowledge of every fact comprising its cause of action and that the deponent could rely for its knowledge on the documents in the corporation's possession.²³

²² Founding affidavit, paras 1 and 3, Caselines 02-06-07

²³ *Dean Gillian Rees v Investec Bank Limited* (330/13) [2014] ZASCA 38 para 15

31. I turn now to deal with the two new defences raised by the second respondent in his supplementary answering affidavit, namely *res judicata* and the constitutional challenge.

The second respondent's supplementary answering affidavit

Res judicata

32. In his supplementary answering affidavit, the second respondent avers that²⁴:

- 32.1 The applicant made an “election” to take judgement against the first, third, and fourth respondents only and in full, despite the fact that he is one of the respondents in the matter. The applicant is bound by that election.
- 32.2 He is advised that the matter has accordingly become *res judicata*. The court has given an order on the same case and on the same issues between the parties.
- 32.3 It goes against public policy to have the same thing being demanded more than once.
- 32.4 Since the applicant elected to take an order against the first, third and fourth respondents, it can no longer claim the same monetary judgement against him because that would amount to demanding the same thing more than once.
- 32.5 The applicant is no longer suing the respondents, jointly and severally, the one paying the other to be absolved.

²⁴ Supplementary Answering Affidavit, paras 15 – 25, Caselines 02-111-113

- 32.6 If the applicant is allowed to proceed against him, there is a real risk and possibility that another court may render a conflicting decision on the same issue.
- 32.7 If the dispute was still live and justiciable, he would have been entitled to claim an indemnity or contribution from the third respondent based upon a *pro rata* shareholding arrangement in a company.
- 32.8 The applicant has not explained whether or not it has executed the order against the first, third and fourth respondents. The applicant may well already have recovered all of the money or a substantial portion thereof, because the applicant holds security over the immovable property belonging to the third and fourth respondents and the property has been declared executable. According to the applicant, the value of the property is sufficient to cover the payment of a large portion of the amount owing to it.
- 32.9 It is for this reason that the application should be dismissed with costs.

The applicant's supplementary replying affidavit

33. The applicant in its supplementary replying affidavit avers, that²⁵:

- 33.1 The first, second, third and fourth respondents executed a deed of suretyship and indemnity in favour of the applicant in terms of which they, as co-indemnifiers with FBC, indemnified the applicant against any loss it may sustain consequent upon the issuing of any guarantee issued by the applicant on behalf or at the behest of FBC.

²⁵ Supplementary Replying Affidavit, Caselines 02-172

- 33.2 The respondents renounced the benefits of excussion and division.
- 33.3 Accordingly, the applicant can proceed to seek payment from any of the respondents at any given stage, and the second respondent's right of recourse for any payment he has made to the applicant is to seek payment from the first, third and fourth respondents.
- 33.4 The applicant is not bound by an election because it first sought payment from the remaining respondents. The fact that judgement has already been obtained against the other respondents and not against the second respondent does not mean that the matter is *res judicata*.

The law relating to res judicata

34. The defence of *res judicata* is applicable where a matter has already been decided and is available where the dispute was between the same parties, for the same relief or the same of cause of action. A party seeking to rely on the defence of *res judicata* must allege and prove all the elements underlying the defence.²⁶

Analysis

35. The second respondent cannot prove all of the aforesaid elements. The dispute is not between the same parties because the dispute and subsequent judgment obtained was between the applicant, and the first, third and fourth respondents. The applicant has not obtained judgement against the second respondent.
36. The second respondent has not advanced any evidence that the applicant made an "election" pursuant to which the applicant can be said to have

²⁶ *Democratic Alliance v Brummer* 2021 (2) All SA 818 (WCC)

“abandoned” its claim against him. The applicant took judgement against the other respondents because they did not oppose the matter.

37. On the facts, the litigation continued against the second respondent. The applicant did not file a notice of withdrawal of its claim against the second respondent. The *lis* between them remains alive.
38. The second respondent as a co-indemnifier renounced the benefit of excussion (*beneficium ordinis seu excussionis*)²⁷.
39. In *ABSA Bank Ltd v Prinsloo Families Trust & Others* 2024 (3) SA 80 (GJ) (4 December 2023), the court held that the fact that the creditor obtained judgement against one defendant (debtor) does not disentitle the creditor from obtaining judgement against the remaining defendants.²⁸
40. Accordingly, there was no obligation on the applicant to pursue judgement against all four of the respondents at the same time. As such, the applicant is not required to demonstrate what steps it took to execute on the judgment obtained against the first, third and fourth respondents, while pursuing judgment against the second respondent.
41. The second respondent’s right of recourse for any amount paid by him on behalf of the other sureties is to claim that amount from them directly in a separate action and/or claim.
42. Accordingly, the deed of suretyship and indemnity of the second respondent remains enforceable, and the applicant remains entitled to pursue judgment against the second respondent.
43. I find that the second respondent’s defence of *res judicata* has no merit.

²⁷ Founding Affidavit Annexure FA2 para 7, Caselines 02-37

²⁸ *ABSA Bank Ltd v Prinsloo Families Trust & Others* 2024 (3) SA 80 (GJ) (4 December 2023), para 53

The application of the NCA

The applicant's founding affidavit

44. In its founding affidavit, the applicant avers that the provisions of the NCA do not apply to this matter because, essentially, the transaction envisaged by the Indemnities²⁹, and specifically the guarantee issued on FBC's behalf³⁰, relates to the issuing of a guarantee which is governed by the provisions of the Short Term Insurance Act No 53 of 1998 ("the Short Term Insurance Act")³¹.
45. I pause to note here that the second respondent did not deal with this in his answering affidavit.

The second respondent's supplementary answering affidavit

46. In the second respondent's supplementary answering affidavit, he avers that:
- 46.1 the claim by the applicant that the NCA does not apply because the guarantee that it issued to or on behalf of FBC is governed by the provisions of the Short Term Insurance Act, is incorrect and fundamentally misguided.³²
- 46.2 it is common cause that the second respondent signed a deed of indemnity and suretyship in favour of the applicant in the event of FBC failing to discharge its liability to the applicant. The suretyship is the only instrument that grants the applicant a claim against the second respondent.³³

²⁹ Applicant's Founding Affidavit Annex FA1 and FA2, Caselines p. 02-24, 02-34-35

³⁰ Applicant's Founding Affidavit Annex FA4, Caselines p. 02-48-49

³¹ Applicant's Founding Affidavit, para 27.1, CaseLines p. 02-19.

³² Second Respondent's Supplementary Answering Affidavit paragraph 25 and 26, CaseLines p. 02-113.

³³ Second Respondent's Supplementary Answering Affidavit paragraph 27, CaseLines p. 02-113.

- 46.3 he has been advised that the deed of suretyship constitutes a credit agreement in terms of the meaning and ambit of the NCA. The only question is whether or not the deed of suretyship is exempt from the application of the NCA.
- 46.4 Section 4(1) of the NCA, applies to every credit agreement between parties dealing at arm's length and made within or having effect within the Republic.³⁴
- 46.5 insofar as natural persons are concerned, the fallback position is that when the consumer is a natural person, the NCA finds application in all circumstances. However, where the consumer is a juristic person, there are circumstances where the NCA finds no application. The exceptions are provided for in section 4(1) of the NCA.³⁵
- 46.6 In other words, the applicant was duty bound to conduct the assessment that is required to be made in terms of section 81(2) of the NCA before asking the second respondent to guarantee the debts or obligations of FBC. It is common cause that in his case no assessment contemplated under section 81(2) of the NCA was done.
- 46.7 the said section 4(2)(c) creates an anomaly because it divests the protection afforded to natural persons under section 4(1), namely that the NCA applies in all such transactions. Section 4(2)(c) therefore conflicts with the default position.
- 46.8 in consequence, section 4(2)(c) removes the protection of natural persons consumers without such persons being necessarily aware that they are waiving rights and protection of the NCA.³⁶

³⁴ Second Respondent's Supplementary Answering Affidavit paragraph 33, CaseLines 02-114.

³⁵ Second Respondent's Supplementary Answering Affidavit paragraph 34, CaseLines 02-114.

³⁶ Second Respondent's Supplementary Answering Affidavit paragraph 38, CaseLines 02-115.

- 46.9 the result is that a natural person consumer believing to be protected under the NCA, finds him or herself without any such protection without being afforded an opportunity to consciously waive such protection.³⁷
- 46.10 (therefore) section 4(2)(c) takes away the advantages sought to be bestowed by the NCA, *inter alia*, in its preamble and section 3.³⁸
- 46.11 the NCA clearly sought to distinguish between natural persons and juristic persons but a natural person executing a credit guarantee is treated on exactly the same footing as a juristic person.³⁹
- 46.12 in this case, the deed of suretyship is a template, it does not say where the NCA applies and where not. It is left to the consumer to guess and the bank simply approaches it on the middle ground of uncertainty.⁴⁰
- 46.13 the discrimination and discord created by section 4(2) (c) of the NCA falls to be declared invalid in terms of section 172 of the Constitution⁴¹.

The applicant's supplementary replying affidavit

47. In its supplementary replying affidavit, the applicant contends that:

- 47.1 the NCA does not find application as the guarantee issued on FBC's behalf is governed by the Short Term Insurance Act.

³⁷ Second Respondent's Supplementary Answering Affidavit paragraph 39, CaseLines 02-116.

³⁸ Second Respondent's Supplementary Answering Affidavit paragraph 40, CaseLines 02-116.

³⁹ Second Respondent's Supplementary Answering Affidavit paragraph 41, CaseLines 02-116.

⁴⁰ Second Respondent's Supplementary Answering Affidavit paragraph 42, CaseLines 02-116 – 02-117.

⁴¹ Second Respondent's Supplementary Answering Affidavit paragraph 43, CaseLines 02-117.

- 47.2 The second respondent has confused the nature of a demand guarantee which is regulated by the provisions of the Short Term Insurance Act with a "guarantee" defined in the NCA. In consequence there was no obligation on the applicant to comply with the provisions of the NCA.⁴²
- 47.3 the deed of suretyship does not constitute a credit agreement as defined in the NCA.⁴³
- 47.4 the principal debtor in terms of which the guarantee was issued is FBC a juristic person which is excluded from the provisions of the NCA in terms of section 4(1)(a).⁴⁴
- 47.5 the NCA applies only to the extent that it applies to the principal debtor. If the NCA does not apply to the principal debtor, it does not apply to the surety (the second respondent).⁴⁵

Analysis

48. In order to impugn the provisions of section 4(2)(c) of the NCA, the second respondent (in his heads of argument) asks this court to find first, that the deed of suretyship and indemnity should be regarded as a "credit guarantee" to which the NCA applies. In my view, if that finding is not made, the second respondent's case falls at the first hurdle.
49. Section 8(5) of the NCA provides that *"(5) An agreement irrespective of its form, but not including an agreement contemplated in sub-section 2, constitutes a credit guarantee if, in terms of that agreement, a person undertakes or*

⁴² The Applicant's Supplementary Replying Affidavit paragraphs 27-29, CaseLines 02-173.

⁴³ The Applicant's Supplementary Replying Affidavit paragraphs 66, CaseLines 02-182.

⁴⁴ The Applicant's Supplementary Replying Affidavit paragraphs 68, CaseLines 02-183.

⁴⁵ The Applicant's Supplementary Replying Affidavit paragraphs 69, CaseLines 02-183.

promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or credit transaction to which this Act applies.”

50. Accordingly, the deed of suretyship and indemnity must be found to be an agreement which secures an obligation of FBC to the applicant which is either a “credit facility” or a “credit transaction” (subject to the exclusion provided for in sub-section 2).
51. In terms of Section 8(3) of the NCA, a “credit facility” is an agreement in terms of which the credit provider undertakes to supply goods or services or to pay an amount or amounts to the consumer or on his behalf, or at his direction. The consumer’s obligations to pay the price for the goods or services or to repay the money advanced is deferred or else he is billed periodically. The consumer pays a charge, fee or interest in respect of the arrears deferred or in respect of the amount billed which is not paid within the time agreed upon by the parties. Common examples of a credit facility are overdrawn cheque accounts, credit card transactions, and an account with a retailer which supplies furniture or other consumer goods on a buy-now pay-later basis.⁴⁶
52. In terms of section 8(1) read with section 8(4) of the NCA a “credit agreement” constitutes a “credit transaction” if it is:
 - a. A pawn transaction;
 - b. A discount transaction;
 - c. Incidental credit agreement;
 - d. Instalment agreement;
 - e. Mortgage agreement;

⁴⁶ Guide to the National Credit Act, Service Issue 10, Commentary, JM Otto “Types of Credit agreement” , pages 8-3 to 8-4(1)

- f. Secured loan;
 - g. Lease;
 - h. Any other credit agreement.
53. Having regard to what I have said above, I do not find that the deed of suretyship and indemnity executed by the second respondent should be regarded as a “credit guarantee to which the NCA has application.
54. The relationship between the applicant and FBC is set out in the papers. It is common cause that:
- 54.1 The first to fourth respondents executed a deed of suretyship and indemnity in favour of the applicant in terms of which they, as co-indemnifiers with FBC, indemnified the applicant against any loss it may sustain consequent upon the issuing of any guarantee by the applicant on behalf of or at the behest of FBC.
 - 54.2 FBC made application to the applicant for a guarantee.
 - 54.3 At clause G of the application for a guarantee, which is titled “Declaration”, it is recorded, *inter alia*, that “I/We [FBC] agree in consideration of the fact that Santam Limited has consented to act as surety, to pay the premium in respect of each guarantee that Santam Limited may provide me/us [FBC] with at inception date of such guarantee. Should a guarantee, following the lapse of one year from the inception date, still be required by the employer (beneficiary)[ACSA]. I/we [FBC] furthermore agree to pay Santam Limited all renewal premiums for the subsequent years at renewal

date, until I/we [FBC] can provide satisfactory proof to Santam Limited that the guarantee is no longer required”⁴⁷

55. The Short Term Insurance Act defines a “guarantee policy” to mean “[a] contract in terms of which a person, other than a bank, in return for a premium, undertakes to provide policy benefits if an event, contemplated in the policy as a risk relating to the failure of a person to discharge an obligation occurs and includes a reinsurance policy in respect of such a policy”.
56. Section 8(2) of the NCA provides that an agreement irrespective of its form is not a credit agreement if it is a policy of insurance or credit extended by an insurer solely to maintain the payment of premiums on a policy of insurance.
57. It is clear that FBC has been issued with a policy of insurance. In terms of Section 8(2) of the NCA, a policy of insurance is not a “credit agreement”. Therefore, the NCA does not have application in this matter.
58. The purpose of Section 4(2)(c) of the NCA is to provide greater certainty in applying section 4(1) of the NCA. It 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.*”
59. In *Firststrand Bank t/a RMB Private Bank v Nagel & Others*⁴⁸, the court found that if the NCA does not apply to the principal debtor, the NCA does not apply to the surety or co-principal debtor.

⁴⁷ Founding Affidavit, Annexure FA3, Application for a Guarantee, Caselines 02-46-47

⁴⁸ *Firststrand Bank t/a RMB Private Bank v Nagel & Others* [2013] ZAGPJHC 200; see also *Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2009 (2) SA 384 (T)

60. In *Shaw and Another v Mackintosh and Another*, the court stated, “*If the NCA does not apply to the credit transaction, it cannot apply to the credit guarantee.*”⁴⁹
61. For the reasons stated above, there is no proper basis in fact, or in law, for the purported constitutional challenge.
62. I am of the view that the applicant has made out a proper case for the relief that it seeks.
63. As to the question of costs, the deed of suretyship and indemnity makes provision for attorney and client costs.⁵⁰
64. I make the following order:
- 64.1 The second respondent is to make payment to the applicant in the amount of R4,000,000.00 (Four million Rand).
- 64.2 The second respondent is to make payment to the applicant of interest on the amount of R4,000,000.00 (Four million Rand) at the rate of 12.5% per annum, calculated from 28 February 2017 until date of payment.
- 64.3 The second respondent is to make payment to the applicant of its costs of suit, on the attorney and client scale.

S McCafferty AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

⁴⁹ *Shaw and Another v Mackintosh and Another* (267/17) [2018] ZASCA 53 para 8

⁵⁰ Annexure “FA2” CaseLines p. 02-36 para 2

Date heard: 5 June 2024

Date of judgement: 5 September 2024

APPEARANCES:

For the applicant: K Mitchell, Chambers Sandton

Instructed by:

Frese Gurovich Attorneys, Johannesburg

For second respondent: M Sikhakhane

Instructed by:

Mabuza Attorneys, Houghton