IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

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

03/02/2012
DATE SIGNATURE

CASE NUMBER: 43357/11
DATE: 3 February 2012

PRISMA VERPAKKING NORDE (PTY) LTD	*PLAINTIFF*
V	
JAPIE KRUGER HOLTZHAUSEN	*1st DEFENDANT*
CATHARINA SUSANNA HOLTZHAUSEN	*2nd DEFENDANT*
HEINRICH DUVENHAGE	*3rd DEFENDANT*
SUSAN VAN VUUREN	*4th DEFENDANT*

JUDGMENT

MABUSE J:

INTRODUCTION

1. This is an application for summary judgment. The plaintiff, a company with limited liability registered in terms of the company statutes of this country with its registered address at Third Floor, Newland Centre, New Street, Paarl, has issued summons against the defendants jointly and severally, the one paying and the others to be absolved, for payment of a sum of R439,321.85, interest and further ancillary relief. On 19 October 2011 judgment by default was granted against the second and fourth defendants for payment of the said amount plus interest and costs. Therefore the target of this application for summary judgment is the third defendant, an adult business man whose *domicilium citandi et executandi* is 18 Jan Smuts Avenue, Parktown, Johannesburg.

2. The plaintiff's cause of action arises from a written acknowledgement of debt signed on 29 October 2009 at Paarl, in the alternative, Marble Hall, between the plaintiff at the material time represented by one Charles Steenkamp and Tembador which was there and then represented by the first defendant, an adult businessman whose chosen *domicilium citandi et executandi* was Plot 202A, Wolwekraal, Marble Hall in Mpumalanga Province and a Deed of Suretyship signed by the third defendant at Marble hall on 8 April 2010 and the Plaintiff, represented by the said Steenkamp at Marble Hall, at Paarl on 12 April 2010. According to the said acknowledgement of debt a copy whereof was attached to the plaintiff's summons, Tembador' full names are Tembador 136 (Pty) Ltd ("Tembador").

THE FACTS

3. In terms of the said acknowledgement of debt:

   3.1 Tembador acknowledged itself to be indebted to the plaintiff in the sum of R1,683,162.15;

   3.2 It accepted liability for interest on the outstanding amount at the prime rate of Standard Bank Limited, calculated from 1 September 2009 until 29 October 2010;

   3.3 It also accepted liability for interest on the outstanding amount at the prime lending rate, compounded monthly in arrears, from 29 October 2010 to date of payment in full;

3.4 It undertook to pay the outstanding amount owing together with interest thereon by means of three instalments as follows:

3.4.1 Payment of R561,050.00 on or before 6 November 2009;

3.4.2 Payment of R561,054.00 on or before 6 September 2009; and

3.4.3 Payment of the outstanding balance plus interest on or before 6 January 2010;

3.5 The full balance of the principle debt and any interest accrued would immediately become due and payable at the plaintiff's option without prior notice from the Plaintiff should Tembador fail to pay any instalment on the due date;

3.6 Acceptance by the plaintiff of any payment made by Tembador after the due date would not be regarded as nor constitute a derogation or waiver of the rights of the plaintiff in terms of the acknowledgement and any indulgence or relaxation which the plaintiff might grant would be without prejudice to the rights of the plaintiff as is specified in the said acknowledgement of debt.

3.7 Tembador agreed that the amount of its indebtedness to the plaintiff at any time should be determined and proved by way of a certificate signed by the Financial Director of the plaintiff. Such certificate would be accepted as *prima facie* evidence of such indebtedness and would be sufficient to empower the plaintiff to bring the application for summary judgment or an application for provisional sentence in a competent court against Tembador for the amount as set out in such certificate and Tembador accepted the onus of proving that such amount did not represent the amount due to the plaintiff.

3.8 Tembador agreed furthermore to pay the plaintiff or its attorneys on demand all tracing fees, legal costs on attorney and own client scale and collection commissions payable by the plaintiff in respect of any action or proceedings which might be instituted against it in terms of or arising out of its acknowledgement.

4. On 12 April 2010 and at Paarl, in the alternative Marble Hall, the plaintiff, then represented by one Charl Steenkamp and Tembador, at the time represented by the first defendant, entered into a written addendum to the acknowledgement of debt. In terms of the aforementioned addendum,

4.1 the indulgence granted by the plaintiff in terms of the said addendum could not be deemed in any way to affect, prejudice or derogate from the plaintiff's rights arising from the acknowledgement of debt, nor could it in any way be regarded as waiver of any of the plaintiff's rights thereunder, nor could it be an innovation of the acknowledgement of debt.

4.2 Tembador undertook to pay the plaintiff as follows:

4.2.1 an amount of R250 000.00 on or before 30 March 2010;

4.2.2 an amount of R380 000.00 on or before 14 May 2010; and

4.2.3 an amount of R303 000.00 on or before 11 June 2010; and

4.2.4 the outstanding balance of the capital sum referred to in the acknowledgement of debt plus interest thereon and calculated in accordance with the provisions of the aforementioned acknowledgement of debt on or before 30 June 2010.

5. Tembador failed to make the payments as stipulated in the aforementioned acknowledgement of debt and the addendum thereto and only made the following payments:

5.1 R561,054.00 on 6 November 2009;

5.2 R437,75 on 9 November 2009;

5.3 R100 000.00 on 7 December 2009;

5.4 R100 000.00 on 12 December 2009;

5.5 R250 000.00 on 9 April 2010;

5.6 R200 000.00 on 30 November 2010; and

5.7 R200 000.00 on 3 December 2010.

No further payment from the said Tembador was ever received since then.

6. Accordingly, the full balance of the principle debt and accrued interest became due and payable immediately in terms of clause 7 of the acknowledgement of debt.

7. As at 1 March 2011 Tembador was indebted to the Plaintiff in the amount of R439 321.85 as was evident from a certificate signed by the Financial Director of the Plaintiff annexed to the plaintiff's summons as annexure POC3.

7.1 On 8 April 2010 and at Marble Hall the third defendant, among others, bound himself in writing as surety and co-principal debtor in solidum with Tembador for the due and punctual performance by Tembador of all its obligations under the said acknowledgement of debt. He signed the suretyship undertaking both as the surety and co-principal debtor.

7.2 According to the said suretyship, the third defendant bound himself as surety and co-principal debtor in solidum to the plaintiff for payment of all amounts due and payable by Tembador.

7.3 The further terms of the aforementioned addendum were that the third defendant further agreed to be liable to the plaintiff for any legal costs, including legal expenses, on the attorney-and-client scale incurred by plaintiff due to Tembador's default in discharging its obligations to the plaintiff.

7.4 The third defendant chose his *domicilium citandi et executandi* at Plot 202A Wolwekraal, Marble Hall, Mpumalanga Province. He agreed furthermore that no termination, cancellation, limitation or variation of the suretyship would be of any force or effect unless it had been agreed to in writing and signed by the plaintiff.

7.5 The third defendant renounced the benefits arising from the legal *exceptions ordinis seu excussionis et divisionis et divisionis and de doubus vel pluribus reis debedendi* and declared that he was fully acquainted with the meaning and effect thereof and understood and appreciated the said exceptions.

7.6 He agreed to the term that the suretyship agreement comprised the entire agreement between the plaintiff and him and that the plaintiff would not be bound by any undertakings, representations or warrantees not expressly recorded in it.

8. As Tembador failed to make payment to the plaintiff in the amount of R439 321.85, the third defendant was liable to the plaintiff in the said amount plus interest reckoned from 1 April 2011.

9. The plaintiff contends that the National Credit Act No. 34 of 2005 ("the Act"), is not applicable to the transaction between it and Tembador as, firstly, Tembador is a juristic person and, secondly, the agreement is a large agreement as defined in s. 4(1)(b) alternatively in s. 4(1)(a)(i) read together with s. 9(4) of the Act.

10. On the basis of the aforementioned reasons the plaintiff claims from the third defendant payment of the amount of R439,321.85.

11. The third defendant has filed an opposing affidavit in which he denied, for the reasons he has set out in the said affidavit, that he had entered an appearance merely for the sake of delay. He denied in the same affidavit that he was personally liable, in terms of the said acknowledgement of debt, for the amounts claimed. Furthermore he denied that the amounts which the plaintiff claimed from him were due and payable and that the said amounts were correct.

12. The third defendant contended that, although the plaintiff made the allegations that the Act is not applicable as Tembador is a juristic person and that it is a large agreement as defined in s. 4(1)(b) alternatively 4(1)(a)(i) read with s. 9(4) of the Act, the said Tembador was not a party to this action. He opined that in view of the fact that he was a surety and co-principal debtor with the co-defendants, the Act does apply to him.

13. The third defendant contended furthermore that the transaction was unlawful and not enforceable by reason of the fact that the plaintiff was not a registered credit provider at the time when the acknowledgement of debt was entered into. He contended furthermore that the plaintiff neither made the allegation that it was a registered credit provider and nor did it submit any proof of the fact that it was indeed registered as such. Accordingly the plaintiff's claim against him was unenforceable until such time as the plaintiff could prove that it was indeed a registered credit provider.

14. The third defendant denied that he signed the original acknowledgement of debt agreement or the subsequent addendum agreement.

15. The attitude of the third defendant is that the provisions of the Act are applicable to the transaction and accordingly the plaintiff should have sent him a notice in terms of s. 129 of the said Act. As it has failed to comply with the said section, the plaintiff was not entitled to proceed against him.

16. The third defendant contended furthermore that the suretyship constituted reckless credit as defined by the Act in as far as it related to him, considering his financial position at the time of conclusion of suretyship and was of the view that, for that reason, the claim was unenforceable. Tembador entered into a written addendum to the acknowledgement of debt.

17. In order to successfully resist the plaintiff's application for summary judgment, the third defendant must satisfy the court that he had a *bona fide* defence and disclose fully the grounds of such defence and the material facts on which he relied for his defence.

18. In his opposing affidavit, the third defendant has raised the following five defences against the plaintiff's application for summary judgment that:

18.1 the amount claimed has been incorrectly determined and was thus not due and payable;

18.2 he did not sign the acknowledgement of debt or the addendum thereto;

18.3 the plaintiff failed to comply with the provisions of the National Credit Act;

18.4 the plaintiff was not a registered credit provider in terms of the provisions of the National Credit Act; and

18.5 the suretyship constituted an unenforceable and reckless credit transaction.

I now turn to dealing with the Third defendant's defences singly.

19. THE AMOUNT CLAIMED HAS BEEN INCORRECTLY DETERMINED AND WAS THEREFORE NOT DUE AND PAYABLE

19.1 It is as clear as crystal that the third defendant disputes that he owes the plaintiff the sum of R439,321.85. The third defendant did not however furnish any reasons why he contended that the said amount had been incorrectly calculated. This is not

enough and I regard it as an unfair litigation. The plaintiff is entitled to know the reasons why the third defendant contends that the amount claimed has been incorrectly calculated. Where a party contends that the amount claimed has been incorrectly calculated he should indicate the amount that, in his view, the other party should claim and how that amount is computed.

20. Where a party, as the third defendant has done, fails to furnish any reasons for his view, he will have failed to fully disclose the material facts upon which his defence is based and the court will not be able to find that he has a *bona fide* defence. See **Maharaj v Barclays National Bank Limited 1976(1) SA 418 A at 426 C-D** where the court stated as follows:

"The word "fully" as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence."

21. Accordingly the third defendant's defence that the amount claimed has been incorrectly established stands to be dismissed on this point alone.

22. There is another point relating to the third respondent's dispute of the correctness of the amount claimed that I need to consider. It was argued by counsel for the plaintiff that the third defendant's defence that the amount claimed has been incorrectly determined was baseless and lacked any merit. Counsel for the plaintiff argued furthermore that in terms of clause 8 of the Acknowledgement of Debt, Tembador's indebtedness could at any time be determined and proved by a certificate signed by the plaintiff's financial director.

23. Accordingly such a certificate would, without much ado, be accepted as *prima facie* proof of Tembador's indebtedness to the plaintiff and would be sufficient to enable the plaintiff to bring an application for summary judgment in a competent court. The same clause 8 states, in addition, that the third defendant accepted the onus of proving that such an amount did not represent the amount due by him to the plaintiff. The third defendant, as I have already found

above, has failed to dispute that the amount claimed by the plaintiff did not represent the extent of his indebtedness to the plaintiff.

24. The terms of clause 8 of the said Acknowledgement of Debt were repeated in clause or paragraph 6 of the contract of suretyship which was signed by the third defendant himself on 8 April 2010. In his opposing affidavit, the third defendant did not deny that on 8 April 2010 he signed an addendum, although this admission was contained in his counsel's heads of argument. I must therefore accept that the third respondent was at all material times aware of the contents of paragraph 6 of the Deed of Suretyship and that his contention that the amount which the plaintiff claimed has not been correctly worked out was disingenuous.

25. Accordingly I dismiss the third defendant's first defence as lacking in merit.

26. HE DID NOT SIGN THE ACKNOWLEDGEMENT OF DEBT

26.1 In his opposing affidavit, the Third defendant denied ever having signed the Acknowledgement of Debt or the addendum subsequent thereto. This issue was not referred to in the third defendant's counsel's heads of argument.

27. It is clear that the action against the third defendant is premised on suretyship and not on the Acknowledgement of Debt or Addendum. His liability arises from the fact that on 8 April 2010 he signed a contract of suretyship and thereby bound himself to the plaintiff for payment of all the amounts due and payable by Tembador 136 (Pty) Ltd to the plaintiff in fulfilment of Tembador's obligations arising from the Acknowledgement of Debt signed by Tembador's representative.

28. The contract of suretyship stated explicitly that the third defendant acknowledged that the plaintiff would at all times be entitled, without reference to him, to enter into an agreement with Tembador to amend any of the terms of the agreement between the parties. The plaintiff reserved the right to extend the time in which Tembador was afforded to repay the loan amount without the plaintiff vitiating any of its rights in terms of the contract of suretyship. The contract of suretyship stated furthermore that any amendment or variation of the terms of the acknowledgement of debt would not be regarded as a novation of the indebtedness of

Tembador and the Third defendant acknowledged that he would not be released from his liability in terms of the suretyship as a result thereof.

29. In my view, this ground too lacks in merit and ought to be dismissed.

30. THE PLAINTIFF FAILED TO COMPLY WITH THE PROVISIONS OF THE NATIONAL CREDIT ACT

31. There exists a serious but genuine disparity between the parties as to whether the provisions of the Act apply to the matter or transaction between them. The third defendant contends that the said Act applies since he is a surety and co-principal debtor. It was argued by counsel for the third defendant that, because the said Act applies, the plaintiff has failed to comply with its provisions, in particular s. 129, thereof in as much as the plaintiff has failed to send him a notice referred to in the said section. Section 129 of the Act provides as follows:

"129(1)If the consumer is in default under a credit agreement, the credit provider –

(a) 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 intend that the parties resolve any dispute under the agreement or develop and agree on a plan to bring payments under the agreement up to date; and

(b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before

(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and

(ii) meeting any further requirements set out in section 130."

32. The provisions of s. 129 are, where they apply, peremptory and failure by a party to comply with them is fatal. There are two reasons that the third defendant provided in support of his view that the provisions of the said Act are applicable. The first of these two reasons is that, although the plaintiff contended that the Act was not applicable as Tembador was a juristic person and that the amount involved made the agreement a large one, Tembador was not a party to this action; secondly, that the third defendant contended that the action against him was based on the suretyship and not on Acknowledgement of Debt. As the plaintiff has failed

to comply with s. 129 of the said Act, it was the third defendant's view that its claim for summary judgment should, on the basis of the aforementioned two reasons, fail.

33. I now turn to consider the plaintiff's view. According to the plaintiff, the credit agreement on which its claim was based was concluded between it and Tembador 136 (Pty) Ltd and Tembador was a juristic person as envisaged by the provisions of s. 4(1)(a), and secondly the credit agreement was, as referred to in s. 4(1)(b), a large agreement. Based on those two reasons, it is the plaintiff's case, and it was so argued by the plaintiff's counsel, that the Act does not apply to the credit agreement between the parties and therefore does not apply to the transaction of suretyship in terms of which the third respondent had undertaken or promised to satisfy the obligation of the said Tembador (Pty) Ltd.

34. While the plaintiff accepted that the third defendant was surety it opined that when a surety guarantees payment of a credit agreement in terms of which the consumer is a juristic person, as contemplated in terms of s. 4(1)(a), and the credit agreement is a large agreement, as contemplated in s. 4(1)(b), the provisions of the Act do not apply to such a surety and such a surety may not seek the protection afforded by s. 129 of the Act. In other words, where the circumstances set out in s. 4(1)(a) and 4(1)(b) of the Act exist, the position of the surety is that the Act will also not apply to him or her. That this is the position appears quite clearly from the provisions of s. 2(c) of the said Act which provides as follows:

> "2 *For greater certainty in applying subsection (1)*
>
> *(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."*

The question whether or not the provisions of the Act apply to the transaction of suretyship between the credit grantor and the surety who guarantees payment in terms of which the consumer is a juristic person as envisaged in s. 4(1)(a) of the Act, and the credit agreement is a large agreement, as contemplated in s. 4(1)(b) of the Act, depends on whether the Act applies to the acknowledgement of Debt to which the suretyship is secondary. Consequently, the provisions of the Act will not apply to the suretyship transaction if they do not apply to *an Acknowledgement of debt* to which suretyship is secondary.

Accordingly where this Act does not apply to a transaction or credit agreement, it will also not apply to surety of a principal debt.

35. Counsel for the plaintiff referred the court to JW Scholtz: **Guide To The National Credit Act 2005 Lexis Nexis**; in which the learned author stated that a contract of suretyship is indeed a credit agreement. He cautioned however that the agreement of which the guarantee applies must itself be subject to the Act before the Act can apply to the relevant contract of suretyship. In order to explain the law, the said author used the following example:

"If a member of a close corporation gives a guarantee in respect of a lease or an instalment sale agreement entered into by the close corporation and the principle debt equals or exceeds R250,000.00, the underlying agreement is not subject to the Act and the credit guarantee likewise falls outside the scope of the Act." See paragraph 8.2.4 thereof.

The issue regarding the nature of the liability of the surety and whether as such he qualifies for protection under the Act was visited and decided in **First Rand Bank Limited v Carl Beck Estates (Pty) Ltd 2009(3) SA 384 TPD**. The court, having reiterated that s. 8(5) of the Act provided that an agreement constitutes a credit agreement if, in terms of that agreement a person undertakes or promises to satisfy upon demand any obligation of a consumer in terms of a credit facility or credit transaction to which the Act applies, held that the Act did not apply to credit agreement where a consumer is a juristic person.

In the said authority, the first respondent, which was a juristic person, had concluded a large agreement. The court reasoned that in such a case, one of the exemptions contained in s. 4 of the Act had to apply to the credit agreement by reason of the fact that either the value or turnover exceeded the threshold and s. 4(1)(a) would accordingly exempt the application of the Act or the value or turnover failed to satisfy the minimum threshold and s. 4(1)(b) of the Act would exempt the application of the Act. The court decided that where the provisions of the Act do not apply to a credit agreement, no duty rested on the applicant or plaintiff to furnish the respondent or defendant with a notice referred to in s. 129 of the Act before commencing legal proceedings against the respondent or defendant.

36. In conclusion I find that the principal credit agreement was a large agreement which was concluded by a juristic person. I therefore find that for those two reasons the provisions of the

Act do not apply to the transaction in question. I also find that the ancillary agreement of suretyship that the third defendant signed on 8 April 2010, as a consequence, falls outside the scope of the application of the said Act. I therefore find no merit at all in the third defendant's defences that the Act applies. Accordingly there was no obligation on the plaintiff to provide the third defendant with a notice in terms of s. 129 of the Act. In view of the finding of this court that the provisions of the Act did not apply to the subsections which constitutes the subject matter of this litigation the rest of the defences raised by the third defendant do not merit any further consideration.

Accordingly, subject to the plaintiff's prayers in the combined summons that the one paying and the other to be absolved, I make the following order:

1. Summary judgment against the third defendant for payment of the sum of R439,321.85 is hereby granted.
2. The third defendant is hereby ordered to pay interest on the said sum of R439,321.85 at Standard Bank's prime lending rate from time to time calculated daily and computed monthly in arrears as from 1 April 2011 to date of payment.
3. The third defendant is ordered to pay the costs on the scale as between attorney-and-client.

P.M. MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Plaintiff's Attorneys:	*Messrs MacRobbert Inc: on instruction of Werksmans Inc.*
Plaintiff's Counsel:	*Adv. N Breytenbach*
Third Defendant's Attorneys:	*Messrs Jasper vd Westhuzien & Bodenstein Inc.*
Third Defendant's Counsel:	*Adv. FG Janse van Rensburg*
Date Heard:	*28 November 2011*
Date of Judgment:	*3 February 2011*