SUPREME COURT OF APPEAL OF SOUTH AFRICA

-

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM	The Registrar, Supreme Court of Appeal
DATE	29 March 2018
STATUS	Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

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

Today the Supreme Court of Appeal (SCA) dismissed an appeal against the judgment of the Gauteng Local Division, Johannesburg. The issue on appeal concerned the proper interpretation of s 8(5) of the National Credit Act 34 of 2005 (the NCA).

A brief background of the matter is that, the first respondent, Glenn William Mackintosh (Mackintosh) and Mabili Search & Selection (Pty) Limited (Mabili) concluded an oral agreement, in 2009, in terms of which an amount of R2 million would be loaned to Mabili by Mackintosh. The parties, in October 2012, signed a written acknowledgement of debt (the agreement) in terms of which Mabili, as the debtor, acknowledged its indebtedness to Mackintosh, the creditor. In the agreement Mr Shaw and Mr Taylor (the appellants) bound them self as sureties for the amount owed by Mabili, the appellants were not party to the oral agreement. Mabili subsequently defaulted on its repayments.

Mackintosh contended that the agreement between it and the appellants was a credit guarantee and therefor falls outside the operation of the NCA because it was a credit guarantee in respect of an agreement that was not itself subject to the NCA. The appellants' argued that the agreement between them and Mackintosh was not a credit guarantee, but a credit transaction as defined in s 8(4)*(f)* of the NCA and that there had been no compliance by Mackintosh with his obligations under the NCA.

The SCA accepted that, for the purpose of the appeal, the appellants were co-principal debtors. The SCA considered that the NCA applies to three kinds of agreements, namely a credit facility, a credit transaction or a credit guarantee. In terms s 1 of the NCA an agreement is a credit guarantee if 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 the NCA applies.

The SCA considered the operation of s 8(5), a precondition to the operation of s 8(5) is that it applies to the obligations of another. The language of the section refers both to an undertaking and a promise to satisfy the obligation of another. In the section no reference to a suretyship or guarantee or any similar word is used. The appellants were not granted any loan nor were any credit advanced to them. The involvement of the appellants only arose when they undertook or promised to pay on demand the admitted indebtedness of Mabili to Mackintosh.

The SCA found that the agreement expressly stated that the sum of R2 million was advanced to Mabili and not the appellants. That brings the obligations of the appellants squarely within the language of s 8(5). However, Mackintosh was not a credit provider in terms of s 40 of the Act. He was not in the business of providing credit. The agreement was a once-off transaction and not falling within the ambit of the provisions of the NCA. Section 4(2)*(c)* of the NCA provides that the NCA applies to a credit guarantee only to the extent that the NCA applies to a credit facility or credit transaction. Due to the provisions of s 4(2)*(c),* and even though obligations of the appellants fall within the language of s 8(5), the agreement between the appellant and Mackintosh falls outside the NCA.

The appeal was dismissed with costs.