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THE NATIONAL CREDIT ACT REGARDING SURETYSHIPS AND RECKLESS LENDING

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1 Introduction

The provisions that prohibit reckless credit granting form part of the measures that were introduced by the *National Credit Act*[1] with the aim of resolving the problem of over-indebtedness and preventing reckless credit lending. In terms of section 81(2) of the *National Credit Act* a credit provider may not enter into a credit agreement with a consumer without first taking reasonable steps to assess the consumer's debt re-payment history, existing financial means, prospects and obligations, his understanding of the risks and costs of the proposed credit, and his rights and obligations under a proposed credit agreement. The credit agreement will be reckless in terms of the *National Credit Act* if the credit provider fails to conduct this assessment, irrespective of the outcome of the assessment. It seems that a practice of not conducting this assessment has evolved amongst certain credit providers where the credit agreement involved is a suretyship agreement. This article investigates whether or not a suretyship agreement is a credit agreement for the purposes of the *National Credit Act*; what the definition of a credit guarantee set out in section 8(5) encompasses; and if a section 81(2) assessment should be conducted in the case of a suretyship agreement.

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[1] *National Credit Act* 34 of 2005, hereinafter "the *National Credit Act*" or simply "the Act". In this article words in the singular also mean in the plural and *vice versa*, and words in the masculine also mean in the feminine and neuter.

2 Is a suretyship agreement a credit agreement in terms of the *National Credit Act?*

2.1 What is a credit guarantee?

The *National Credit Act* provides, subject to certain exemptions, that the Act generally applies to every credit agreement (eg, money-lending transactions irrespective of the amount) between parties dealing at arm's length and made or having an effect in South Africa.[2] The *National Credit Act* defines the word "credit" when used as a noun as: "a deferral of payment of money owed to a person, or a promise to defer such a payment; or a promise to advance or pay money to or at the direction of another person".[3] The Act also defines a "credit agreement" in section 8 and states that it includes a "credit facility"[4] or a "credit transaction";[5] or a "credit guarantee";[6] or any combination of these.[7]

It is imperative to know whether a suretyship agreement is a credit agreement in terms of the *National Credit Act* because a suretyship agreement is an important tool that credit providers use in limiting the risk of granting credit – a third party provides surety to pay where the original (principal) debtor fails to pay.[8] Non-compliance with the provisions of the *National Credit Act* in respect of suretyship agreements can have serious consequences for credit providers, if the Act does, in fact, apply to such agreements.

It is therefore essential to analyse the definition of a "credit guarantee". A "credit guarantee" is defined as follows in section 8(5):

> An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit guarantee if, in terms of that agreement, a

2 Section 4 *National Credit Act* 34 of 2005.
3 Section 1 *National Credit Act* 34 of 2005.
4 As defined in s 8(3) *National Credit Act* 34 of 2005.
5 As defined in s 8(4) *National Credit Act* 34 of 2005.
6 As defined s 8(5) *National Credit Act* 34 of 2005.
7 Section 8(1)(*d*) *National Credit Act* 34 of 2005. See also Otto *National Credit Act* 15; Stoop 2008 *De Jure* 354.
8 See Mostert 2009 *De Rebus* 53.

> 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.

In terms of subsection 2, referred to in the definition, no agreement is 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, if it is a lease of immovable property, or if it is a specific stokvel transaction.[9]

It may be argued that the definition of a credit guarantee is not reconcilable with the definition and characteristics of a common-law suretyship (ie an accessory guarantee), but that it refers rather to a primary guarantee, such as a demand guarantee or letter of credit, and that the *National Credit Act* therefore does not apply to a common-law suretyship.[10] Contrary to accessory guarantees (eg, suretyships), primary guarantees, such as demand guarantees and letters of credit, create primary obligations which are not dependent on the existence of a principal debt.[11] Therefore, the definition and nature of a contract of suretyship (ie, accessory guarantee) and primary guarantees should be examined.

2.2 What is a suretyship?

2.2.1 General

"Guarantees are usually taken to provide a second pocket to pay if the first should be empty".[12] Guarantees and indemnities, which are also described as "securities", are distinct arrangements in terms of which a third party – the surety (guarantor) – agrees to assume liability if the debtor defaults or causes loss to the creditor. The former arrangement is a traditional guarantee (suretyship) and the latter involves an indemnity.[13] Therefore, a guarantee is usually issued to cover a credit agreement or

9 See s 1 read with s 8(2)(*c*) *National Credit Act* 34 of 2005 for the definition of "stokvel".
10 Mostert 2009 *De Rebus* 53-55; see also *List v Jungers* 1979 3 SA 106 (A) and *Union and South-West Africa Insurance Co Ltd v Hull* 1972 4 SA 481 (D) on guarantees and suretyships.
11 Lotz "Suretyship" 195.
12 Wood *Security and Guarantees* 313.
13 Ellinger *Modern Banking Law* 259.

transaction; in other words, the guarantee is issued as financial security by a third party in favour of the creditor.[14]

In South African law the words "guarantee" and "suretyship" have often been referred to as synonyms and have been referred to interchangeably by legal writers and courts alike. For instance, sometimes the word "guarantee" or variants of the word are used when suretyship is meant. At other times the word "guarantee" is meant to be used as a verb and the meaning is then more straightforward. In recent years this practice of using the words "guarantee" and "suretyship" synonymously and interchangeably has been criticised. However, the practice is ingrained in the South African law reports and will be difficult to eradicate.[15] It is not our intention to attempt to describe the exact differences between the words "guarantee" and "suretyship", nor is it our intention to distinguish between the "suretyship" and the "indemnity contract".[16] The generic term "guarantee" can comprise two very different devices: (1) the primary guarantee (ie, the demand guarantee, which is also known as the performance guarantee/bond or the independent guarantee) or letter of credit, and (2) the secondary (or accessory) guarantee (ie, the suretyship guarantee or the traditional guarantee). However, as demand guarantees and letters of credit (including standby letters of credit) are also sometimes regarded as either forms of guarantees, particularly contracts of suretyship,[17] or closely related to them, but with

14 Gorton 1997 *JBL* 240.

15 Forsyth and Pretorius *Suretyship* 27 note 7; *Mouton v Die Mynwerkersunie* 1977 1 SA 119 (A). The distinction between the word "guarantee" (in Afrikaans also known as "garansie" and "waarborg") and "suretyship" is indeed problematic (see Lubbe 1984 *THRHR* 391; Caney *Suretyship* 65-66). In practice, the characteristics of so-called common-law suretyship are blurred, *inter alia* by poor, vague or wide drafting of agreements (see also Lubbe 1984 *THRHR* 391). For example, in the case of *Neuhoff v York Timbers Ltd* 1984 4 SA 666 (T) 675 the surety's obligations were set out in broad terms in the agreement and the words "payment upon demand" were used. Therefore, even if the words "suretyship" and "guarantee" are used in a contract, their meaning must still be gathered from the context (see *List v Jungers* 1979 3 SA 106 (A)).

16 For a discussion of the difference between suretyship and contract of guarantee, see Forsyth and Pretorius *Suretyship* 30–32 and the authorities cited; and for a discussion of the differences between a contract of suretyship and indemnity contract, see also Pretorius 1982 *THRHR* 73; Lubbe 1984 *THRHR* 383; De Wet and Van Wyk *Kontraktereg* 391; Pretorius 2001 *SA Merc LJ* 95; Sonnekus 2009 *TSAR* 165 and De Villiers *Suretyship* 3-33 and the authorities cited there (see also note 32 below for a brief discussion of the indemnity contract).

17 Van Niekerk and Schulze *International Trade* 302. It has also been said that a demand guarantee is comparable to an indemnity rather than a suretyship (for a full discussion of this, see Penn 1986 *JIBL* 225–226). However, for a view that a demand guarantee is distinguished from a true indemnity, see Perrignon 1991 *JBFLP* 161.

distinct characteristics,[18] it is important for current purposes to distinguish the demand guarantee, the commercial letter of credit and the suretyship guarantee from one another. From the discussion below, it will be seen that the demand guarantee is unique in character and actually stands between the suretyship guarantee (where the undertaking to pay is secondary both in intent and in form - ie, it is accessory to the principal debt) and the commercial letter of credit (where the undertaking to pay is primary both in form and intent), in the sense that, it is secondary in intent but primary in form (ie, the guarantor has a secondary intent to pay, but the payment obligation is primary in form).

It should also be borne in mind that it is always a question of construction, whether a particular contract is an accessory (secondary) guarantee (eg, suretyship) or a primary guarantee (eg, a demand guarantee or letter of credit).[19]

2.2.2 Defining the accessory guarantee (suretyship guarantee)

The Roman law and the Roman-Dutch common law required no formalities regarding contracts of suretyship.[20] Initially, it was not necessary, for a contract of suretyship to be valid, that it should take a specific form or be embodied in writing.[21] This position was later changed by legislation. Today, section 6 of the *General Law Amendment Act*[22] requires that the terms of a contract of suretyship must be embodied in a written document signed by, or on behalf of, the surety, in order for it to be valid and enforceable in the South African law.[23]

Unfortunately, section 6 neglected to define what a contract of suretyship was.[24] The early and classical jurists also did not clearly define the contract of suretyship.[25]

18 See, eg, Dolan *Commercial and Standby Credits* para 2.10[1]; Andrews and Millett *Guarantees* 1; and O'Brien "Letters of Intent" 158.
19 See, eg, *Marubeni Hong Kong and South China Ltd v The Mongolian Government* 2004 2 Lloyd's Rep 198 (QB (Com Ct)).
20 Thomas *Roman Law* 335; Hahlo and Khan *Union of South Africa* 705; Forsyth and Pretorius *Suretyship* 25; and De Villiers *Suretyship* 3.
21 De Villiers *Suretyship* 3.
22 *General Law Amendment Act* 50 of 1956.
23 For a full discussion of the law of suretyship, see Forsyth and Pretorius *Suretyship*; and Lotz "Suretyship" paras 189–217.
24 Forsyth and Pretorius *Suretyship* 24 note 2.
25 Roberts *Law of Contract* § 3785.

Although some Roman-Dutch jurists tried to offer a definition, none of them could offer an exact definition of the suretyship.[26] The lack of a legislative definition or any other proper definition of the suretyship led to disagreements among South African jurists.[27] The courts also tried to formulate definitions.[28] For instance, in *Corrans v Transvaal Government and Coull's Trustee*[29] Innes CJ said that the definitions of the old authorities came to this, namely

> that the undertaking of the surety is accessory to the main contract, the liability under which he does not disturb, but it is an undertaking that the obligation of the principal debtor will be discharged, and, if not, that the creditor will be indemnified.

Eventually, Forsyth and Pretorius provided a well-drafted definition of the suretyship. They define the suretyship as an

> accessory contract by which a person (the surety) undertakes to the creditor of another (the principal debtor), primarily that the principal debtor, who remains bound, will perform his obligation to the creditor and, secondarily, that if and so far as the principal debtor fails to do so, the surety will perform it or, failing that, indemnify the creditor.[30]

Their definition of suretyship has since been supported by the Appellate Division (as it was known then).[31] According to them, the fact that the surety's obligation is an

26 Grové *Borgstelling* 65; and De Villiers *Suretyship* 4.

27 Grové *Borgstelling* 65, who refers to Roberts *Law of Contract* as authority.

28 *Corrans v Transvaal Government and Coull's Trustee* 1909 TS 605 612; *Gerber v Wolson* 1955 1 SA 158 (A) 166.

29 *Corrans v Transvaal Government and Coull's Trustee* 1909 TS 605 612. This definition was approved in *Hutchinson v Hylton Holdings* 1993 2 SA 405 (T).

30 See Forsyth and Pretorius *Suretyship* 27-28.

31 See, eg, *Trust Bank of Africa Ltd v Frysch* 1977 3 SA 562 (A) 584F; *Sapirstein v Anglo African Shipping Co (SA) Ltd* 1978 4 SA 1 (A) 11H; and *Nedbank Ltd v Van Zyl* 1990 2 SA 469 (A) 473I. It was also referred to with approval in *Basil Read (Pty) Ltd v Beta Hotels (Pty) Ltd* 2001 2 SA 760 (C) 766F. See in this regard, Forsyth and Pretorius *Suretyship* 27. However, in *Carrim v Omar* 2001 3 All SA 71 (W) Stegmann J (in para 57) disagreed with the definition given by Forsyth and Pretorius and stated: "In light of these considerations, I am respectfully, but firmly, of the view that Caney's definition of the contract of suretyship as comprising a primary undertaking by the surety that the principal debtor will perform his obligation, and only a secondary obligation that if the principal debtor defaults, the surety will indemnify the creditor, cannot be supported. The authorities establish clearly enough that by the contract of suretyship, the surety accedes to the obligation of the principal debtor in the sense that, without disturbing the primary liability of the principal debtor, the surety gives a conditional undertaking that if the principal debtor should fail to perform his obligation, the surety will perform it in his place, if appropriate, or will otherwise indemnify the creditor. Such other indemnification will generally take the form of the payment of such damages as the creditor may have suffered in consequence of the principal debtor's breach of contract. It is not a prerequisite of a contract of suretyship that the intending surety should primarily undertake that the principal debtor will perform his obligation to the creditor." Furthermore, not all jurists agree with the definition provided by Forsyth and Pretorius. For

accessory obligation, simply means that in order to constitute a valid suretyship between surety and creditor, there has to be a valid principal obligation between the debtor and the creditor. The suretyship is said to be accessory to the transaction that creates the obligation of the principal debtor. In other words, every suretyship is conditional upon the existence of a principal obligation. Therefore, in the absence of a valid principal obligation, the surety is generally not bound and the surety can raise any defence that the principal debtor can raise.[32]

In the English law a "guarantee" is defined as a promise to be liable for the debt, or failure to perform some other legal obligation, of another person.[33] The person to whom the promise is made, for example a bank, may be called the "creditor", the person who makes the promise is the surety or guarantor, and the other whose

instance, Lotz "Suretyship" para 190 states that although there is no universally accepted definition of suretyship, the following definition correctly reflects the normal incidents of a suretyship: "Suretyship is a contract in terms of which one person (the surety) binds himself as debtor to the creditor of another person (the principal debtor) to render the whole or part of the performance due to the creditor by the principal debtor if and to the extent that the principal debtor fails, without lawful excuse, to render the performance himself." In criticising the definition provided by Forsyth and Pretorius, Lotz states that while it can be accepted that it will, at the time of contracting, be in the mind of both the creditor and the surety that the principal debtor will perform, it seems futile to say that the surety's primary undertaking is that the principal debtor will perform as that "primary undertaking" clearly does not create a primary (or any) obligation between the creditor and the surety. Furthermore, if such a primary obligation were indeed created, a creditor would probably have to call on a surety to perform in terms of the primary obligation (ie, call on the surety to persuade the principal debtor to perform) before enforcing the secondary obligation and that is not the law (Lotz "Suretyship" para 191).

32 See Forsyth and Pretorius *Suretyship* 28. In our law the contract of suretyship is also a contract of indemnity, because it is entered into for the better security of the creditor. However, the same cannot be said of indemnity contracts, because not all contracts of indemnity are contracts of suretyship. The absolute and independent nature of the contract of indemnity distinguishes itself from the subsidiary and accessory nature of the contract of suretyship (see Roberts *Law of Contract* § 3795; and De Villiers *Suretyship* 6). There is no statutory definition or acceptable definition of contract of indemnity in modern South African literature or case law. The latest definition offered, which took all previous definitions provided by jurists as well as courts into consideration, defines a contract of indemnity (see De Villiers *Suretyship* 8-9 and the authorities cited) as: "an agreement in terms whereof a person (the indemnifier), binds himself as principal debtor to another (the indemnified), to protect, secure and hold the indemnified harmless against any hurt, harm or loss sustained, or legal responsibility incurred by the indemnified as a result of past or future events, whatever the nature of such events, and which form the subject matter of the indemnity." In practice, it is often difficult to distinguish between a suretyship and a contract of an indemnity, particularly because they share many similarities, but also have important differences. A discussion of the differences and similarities of a suretyship and a contract of indemnity falls outside the scope of this article, but a full discussion thereof can be found in the following sources: Pretorius 1982 *THRHR* 73; Lubbe 1984 *THRHR* 391; De Wet and Van Wyk *Kontraktereg* 391; Pretorius 2001 *SA Merc LJ* 95; De Villiers *Suretyship* 3-33; Sonnekus 2009 *TSAR* 165.

33 Section 4 of the *Statute of Frauds* 1677 (England); see also the authorities cited in Hapgood *Banking* 701, 702 note 1.

obligation is guaranteed, for example, the bank's customer, is the principal debtor.[34] A true guarantee obligation (eg, suretyship) is secondary and accessory to the obligation, the performance of which is guaranteed; and the surety (or guarantor) undertakes that the principal debtor (the bank's customer) will perform his (the principal debtor's) obligation to the creditor (the bank) and that he (the guarantor or surety) will be liable to the creditor if the principal debtor does not perform. The guarantor's (the surety's) liability for the non-performance of the principal debtor's obligation is therefore co-extensive with that obligation. This means that if it turns out that the principal debtor's obligation does not exist, is void, discharged or diminished, the guarantor's (the surety's) obligation in respect thereof is also. This is contrary to the situation where a primary or direct undertaking, such as a demand guarantee or letter of credit, has been given to perform the customer's obligation. If the undertaking is of this nature, then the promise will be enforceable whether or not that of the principal debtor is enforceable.[35]

When a bank advances money to its customer, it often requires security from a third party by way of a contract of guarantee (ie, a contract of suretyship) to secure the money advanced to the customer.[36] It has been stated that a "suretyship" is the generic term given to contracts in terms of which one person (the surety) agrees to answer for some existing or future liability of another (the principal) to a third person (the creditor), and by which the surety's liability is in addition to, and not in substitution for, that of the principal.[37] A suretyship guarantee is *secondary both in intent and in form*. The intention of the parties is that the surety will be called upon to pay (or, instead, to perform the principal debtor's obligations under the underlying contract) only if the principal debtor defaults in performance, and then only to the extent of the principal debtor's liability and subject to any defences available to the principal debtor. This intention is reflected in the form of the suretyship guarantee, which is expressed to become payable only upon the principal debtor's default.[38]

34 Hapgood *Banking* 701.
35 Hapgood *Banking* 701-702; Bennett 1994 *JBL* 575.
36 Goode *Guide to the URDG* 15.
37 Andrews and Millett *Guarantees* para 1-001.
38 Goode *Guide to the URDG* 15.

2.2.3 Accessory guarantees (suretyship guarantees) v primary guarantees (letters of credit and demand guarantees)

In contrast to the above, the demand guarantee and letters of credit create another kind of duty that is a primary duty which is not materially, that is, substantively conditional on bringing proof of the breach or failure of the primary obligor under the transaction. These instruments are in this regard materially independent, and they may become due and payable before any such duty arises under the transaction or even entirely regardless of whether or not any such duty matures now or later on.[39]

A demand guarantee in contrast can be described as a personal security under which a guarantor (eg, a bank) promises payment to a beneficiary (creditor) if a principal (the bank's customer and also the debtor) defaults in the performance of his obligation (eg, the construction of a building). The bank pays if the documents presented with the demand for payment (where applicable) comply with the documents that are mentioned in the text of the demand guarantee. The bank's obligations are independent (autonomous) of the underlying contract (eg, building contract) between the beneficiary and the principal, which means that, in principle, the bank must pay if proper complying documents are presented, even if the beneficiary and the principal have not stipulated that there is a default under the original underlying contract.[40]

Contrary to the accessory guarantee (ie, the suretyship guarantee), the commercial letter of credit is a credit in which the bank's *undertaking to pay is primary both in form and intent*. The classic case is a commercial letter of credit covering the price of a shipment of goods under a documentary sale transaction (particularly international sale transactions). The agreed method of payment of the price is not payment by the buyer, but payment by the bank pursuant to its independent undertaking. The bank is the first port of call for payment, and the buyer's direct payment obligation under the contract of sale is suspended pending presentation of the documents and payment by the bank. Only if the documents are properly presented and the bank declines to

39 Kurkela *Letters of Credit* 12-13.
40 De Ly 1999 *Int'l Law* 832.

pay, does the buyer's own duty of payment revive.[41] If the credit is honoured, that duty is extinguished; while if the bank refuses to pay because of the seller's failure to tender conforming documents, the buyer is entitled to withhold payment and, indeed, to treat the contract of sale as repudiated in the absence of a fresh and conforming tender within the period of the credit.[42]

In this scenario, the intention of the parties to the underlying contract (ie, to the contract of sale) is that the bank issuing the letter of credit is to be the first port of call for payment and this is the effect of the agreement between them. Whereas in the case of an accessory guarantee (ie, suretyship guarantee) the creditor (beneficiary) cannot make a call for payment on the guarantor without establishing default by the principal debtor, the opposite is true of the letter of credit, where the parties have elected payment by the bank (guarantor) as the primary method of payment. Only if this fails without fault on the part of the beneficiary is he (the beneficiary) entitled to resort to the buyer (principal) under the underlying contract of sale.[43]

The demand guarantee stands between the accessory guarantee (ie, suretyship guarantee) and the commercial letter of credit in the sense that it is *secondary in intent but primary in form*. Performance in terms of the underlying contract is due, in the first instance, from the principal and the demand guarantee is intended to be resorted to only if the principal has failed to perform. Although this is the intention of the parties, the demand guarantee is not in form linked to default under the underlying contract, nor is there any question of performance of that contract by the guarantor. The only purpose of the demand guarantee is to hold the beneficiary risk-free up to the agreed maximum amount; and the only condition of the guarantor's (eg bank's) payment liability is the presentation of a demand and of all the other documents (if any) specified in the guarantee in the prescribed manner and within the period of the guarantee.[44]

The demand guarantee is unique in its character. The guarantor (eg the bank) is not concerned with the underlying contract, and if the demand is duly presented,

41 Eitelberg 2002 *SALJ* 121.
42 Goode 1995 *St Louis Univ LJ* 729; Schwank 1991 *Comp LYB Int'l Bus* 318.
43 Goode *Guide to the URDG* 15.
44 Goode *Guide to the URDG* 15.

payment must be made – in spite of allegations by the principal that he (the principal) has fully performed in terms of that contract – in the absence of established fraud or another event constituting grounds for non-payment under the applicable law.[45] The guarantor (bank) of a demand guarantee therefore promises or gives a primary or direct undertaking to perform the principal's obligation, irrespective of whether or not the principal's (principal debtor's) obligation is enforceable.[46]

So the fundamental difference between an accessory guarantee (suretyship guarantee) and a primary guarantee (eg, demand guarantee and letter of credit) is that the liability of a surety of an accessory guarantee is secondary, whereas the liability of the guarantor (or issuer) of a primary guarantee is primary. A surety's liability is co-extensive with that of the principal debtor and, if the surety disputes default by the principal debtor, the creditor must prove such default. Neither statement applies to a primary guarantee, such as a demand guarantee or letter of credit. The principle that underlies demand guarantees and letters of credit is that each contract is autonomous. More specifically, the obligations of the guarantor/issuer of a demand guarantee or letter of credit are not affected by disputes under the underlying contract between the beneficiary and the principal. If the beneficiary of a demand guarantee or letter of credit makes an honest demand, it does not matter whether it is between himself and the principal, he is entitled to payment.[47] The guarantor/issuer must honour such a demand, the principal must reimburse the guarantor/issuer, and any disputes between the principal and the beneficiary, for example, any claim by the principal that the drawing was a breach of the contract between them, must be resolved in separate proceedings to which the guarantor/issuer will not be a party.[48] Therefore, if actual proof of breach or non-performance is required under the guarantee, the facility is not a primary guarantee, but an accessory guarantee (suretyship).

45 Goode *Guide to the URDG* 15*.*
46 Hapgood *Banking* 701-702.
47 Hapgood *Banking* 730; Coleman 1990 *Lloyd's Maritime and Commercial Law Quarterly* 224; *State Trading Corporation of India Ltd v ED and F Man (Sugar) Ltd and ANR* 1981 Com LR 235 (CA).
48 Hapgood *Banking* 730.

2.3 Does the National Credit Act *include suretyships?*

One has to decide on the basis of the above definitions if a common-law suretyship falls within the ambit of the definition of a credit guarantee as set out in the *National Credit Act*. Accordingly, the definition of credit guarantee has to be interpreted by giving the words their ordinary meaning in the context of the statute read in its entirety. If the definition then remains ambiguous, regard must be had to indicators of the legislature's intention.

In terms of the definition of a "credit guarantee" in section 8(5), a credit guarantee exists when "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". On the one hand, one might ask if a common-law suretyship indeed falls within the ambit of this definition, taking into consideration that a suretyship can arise only when the principal debtor is in default and not as stated in the definition merely "upon demand". A suretyship also has a conditional and secondary nature.[49] On the other hand, the definition also requires the existence of an obligation of another consumer and it therefore seems as if the existence of a "credit guarantee" in terms of section 8(5) is dependent on the existence of a principal debt. This could imply that the definition refers to an accessory guarantee. As already indicated, in an accessory contract, such as a suretyship, an underlying valid principal obligation between another party and the credit provider is required. The phrase "obligation of another consumer" in section 8(5) therefore possibly indicates that a "credit guarantee" in terms of the *National Credit Act* has an accessory nature. The issue, therefore, is if the definition of "credit guarantee" in terms of the Act encompasses guarantees that are unconditional and primary in nature (eg, demand guarantees and letters of credit) and/or guarantees that are conditional upon the breach of a contract (ie, a contract of suretyship).

In order to gain clarity, it should be investigated whether or not a surety will arise only when the principal debtor is in default. In other words, can a surety arise merely upon a demand to satisfy an obligation? In terms of the general definition of

49 Mostert 2009 *De Rebus* 53-55 and para 2.2.2 above.

suretyship provided by Forsyth and Pretorius,[50] quoted above and accepted by the Appellate Divisions (as it was then known),[51] default of the principal debtor is a requirement to trigger a suretyship, and not a mere demand.

From the definition provided by Forsyth and Pretorius it is clear that the two most important characteristics of a suretyship are, firstly, that it is an accessory contract, and secondly, that it is triggered only once the principal debtor is in default.[52] This means that the surety can be enforced only once the principal debtor commits breach of contract and not upon a mere demand.[53] In *Carrim v Omar*[54] Stegmann J held (relying on Lubbe's opinion) that a promise by a third person to the effect that the principal debtor will perform his obligation to the creditor may serve as partial evidence that the third person intended to bind himself as a surety, but that such a promise will amount to a suretyship only if it is accompanied by a conditional undertaking on the part of the third person to perform or otherwise indemnify the creditor.

So at this stage it may seem to be debatable as to whether or not a suretyship does, in fact, fall within the definition of a "credit guarantee", since the definition merely states that a consumer promises or undertakes to satisfy the principal debtor's obligations upon demand. No reference is made to default of the principal debtor.

The words "upon demand" used in the definition of a credit guarantee must, however, not be read too literally, be over-emphasised or given any special meaning.[55] In our view, these words in the Act simply mean that in terms of this type of agreement the person (surety) undertakes/promises to satisfy (pay) any obligation of another person (the principal debtor) when the credit provider asks (calls upon) him to do so - in other words when the credit provider has informed him that the principal debtor has defaulted and payment is now *demanded* from him. This is in accord with how traditional suretyship guarantees work in practice – sureties become

50 See Forsyth and Pretorius *Suretyship* 27-28 and the discussion in para 2.2.2 above.
51 See the authorities cited above in footnote 31.
52 Strydom *Aksessoriteitsbeginsel* 136; Lubbe 1984 *THRHR* 385; Lotz "Suretyship" 192-194. See also the discussion in paras 2.2.2 and 2.2.3 above.
53 Lubbe 1984 *THRHR* 386.
54 *Carrim v Omar* 2001 3 All SA 71 (W) para 37.
55 As was unnecessarily done by Mostert 2009 *De Rebus* 53.

liable to perform or indemnify the creditor only where the principal debtor has defaulted and the surety is then called upon/requested by the credit provider (eg, bank) to perform on the principal debtor's behalf. So until a creditor demands/requests from the surety to perform in terms of the suretyship, the surety might not even be aware of the default of the principal debtor and that his obligation to perform or indemnify has now arisen. The words "upon demand" used in section 8(5) do not, in our view, carry the same meaning as they would when dealing with primary guarantees, such as demand guarantees.

In addition to the above, cognisance must also be taken of section 4(2)(c) of the Act. Section 4(2)(c) of the Act also provides that the Act will apply to a credit guarantee only to the extent that the Act applies to the underlying credit facility (eg, credit-card facility) or credit transaction (eg, mortgage agreement) in respect of which the credit guarantee is granted. Therefore, if the Act does not apply to the credit facility or credit transaction (ie, the primary debt) in respect of which the credit guarantee is granted, the Act will not apply to the guarantee. From section 4(2)(c) the deduction can be made that the term "credit guarantee" clearly refers only to accessory/secondary guarantees, such as suretyships, because a clear reference is made to the primary debt (ie, the underlying contract) and if it were to also include primary guarantees, such as letters of credit or demand guarantees, there would not have been any reference to the primary debt (ie, the underlying contract) as these latter guarantees are not concerned in the least with the underlying contract. The deduction is also further strengthened by the fact that accessory/secondary guarantees are normally subject to the same substantive law and the same jurisdiction or arbitration clause to which the underlying transaction (ie, primary debt) itself is subject[56] and section 4(2)(c) of the Act makes it clear that the Act will apply to the credit agreement only to the same extent that it will apply to the primary debt.

So it would appear as if the definition of "credit guarantees" caters for the accessory nature of a contract of suretyship by referring to another person's (consumer's) obligations. However, a contract of suretyship is also, as stated above, conditional upon a breach of contract. The definition seems to imply that the existence of a

56 See Kurkela *Letters of Credit* 13.

principal obligation is required but it is not clear whether the definition makes provision for the conditional nature of a contract of suretyship. It could thus easily seem as if the *National Credit Act* does not apply to contracts of suretyship. However, on the face of it, it appears that a common-law suretyship is covered by the definition of "credit guarantee" since the existence of another consumer's obligation is required. Unfortunately, the use of the phrase "upon demand" could unnecessarily lead one to the wrong conclusion that the definition of "credit guarantee" does not cater for the conditional nature of a contract of suretyship.

In *Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd*[57] one of the things the court had to decide was whether or not a surety and co-principal debtor (second respondent) was a consumer to whom a notice in terms of section 129 of the *National Credit Act* (ie, default notice) was required to be given. The second respondent entered into a suretyship agreement in terms of which he undertook to bind himself in his personal capacity in favour of the plaintiff (the bank) for all the first respondent's (the principal debtor's) debt (concerning a mortgage agreement) to an unlimited amount and he signed the undertaking as "surety and co-principal debtor". The first respondent was a private company (a juristic person). The court held that in terms of section 8(5) of the *National Credit Act* a credit guarantee will be regulated in terms of the Act only if the underlying credit facility or credit transaction (ie, the principal credit agreement) is also regulated in terms of the Act.[58] The court held that on the merits of the case the Act did not apply to the mortgage agreement (ie, the principal debt) and therefore did not apply to the suretyship.[59] The court, however, remarked that:[60]

> There is no doubt that the suretyship obligations of the second respondent theoretically fall within the definition of a credit agreement which encompasses a credit guarantee... in terms whereof – 'a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction … .

The court therefore in this *obiter* remark accepted that the *National Credit Act* could apply to a suretyship agreement and that it clearly fell within the definition of a "credit

57 *Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2009 3 SA 384 (T).
58 *Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2009 3 SA 384 (T) para 18. See also s 4(2)(c) *National Credit Act* 34 of 2005.
59 *Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2009 3 SA 384 (T) para 18.
60 *Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2009 3 SA 384 (T) para 18.

guarantee" as set out in section 8(5). This case also confirms that the Act will apply to a credit guarantee only to the extent that the Act applies to the underlying credit facility or credit transaction (the principal debt) in respect of which the credit guarantee is granted.[61] Where the principal debt is not a "credit agreement" that falls within the scope of the Act, the suretyship will fall under the common law and the surety will not be entitled to raise any of the defences or provisions of the *National Credit Act*.[62] Also where the principal debtor in terms of the underlying credit agreement is not a "consumer" falling within the ambit of the Act,[63] the surety (even if he is also a co-principal debtor and in his own right constitutes a "consumer" for the purposes of the Act) will also not be entitled to rely on the protection afforded by the Act.[64] Although the *obiter* view expressed by the court has been supported by the majority of jurists,[65] there are still some that disagree that suretyships fall within the definition of "credit guarantee".[66]

Even though the court (as per Van der Merwe AJ) in *Nedbank Ltd v Wizard Holdings*[67] did not specifically deal with the issue of whether or not the definition of a "credit guarantee" also included a suretyship agreement, it dealt with the matter before it as if it did. Van der Merwe AJ also confirmed that the *National Credit Act* did not apply to the suretyship agreement if the principal/primary debt did not arise from a credit agreement which fell within the scope of the Act. It follows from the *Nedbank Ltd v Wizard Holdings* case that even if it is a natural person that has signed a suretyship the *National Credit Act* will still not apply if the principal debt does not fall within the ambit of the Act.

61 Sections 4(2)(c) and 8(5) *National Credit Act* 34 of 2005.

62 *Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2009 3 SA 384 (T) 390A-D. See also the discussion of the various protection mechanisms a surety will have at his disposal if the *National Credit Act* applies to the suretyship agreement in para 2.4 below.

63 See s 1 read with s 4 *National Credit Act* 34 of 2005.

64 *Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2009 3 SA 384 (T) paras 19-24.

65 Scholtz *et al National Credit Act* in para 8.2.4; Scott *et al Law of Commerce* 172; Logan 2008 www.debtpack.com 33.

66 Mostert 2009 *De Rebus* 53.

67 *Nedbank Ltd v Wizard Holdings* 2010 5 SA 523 (GSJ) paras 4, 9 and 10. The court (as per Yekiso J) in *Structured Mezzanine Investments (Pty) Ltd v Davids* 2010 6 SA 622 (WCC) was also clearly of the view that a suretyship agreement fell within the definition of a credit guarantee as contemplated in s 8(5) *National Credit Act* 34 of 2005 (see para 16).

67 *Nedbank Ltd v Wizard Holdings* 2010 5 SA 523 (GSJ) paras 9 and 10. See also ss 4(2)(c) and 8(5) *National Credit Act* 34 of 2005.

2.4 *What are the repercussions if the* **National Credit Act** *does apply to suretyships?*

If the Act were to apply to a suretyship agreement this would have certain repercussions. For example, a surety would be entitled to rely on the various protection mechanisms of the *National Credit Act* by raising, for example, the defence that the credit guarantee itself amounts to "reckless credit lending",[68] or that the entire underlying credit agreement is unlawful[69] or that a specific provision in that agreement is unlawful.[70] The credit provider would also have to follow the special debt collection procedure set out in the Act[71] if he wished to enforce the credit agreement where the principal debtor has defaulted. In terms of this procedure, a credit provider must *inter alia* give the surety written notice of the principal debtor's default and his (ie, the surety's) liability, and propose referral to an entity (eg, debt counsellor, ombud or alternative dispute resolution agent[72]) which might resolve any dispute or result in agreement on a plan for full payment. The credit provider would also have to comply with certain time periods linked to the giving of such notice, before approaching a court. Where a surety is over-indebted, he would also be able to apply for the debt relief measures provided for in the Act.[73] The credit provider would not have to submit periodic statements of the account to the surety (consumer) of a suretyship (credit guarantee), until the time that the credit provider first called on the surety (guarantor) to satisfy an obligation in respect of that guarantee.[74]

The *National Credit Act* does not stipulate that there are any formalities that need to be complied with for a credit guarantee to be valid, but, section 6 of the *General Law Amendment Act*[75] requires that the terms of a contract of suretyship must be embodied in a written document signed by, or on behalf of, the surety, in order to be

68 Section 80 *National Credit Act* 34 of 2005.
69 Section 89 *National Credit Act* 34 of 2005.
70 Section 90 *National Credit Act* 34 of 2005.
71 Sections 129, 130 *National Credit Act* 34 of 2005.
72 Defined in s 1 *National Credit Act* 34 of 2005 as a person providing services to assist in the resolution of consumer credit disputes through conciliation, mediation or arbitration.
73 Sections 79, 85-88 *National Credit Act* 34 of 2005.
74 Section 107(1) *National Credit Act* 34 of 2005. Furthermore, Chp 5, part D (ss 107-115 *National Credit Act* 34 of 2005) will apply also only once the consumer is called up to honour his obligations in terms of the credit guarantee.
75 See para 2.2.2 above.

valid and enforceable in the South African law.[76] However, the Act does deal with all of the issues relating specifically to the underlying credit agreement (ie, the principal debt) in order for it to be valid. For example, the Act stipulates certain disclosures that need to be made by the creditor before a credit agreement may be concluded, and the form or format which the credit agreement must take. Furthermore, the Act also prohibits a number of terms that were often found in the standard terms and conditions of many credit agreements in the past. For instance, terms waiving certain common-law rights, such as the liability for latent defects; and terms exempting or limiting the credit provider's liability for pre-contractual misrepresentation or its vicarious liability for employees may not be included in credit agreements. The Regulations to the Act[77] also specifically provide that the following common-law "rights" (defences) that are available to a debtor may not be waived in a credit agreement: *exceptio errore calculi*, *exceptio non numerate pecuniae* and *exceptio non causa debiti*.

The *exceptio non causa debiti* is usually renounced in suretyships securing debts not arising from a money debt and as a result of such renunciation the surety will bear the onus of establishing that a principal debt (the cause of action) does not exist.[78] The *exceptio non numerate pecuniae* is usually renounced where the debt secured by a suretyship arises from a money loan and as a result of such renunciation the debtor will bear the onus of proving that no money was received from the creditor.[79] Renunciation of the *exceptio errore calculi* prevents a surety from disputing the accuracy of previously agreed amounts or accounts.[80] So, since these are defences that were often specifically renounced in contracts of suretyship it can further be argued that it is clear that it was the intention of the legislature to specifically include suretyships in the definition of a credit guarantee and not to include only primary guarantees into the definition of a "credit guarantee", as has been argued by some.[81]

76 See also para 2.2.2 above.
77 Regulation 32 in GN R489 in GG 28864 of 31 May 2006. See also Otto 2011 *TSAR* 48-49.
78 Forsyth and Pretorius *Suretyship* 42; *Cohen v Louis Blumberg (Pty) Ltd* 1949 2 SA 849 (W) 850-851.
79 Forsyth and Pretorius *Suretyship* 106-107; *First National Bank of Southern Africa Ltd v Bophuthatswana Consumer Affairs Council* 1995 2 SA 853 (BG) 866; *Harrowsmith v Ceres Flats (Pty) Ltd* 1979 2 SA 722 (T) 729F-G.
80 *Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd* 1993 4 SA 206 (W) 208, 221–222.
81 Mostert 2009 *De Rebus* 53.

One may then ask why the benefits of excussion and division are not also prescribed as remedies or rights that may not be waived. This could be ascribed to the fact that renunciation of the benefits of excussion and division is wholly superfluous and meaningless where sureties, as the practice is, bind themselves as "sureties and co-principal debtors" with the debtor.

2.5 Does the Act apply to the surety and co-principal debtor to the same extent that it applies to the principal debtor?

It should be noted that where the words "co-principal debtor and surety" are used in a suretyship agreement, the *National Credit Act* should apply to the surety and co-principal debtor to the same extent that the Act applies to the principal debtor and the principal debt. If someone has bound himself as co-principal debtor his obligations are co-equal in extent with those of the principal debtor and of the same scope and nature and he is liable together with the principal debtor jointly and severally, which means that a co-principal's debt becomes enforceable at the same time as the principal debt.[82] In the *Trans-Drakensberg Bank Ltd v The Master*[83] the court held that where a person binds himself as "surety and co-principal debtor" this results in joint and several liability along with the principal debtors and the person stands in the same relation to the creditor as the principal debtor. It therefore follows that the co-principal debtor is entitled to receive the same notice as that to which the principal debtor would have been entitled.[84]

However, in *Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd*[85] the court held that a surety who has bound himself as surety and co-principal debtor remains a surety whose liability arises wholly from the contract of suretyship and that signing as surety and co-principal debtor does not render a surety liable in any capacity other than that

82 *Union Government v Van der Merwe* 1921 TPD 318 322; *Mahomed v Lockhat Bros & Co Ltd* 1944 AD 230 238; *Business Buying and Investment Co Ltd v Linaae* 1959 3 SA 93 (T) 95-96; *Trans-Drakensberg Bank Ltd v The Master* 1962 4 SA 417 (N) 422; see also Caney *Suretyship* 51; Lotz "Suretyship" 203.

83 *Trans-Drakensberg Bank Ltd v The Master* 1962 4 SA 417 (N).

84 *Trans-Drakensberg Bank Ltd v The Master* 1962 4 SA 417 (N) 422. See also para 2.4 above, where it is indicated what the repercussions would be if the Act were to apply to a contract of suretyship, and the various protection mechanisms of the Act a surety would be entitled to rely on.

85 *Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2009 3 SA 384 (T) paras 22-24.

of a surety who has renounced the benefits of excussion and division. The court also found that *in casu* the second respondent was sued as a guarantor to the obligations of the first respondent in terms of a credit transaction to which the Act did not apply. It therefore followed that he could not claim that he was entitled to have received a section 129 notice in terms of the Act (because the Act did not apply to the principal obligation). This implies that a co-principal debtor is entitled to receive the same notice as that to which the principal debtor is entitled (if the Act applies).

3 Do the reckless credit provisions apply to credit guarantees?

If one accepts or assumes that the *National Credit Act* applies to a contract of suretyship and such a contract is a credit guarantee, it is quite possible that a credit provider is obliged to conduct a section 81(2) assessment before concluding such a contract. In order to determine whether or not such a duty does in fact exist, section 81(2) should be analysed in more detail.

3.1 The reckless credit provisions

The *National Credit Act* introduced direct measures aimed at preventing reckless credit granting, and debt-relief measures directed at dealing with over-indebtedness.[86] These direct measures are found in sections 78 to 88 of the Act. This part of the Act does not, however, apply to credit agreements where a juristic person is the consumer.[87] The provisions of the Act aimed at preventing the reckless granting of credit do not apply to school or student loans, emergency loans, public interest credit agreements, incidental credit agreements or a temporary increase in the credit limit of a credit facility.[88] In essence, these reckless credit provisions stipulate that a credit provider may not enter into a credit agreement without first taking reasonable steps to assess the consumer's understanding of the risks and costs of the proposed credit and his rights and obligations under a proposed credit

86 Part D, Chapter 4 *National Credit Act* 34 of 2005; Roestoff and Renke 2005 *Obiter* 569-574; Renke, Roestoff and Haupt 2007 *Obiter* 229-270.

87 Section 78(1) *National Credit Act* 34 of 2005.

88 Sections 80-84 *National Credit Act* 34 of 2005 for the reckless credit provisions and s 78(2) *National Credit Act* 34 of 2005 for the exemptions.

agreement;[89] as well as his debt repayment history[90] and his existing financial means, prospects and obligations.[91] The consumer must fully and truthfully answer any requests for information made by the credit provider as part of this assessment.[92] The credit agreement is deemed to be reckless in terms of the Act if the credit provider failed to conduct the above assessment, irrespective of what the outcome of the assessment might have been, or if the credit provider conducted the assessment but concluded the agreement despite the fact that the information available indicated that the consumer did not generally understand or appreciate the risks, costs or obligations under the credit agreement, or if the consumer would become over-indebted by entering into the credit agreement.[93]

The consequences of the reckless granting of credit are addressed in section 83. If the credit provider failed to conduct the required assessment[94] or the consumer entered into the credit agreement without understanding the risks, costs or obligations under the credit agreement, the court may make an order setting aside (setting aside means that the consumer does not have to perform his obligations at all[95]) all or a part of the consumer's obligations and rights, or the court may suspend the force and effect of the credit agreement.[96] If entering into a credit agreement would make the consumer over-indebted,[97] the court must consider whether or not the consumer is over-indebted at the time of the court proceedings, and if he is, the court may suspend (meaning that the consumer need not make any payment and no interest may be recovered for the suspended period in terms of section 84)[98] the force and effect of the credit agreement until a date determined by the court. The court may also restructure the consumer's obligations.[99]

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89 Section 81(2)(a)(i) *National Credit Act* 34 of 2005.

90 Section 81(2)(a)(ii) *National Credit Act* 34 of 2005.

91 Section 81(2)(a)(iii) *National Credit Act* 34 of 2005; see also s 78(3) *National Credit Act* 34 of 2005, that clearly provides what is meant by "financial means, prospects and obligations" in this context. Furthermore, see also Roestoff and Renke 2005 *Obiter* 572 and Kelly-Louw 2008 *SA Merc LJ* 218-222.

92 Section 81(4) *National Credit Act* 34 of 2005.

93 Section 80(1)(a)-(b) *National Credit Act* 34 of 2005.

94 Section 80(1)(a) *National Credit Act* 34 of 2005.

95 Otto *National Credit Act* 67.

96 Section 83(2)(a)-(b) *National Credit Act* 34 of 2005.

97 Section 80(1)(b)(ii) *National Credit Act* 34 of 2005.

98 Otto *National Credit Act* 67.

99 Section 83(3)(*a*)-(*b*) *National Credit Act* 34 of 2005; see also s 87(1) *National Credit Act* 34 of 2005 for re-arrangement of a consumer's obligations.

Therefore, before a credit provider and a consumer enter into a credit guarantee agreement (and by implication also a suretyship agreement), the credit provider must conduct a section 81(2) assessment of the proposed consumer if the credit guarantee is a guarantee falling within the ambit of the *National Credit Act*.[100] Section 81(2) forms part of Part D of chapter 4 of the Act. Some agreements are expressly excluded from the application of this part of the Act, but credit guarantees are not expressly exempted. So if a credit provider enters into a credit guarantee agreement without conducting the required section 81(2) assessment, the agreement might be declared reckless. However, the opinion has been expressed in practice that the section 81(2) assessment does not have to be conducted where the credit agreement involved is a credit guarantee (ie, a suretyship agreement) because in that instance the credit provider does not lend money to the consumer. Section 81(2) does not require the lending of money to a consumer in order for the prescribed assessment to be obligatory. The same applies to a credit facility, for example in the form of a credit card or an overdraft facility, where no money is lent to the consumer on the first day of the agreement. A credit guarantee is a credit agreement and section 81(2) clearly requires that a credit provider "must not enter into a *credit agreement* without first taking reasonable steps to assess…". Furthermore, section 80(3)(*b*) and (*c*) makes provision for taking into consideration the settlement value of a credit guarantee if a reckless credit determination is made. Credit providers therefore have to conduct a section 81(2) assessment even if the credit agreement is a credit guarantee.

4 Conclusion

It is vital to know if a suretyship agreement is a credit agreement in terms of the *National Credit Act* because such an agreement is an important tool that credit providers use in limiting the risk of granting credit. To answer the question whether or not a suretyship agreement is a credit agreement in terms of the *National Credit Act*, the definition of "credit guarantee", as set out in section 8(5), was analysed and then compared with the common-law definition of "suretyship". When the definition of suretyship is analysed in isolation, it appears that a common-law suretyship is not

100 Section 4(2)(*c*) *National Credit Act* 34 of 2005.

covered by the definition of a "credit guarantee" and that a contract of suretyship, therefore, does not qualify as a credit agreement in terms of the *National Credit Act*. But, in our view, based on the numerous reasons provided above,[101] it appears that the suretyship contract does, in fact, fall within the definition of a "credit guarantee" and that the Act does, therefore, apply to suretyships. Of course, the best solution to resolve the uncertainty would be if the legislator could clarify the matter by amending the Act. However, the chances of that happening seem to be slim at present.

Furthermore, if it is accepted that a contract of suretyship constitutes a credit guarantee, the reckless-credit provisions in the Act will also apply to suretyships that fall within the scope of the Act. The reckless-credit provisions stipulate that a credit provider may not enter into a credit agreement without first taking reasonable steps to assess the consumer's understanding of the risks and costs of the proposed credit and his rights and obligations under a proposed credit agreement. Failure to conduct this reckless-credit assessment could lead to suretyship agreements being declared reckless. Credit providers therefore must conduct a section 81(2) assessment even if the credit agreement is a credit guarantee (ie, a suretyship).

So, to conclude, credit providers might have to review their assessment procedures in order to conduct affordability assessments even when the credit agreement involved is a suretyship agreement. Failure to do so may lead to many suretyship agreements being declared reckless. Credit providers should also ensure that they send section 129 notices to co-principal debtors if the principle debtors are entitled to receive such notices. Where legal action is taken against sureties, credit providers should also follow the special debt collection procedures set out in the Act, when the Act applies to the suretyship agreement.

101 See the full discussion in paras 2.3-2.5 above.

Bibliography

Andrews and Millet *Guarantees*

Andrews GM and Millet R *Law of Guarantees* 4th ed (Sweet & Maxwell London 2005)

Bennett 1994 *JBL*

Bennett HN "Performance Bonds and the Principle of Autonomy" 1994 *JBL* 574-586

Caney *Suretyship*

Caney LR *The Law of Suretyship in South Africa* (Juta Cape Town 1970)

Coleman 1990 *Lloyd's Maritime and Commercial Law*

Coleman M "Performance Guarantees" 1990 *Lloyd's Maritime and Commercial Law Quarterly* 223-243

De Ly 1999 *Int'l Law*

De Ly F "The UN Convention on Independent Guarantees and Stand-by Letters of Credit" 1999 *Int'l Law* 831-847

De Villiers *Suretyship*

De Villiers APM *The Suretyship and the Indemnity Contract Differentiated* (LLM dissertation Unisa not dated)

De Wet and Van Wyk *Kontraktereg*

De Wet JC and Van Wyk AH *Die Suid-Afrikaanse Kontraktereg en Handelsreg (Vol 1)* 5th ed (Butterworths Durban 1992)

Dolan *Commercial and Standby Credits*

Dolan JF *The Law of Letters of Credit: Commercial and Standby Credits* (Warren, Gorham & Lamont Boston 1996)

Eitelberg 2002 *SALJ*

Eitelberg E "Autonomy of Documentary Credit Undertakings in South African Law" (2002) *SALJ* 120-137

Ellinger *Modern Banking Law*

Ellinger EP *Modern Banking Law* (Clarendon Press Oxfordshire 1987)

Forsyth and Pretorius *Suretyship*

Forsyth CF and Pretorius JT *Caney's Law of Suretyship in South Africa* 5th ed (Juta Cape Town 2002)

Goode *Guide to the URDG*

Goode R *Guide to the ICC Uniform Rules for Demand Guarantees: ICC Publication No. 510* (ICC Paris 1992)

Goode 1995 *St Louis Univ LJ*

Goode R "Abstract Payment Undertakings and the Rules of the International Chamber of Commerce" 1995 *St Louis Univ LJ* 725-743

Gorton 1997 *JBL*

Gorton L "Draft UNCITRAL Convention on Independent Guarantees" 1997 *JBL* 240-253

Grové *Borgstelling*

Grové NJ *Die Formaliteitsvereiste by Borgstelling* (LLM dissertation UP 1984)

Hahlo and Kahn *Union of South Africa*

Hahlo HR and Khan E *The Union of South Africa: The Development of It's Laws and Constitution* (Delran, NJ Datapro Research Corp 1960)

Hapgood *Banking*

Hapgood M *Paget's Law of Banking* 12th ed (Butterworths London 2002)

Kelly-Louw 2008 *SA Merc LJ*

Kelly-Louw M "The Prevention and Alleviation of Consumer Over-indebtedness" 2008 *SA Merc LJ* 200-226

Kurkela *Letters of Credit*

Kurkela MS *Letters of Credit and Bank Guarantees Under International Trade Law* 2nd ed (Oxford University Press New York 2008)

Lotz "Suretyship"

Lotz JG "Suretyship" in Joubert WA (ed) *The Law of South Africa* (Durban Butterworths 1997)

Lubbe 1984 *THRHR*

Lubbe GF "Die Onderskeid tussen Borgtog en Ander Vorme van Persoonlike Sekerheidstellings" 1984 *THRHR* 383-393

Mostert 2009 *De Rebus*

Mostert D "Suretyship Agreement Must Comply with the NCA" 2009 June *De Rebus* 53-55

O'Brien "Letters of Intent"

O'Brien P "Letters of Intent and Demand Guarantees" in University of Johannesburg Centre for Banking Law *Annual Banking Law Update Conference* 1993 Johannesburg 134-180

Otto *National Credit Act*

Otto JM *The National Credit Act Explained* (LexisNexis Butterworths Durban 2006)

Otto 2011 *TSAR*

Otto JM "Statutêr verbode bedinge in kredietooreenkomste" 2011 *TSAR* 38-61

Penn 1986 *JIBL*

Penn G "On-demand Bonds – Primary or Secondary Obligations?" 1986 *JIBL* 224-230

Perrignon 1991 *JBFLP*

Perrignon R "Performance Bonds and Standby Letters of Credit: The Australian Experience" 1991 *JBFLP* 157-166

Pretorius 1982 *THRHR*

Pretorius JT "*Diners Club South Africa (Pty) Ltd v Durban Engineering (Pty) Ltd 1980 3 SA 53 (A)*: Borgkontrak of Vrywaringskontrak?" 1982 *THRHR* 73-76

Pretorius 2001 *SA Merc LJ*

Pretorius JT "Surety and Indemnity" 2001 *SA Merc LJ* 95-101

Renke, Roestoff and Haupt 2007 *Obiter*

Renke S, Roestoff M and Haupt F "The National Credit Act: New Parameters for the Granting of Credit in South Africa" 2007 *Obiter* 229-270

Roberts *Law of Contract*

Roberts AA *Wessels, Sir JW: The Law of Contract in South Africa* 2nd ed (Butterworths Durban 1951)

Roestoff and Renke 2005 *Obiter*

Roestoff M and Renke S "Debt relief for consumers - the interaction between insolvency and consumer protection legislation: Part 1" 2005 *Obiter* 561-574

Scholtz *et al National Credit Act*

Scholtz JW *et al Guide to the National Credit Act* (LexisNexis Durban 2008)

Schwank 1991 *Comp LYB Int'l Bus*

Schwank F "Electronic International Bank Guarantees and Letters of Credit" 1991 *Comp LYB Int'l Bus* 317-330

Scott *et al Law of Commerce*

Scott TJ *et al Law of Commerce in South Africa* (Oxford University Press Cape Town 2009)

Sonnekus 2009 *TSAR*

Sonnekus JC "Indemniteitsborgstelling en Borgbeskerming: *Fedbond Nominees (Pty) Ltd v Meier*" 2009 *TSAR* 165-184

Stoop 2008 *De Jure*

Stoop PN "Kritiese Evaluasie van die Toepassingsveld van die 'National Credit Act'" 2008 *De Jure* 352-370

Strydom *Aksessoriteitsbeginsel*

Strydom N *Die Aksessoriteitsbeginsel in die Suid-Afrikaanse Reg* (LLM dissertation UJ 2000)

Thomas *Roman Law*

Thomas JAC *Textbook of Roman Law* 2nd ed (North-Holland Pub Co Amsterdam 1981)

Van Niekerk and Schulze *International Trade*

Van Niekerk JP and Schulze WG *The South African Law of International Trade: Selected Topics* 2nd ed (SA Legal Publications Pretoria 2006)

Wood *Security and Guarantees*

Wood PR *Law and Practice of International Law: Comparative Law of Security and Guarantees* (Sweet & Maxwell London 1995)

Register of court cases

Basil Read (Pty) Ltd v Beta Hotels (Pty) Ltd 2001 2 SA 760 (C)

Business Buying and Investment Co Ltd v Linaae 1959 3 SA 93 (T)

Carrim v Omar 2001 3 All SA 71 (W)

Cohen v Louis Blumberg (Pty) Ltd 1949 2 SA 849 (W)
*Corrans v Transvaal Government and Coull's Trustee*1909 TS 605
First National Bank of Southern Africa Ltd v Bophuthatswana Consumer Affairs Council 1995 2 SA 853 (BG)
Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd 2009 3 SA 384 (T)
Gerber v Wolson 1955 1 SA 158 (A)
Harrowsmith v Ceres Flats (Pty) Ltd 1979 2 SA 722 (T)
Hutchinson v Hylton Holdings 1993 2 SA 405 (T)
List v Jungers 1979 3 SA 106 (A)
Mahomed v Lockhat Bros & Co Ltd 1944 AD 230
Marubeni Hong Kong and South China Ltd v The Mongolian Government 2004 2 Lloyd's Rep 198 (QB (Com Ct))
Mouton v Die Mynwerkersunie 1977 1 SA 119 (A)
Nedbank Ltd v Wizard Holdings 2010 (5) SA 523 (GSJ)
Neuhoff v York Timbers Ltd 1984 4 SA 666 (T)
Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd 1993 4 SA 206 (W)
Sapirstein v Anglo African Shipping Co (SA) Ltd 1978 4 SA 1 (A)
State Trading Corporation of India Ltd v ED and F Man (Sugar) Ltd and ANR 1981 Com LR 235 (CA)
Structured Mezzanine Investments (Pty) Ltd v Davids 2010 (6) SA 622 (WCC)
Trans-Drakensberg Bank Ltd v The Master 1962 4 SA 417 (N)
Trust Bank of Africa Ltd v Frysch 1977 3 SA 562 (A)
Union and South-West Africa Insurance Co Ltd v Hull 1972 4 SA 481 (D)
Union Government v Van der Merwe 1921 TPD 318

Register of legislation

National Credit Act 34 of 2005
General Law Amendment Act 50 of 1956
Statute of Frauds 1677 (England)

Register of government publications

GN R489 in GG 28864 of 31 May 2006

Register of internet sources

Logan 2008 www.debtpack.com

Logan S 2008 *The National Credit Act 34 of 2005: A Basic Guide for Attorneys* www.debtpack.com/Portals/0/docs/LSSA_NCA_GUIDE.pdf [23 April 2011]

List of abbreviations

ABLU	Annual Banking Law Update
Comp LYB Int'l Bus	Comparative Law Yearbook of International Business
Int'l Law	International Lawyer
JBFLP	Journal of Banking and Finance Law in Practice
JBL	Journal of Business Law
JIBL	Journal of International Banking Law
THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
SALJ	South African Law Journal
SA Merc LJ	South African Mercantile Law Journal
St Louis Univ LJ	Saint Louis University Law Journal
URDG	Uniform Rules for Demand Guarantees

THE *NATIONAL CREDIT ACT* REGARDING SURETYSHIPS AND RECKLESS LENDING

PN Stoop*

M Kelly-Louw**

SUMMARY

In terms of the *National Credit Act* a credit provider may conclude a credit agreement with a consumer only after he has made a proper financial assessment and concludes that the consumer will be able to satisfy all of his obligations under all his credit agreements. However, a practice of not conducting this affordability assessment has evolved amongst certain credit providers where the credit agreement involved is a suretyship agreement. This article investigates whether or not a suretyship agreement is indeed a credit agreement in terms of the *National Credit Act*, and if a financial assessment should be conducted in the case of a suretyship agreement. The main aim of the article is to try to identify what the concept of a "credit guarantee", as defined in the Act, encompasses and ultimately if the common-law contract of suretyship falls under this definition. Our conclusion is that "credit guarantee" is as vague and problematic as many of the other definitions in the Act. If one reads the Act in its entirety (including the regulations to the Act), it seems unlikely that the legislature intended not to regulate common-law suretyships also.

KEYWORDS

National Credit Act; credit guarantees; suretyship; guarantees; reckless credit

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