

Suretyship and debt review

By Nthupang Magolego

The debt review phenomenon has sparked much controversy and debate in the legal fraternity and the credit industry at large. Another point that could soon emerge as contentious involves debt review and suretyship agreements.

Section 8(5) of the National Credit Act 34 of 2005 (NCA) deals with suretyship agreements (or, as the NCA states, credit guarantees). This section states that whenever a person agrees to settle the debt of another consumer under a credit agreement to which the NCA applies, that agreement will be a suretyship agreement regulated by the NCA.

Consumers who are struggling to cope with their debts can apply through a debt counsellor to be declared over-indebted, bringing about the outcomes mentioned in ss 86, 87 and 88 of the Act. Of relevance to these outcomes is the fact that a consumer who has been declared over-indebted is precluded from incurring further debts.

It is trite that suretyship agreements can be included under debt review, as confirmed by reg 24 of the regulations under the NCA, and need not be discussed further.

What could be contentious with regard to suretyship agreements and debt review is the fact that a consumer who is under debt review is precluded from incurring further debts, as provided for in s 88(1).

The bone of contention with this stems from the description of a suretyship agreement in s 8(5).

As mentioned above, a suretyship agreement will be regarded as a credit agreement regulated by the NCA if the principal credit agreement it aims to secure is also regulated by the NCA.

In the context of the NCA in its entirety, it is accepted that not all credit agreements are regulated by the NCA. For example, s 4(1) of the NCA states that credit agreements with juristic persons will not be regulated by the NCA if –

- the credit agreement is a large agreement; in other words the loan amount is in excess of R 250 000; or
- the annual turnover of the juristic person is in excess of R 1 million.

Bearing this in mind, any suretyship agreement that aims to secure the indebtedness of a juristic person where the credit agreement is regarded as a large agreement or where the turnover of that juristic person is above the stipulated threshold, the suretyship agreement will not be regulated by the NCA because the principal credit agreement is not regulated by the NCA.

It often happens in practice that whenever a juristic person enters into a credit agreement the credit provider requires the directors or members of that juristic person to provide suretyships for the indebtedness of the juristic person.

Whether or not those suretyship agreements will fall in the ambit of the NCA depends on whether or not the principal agreement is regulated by the NCA.

Thus, if the directors or members of a juristic person sign suretyship agreements with regard to a large credit agreement above R 250 000 or if the turnover of that juristic person is above the stipulated threshold of R 1 million, then those suretyship agreements will not be regulated by the NCA.

This raises some complications for debt review, in that if a suretyship agreement is not regulated by the NCA as a result of the principal credit agreement not being regulated by the NCA, does this mean that the provisions of the NCA on debt review are not applicable?

In particular, does s 88(1) of the NCA not apply?

In other words, can a member or director of a juristic person under debt review sign a suretyship agreement that is not regulated by the NCA (which precludes the incurring of further debts by persons under debt review)?

In my opinion, the answer to these questions should be in the negative. This is because, when reading the NCA as a whole, and having regard to the purpose and objectives of the Act and the debt review provisions, it could not have been the legislature's intention to permit any person who has been placed under debt review to incur further debt, irrespective of how or why the debt is incurred. This stance is indirectly supported by reg 24, which states that all debts, including suretyship debts, can be included under debt review.

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