REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

**CASE NO: 2013/3958**

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

09/05/13
DATE

SIGNATURE

In the matter between:

**MERCANTILE BANK LIMITED** Applicant

and

**HAJAT, AHMED FAROUCK** Respondent

---

**JUDGMENT**

---

**MILTZ AJ:**

INTRODUCTION

1. The applicant seeks judgment for payment of R3 751 110.66, interest thereon, an order declaring certain mortgaged property specially executable in terms of two mortgage bonds and the costs of the application on the attorney and client scale.

2. The respondent resisted the application relying principally in the answering affidavit on the existence of a dispute of fact which he suggested precluded the applicant from proceeding to recover the alleged indebtedness by way of motion proceedings.

3. During argument the opposition crystallised into three contentions. The first was that there is no cause of action disclosed in the founding affidavit. The second was that if it is found that there is a cause of action, then the credit agreement on which the applicant relies was reckless within the contemplation and meaning of section 80 of the National Credit Act No. 34 of 2005 ("NCA") due to the applicant allegedly having failed to conduct an assessment as required by section 81(2) of the NCA.

4. Finally, Ms Dénichaude, who appeared for the respondent, requested that if I am against the respondent on the first two defences I should postpone the application to permit the respondent to bring an application for relief in terms of section 83 of the NCA.

5. I will deal with the respondent's contentions more fully below. First, however, I will set out what I consider to be the relevant facts.

6. On 11 January 2012, the parties concluded a written home loan agreement ("the loan agreement"). In terms of the loan agreement the respondent's prior indebtedness to the applicant of R16 786 696 would be reduced to an amount of R3.5 million. This would be achieved by a third party, Rayhaan Hassim, assuming liability to the applicant in respect of R10.5 million thereof and through the applicant writing off an amount of R2 786 696.

7. The balance would be repaid by the respondent to the applicant in 240 monthly instalments commencing on 25 May 2012.

8. The entire arrangement was conditional upon the respondent granting the applicant a second continuing covering mortgage bond ("the second mortgage bond") for an amount of R1 million over the property already mortgaged in favour of the applicant for an amount of R2.5 million ("the first mortgage bond"). The property was an investment property in a residential development in Tongaat, Kwazulu Natal known as Section 3, Santana Sands ("the property"). The respondent does not reside at the property.

9. The condition precedent was fulfilled and the second mortgage bond was registered over the property. The effect thereof was that the

respondent's reduced indebtedness to the applicant of R3.5 million was secured by the first and second mortgage bonds.

THE CAUSE OF ACTION

10. Ms Dénichaude complained that because the loan agreement was in the form of a home loan agreement which contemplated a future payment by the applicant to the respondent of the credit to be advanced in terms thereof, that the application, based as it was on a portion of the respondent's past indebtedness to the applicant, did not disclose a cause of action for payment.

11. I do not agree. The loan agreement on which the applicant relies must be interpreted as a whole. The intention of the parties thereto as expressed therein was to record that the credit to which the loan agreement related had been advanced already.

12. The heading "PART A : Amount Advanced" and the words "Credit Advanced" that follow are against the respondent's interpretation of the document. The only words in the entire document that suggest a possible future distribution are those on the right hand side in Part A "PROPOSED DISTRIBUTION TO BE PAID TO THE BORROWER".

13. However, as was pointed out by Mr Pincus who appeared for the applicant, additional condition 6 on the second page of the loan agreement contains an express acknowledgement by the respondent that the loan agreement constituted the restructuring of an existing

debt. Practically speaking, the credit advanced constituted part of the prior indebtedness of R16.5 million to which I have already referred above. This was not disputed by the respondent who did not complain in the answering affidavit that the credit was not advanced.

14. In my view therefore the applicant was entitled to rely on the loan agreement as part of a cause of action that is validly constituted by the averments in the founding affidavit and annexures thereto.

15. In terms of the loan agreement, the respondent was obliged to make payment of monthly instalments as already referred to above. It is common cause that he did not do so.

16. The respondent's failure to make payment constituted a breach of the loan agreement. This entitled the applicant to terminate the loan agreement and claim payment of the amount due in respect thereof. It has done so.

17. I find no recognisable dispute of fact in relation to the cause of action. It follows that unless there is some merit in either of the respondent's remaining points, the applicant is entitled to judgment as prayed.

NO CREDIT ASSESSMENT

18. In considering the second contention, that is, that the loan agreement is invalid because it was concluded without any credit assessment being

conducted, it is necessary to consider the relevant facts on a broader basis than the averments of the respondent alone.

19. In his answering affidavit, the respondent testified *inter alia* about his introduction to Hassim by his bookkeeper Moosa during September 2011 and a meeting amongst them at approximately that time. The respondent stated that having provided Hassim with details of his indebtedness to his creditors, he then concluded an agreement with Hassim.

20. In terms of that agreement the respondent would remain the appointed franchisee of the business of the Oaklands Garage ("the business"), the respondent would retain 25% of the shares in the company that operated the business, the respondent would be responsible for the day-to-day running of the business, Hassim would become the owner of 75% of the shares in the company, Hassim would settle the respondent's indebtedness to all creditors in full and final settlement including any amounts owed to the applicant and finally the respondent would become entitled to 25% of the savings afforded to Hassim as a result of his cash settlement negotiations with the creditors concerned.

21. The respondent then stated that he was unaware of any balance to be written off by the applicant as part of the agreement. He stated that Hassim was obliged in terms of their agreement to discharge or settle his indebtedness to all his creditors, including the applicant in full.

22. The difficulty with the respondent's version is that after the respondent entered into the September 2011 agreement with Hassim, the respondent entered into the loan agreement and pursuant thereto and to render the loan agreement unconditional, he caused the second mortgage bond to be registered over the property. He would not have done so if his agreement with Hassim obliged Hassim to discharge the respondent's entire indebtedness to the applicant in full. If that was the case there would have been no basis for the loan agreement and the granting and registration of the second mortgage bond. Indeed there would have been no need for the respondent's indebtedness to have restructured at all.

23. The applicant gave effect to the material express term of the loan agreement which provided that upon registration of the second bond the outstanding balance covered by the first bond would be considered "settled in full" from the "proceeds" of the loan agreement. The effect thereof would be that the first and second bonds together would constitute security for the full amount payable by the respondent to the applicant in terms of the loan agreement.

24. In response to the version of events of the respondent as aforesaid, Desmond Ian Gower, the Head of Risk of the applicant, in the replying affidavit explained that he and Steven John Ross, the Manager of Collections of the applicant, negotiated with the respondent with a view

to assisting the respondent to limit the extent of his indebtedness to the applicant.

25. The respondent was assisted in the negotiations by Hassim. Those negotiations resulted in the restructuring of the indebtedness of the respondent to the applicant already referred to. Gower pointed out in the replying affidavit that the loan agreement with the respondent as well as the agreement entered into between the applicant and Hassim were entered into simultaneously at Hassim's offices in Midrand pursuant to a meeting held between the applicant, Ross, Gower, Hassim and the respondent. This is borne out by the dates and places of signature appended to the relevant agreements.

26. In the replying affidavit, Gower stated that the financial implications for the respondent of concluding the loan agreement, the fact that he had a general understanding and appreciation of the nature of the transaction and of his rights and obligations were all discussed at length at the meeting.

27. Gower stated that the applicant was able to come to the conclusion that the respondent was able to fulfil his financial obligations to the applicant in terms of the loan agreement during the course of such discussions and based on previous assessments conducted by the applicant in respect of the respondent's finances. Documentation provided to the applicant by the respondent during 2009, 2010 and most recently relating to the financial year ended 28 February 2011 enabled the applicant to assess the respondent's financial position.

These documents as well as assessments conducted during the course of the meeting at Hassim's offices enabled the applicant to conclude that the respondent was financially able to comply with all his financial obligations in terms of the loan agreement.

28. None of the statements by Gower in his affidavit, which were put up in response to the respondent's allegation that no assessment was conducted at the time of the agreement, was refuted by the respondent. The respondent did not seek an opportunity to deal with these by way of a further affidavit.

29. The features of the evidence that I have referred to above satisfy me that to the extent that the respondent attempts to create a dispute of fact with reference to events surrounding the conclusion of the loan agreement as part of the restructuring of his indebtedness to the applicant, his version, such as it is, is far-fetched and implausible and can be rejected on the papers alone.

30. I accept unequivocally Gower's version that an assessment was indeed conducted by the applicant at the time of the restructuring of the respondent's indebtedness. The entire arrangement constituted by the tripartite agreements was premised on the respondent's inability to service the prior debt and was aimed and concerned with the reduction of that debt to a level that the respondent could manage in what had become distressed times for him in his business.

31. Section 82(1) of the NCA permits the credit grantor to determine its own procedures for the conduct of risk assessments. I have no hesitation in finding that Gower and Ross, both senior employees of the applicant, were entitled to conduct the assessment of the respondent's ability to service the reduced indebtedness in the circumstances and manner in which they did so.

32. For the reasons set out above I am therefore satisfied that the applicant conducted an assessment as required by section 81(2) of the NCA and that there is no merit in the defence that none was conducted.

POSTPONEMENT OF THE APPLICATION

33. The final request by the respondent's counsel was for the application to be postponed to enable the respondent to apply for a declaration in terms of section 83 of the NCA.

34. The applicant alleged that it complied with sections 129 and 130 of the NCA and attached annexure "SR4", being a copy of the statutory notice required in terms thereof, in support thereof. However the respondent merely denied these allegations. The respondent also denied that he had been in default of his obligations in terms of the loan agreement for a period in excess of twenty business days and that at least ten business days had elapsed since the relevant notice was furnished to him.

35. Significantly the respondent did not attempt to explain why, in view of his denial that he received the statutory notice, his signature with the date 21 August 2012 appeared as the receipt on the notice concerned.

36. The statutory notice referred to which obviously was received by the respondent and ignored afforded the respondent the prescribed statutory period to respond thereto or to take any of the steps contemplated by section 129(1)(a) of the NCA. The respondent did not take any steps at all.

37. The effect of the respondent's conduct in ignoring the notice, with reference to section 86 of the NCA, was to preclude an application for debt review, at least in respect of the loan agreement that was the subject of the relevant notice. *Guide to the National Credit Act* (Lexis Nexis), para 11.3.3.2 (d) at pages 11-12 to 11-16 and the cases referred to therein.

38. Section 83 of the NCA, which is relied on by the respondent, does not relate to debt review *per se*, but provides the Court considering a credit agreement with a discretion to declare that the credit agreement is reckless.

39. In *SA Taxi Securitisation (Proprietary) Limited v Mbatha and two similar cases 2011 (1) SA 310 (GSJ)* Levenberg JA, with reference to a defence raised in summary judgment proceedings which was based on

section 83 and 84 of the NCA held (in paras 56 to 57 of the judgment) that:

> "[56] In any event, even if I am wrong in that view, the defendants have not set out their defence of reckless credit in any of the actions with sufficient particularity to comply with the requirements of *Breitenbach v Fiat*. In order to demonstrate that reckless credit was granted, the defendants should have provided some particularity concerning the following:
>
> [56.1] details should have been given of the negotiations leading up to the conclusion of the agreement. The defendant should have identified the parties involved in the negotiations, to the extent that the defendant is able to do so. The defendant should also have disclosed details concerning any credit application that the defendant signed and the circumstances in which the defendant signed those credit applications. This information would have enabled the court to evaluate whether there is a basis for the allegation that no assessment was conducted under the NCA. ...
>
> [56.2] ...
>
> [56.3] if the defendants wished to rely on s80(1)(b)(ii), each defendant should provide details of all of its indebtedness at the time that the lease agreement was concluded, as well as information concerning the defendant's potential income and expenditure, including any income that might arrive from the utilization of the motor vehicle as a taxi.
>
> [56.4] information should have been provided concerning the defendant's current levels of indebtedness, and income and expenditure, in order to enable the court to evaluate whether the court might, in the exercise of its discretion, either set aside the credit agreement, or suspend it.
>
> [57] In outlining the type of information that the defendant should have provided if it wished to avail itself of the defence of "reckless credit", I do not intend to be didactic or to lay down any immutable principle of law or procedure. It may be that, even if a defendant does not provide as much information as is suggested in the previous paragraph, a defendant will nevertheless be

> entitled to defeat some aspect of the claim for summary judgment on the basis of "reckless credit". Suffice it to say that, in the present case, the defendants have not even come close to providing sufficient information to substantiate the defence."

40. Levenberg AJ, in the judgment *supra*, was considering an application for summary judgment. In such an application it is not necessary for a respondent to set out every material fact on which the defence is based. All that is required is that the respondent should swear in a *bona fide* manner to facts that if proved at the trial will constitute a defence to the plaintiff's action.

41. In the present application the respondent was required to put up a sufficient factual basis to enable the Court to find at least the existence of a *bona fide* dispute surrounding whether the applicant had conducted an assessment or not and if so, that nevertheless the loan agreement constituted a reckless credit agreement in terms of the NCA.

42. The fact that payments were not made when due is not evidence without much more, of reckless credit. The only contention advanced by the respondent to support the allegation that reckless credit was granted was the following:

> "I was already overindebted at the time that the loan agreement was entered into as I was already unable to meet my other financial obligations under other credit agreements. I have been unable from the outset to pay even one instalment in terms of the loan agreement."

43. In paragraph 68 of the answering affidavit the respondent contended that "The applicant should never have granted me the credit in such a reckless manner, under circumstances where I was already financially disabled."

44. These averments by the respondent are hopelessly inadequate and provide no assistance to the enquiry whether the credit was indeed reckless.

45. In the circumstances and for all the reasons already set out above there is no basis on the papers for a finding that the credit agreement constituted by the loan agreement was reckless. It follows that there is no basis to proceed further and set aside or suspend any part of the respondent's rights and obligations under the relevant agreement. The fact that the loan agreement was cancelled after due compliance by the applicant with the relevant provisions of the NCA and the respondent's failure to respond thereto within the prescribed periods or at all exacerbated the position for the respondent.

46. There is no basis for the postponement of the application as requested. The respondent had every opportunity to apply to Court by way of a counter-application for such relief as he considered appropriate in the face of the application. He chose not to do so. There is no reason why the applicant should be stalled any longer and kept from the judgment it is entitled to.

47. In the circumstances, I will not postpone the application which has been fully argued on the papers before me.

THE MORTGAGE BONDS

48. I asked counsel during argument to address me on whether, if the application for judgment succeeds, I should grant the relief that is sought to declare the mortgaged property specially executable.

49. It is common cause that the mortgaged property is an investment property and that the respondent does not reside there. It is also common cause that a tenant resides at the mortgaged property. The terms of the tenant's occupation do not appear from the affidavits and annexures in the application.

50. It was not suggested by either Mr Pincus or Ms Dénichaude that if I grant judgment as prayed it should not include an order declaring the mortgaged property specially executable. The provisions of the common law pertaining to the law of lease and the Prevention of Illegal Evictions and Unlawful Occupation of Land Act, 19 of 1998 more than adequately will protect the rights of any person whose occupation might be affected by execution when levied in terms of the order I propose to make.

**CONCLUSION**

51. In the premises, the following order is made:

1. Judgment is entered against the respondent for:

   1.1. payment of the sum of R3 751 110.66;

   1.2. interest on the aforesaid amount at the rate of 8.5% per annum from 1 January 2013 to date of final payment;

2. The unit consisting of section no. 3 as shown and more fully described on sectional plan no. SS151/2008 in the scheme known as Santana Sands ("the scheme") at Tongaat in the Ethekwini Municipality of which section the floor area is 248 square meters in extent together with an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan in terms of mortgage bond no. SB000813/09 ("the first bond") and mortgage bond no. SB009881/12 ("the second bond") is declared specially executable for the full amount of the judgment to the extent of the amounts and for the causes referred to in clauses 1 and 2 of the first bond and clause 1 of the second bond;

3. The respondent is ordered to pay the costs of the application on the attorney and client scale.

DATED THE 09 DAY OF MAY 2013 AT JOHANNESBURG

**I. MILTZ AJ**
ACTING JUDGE OF THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG