REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 33795/12

(1) REPORTABLE: no
(2) OF INTEREST TO OTHER JUDGES: no
(3) REVISED.

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DATE SIGNATURE

In the matter between:

NEDBANK **Plaintiff**

And

GOSSAYN LEVINA **1ST Defendant**

GOSSAYN STEPHAN ANTHONY **2ND Defendant**

CEDAR COUNTRY INN 2008 CC **3RD Defendant**

J U D G M E N T

VICTOR J:

[1] The plaintiff bank lent and advanced money to the first defendant and it seeks payment.

Issues for determination

[2] The defendants have raised two issues, namely, that the certificate of balance was incorrect and that there was no compliance with the provisions of the National Credit Act 34 of 2005, in relation to the subsequent conclusion of a consolidation agreement between the parties.

Relevant background facts

[3] The plaintiff in this matter extended four different loans to the first defendant. The amount lent and advanced were secured by the registration of a mortgage bond registered by the first defendant in favour of the plaintiff. During 2011 the loans were consolidated to assist the first defendant and to ensure a lower interest rate. The mortgage bonds were registered over portion 4……., a portion of portion 1…… of the farm P…….. 1…….. The loans were entered into on 30 August 2002, 15 May 2006, 17 July 2007 and 24 December 2007.

[4] On or about 7 June 2008 the first defendant committed a breach of the agreements by failing to pay and the debit orders were reversed. The reversals of the first defendant's debit orders were

repeated from 10 December 2008 to 4 August 2012. In order to secure the indebtedness owing to the poor payment record, on 29 November 2006 the second defendant executed a written deed of suretyship in favour of the plaintiff and bound himself as surety and co-principle debtor with the first defendant in respect of the first defendant's liability to the plaintiff. Due to the first defendant's continued breaches and on or about May 2010 the plaintiff and the first defendant began negotiations with a view to consolidating the first defendant's loan agreements.

[5] The consolidation agreement was finally signed a year later on 13 July 2011. The first defendant breached the consolidation agreement immediately after it was entered into. As a result of the previous breaches of the various agreements increased the amount of indebtedness increased owing to the non-payment of interest.

[6] As part of the negotiation the first defendant was required to provide additional security and on or about 1 July 2011 the third defendant executed a written deed of suretyship in favour of the plaintiff in terms of which it bound itself as surety and co-principle debtor with the first defendant in the amount of R9 675 000.00. It bears mention that the first defendant is the sole member of the third defendant. The third defendant is in liquidation.

[7] A certificate of balance indicates that the first defendant is indebted to the plaintiff in the amount of R12 012 755.21. Insofar as it may be relevant to the defendants' case, the requisite notice was given to the defendants in terms of section 129 of the National Credit Act. The first defendant does not live in the immovable property. She has four other properties registered in her name in the Honeyvale area. The plaintiff also seeks interest at 9.25% per annum calculated from 1 January 2015 to date of final payment.

[8] The purpose of the National Credit Act is to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting and to provide for debt reorganisation in cases of over indebtedness. In this case the consumer is a businesswoman, who not only owns immovable properties, but also owns the immovable property from where she conducted her business which appears to be a hotel type business from the mortgaged property. The plaintiff's witnesses testified that the first defendant is a successful businesswoman and impressed as such in particular when the consolidated loan was negotiated.

The consolidated loan

[9] It is the plaintiff's case that the consolidation agreement is not a new loan but merger of the four loans. All the plaintiff did over the period of one year, was to negotiate the consolidated loan. The first defendant was fully involved in the process hence it took a year

to conclude. If regard be had to the consolidated agreement of the loan it is of importance that the plaintiff bank itself regards the loan as one being in terms of the National Credit Act. The agreement of loan refers to the amount which would be registered R9 505 130.00. The interest is set out fully. The total cost of the agreement is set out as well as the ultimate amount which the first defendant would pay over the 30-year period.

[10] In paragraph 4 of the consolidated loan reference is made to the fact that no money would be advanced to the first defendant or on her behalf. Notwithstanding the heading of the consolidated agreement it is the plaintiff's case that in the absence of advancing further monies the loan is not governed by the National Credit Act. It was argued on behalf of the defendants that the fact that an additional amount of R1 million described as security was included in the consolidated agreement this meant, therefore, that there was an additional amount and, therefore, the plaintiff failed to comply with the provisions of the National Credit Act.

[11] In *RMB Private Bank, a division of the First Rand Bank v Kaydeez Therapies CC, (in liquidation),* case number 2012/00793 the Court held that:

> "Only parliament can determine whether or not the National Credit Act of 2005 in its entirety or

> in part is applicable to an agreement between creditor and debtor."

[12] In other words, the mere fact that this consolidated agreement is framed with reference to the National Credit Act in my view, does not bring it within the ambit of the National Credit Act despite the heading at the top of the agreement.

[13] Of further importance is the fact that in clause 21 the defendants were not precluded from applying to a debt counsellor in the prescribed manner to have the defendants declared over indebted. The case as currently argued for the defendants is that the bank should never have consolidated the loans because at the time she was over indebted. The date of the loan agreement is 13 July 2011. At no stage during the negotiations did the first defendant claim to be over indebted. If regard be had to the annual financial statements it is clear that the first defendant anticipated very fully that she could pay the indebtedness. I will refer to the figures shortly.

Defence of over-indebtedness

[14] In the declaration made by the first defendant to the plaintiff she showed her assets as being substantial. Both Mr Vos and Mr Golden of the plaintiff testified very clearly how they very carefully considered the financial status of the first defendant and her ability to

repay same. This negotiation took place over a year and they covered every aspect of her finances. They could see there was nothing that she could hide nor could she introduce any subterfuge because her banking account and that of the third defendant was held by the plaintiff and they analysed the accounts very carefully.

[15] At that stage, at the time of making the application, that application agreement was signed already 5 April 2011 well before the consolidation agreement and she reflected her expenses as R77 000.00 per month and the amount that she wished to secure in the consolidated agreement was R9 675 000.00.

[16] In my view, the first defendant is a well-informed business person. She is not the kind of person which the National Credit Act intends to protect. If regard be had to the annual financial statements of the business (third defendant), in particular, for the year ending 28 February 2011 the first defendant received rentals in the amount of R1 048 735.00. She had retained income of R1 120 793.00 and there was a net profit of R1 473 740.00 and she had drawings of R199 760.00 and her retained income as at 2011 was R1 274 220.00. In other words, at the time that the bank did the financial assessment it was clear that the first defendant had ample income to pay the indebtedness which was R76 000.00 per month in respect of the consolidated loan.

[17] If that was not sufficient, the further interim financial statement was called for by the plaintiff. The statement is dated 15 May 2011. The statement showed receipts of rental and municipal costs amounting to R218 486.00 which reflected a period of less than three months. She had her retained profit, she had drawings and, in my view, the bank very carefully considered her repayment ability. It is clear that the first defendant could afford the repayment amount.

[18] Prior to the consolidation agreement being approved it went through two senior committees of the plaintiff. The consolidation agreement covered the capital balance outstanding and the arrears.

[19] Taking into account the loans, the capital balance outstanding on the Corsa bakkie of R28 000.00, her two credit cards (which were settled) meant that her exposure to the plaintiff was R9 675 742.03 and this was the amount that formed the basis of the consolidation agreement.

S8 (4) of the National Credit Act

[20] In terms of section 8 (4) of the National Credit Act, it is necessary to consider whether the consolidation agreement was governed by section 8 of the National Credit Act. In terms of section 8 (4) an agreement, irrespective of its form, but not including an agreement contemplated in subsection (2) constitutes a credit transaction if it is an incidental credit agreement, an instalment

agreement, a mortgage agreement or secured loan, a lease or any other agreement other than a credit facility. In my view, the final agreement that the defendant concluded with the plaintiff was a consolidation agreement and, therefore, is not the type of agreement which is defined in terms of section 8 (4) of the Act. I accept the submission by the plaintiff that this agreement did not fall within the purview of the National Credit Act.

The effect of debt review, re-arrangement order or agreement

[21] The first defendant contends that because the consolidation agreement provided for additional security of one million rand there had been a contravention of the provisions of s88 of the National Credit Act and this invalidated the consolidation agreement. The preamble of s 88 (1) of the National Credit Act provides that a consumer who alleges that he or she is over indebted may incur no further charges under the credit facility other than a consolidation agreement. More specifically in terms of section 88 (1) (a), (b) and (c), the Act provides that a further credit agreement cannot be entered into or further charges incurred: (a) where the debt counsellor rejects the application or (b) where the Court has determined that the consumer is not over indebted and (c) a Court having made an order or the consumer and credit providers having made an agreement unless the consumer fulfilled the obligations by way of a consolidation agreement.

[22] None of the events contemplated in terms of s88 were pending when the first defendant entered into the consolidation agreement. There were no matters pending before a debt counsellor nor did the question of over indebtedness pend before a court at the time of the consolidation agreement. On a proper reading of S88 of the National Credit Act the defendants cannot escape their indebtedness when none of the events envisaged were pending and moreover a consolidation agreement is one of the agreements, which falls outside of the definition. The defendants reliance on s88 must fail.

Other defences

[23] There was a further issue of non-compliance raised by the first defendant regarding a pre-quotation agreement. Mr Vos testified that he could not remember providing the defendants with a pre-quotation agreement prior to the conclusion of this consolidation agreement. Mr Golden disagreed with that and his recollection was that such an agreement was in the security section of the bank. It is also common cause that the defendants did not bring any application in terms of rule 35 (3) to obtain copies of these additional documents on which they wished to rely in this trial.

[24] The defendants also relied on section 119 of the Act which provides that a credit limit under a credit facility may be increased and it is the defendant's case that the credit assessment was not done in accordance with this section. The defence was that the plaintiff should have known that the first defendant was already over indebted at that stage and, therefore, despite the fact that she agreed to this additional R1 million this was invalid as she was already over indebted. I cannot accept that submission. The increase in security did not mean an increase in the loan *per se*. The Act does distinguish between small and intermediate or large loans. See *Ex Parte Ford and two similar cases* 2009 (3) SA 376 (WC) para 20 referring to *BMW Financial Services SA [Pty] Ltd v Mudaly* 2010 (5) SA 618 (KZN).

[25] The purposes of the Act are set out in s(3) of the National Credit Act. The provisions are directed at providing protection to the consumer and redressing the imbalance that will usually exist between credit provider and consumer. They aim to prevent exploitation of the consumer by reckless lending and to facilitate the resolution of the difficulties that afflict consumers to become over indebted. In so doing, a balance is to be struck between the interest of the consumer and those of the credit provider. However, what is very clear is that each agreement has to be determined in terms of section 8 in terms of the nature of the agreement, the subject matter of the agreement, the substance, the purpose and the function of a

particular agreement as well as the intention of the parties gathered from the conduct.

[26] All this should be taken into account and should form the basis of prime considerations in this regard. See *Voltex [Pty] Ltd v Chenleza CC and others* 2010 (5) 267 (KZP) and *Bridgeway Ltd v Markham* 2008 (6) SA 123 (WLD).

[27] The defendant also relied on s117 and s119 of the National Credit Agreement Act. S117 provides for changes by agreement. S 117 is subject to s119 which provides for increases in credit limits, in particular, section 119 (6):

> "If when increasing the credit limit under a credit facility the credit provider alters any form of the credit agreement, the credit provider must comply with the requirements set out in section 93 and 117."

[28] Section 93 provides as follows:

> "The credit provider must deliver to the consumer without charge a copy of the document that records their credit agreement

> and the credit provider must comply with the various requirements."

[29] The defendants did not testify. The witnesses for the plaintiff testified and were adamant that copies of documents were given to them and also at the time of concluding the consolidation agreement.

The Evidence

[30] It is common cause that none of the problems raised in relation to non-compliance with procedure in relation to the earlier four loans was raised. Those loans seem to have met the requirements of the National Credit Act. It is only the consolidation agreement that is challenged. In order to finally assess the question of the two defences raised by the defendants, who did not testify, the evidence needs to be analysed. Ms Moagi testified that the figures in the certificate of balance were correct. The computers were in order, her boss, Mr Drosky also signed off the certificate as correct. In cross-examination, she very properly conceded that if incorrect figures were given to her then the balance in the certificate would be incorrect but that the certificate was *prima facie* correct. On behalf of the defendants, however, no figure was put to her as to its alleged incorrectness. Instead, a mere generalised allegation was put to her that her figures were wrong. This cavalier off the cuff approach about alleged incorrect figures by the defendant has no merit. One cannot

simply attack a *prima facie* balance in a certificate without having any figures to attack the facts in the certificate of balance.

[31] Mr Vos testified that he was the plaintiff's relationship manager and had a lot of dealings with the defendants in order to try and assist them with their cash flow problems. They had enough assets to cover the indebtedness. It does seem that at the time when she defaulted on the consolidation agreement in respect of the debit orders there was a cash flow problem.

[32] It was put to him that he was not present when the consolidation agreement was signed and that the first defendant was also not present. He denied this and stated that he would not have witnessed the agreement if he was not present. I am of the view that Mr Vos is an honest witness. In particular, it was put to him that he did not prepare a pre-agreement quotation. He could not remember it and conceded that he had not prepared one.

[33] Mr Golden testified. He was a senior manager at the time the consolidation agreement was concluded and he confirmed that indeed there was the pre-quotation and that the defendants had simply not asked for a copy of that for purposes of trial. It was in the security section. Mr Golden testified that from the moment the defendants defaulted they were placed in the legal department. Negotiations commenced to try and arrange more favourable terms

for the defendant. I got the impression that the consolidation agreement was not an agreement that was imposed on the first defendant. She clearly wanted to conclude the consolidation agreement. At various times she had to provide throughout that year of negotiation different figures and different documents in order to assist the bank to assess her credit worthiness and her ability to repay the loan.

[34] As already indicated, there were term loans and mortgage loans that were merged in order for her to obtain a more favourable interest rate. He described in detail how the defendant's financial profile was analysed and considered. Affordability was one of the key issues in the exercise. The credit committee, of which he was a member, carefully considered all the figures. They did a due diligence and they came to the conclusion that the repayment of R76 480.40 per month was affordable for her and I have already referred to the context of the annual financial statement and the interim financial statement. The bank was in a position to verify the figures in the annual financial statements since all her banking was done with the plaintiff.

[35] The third defendant rented the property from the first defendant from which to run the business and I have already referred to the rental that she received, her drawings and also her loan account and the money that was owed to her. It was submitted on

behalf of the defendants that the rental was in fact not a true figure because that included disbursement for water and lights. However, the defendants failed to testify when they were in a position to do so on the question of the water and lights accounts since they themselves were running the business. The defendants did not testify, they closed their case before testifying. In the absence of contrary evidence I, therefore, accept that the assessments done by the bank were in accordance with good and best practice.

[36] Mr Golden also testified that there was consistency in her financial profile and all these factors went into considering her ability to afford this loan. She had a contract with Goldfields of R500 000.00 per month. She also had to waive benefits, which included use rights over the mortgage property. She had income of R2 million to service the debt of 12 instalments at R67 000.00 totalling R918 000.00 per annum. The net profit reflected on the balance sheet was good amounting to a couple of hundred thousand per annum.

[37] A further feature in assessing her affordability is a document filled in by the first defendant's husband, the second defendant, which showed assets of R15.5 million and liabilities of R9.2 million. There were supporting vouchers. The fact that the first defendant continued to pay off her credit cards and car loan does reflect that all this was affordable. The

first defendant did not testify and would have had her own motive not to repay the instalment, particularly immediately after the consolidation agreement. She never bothered to testify to explain why she no longer paid. She either failed, or could not, or refused to pay the consolidated loan instalment. It is not for the court to speculate.

[38] It was put to the plaintiff's witnesses on affordability viz that if the first defendant called up her loan account the third defendant would have been insolvent. Even if her loan account was factored out of the situation there was still sufficient income for her at the time to repay the amount of R67 000.00 per month. The defendants referred to her drawings, amounting to some R16 000.00 a month and submitted that she would never have been able to repay a loan of R76 000.00 per month. This is a simplistic and opportunistic analysis of the actual situation and I reject it. The first and second defendant were selective in choosing which creditors to pay. They elected not to have the third defendant pay a rental figure of R67 000 per month. There is ample other evidence and context to show that she did not have an income of R16 000.00 per month. She had four other homes. Presumably as a businesswoman, she did not leave them to stand empty without a rental stream.

[39] There was also criticism that the plaintiff had not ceded the book debts of the third defendant to the plaintiff. There was a further

criticism in relation to affordability and over indebtedness. It was submitted that the plaintiff should not have given a 55-year-old woman a 30-year loan. Mr Golden testified that the first defendant herself was optimistic and had she properly managed her financial affairs she could have repaid the 30 year loan with ease even if it meant she would be 85 years old at the time of the final instalment. However, in the absence of the first defendant testifying, there were a lot of possibilities such as the sale of the business or the sale of the property if the time came for her not to be able to manage. This was not canvassed before me in order to disprove the plaintiff's allegation that the consolidated loan was affordable.

[40] I accepted the evidence of the plaintiff's witnesses. I accept the evidence of Ms Moagi regarding the accuracy of the certificate of balance. I also accept the evidence of Messrs Vos and Golden on the aspect relating to best practice in relation to the requirements of the National Credit Act even if there was no need to do so. The first defendant is a businesswoman. She is not a person who needs the protection of the National Credit Act, its purpose being really to protect a vulnerable consumer.

[41] In addition, I also have regard of the case of *Voltex* already referred to and looking at the consolidation agreement it is merely a merger of the agreements. Those agreements were properly

negotiated in terms of best practice but do fall outside the ambit of the National Credit Act. I also have regard to the subject matter, the substance, the purpose and function of the particular agreement as well as the intention of the parties gathered from their conduct, which forms a prime consideration in this matter.

[41] In the result, I find that the plaintiff succeeds in this action.

The order I would make is:

1. judgment is granted against the first and second defendants jointly and severally the one paying the other to be absolved as follows:
    1.1. Payment of the sum of R12 012 755.21.
    1.2. Interest on the aforesaid amount at the rate of 9.25% per annum calculated from 1 January 2015 to date of final payment.
    1.3. Cost of suit.

2. An order declaring the following immovable property specially executable:

    2.1. Holding 4……. a portion of 1……. of the farm P……. 1……., previously known as holding 19 Chancecliff Agricultural Holdings registration division IQ Province of

Gauteng situated stand 4……., a portion of 1……. of the farm P……. mortgaged under mortgage bond number B5……., B0……. and B0……. measuring 1755 square metres held by deed of transfer T……. subject to the terms and conditions therein.

2.2. Holding 4……. a portion of portion 1…….. of the farm P…….. 1……. previously known as 20 Chancecliff Agricultural Holdings, registration division IQ Province of Transvaal situated at stand 4……. a portion of 1…….. of the farm Paardeplaats 1……. mortgaged under mortgage bond number B5……. and B…….. measuring 1754 square metres held by deed of transfer T…….. subject to the conditions contained therein.

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M. VICTOR

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

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Date of Hearing: 13th of February
Date of Judgment: 18th of February 2015