REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 40350/2012

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

5/3/2020
DATE

SIGNATURE

In the matter between:

FIRSTRAND BANK LIMITED Plaintiff

And

BRIDGETTE MAFORA Defendant

JUDGMENT

RANCHOD, J

Introduction

[1] Plaintiff's claim against the defendant is for payment of (as per the combined summons) R699 192-69 together with interest thereon at the rate of 7.10% per annum calculated daily and compounded monthly in arrears from 20 July 2012 to date of payment, based on a home loan agreement dated 12 February 2008. The loan granted to the defendant was for R750 000-00 which was secured by a mortgage bond No 035986/08 over certain immovable property Erf 32 Wonderkrater Vakansiedorp Township, Registration Division KR, Limpopo Province (the property). The plaintiff seeks to have the property declared specially executable. There is also a prayer for costs on the attorney and client scale.

[2] The defendant filed a plea which was later amended on 21 October 2016. The plaintiff replicated to the amended plea. Thereafter, the defendant filed a further amended plea dated 08 December 2016 to which plaintiff did not replicate as the further amended plea had not come to its attorney's attention. It was agreed that the matter then proceed on the basis that the correct set of pleadings before the court were the combined summons and particulars of claim and the defendant's amended plea dated 08 December 2016.

[3] The defendant entered into a written sale agreement with Waterberg Minerale Bron (Pty) Limited in terms of which she purchased the property known as Erf 32 Wonderkrater Vakansiedorp Township (the property).

[4] The plaintiff and the defendant entered into a written credit agreement in terms of which the plaintiff provided credit to the defendant to enable her to make payment of the purchase price. A covering mortgage bond would serve as security for the defendant's obligations to the plaintiff.

Common cause facts

[5] The existence of the credit agreement, the terms and conditions thereof, the fact that the defendant is the registered owner of the property, and the fact that the plaintiff registered a first covering mortgage bond over the property are all common cause.

Point *in limine*

[6] The defendant raised a point *in limine* that the plaintiff had failed to comply with the provisions of s129 of the National Credit Act 34 of 2005 (the NCA) in that defendant did not receive a statutory notice in terms of the section. I was satisfied with reference to the evidence of proof of posting the notice, the relevant 'track and trace' report from the post office provided by the plaintiff which proved that the notice was indeed sent – by registered post – to the correct address. It reached the correct post office (and it had been collected).

[7] Defendant's counsel conceded that the relevant facts were correct and that the point *in limine* was no longer an issue. I ruled that there had been proper compliance by the plaintiff with s129 of the NCA.

[8] The defendant's primary defence is that the credit agreement constitutes reckless credit (as defined in s80 of the NCA) in that plaintiff had failed to conduct a proper assessment to determine whether or not she had the financial means to honour her credit obligations if the credit she applied for was granted. Had the plaintiff done so it would have realised that she would have become over indebted.

[9] Defendant also says she had a commercial purpose in mind when she entered into the credit agreement with the plaintiff. Hence, plaintiff was obliged to take steps to assess whether there was a reasonable basis to conclude that the commercial basis might prove to be successful.

Background facts

[10] The defendant attended a presentation by one Cecil Uren regarding investment in properties in Limpopo (as well as Kwazulu Natal). He told defendant the property in Limpopo was for sale for R750 000-00 and that she could realise a profit on it of R250 000-00. She concluded a deal and applied for finance from the plaintiff for the purchase price.

[11] After the property was registered in her name and a mortgage bond registered over it, the defendant paid the monthly instalments from 2008 until 2012 when, she said, a forensic investigator from the plaintiff informed her that he was investigating an alleged fraud in relation to the sale of the property by Uren. Defendant stopped paying the monthly instalments on the bond when she

concluded that Uren had perpetrated a fraud in selling the property, which was a vacant stand, to her.

[12] The defendant had also applied to the plaintiff, together with another person as co-applicant for a loan to purchase a property at Olso Beach at Port Shepstone which was also marketed by Uren. The plaintiff had declined that application. More on this aspect later on in this judgment.

[13] The defendant had also applied for a loan from Absa bank to finance the purchase of a property in a township known as Elysium in Kwazulu Natal (the Elysium property) which, again, was also marketed by Uren. Absa had granted the loan. It is apparent that the same fate befell that transaction as the Wonderkrater one. When the defendant defaulted on paying Absa it took legal action. The matter was eventually settled with defendant undertaking to pay a specified amount to Absa, the details of which are not relevant for present purposes. Suffice to say that the defendant unfortunately fell victim to two transactions involving Uren.

[14] It is worth mentioning that it transpired that Uren had also assisted the defendant to pay for the first six months' instalments in respect of the properties purchased by the defendant – no doubt as a sop to persuade her to purchase the properties.

[15] It transpired that the properties were sold by Uren at hugely inflated prices which were far above their market values. In the case of Wonderkrater defendant found out that the property was worth only about R300 000.

[16] The facts of this matter regarding the sale by Uren of the property to the defendant are almost identical to that in *ABSA Bank Ltd v Malecia Constance Kganakga* (unreported) No. 26467/2012 GLD. Under the heading 'The Alleged Manipulations of the Seller and His Agents' Satchwell J sketches the story regarding the alleged misrepresentations and possible fraud of Uren in paragraphs 7 – 8. It is worth quoting them here:

> '**THE ALLEGED MANIPULATIONS OF THE SELLER AND HIS AGENTS**
>
> 7. Although not pleaded, the story of the misrepresentations and possible fraud of one Cecil Uren and his assistant, Patricia, featured in the defendant's case. She had been invited to attend a presentation at the Wanderes Club where the marvels of investment in land in KZN were touted and the possibilities of profits to be made through purchase and subsequent subdivisions and then resale were extolled. Defendant through the services of the said Patricia and a person known as Debbie Mulder (apparently a bond originator) made the offer to purchase the Elysium property for R 900, 000. At all times, defendant intended to acquire the land, keep it for a short while, subdivide it and then sell the subdivisions on. She saw this as an investment opportunity. Debbie facilitated the granting of the mortgage loan financed by Absa. Defendant took transfer of the property. It subsequently emerged that the immovable property is not capable of subdivision, was never worth R 900, 000 and is thought to have only been worth about R 420, 000 at the time of purchase in 2007.
>
> 8. Defendant understandably feels that misrepresentations were made to her by Cecil Uren and his compatriots. She feels that she wanted to make an investment and has been diddled out of hard earned monies because that

investment was never sound and the anticipated profits were never likely to be forthcoming.'

[17] The same bond originator, one Debbie Mulder featured in that matter, as here.

[18] In this matter before me the defendant – as the defendant did in *Absa v Kganakga* – complained about and were indignant about the role of the plaintiff. There seemed to be a suggestion that employees of the bank were complicit with Debbie Mulder in granting the loan to the defendant. Defendant was of the view that when she applied for the loan the bank should have investigated whether her 'investment' would be viable.

[19] In the second amended plea which serves before this court the defendant, as I said, specifically raises the defence that plaintiff granted credit to her recklessly when regard is had to the provisions of sections 80, 81(2) and 81(3) of the Act as well as the relevant regulations framed thereunder.

The law

[20] '**80. Reckless credit -**

(1) A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119(4)-

(a) The credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome **of** such an assessment might have concluded at the time; or

(b) The credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that –

(i) the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement; or

(ii) entering into that credit agreement would make the consumer over-indebted.

(2) When a determination is to be made whether a credit agreement is reckless or not, the person making that determination must apply the criteria set out in subsection **(1)** as they existed at the time the agreement was made, and without regard for the ability of the consumer to-

(a) meet the obligation under that credit agreement; or

(b) understand or appreciate the risks, costs and obligations under the proposed credit agreement,

At the time the determination is being made.

(3) When making the determination in terms of this section, the value of-

(a) any credit facility is that credit limit at that time under that credit facility;

(b) any pre-existing credit guarantee is –

(i) the settlement value of the credit agreement that it guarantees, if the guarantor has been called upon to honour that guarantee; or

(ii) the settlement value of the credit agreement that it guarantees, discounted by a prescribed factor; and

(c) any new credit guarantee is the settlement value of the credit agreement that it guarantees, discounted by a prescribed factor.

81. Prevention of reckless credit -

(1) When applying for a credit agreement, and while that application is being considered by the credit provider, the prospective consumer must fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section.

(2) A credit provider must not enter into a credit agreement without first taking reasonable steps to assess –

(a) the proposed consumer's-

(i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;

(ii) debt re-payment history as a consumer under credit agreements;

(iii) existing financial means, prospects and obligations; and

(b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement.

(3) A credit provider must not enter into a reckless credit agreement with a prospective consumer

(4) For all purposes of this Act, it is a complete defence to an allegation that a credit agreement is reckless if –

(a) the credit provider establishes that the consumer failed to fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section; and

(b) a court or the Tribunal determines that the consumer's failure to do so materially affected the ability of the credit provider to make a proper assessment.'

82. Assessment mechanisms and procedures -

(1) Subject to subsections (2)*(a)* and (3), a credit provider may determine for itself the evaluative mechanisms or models and procedures to be used in meeting its assessment obligations under section 81, provided that any such mechanism, model or procedure results in a fair and objective assessment.

(2) The National Credit Regulator may-

(a) pre-approve the evaluative mechanisms, models and procedures to be used in terms of section 81 in respect of proposed developmental credit agreements; and

(b) publish guidelines proposing evaluative mechanisms, models and procedures to be used in terms of section 81, applicable to other credit agreements.'

The evidence and its evaluation

[21] It is apparent that there are factual and legal issues to be considered in determining the real issue before the court, i.e whether the credit agreement entered into between the plaintiff and the defendant constitutes reckless credit.

[22] Mr Roy Gomes is a manager in the loans recovery department of the plaintiff for the past 13 years. He gave evidence on behalf of the plaintiff. He testified that a credit assessment was made when the defendant applied for credit through Debbie Mulder and it was found, based on the available information, that the defendant would not have become over-indebted by entering into the credit agreement with the plaintiff.

[23] He was asked why the original loan application form for the Wonderkrater property was not available. He said it was probably lost together with other documents when the plaintiff switched over to what he referred to as the 'NAS system.' He said they even asked the bond originator (Debbie Mulder) for a copy but she said she did not retain a copy. He was sure that there was such an application form at the time because the information captured in the plaintiff's electronic records must have been from that application form. The explanation does not seem far-fetched. It seems to me that in all probability the plaintiff must have received the application form from the defendant, probably via the bond originator.

[24] Mr Gomes went on to say that the defendant had also submitted a separate loan application to the plaintiff on the same day (20 November 2007) as the application for the Wonderkrater property in respect of another property (Erf 68, Ramsdal Street, Oslo Beach, Port Shepstone[1]), and that the information regarding the defendant's income and expenditure (as contained in that

[1] Paginated pages 33 – 34 of the Trial Bundle.

application form) is substantially the same as the information that had been captured in the plaintiff's records for the Wonderkrater loan application.

[25] Under cross-examination it was put to him that at the time the application was made the defendant had other commitments which were not included or considered in the plaintiff's assessment. Mr Gomes testified that the defendant had disclosed only one loan commitment (ostensibly a Standard Bank loan requiring an existing monthly commitment of R6 200-00 per month) in her application.[2] She listed her net income as R22 145-05, credit card payment of R100-00 and living expenses as R3 419-00. She listed her net disposable income as R11 726-05. Based on this information it was (together with other criteria[3]) concluded that defendant would not be over-indebted if the loan was granted. The defendant had not disclosed at the time that she had another loan agreement in respect of immovable property with Absa Bank.

[26] Mr Gomes further testified that after the mortgage bond was registered in 2008 the defendant paid the monthly instalments until about April or May 2012 when she stopped paying but then made several intermittent payments until January 2013 when the last payment was made. As I said earlier, she stopped paying when a forensic investigator from the plaintiff informed her he was investigating an alleged fraud perpetrated by Uren.

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[2] Pages 33 – 34 of the Trial Bundle.
[3] Gomes said this included, *inter alia,* proof of income, valuation of the property and a credit check.

[27] Counsel for the defendant put it to Gomes that defendant will testify that her expenses were listed as just over R18 000-00. However, it is clear from the Trial Bundle that this amount was stated in the earlier application in July 2007 when Mr Mokgopa was a co-applicant for the loan for the Elysium property. And that loan application was in any event declined by the plaintiff.

[28] When defendant applied for the Wonderkrater and Olso Beach loans she did not disclose to plaintiff that she had been granted a loan by Absa for the Elysium property (for which, as I said, the plaintiff had earlier declined a loan in July 2007.) If the defendant had disclosed the Absa loan, said Gomes, plaintiff would not have granted the Wonderkrater loan to the defendant.

[29] The plaintiff had made discovery of the defendant's application form to obtain finance in respect of the Oslo Beach property which had been submitted by defendant on the same day as the application for the Wonderkrater property. Gomes explained that the information captured in the plaintiff's records for that application is substantially the same as for the application in respect of the Wonderkrater property. Her disclosed income is also substantially the same as it was in her application form when she applied for credit to purchase the Elysium property (some six month earlier). The only difference appears to be a deviation regarding the defendant's living expenses.

[30] In answer to a question from me the defendant replied that her living expenses at the time were about R5 000-00 per month.

[31] It seems to me that on a balance of probabilities, the plaintiff had conducted an assessment as envisaged in the NCA. The plaintiff's evidence that the assessment indicated that defendant would not have become over-indebted by entering into the credit agreement is more probable than defendant's defence that the plaintiff had not conducted an assessment at all.

[32] The defendant's contention that plaintiff should have known about the Absa loan at the time of conducting the assessment (in December 2007) or at the time of entering into the credit agreement (in March 2008) must be rejected. Firstly, the defendant admitted that she did not disclose that loan to the plaintiff when applying for credit for the Wonderkrater property, nor subsequently. Secondly, the defendant did not adduce any evidence to show that plaintiff could have and should have known about the Absa loan agreement.

[33] Much was made about the role of the bond originator Debbie Mulder, where the documents were signed and so on. In my view these are not issues that have any direct bearing on whether the plaintiff granted credit recklessly to the defendant. As I said the defendant honoured her obligations to pay off the loan for some four years when she found out about the alleged fraud.

[34] As Satchwell J stated in *Absa v Kganakga (supra)* at paragraph 69:

> 'Defendant's indignation at the scam to which she had been exposed and the loss of her investment appears to have clouded her attitude towards the bank itself.'

[35] The defendant is an educated person. She has a Bachelor of Commerce degree and is employed by the South African Revenue Service as a Business Analyst. She ought no doubt to be aware of making different types of investments and the various levels of risks attendant thereto. She testified that she had in fact been "given money" by Uren and Debbie Mulder to make payments on the loan for six months – something that had apparently not been disclosed before. It seems to me that this was a further carrot dangled before the defendant by Uren to persuade her to buy the property apart from stating that she stood to make a huge profit from the onward sale of the property.

The alternative defence of 'commercial purpose'

[36] Defendant raised an alternative reckless credit defence in the amended plea that she had purchased the property for a commercial purpose. It was argued that s81(2)(b) of the NCA was therefore applicable. The plaintiff had failed to assess whether such 'commercial purpose may prove to be successful'[4].

[37] Under cross-examination she testified that she bought the property for investment purposes as she thought it was a good deal. She said she thought the plaintiff would investigate (before granting credit) whether there were any fraudulent activities relating to the property. I do not think the plaintiff had any such duty. It was for the defendant to do so.

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[4] Section 81(2)(b) of the NCA *(supra)*.

[38] In my view the two purposes for purchasing the property viz., for investment on the one hand and for commercial purposes on the other cannot be reconciled in this instance. The defendant's purpose was to obtain funds to purchase immovable property. That she hoped to make a huge profit from it cannot be the concern of the credit provider. Again, as Satchwell J said in *Absa v Kagnakga*[5]:

> 'If the credit provider was to examine and assess every hope of profit in every acquisition of property (immovable or otherwise), funding of studies (fine arts versus medicine) and so on, the credit providers would be intruding into areas which the Legislature can never have envisaged.
>
> There was no business or mercantile or trade interest in the application for credit. The acquisition of immovable property (unless perhaps a commercial long lease or units for rental purposes) is not a commercial undertaking.'

[39] It is most unfortunate that defendant fell prey to the scam but the plaintiff cannot be blamed for that. As Satchwell J said, the NCA is not about the risk in the value of that which is acquired with credit. It is about risk in the ability to pay for credit.[6]

[40] The alternative defence must fail.

[41] A final point. During re-examination the defendant inexplicably stated that her defence was that she was defrauded (for which she sought to hold the plaintiff liable) but her previous attorney raised the reckless lending defence.

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[5] At paras 75-76
[6] Paragraph 72 – *Absa v Kganakga (supra).*

The latter defence is then clearly an afterthought – as defendant herself testified. It bears mentioning also that when defendant entered an appearance to defend, the plaintiff applied for summary judgment. In her affidavit resisting summary judgment she did not raise the defence that the plaintiff had not conducted a proper credit assessment.

[42] In all circumstances the defence that reckless credit was granted by the plaintiff must fail.

[43] The plaintiff provided an updated certificate of balance when arguments were presented reflecting the current balance outstanding as R1 161 124-02.

[44] The property is a vacant stand and not the primary residence of the defendant.

[45] The following order is made:

1. Defendant is to pay plaintiff the amount of R1 161 124-02;
2. Defendant is to pay interest on the above amount calculated at 8.85% per annum, calculated daily and compounded monthly in arrears from 15 May 2019 to date of payment, both days inclusive;
3. Erf 32 Wonderkrater, Vakansiedorp Township, Registration Division KR, Limpopo Province, held by Deed of Transfer No. T34487/2008 is declared specially executable;
4. The Registrar is authorized to issue a writ of execution in respect of the said property;

5. Defendant is to pay the costs of suit on the attorney and client scale; to be taxed.

RANCHOD, J
JUDGE OF THE HIGH COURT

Appearances:

Appearance for plaintiff:	Adv JH Mollentze Instructed by PDR Attorneys Cnr Stanza Bopape (Church) & Richard Streets Hatfield Pretoria
Appearance for defendant:	Mr B Lesomo Seokane Lesomo Inc. c/o Diale Mogashoa Attorneys 1st & 2nd Floors Menlyn Corner 87 Frikkie De Beer Street Menlyn Pretoria