IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case number: 845/2022

In the matter between:

THABO JOHN MAKHOBA Applicant

and

THE STANDARD BANK OF SOUTH AFRICA Respondent

HEARD ON: 11 August 2022 and 5 May 2023

BEFORE: Chesiwe, J

DELIVERED ON: This judgment was given electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be at 13h00 on 09 November 2023.

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[1] The Applicant launched a notice of motion application against the Respondent for reckless lending in terms of section 80(1)(a) of the National

Credit Act 34 of 2005 (here in after the referred to as the NCA). The Applicant appeared in person with the Respondent opposing the application.

[2] The Applicant seeks the following relief:

> *"The credit agreement I entered into with the Respondent in 2012 is reckless in terms of section 80(1)(a) of the National Credit Act and unlawful ab initio in terms of section 164(1) of the National Credit Act 34 of 2005 for it was in violation of section 90(2)(a) of the same Act;*
>
> *In terms of section 83(2)(a) of the same Act I am discharged from my obligation;*
>
> *My wife is reimbursed R55 000,00 with interest so far paid towards its settlement."*

BACKGROUND

[3] This matter was set down for hearing on 11 August 2022. Both parties had filed their written heads of argument. Both parties proceeded with oral arguments. Judgment was then reserved.

[4] The Applicant then proceeded to file an interlocutory application on 30 August 2022, in which he sought re-opening of his case as there was new information and that this information had an impact on the main application. The reserve date in terms of the main application was changed to allow the interlocutory application to proceed.

[5] The matter was set down for 28 October 2022 for the interlocutory application to be heard. On 28 October 2022, the Applicant requested that the interlocutory application be postponed to 3 March 2023 to give the Applicant the opportunity to find legal representation. As the Applicant was in person again, the court granted the postponement.

[6] I pause to mention that even though the Applicant was in person, his papers appeared to be well drafted by a legal person who did not place himself or herself on record.

[7] If and when the Applicant obtained legal aid assistance, the Applicant was supposed to file further papers and heads of argument by 13 January 2023 and the Respondent was to file its heads of argument by 3 February 2023 and in accordance with court practice directives.

[8] On 3 March 2023, parties per agreement, postponed the interlocutory application to 5 May 2023 with costs in the cause.

[9] On 5 May 2023, the Applicant did not appear nor did he give any reason for his non-appearance. Adv. Long on behalf of the Respondent informed the Court that she called the Applicant about the matter being before Court, to which the Applicant informed her that he will be at court on the mentioned date.

[10] This matter has been on the court roll for far too long and the Court can therefore not postpone this matter any further. Consequently, as submitted by Adv. Long on 5 May 2023 that she stands by her written heads of argument in the main application as well as the interlocutory application and with the non-appearance of the Applicant despite having indicated that he'd be at court on the agreed date, this matter needs to be finalized. Court allowed Adv. Long to proceed with her oral arguments.

[11] The judgment will deal with both the Interlocutory Application as well as the Main Application.

[12] The Respondent filed its answering affidavit on 9 March 2022 and it was accompanied by a condonation application. Same was granted as there was no prejudice against the Applicant.

INTERLOCUTORY APPLICATION

[13] The Applicant in the interlocutory application sought the following relief:

“Leave to reopen his case;

Copies of the translated transcripts;

A copy of the confirmatory affidavit of Ms Mlambo wherein she confirmed that she listened to the translated transcripts.”

[14] The Court granted the Applicant the relief sought.

[15] I pause to mention that the Applicant had previously filed three (3) other interlocutory applications, which were withdrawn, the current interlocutory application is the fourth. The different Interlocutory Applications were all under one case number with the following court stamped dates; 5 May 2022, 22 August 2022, 30 August 2022 and 23 September 2022.

[16] The Applicant in his founding affidavit contends that the credit agreement was unlawful and that there was misrepresentation on the side of the Respondent in that the Applicant was not informed about the insurance that was applicable on the credit agreement. Furthermore, the conversations between the Applicant and the Respondent’s representative was in Isizulu and Sesotho and not in English. As a consequence of the miscommunication, there was a misunderstanding between the Applicant and the different representatives’ of the of the Respondent, including the Respondent’s failure to provide the Applicant with verbatim transcripts of the conversation between the Applicant and the Respondent’s representatives.

[17] The Respondent contends that the Applicant has been placed in possession of all the transcripts and affidavits of Xolisile Mlambo, including the annexures to the transcripts that the Applicant has been litigating in a haphazard manner and the Respondent had no option, but to respondent to the allegations raised by the Applicant.

[18] Generally, interlocutory applications are incidental to pending proceedings. These applications are subordinate to the main application yet distinct from it.[1]

[19] In this instance, the Applicant has haphazardly filed interlocutory applications without following proper rules of court as the Applicant was in person. The Court was very lenient in most instances.

[20] The new information sought by the Applicant is not so new as alleged as all the information was provided to him and it is the same information as in the main application. The Respondent had to respond to the same allegations as in the main application, which will be dealt with later.

[21] The Court is not in a position to advise the Applicant on how to handle his litigation. The Court had warned the Applicant on his appearances in person without seeking legal assistance, but with no success.

[22] In **Minister of Finance v Oakbay Investments (Pty) Ltd and Others; Oakbay Investments (Pty) Ltd v Director of the Financial Intelligence Centre** [2]**,** the following was said:

> *"The Court does not provide legal advice to the parties. Courts therefore, consider it inappropriate for any party to come to court for the confirmation of a legal question which is common cause between the parties."*

[23] The Applicant having filed different interlocutory applications as well as confusing the issues between the parties, insisted with proceeding with the litigation except only for the fourth interlocutory application in which he requested to be given an opportunity to sought legal representation and an indulgence which the Court gave.

[24] Having considered the interlocutory application, there is nothing new in the alleged requested information, except that it is a repetition of the main application.

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[1] (See Massey-Ferguson (South Africa) Ltd v Ermelo Motors (Pty) Ltd and Others 1973 (2) ALL SA 383 (T))
[2] 2017 (4) ALL SA 150 (GP)

[25] Therefore, the interlocutory application ought to be dismissed with costs in favour of the Respondent.

THE MAIN APPLICATION

[26] The Applicant's notice of motion launched on 25 February 2022 and its founding affidavit, the Applicant alleges that the Respondent enticed him in taking credit of R29 000, 00. Applicant said the Respondent advised him that the credit account will have an insurance which will cover the debt. The Applicant took up the Respondent's offer as he was running a tuck shop which had closed down. As a result of the tuck shop having closed down, the Applicant indicates that he could therefore not pay the credit account given by the Respondent.

[27] The Applicant then wrote a letter to the Respondent's local branch, requesting that the insurance that was part of the offer for the credit account, cover the debt.[3] Applicant said he was informed by the branch manager that insurance does not cover the credit account debt.

[28] Not having been satisfied with the branch manager's response, Applicant wrote a letter to the Banking Ombudsman.[4] Applicant was not satisfied with the Banking Ombudsman's response and he then proceeded to the National Consumer Council and later to the National Credit Regulator to which responses were given.[5]

[29] The Applicant's main contention is that the Respondent's conduct was unlawful and deceiving and having been reckless with its lending.

[30] The Respondent in the answering affidavit,[6] contends that the loan/credit granted was not reckless nor was there misrepresentation on the part of the Respondent. The Applicant had applied for credit and the transaction was concluded telephonically with the Applicant having disclosed his income and

[3] (Annexure C, page 12 of the Index Hearing Bundle)
[4] (Annexure D, page 13-14 of the Index Hearing Bundle)
[5] (Annexures A and B, page 7 to 11 of the Index Hearing Bundle)
[6] (Page 22 of the Index: Hearing Bundle at sub-paragraph 9.1)

was deemed able to afford monthly repayments. Applicant disclosed his monthly income as R7 500, 00 and monthly expenses as R3 000, 00.[7] Further that when the card was delivered, the Applicant signed and acknowledged receipt of same and gave his proof of residence and identification for verification purposes.[8]

[31] The Respondent attached to the answering affidavit, the telephone recorded conversation between the Applicant and the staff member of the Respondent (Mr Richard Machaba). The record shows the Applicant being an active participant in the application for the credit card. This was to the extent that the Applicant asked that he pay the repair of the bakkie,[9] the following is noted:

> *"MR MAKHOBA: Okay, tell me, I was thinking, maybe – so I can pay 1 200 per month."*
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> *MR MACHABA: Do you want to pay 1 200 per month?*
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> *MR MAKHOBA: Ja, but now that I have a bakkie, but the problem –*
>
> *Mr MACHABA: Yes –*
>
> *MR MAKHOBA: – now is that the bakkie, the engine is not right on my bakkie. So, I will need the money, maybe – so that engine, I see that engine in the website so that the engine, that engine is costing 6 000.*
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> *MR MACHABA: Okay.*
>
> *MR MAKHOBA: Now I do not know, if maybe I can get another money so that I can pay more than 600 a month, maybe 1 200 a month.*

[32] On an unknown date on the transcribed records, at page 134, the telephone conversation between a certain Ms Nhlanhla of Standard Bank continues where the Applicant was offered a balance protection plan under his credit

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[7] (Page 62 of the Index: Hearing Bundle, Annexure SB2 – Transcript of the Telephonic Application conducted with the Applicant)

[8] (Pages 119 to 125 of the Index: Hearing Bundle, Annexures SB5; SB6 and SB7)

[9] (Page 131 to 132 of the Index: Hearing Bundle, Annexure SB8 – Telephonic Transcript in respect of the Limit Increase)

card. It was explained to the Applicant that the balance protection plan covers debt on the credit card should a person be deceased or retrenched.[10]

[33] The Applicant's contention is that the balance protection plan must pay or should have paid for monies owing on the credit card cannot stand as there is nowhere on the transcribed telephonic records where an offer is made, stating that the balance protection plan will pay for the Applicant's debt nor did the Applicant provide any evidence to the contrary.

[34] The Applicant knowingly agreed to the credit facility, to the extent that the he went to the bank to activate the card. The Applicant even went as far as applying for a credit limit increase in 2014.

[35] This Court cannot accept the Applicant's defence of reckless lending including that the balance protection plan was to pay for the credit debt. According to the transcribed record, the Applicant was clearly explained to, on the applicable requirements for the payment of the balance protection plan in relation to the credit facility.[11]

[36] The Applicant's reliance on sections 80(1)(a), 164(1) and 90(2)(a) of the NCA, has no merit as the Respondent had conducted an assessment as required in terms of section 81(2) and took reasonable steps to ensure that the Applicant understood and appreciated the risks involved. The Applicant gave the information of his finances as being in a position to afford and accepted the credit facility. The Applicant assured the Respondent that the family business which is a tuck shop, is doing well and it has been running since 1994.[12]

[37] In **SA Taxi Securitisation (Pty) Ltd v Mbatha** [13], the Court said the following:

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[10] Page 136 of the Index: Hearing Bundle, Annexure SB9 – Telephonic Transcript in Respect of the Credit Insurance of the Credit Card)

[11] Pages 136 to 137 of the Index: Hearing Bundle, Annexure SB9 – Telephonic Transcript in Respect of the Credit Insurance of the Credit Card)

[12] Page 71 of the Index: Hearing Bundle, Annexure SB2 – Transcript of the Telephonic Application conducted with the Applicant)

[13] SA Taxi Securitisation (Pty) Ltd v Molete; SA Taxi Securitisation (Pty) Ltd v Makhoba (51330/09, 52948/09, 53080/09) [2010] ZAGPJHC 24; 2011 (1) SA 310 (GSJ) (30 March 2010)

"Since the enactment of the NCA, there seems to be a tendency in these Courts for defendants to make bland allegations that they are "over-indebted" or that there has been "reckless credit". These allegations, like any other allegations made in a defendant's affidavit opposing summary judgment, should not be "inherently and seriously unconvincing", should contain a reasonable amount of verificatory detail, and should not be "needlessly bald, vague or sketchy". A bald allegation that there was "reckless credit" or there is "over-indebtedness" will not suffice."

[38] Even if the above case refers to summary judgment proceedings, the principles applied in this instance are the same as it is based on reckless lending. The Respondent conducted an affordability assessment before entering into a credit agreement with the Applicant. The Applicant participated in the conversation including asking questions. Annexure **"NM1"** on page 269 of the transcribed record the following is noted:

"Mr. Evans: *And then do you know how the credit card work, sir?*

Mr. Makhoba: *Yes it is, but my problem sir is, I do want a credit card but my problem is I do not have this thing that you want of…*

Mr. Evans: *Of doing what?*

Mr Makhoba: *What I can manage is, it is like, what I can only have is the bank statement. I do not have…*

Mr. Evans: *We do not need a bank statement, you are qualifying already, Mr Makhoba. We do not need a bank statement and we also do not need a payslip."*

[39] During 2014, the Applicant applied for an increase on his credit card facility. The application was also conducted telephonically and the Applicant proceeded to confirm his income as R6000,00 with monthly expenses of R3000.[14] Based on the information the Applicant provided, the credit limit was increased to R29 000,00.

[14] (Page 129 of the Index: Hearing Bundle, Annexure SB8 –Telephonic Transcripts in Respect of the Limit Increase)

[40] Section 80 (1) of the NCA is clear that an agreement will be reckless if the credit provider failed to conduct an assessment, irrespective of the outcome. In this instance the Applicant gave his income and expenses and accepted the credit card, to the extent that he went to the bank to activate the credit card. In my view, the Applicant has failed to prove that the Respondent was reckless in granting the credit facility.

[41] With regard to the issue of language, of which the Applicant alleged that he was spoken to in Isizulu, Applicant was asked by My Evans if he speaks Sesotho and he affirmed that and the conversation proceeded [15]. The Applicant was well conversant in court as he was in person. The issue of the language being the consequence of the miscommunication can therefore not stand.

PRESCRIPTION

[42] The Respondent raised a point *in limine* of prescription, which the Applicant denied that the matter has prescribed. The Applicant in the founding affidavit indicate that he was deceived to agree to the contract in that the balance protection plan was to cover the debt if he was unable pay. Furthermore, the Applicant contends that he had a complaint with the Banking Ombudsman.[16]

[43] The Respondent in the answering affidavit states that the Applicant failed to bring a claim arising from the alleged misrepresentation of the credit insurance policy/balance protection plan on 17 November 2016 as the Applicant instituted the application only on 25 February 2022 and thus the Applicant's claim has expired.

[44] The provisions of section 12 of the **Prescription Act** ,[17] provides as follows:

> *(1) Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due.*

[15] (Page 60 of the Index: Hearing Bundle, Annexure SB2 – Transcript of the Telephonic Application conducted with the Applicant)
[16] (See the Letter from the Ombudsman dated 26 August 2019 on page 13 to 14)
[17] Act 69 of 1969

(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

[45] The ordinary period of prescription of a debt such as the Applicant's is three years from the date on which the debt became due.[18]

[46] The Applicant does not disclose as to what transpired between November 2016 and August 2019. The Applicant only mentioned that the claim for the insurance/balance protection plan was denied by the bank manager and that he received the Ombudsman decision on 26 August 2019.[19] The Applicant further denied that the claim has prescribed as according to the Applicant he was deceived by the Respondent that the credit facility is covered by the balance protection plan.

[47] When prescription is raised, there is two enquiries that take place,[20] as set out in **MEC for Health, Western Cape v M C,**[21] "*the determination of the primary facts on the one hand, and on the other hand, the knowledge or deemed knowledge thereof. This means that once the facts from which the debt arose (the primary facts) have been determined, the enquiry turns to the creditor's knowledge of the primary facts."*

[48] The Applicant's contention is based on a defence of perceived distorted facts by the Respondent. Section 72 of the Prescription Act does not deal with distorted fact or being deceived. It is clear that a prescribed debt starts to run when the debtor prevents the creditor from gaining knowledge of the

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[18] See section 10(1) read with section 11(d) of the Prescription Act 69 of 1969.
[19] (Applicant's Founding Affidavit, page 4 of the Index: Hearing Bundle)
[20] Johannes G Coetzee & Seun and Another v Le Roux and Another (969/2020) [2022] ZASCA 47 (8 April 2022) Van Heerden & Brummer Inc v Bath
[21] MEC for Health, Western Cape v M C [2020] ZASCA 165 (SCA) para [6] – [7]

existence of the debt and the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises.[22]

[49] The Respondent denied the Applicant's claim prescription arose on November 2016. The Applicant received the Ombudsman's decision in August 2019. The Applicant has not placed before Court the fact as to what reasonable exercise he took to prevent or avoided prescription of his claim. The Applicant was already informed on November 2016 that the claim was not covered by the balance protection plan and he chose to ignore the said information that relates to the claim against the Respondent.

[50] In my view, the Applicant had all the facts regarding the claim. The Applicant had knowledge of the identity of the debtor. The Applicant further had the knowledge of the debt. The Applicant may have acted in person throughout the drafting of his papers he filed with the different parties regarding the claim to the extent that he had drafted the written heads of argument. This simply means the Applicant is not as ignorant as it may seem. The Applicant could therefore have avoided prescription in terms of section 10(a) of the Prescription Act.

[51] In **Yellow Star Properties 1020 (Pty) Ltd v MEC Department Planning and Local Government Gauteng,**[23] the court said the following:

> *"It may be that he applicant had not appreciated the legal consequences which flowed from the facts, but its failure to do so does not delay the date prescription commenced to run."*

[52] In a recent judgment of the SCA, **McMillan v Bate Chubb & Dickson Incorporated** [24], the following was said:

> *"The period of prescription begins to run against a creditor when the creditor has the minimum facts which are necessary to institute action."*

[53] Indeed, the Applicant did not only have the minimum facts, but he had maximum facts which he could have used to institute the action.

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[22] (See Van Heerden & Brummer Inc v Bath (356/2020) [2021] ZASCA 80 (11 June 2021))
[23] [2009] ZASCA 25 (2009) 3 ALL 475 (SCA)
[24] (299/2020) [2021] ZASCA 45 (15 April 2021) at para [38]

[54] In my view, the Respondent's contention that the debt has prescribed is correct and I am inclined to agree with the Respondent that the plea on prescription be upheld. The Applicant has not shown any good cause for the relief sought. The application therefore ought to be dismissed.

COSTS

[55] It is a trite principle of our law that a court considering an order of costs exercises a discretion.[25] The courts discretion must be exercised judicially [26]. It is also a well-established law that the general rule is that the costs follow the result.

[56] Counsel for the Respondent submitted that the Applicant be ordered to pay costs on a punitive scale due to the Applicant's conduct during the litigation. The Applicant appeared in person throughout the litigation. The Applicant is a man of straw. It would not be in the interests of justice that the Applicant be punished for wanting to exercise his rights to litigation, nor to be saddled with a punitive costs order. Therefore, each party ought to pay their own costs.

ORDER

[57] Accordingly, it is ordered as follows:

1. The application is dismissed, including the interlocutory application;

2. Each party is ordered to pay their own costs, including costs of the postponements.

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[25] (See Ferreirer v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (2) SA 621 (CC), 1996 (4) BCLR 441 [1996] ZACC 27)

[26] (see Motaung v Mukubela and Another, NNO; Motaung v Mothiba NO 1975 (1) SA 618 (O) at 631 A)

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CHESIWE, J

On behalf of the Applicant:	In person
On behalf of the Respondent:	Adv. P Long
Instructed by:	McIntyre van der Post Attorneys
	BLOEMFONTEIN