REPUBLIC OF SOUTH AFRICA

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

CASE NUMBER: 13690/2021

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

..... **.....**
SIGNATURE **DATE**

In the matter between:

LANDROVER FINANCIAL SERVICES, A PRODUCT
Plaintiff

OF WESBANK, A DIVISION OF FIRSTRAND BANK LIMITED

And

MR FRANK PHIRI
Defendant

JUDGMENT

WINDELL, J:

INTRODUCTION

[1] This is an opposed application for summary judgment.

[2] On 25 May 2018, the plaintiff ("the Bank") and the defendant ("Mr Phiri")

concluded an instalment sale agreement ("the credit agreement") for the purchase of a 2008 Land Rover Defender Puma 110 SW ("the vehicle"). Mr Phiri had to pay the Bank the amount of R413,933.04: an initial deposit of R50,000.00 and 72 equal instalments of R5,749.07 on the first day of each month until the expiry of the credit agreement. It is common cause that the Bank would remain the owner of the vehicle until Mr Phiri had discharged his indebtedness under the credit agreement. Mr Phiri breached the terms of the credit agreement by failing to maintain regular monthly payments.

[3] The Bank seeks an order for the cancellation the credit agreement and seeks the return of the motor vehicle and the postponement of the damages claim *sine die*.

[4] Mr Phiri has filed a plea and resists the summary judgment on two bases: One, he alleges that the Bank did not conduct an assessment in compliance with Section 81(2) of the National Credit Act ("NCA"),[1] and, as a result, the extension of the credit was reckless.[2] Two, he denies receiving the Section 129 notice.

[5] I will deal with each one of the two defences raised separately down below.

RECKLESS CREDIT

[6] In terms of Rule 32(3)(b) of the Uniform Rules of Court, a defendant must satisfy the court by affidavit, or with the leave of the court by oral evidence *….." that the defendant has a bona fide defence to the action.* The sub-rule also states that *"such*

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[1] Act 34 of 2005.

[2] Section 81(2) provides that: 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.

affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor."

[7] The Supreme Court of Appeal ("the SCA") in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture,*[3] with reference *to Maharaj v Barclays National Bank Ltd*,[4] held that this means that there must, firstly, be sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded, and, secondly the defence so disclosed must be both *bona fide* and good in law. The defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, but must at least disclose the defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence. The SCA reiterated that summary judgment procedure was not intended to shut a defendant out from defending, unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavoring to enforce their rights.[5] Failure to comply with these provisions will not necessarily mean, however, that summary judgment will follow. In accordance with the provisions of Rule 32(5), the court retains an overriding discretion to refuse summary judgment.

[8] In *SA Taxi Securitisation v Mbatha and Two Similar Cases,*[6] the court noted that since the enactment of the NCA, there seems to be a tendency for defendants, when taken to court to enforce credit agreements, to make bland allegations that they are 'over-indebted' or that there has been 'reckless credit'. Levenberg AJ held that *"these*

[3] 2009 (5) SA 1 (SCA).
[4] 1976 (1) SA 418 (A).
[5] At [31]
[6] 2011 (1) SA 310 (GSJ).

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. [7]

[9] In *Collett v Firstrand Bank Ltd,*[8] the SCA found that over-indebtedness is not a defence on the merits, but because of summary judgment's extraordinary and stringent nature, these issues may be raised, "*not as a defence to the claim, but as a request to the court not to grant summary judgment in the exercise of its overriding* discretion." The court, however, emphasized that sufficient information (in that instance the facts in support of a request for a resumption of the debt review) must be placed before the court.

[10] In *Standard Bank of South Africa Ltd v Kelly,*[9] Binns-Ward J formulated the inquiry in relation to reckless credit as follows:

> *"In the context of opposing an application for summary judgment on the grounds that an adequate risk assessment did not precede the conclusion of the credit agreement, and that a consequent entitlement has arisen to a declaration that the credit agreement was reckless and an attendant order in terms of section 83(2) of the Act, the defendant is therefore required to set out the pertinent facts in support of his/her opposition in the manner required by Uniform Rule 32(3)".*

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[7] At [26].
[8] 2011 (4) SA 508 (SCA) at paragraph [18].
[9] *Standard Bank of South Africa Ltd v Kelly* (unreported case no. 23427/2010 WCC).

[11] It is with these principles in mind that this court has to examine Mr Phiri's affidavit and establish whether it has complied with the sub-rule.

Were the grounds of the defence of reckless credit set out sufficiently?

[12] Section 80 of the NCA, dealing with reckless credit, reads as follows:

"(1) A credit agreement is reckless if, at the time that the agreement was made, ……

(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."

[13] In its particulars of claim the Bank pleads that it had complied with the provisions of the NCA and that it conducted an assessment as required by section 81(2). In terms of section 81(2), a credit provider may generally conclude a credit agreement with a prospective consumer only after it has done a proper and reasonable assessment and concludes that the consumer will be able to satisfy all his obligations under all his credit agreements, including the prospective credit

agreement. The compulsory assessment requires that a credit provider not only does an affordability (financial) assessment of the consumer, but also assesses the consumer's debt history and tests the consumer's general understanding of the risks, cost and obligations of the credit agreement.

[14] Mr Phiri denies that the Bank complied with the provisions of the NCA. As stated earlier, Mr Phiri is obliged to set out the nature and grounds of his defence. In his affidavit resisting summary judgment he merely copied the words in section 80 and baldly stated that:

> *"4.1 ……. the Plaintiff failed to conduct a proper assessment as required by section 81 (2) of the National Credit Act.*
>
> *4.2 I was not requested to provide the Plaintiff with all information as it relates to my financial means, prospects and obligations and therefore failed to provide same.*
>
> *4.3 The Plaintiff concluded the agreement with me in circumstances where I did not understand or appreciate the risks and costs associated with the conclusion of the agreement. Neither did I understand my rights and obligations at the time when the agreement was concluded."*

[15] In an article titled *"A credit provider's complete defence against a consumer's allegation of reckless lending"*[10], the author asserts that a finding that a credit agreement constitutes reckless credit has many adverse consequences for a credit provider. She states that:

> *"By invoking the reckless-lending provisions, a consumer is substantially protected, particularly when a credit provider who contravened these provisions tries to enforce the reckless credit agreement against the*

[10] 2014 SA Merc LJ 24 by Michelle Kelly-Louw.

consumer. Unfortunately, these reckless-lending provisions carry with them the risk of abuse by some consumers. To limit this abuse, measures were included in the NCA to prevent consumers from abusing these provisions. For instance, section 81(1) requires that when a consumer applies 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 while the credit provider is assessing whether to grant the credit. In addition, section 81(4) provides that it is a complete defence to an allegation that a credit agreement is reckless, if the credit provider proves that the consumer failed to answer fully and truthfully any requests for information made by the credit provider as part of the compulsory assessment required by section 81, and if a court or the National Consumer Tribunal determines that the consumer's failure to do so materially affected the ability of the credit provider to make a proper assessment."

[16] Mr Phiri did not plead that the Bank did not conduct an affordability assessment, but pleaded that it was not a "proper assessment". The only paragraph in Mr Phiri's affidavit in which he attempts to set out facts in support of the defence of reckless credit is paragraph 4.2 in which Mr Phiri pleads that he did not provide the plaintiff with **all** information in respect of his financial means, prospects and obligations and was not requested to do so (emphasis added). Mr Phiri does not plead anywhere in his plea or affidavit how (i) his financial information was requested and (ii) how the information he did not provide did not fall in the category of the information that was requested. Section 81(4) of the NCA obliges the consumer to disclose information

"fully and truthfully", failing which the consumer is barred from raising a defence of reckless credit.

[17] The facts in the *SA Taxi* matter, are similar to the facts *in casu*. In their opposing affidavit in that matter, the defendants pleaded that the credit agreement constituted a reckless agreement as contemplated in section 80 of the NCA in that, (1) the plaintiff failed to conduct an assessment as required of it under section 80(1)(a) of the NCA and, (2) even if an assessment was made (which is denied), the preponderance of information available to the plaintiffs would clearly have shown that the defendants did not understand or appreciate the risk, costs and obligations thereof. In addition, the defendants in *SA Taxi* pleaded that as a result of this failure the defendants are *"entitled to an order setting aside and suspending the Agreement as contemplated in s 83(2) of the NCA."* It bears mention at this stage that Mr Phiri did not plead that he is entitled to an order setting aside the credit agreement as contemplated in section 83 (2) of the NCA.

[18] I agree with Levenberg AJ in *SA Taxi,* that in relying on a defence of reckless credit a defendant should provide some particularity concerning the negotiations leading up to the conclusion of the credit agreement; should identify the parties involved in the negotiations, to the extent that the defendant is able to do so; and should have disclosed details concerning any credit application that he signed and the circumstances in which he signed those credit applications. Levenberg AJ further held that to the extent that each defendant wishes to avail itself of section 80(1)(b) (namely that the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement) a defendant should have provided information demonstrating his level of education

and experience at the time relating to the risk of incurring credit; details of all of his indebtedness at the time that the credit agreement was concluded, as well as information concerning the defendant's potential income and expenditure. Lastly, information should have been provided concerning a defendant's current level 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.

[19] Similarly, in the present matter, if Mr Phiri alleges that credit had been granted recklessly because no assessment was made before the credit was granted, he should have given the details of the negotiations leading up to the conclusion of the credit agreement, and should have, at least, identified the parties to the negotiations. He should also have disclosed details regarding any credit application that he signed and the circumstances in which he signed it. Moreover, Mr Phiri did not disclose the nature and content of the financial information he in fact disclosed to the plaintiff when the assessment was done. He did not provide details of his income and expenses at the time he applied for the loan or what they are currently. This information would have assisted this court to evaluate whether there is a basis for the allegation that no assessment was conducted under the Act. In the present matter Mr Phiri gave no information whatsoever. Moreover, he did not plead that he is entitled to an order setting aside the credit agreement as contemplated in section 83(2) of the NCA. This failure is, in my view, fatal to his defence.

[20] The defence of reckless credit is under the circumstances bald, unsubstantiated and unconvincing. It does not contain a reasonable amount of verificatory detail and is merely raised for the purposes of delay.

The delivery of the vehicle.

[21] If a court declares a credit agreement to be reckless, it can, in terms of section 83 of the NCA either 'set aside' the consumer's 'rights and obligations' in whole or in part, or suspend the force and effect of the credit agreement. As alluded to earlier, Mr Phiri did not plead that he is entitled to an order setting aside the credit agreement as contemplated in section 83(2) of the NCA.

[22] In any event, Masipa J in the matter of *Standard Bank of South Africa Ltd v Panayiotts*[11] (which dealt with a defence of over-indebtedness) held that the NCA did not envisage that a consumer could claim to be over-indebted while he or she retained possession of the goods which formed the subject-matter of the credit agreement. The goods had to be sold to reduce the defendant's indebtedness. She further held that allowing the debtor to remain in possession of the item of security whilst it depreciated in value was prejudicial to the creditor. This also holds true in the present matter.

[11] 2009 (3) SA 363 (W) paragraphs 3 and 4.

[23] In *SA Taxi*, Levenberg AJ held that although section 84(1)(c) contemplates that the credit provider will not be entitled to enforce its rights during the period of suspension, that sub-section must be read with sub-section 84(1)(a) and (b). He held that it is significant that, in relation to the suspension of a credit agreement, section 84 of the NCA focuses on whether the consumer is required to make payments or is obliged to pay any interest, fee or other charge during the period of suspension and that there was therefore no basis for reading into the language of the NCA a provision that, when suspension is appropriate, the court also has the power to permit the consumer to utilise the security in a manner which will permit it to deteriorate during the period of suspension. At paragraph [46] to [50] he states as follows:

> *"[46] It seems unlikely that the legislature ever intended that the consumer could keep the 'money and the box'. If the consumer obtained possession and use of a motor vehicle in circumstances in which no credit should have been extended to the consumer, it would be fundamentally unfair and counterproductive for the consumer to continue to use the vehicle, while at the same time not making any payments under the agreement;*
>
> *[47] If the consumer has a valid complaint that, but for the recklessness of the credit provider, the consumer would never have become involved in the credit transaction, it might be 'just and reasonable' to 'set aside' the agreement. In that event the agreement would be null and void, and as if it had never been. As a consequence, the credit provider, who remains the owner of the vehicle, would be entitled to restoration of the vehicle. On the other hand, the consumer, who no longer has any obligations under the agreement that has been set aside, would be relieved of any further indebtedness or deficiency*

claim under the agreement. In certain circumstances, this would be a fair and symmetrical resolution;

[48] On the other hand, if the effect of the agreement is merely suspended, all elements of the agreement would have to be suspended. This would mean that the consumer would not be entitled to continue to retain possession of the vehicle during the period of suspension. At the same time, the consumer would not have to make any payments under the agreement during the suspension period;

[50] That the NCA does not contemplate the consumer retaining 'the money and the box' is also borne out by the provisions of s 130(1) of the NCA. That section provides that the failure of a consumer to surrender its security is a factor that militates in favour of immediate enforcement of the credit agreement by the credit provider."

[24] I agree with the reasoning of the court in *SA Taxi*. The court must balance the rights of the creditor with those of the debtor. It cannot give the debtor more rights than was envisaged in the credit agreement between the parties as well as the NCA. In the present matter there is no information in the affidavit resisting summary judgment or the plea to indicate on what basis a court might be persuaded, or as to why it might consider it just and reasonable to set aside all or part of Mr Phiri's obligations as permitted in terms of s 83(2)(a) of the NCA. In the circumstances, Mr Phiri cannot be said to have set out the material facts upon which his defence is based with sufficient particularity and completeness to satisfy the court that a *bona fide* defence has been disclosed.

Old v New Rule

[25] Counsel for the defendant submits that both the *Standard Bank* and the *SA Taxi* judgment were determined under the old Rule 32 and that the courts' comments as far as they relate to reckless lending, must therefore be adjudicated against the background of the old Rule 32. It is contended that under the previous regime, a plaintiff would approach the court for summary judgement before a defendant has filed a plea and he would have raised this defence for the first time in his affidavit opposing summary judgment. The court's requirements in *SA Taxi* where it stated that a defendant is required to provide certain information (as set out in paragraphs 56, 56.1, 56.2, 56.3 and 56.4) should therefore be considered in the context of the old Rule 32. It is submitted that under the new Rule 32, this is not relevant anymore, as the plaintiff is now in a position to address a defendant's defence of reckless credit and the allegation that no proper credit assessment was done. In the event that such an assessment was done, this information should be in the possession of the plaintiff if the credit assessment had been done, and should be placed before the court by the plaintiff under the new Rule 32. It is further submitted that such credit applications and evidence around the submission of such an credit agreement would be lead at trial, where the trial court would be in a position to consider the evidence to finally conclude on the merits of the defence.

[26] The argument around the amendment of Rule 32 is misplaced. The amendment is only beneficial to a defendant and is not placed in a worse position. The opportunity to file a plea before summary judgment proceedings are launched gave Mr Phiri an opportunity to place a complete defence before the court. This, Mr Phiri has failed to do. Mr Phiri was granted a second bite at the cherry in filing an affidavit in resisting summary judgment and in compliance with Rule 32(3)(b). Again, he failed to do that. Mr Phiri must set out the "nature" and the "grounds" of his defence. The

words “nature” and “grounds” are not synonyms or alternatives. Facts must be placed before the court to give effect to the word “grounds” in the sub-rule. This must be done with sufficient particularity and completeness as to be able to hold that if these statements of facts are found at the trial to be correct, judgement should be given for the defendant. If the defence is averred in a manner which appears in all the circumstances “*to be needlessly bald, vague or sketchy,* ***that will constitute material for the Court to consider in relation to the requirement of bona fides***” (emphasis added).[12]

RECEIPT OF THE 129 NOTICES

[27] Mr Phiri denies, without amplification, that he received the section 129 notice. In *Kubyana v Standard Bank*[13]**,** the Constitutional Court considered this defence and held as follows:

> *“[48] It is so that section 96(1) requires that notices be delivered “at the address” provided by the recipient. However, this requirement must be understood with due regard to the practical aspects of dispatching a notice by way of registered mail. When a credit provider dispatches a notice in that manner, the notice is sent to a particular branch of the Post Office. That branch then sends a notification to the consumer, indicating that a registered item is available for collection. It is never the case that an item dispatched by registered mail will physically be delivered to an individual – such delivery only occurs if the item is sent by ordinary mail, which does not suffice for purposes of sections 129 and 130 of the Act. If a consumer elects not to*

[12] *Breytenbach v Fiat SA (Edms) Bpk 1976(2) SA 226 T at 228.*
[13] 2014 (3) SA 56 (CC).

respond to the notification from the Post Office, despite the fact that she is able to do so, it does not lie in her mouth to claim that the credit provider has failed to discharge its statutory obligation to effect delivery."

[28] In support of this defence, counsel for the defendant attempted to place certain facts before this court by way of her heads of argument. That cannot be permitted and cannot be taken into consideration.

[29] The Bank is obligated to meet its statutory obligations in attempting to bring the notice to the attention of the consumer. Having so met its obligations under the credit agreement no more can be expected from the Bank. The notice was sent to the duly nominated address under the credit agreement. Having filed no change of address with the Bank, no more can be expected from the credit provider other than to send the letter via registered post, which was done.

[30] Accordingly, there is no merit in this defense.

CONCLUSION

[31] In *Absa Bank Limited v Maritz*[14]*,* the court found that it was not sufficient for a defendant to merely state that the plaintiff did not conduct an assessment as required in terms of section 81(1) of the NCA. Something more is required and the defendant was obliged to place more facts before the court to sustain the defence. This is so because the acceptance of bald allegations that a proper risk assessment

[14] 2018 JDR 0332 (GP).

was not done will create an unsafe precedent in summary judgment application.[15]

[32] Mr Phiri has admitted to being in breach of the credit agreement and his justification for doing so is inadequate. The defence of reckless credit and/or over-indebtedness is not raised without setting out the grounds of the defence. As a result Mr Phiri has failed to raise any *bona fide* and/or triable defence.

[33] In the premises the plaintiff is entitled to summary judgment and the following order is made:

1. Cancellation of the credit agreement.
2. Delivery of 2008 LAND ROVER DEFENDER PUMA 110 SW CHASSIS NUMBER: SALLDHMT77A751925 ENGINE NUMBER: 071113183730244DT
3. Costs of suit;
4. Claim for damages to be postponed *sine die*.

_____

L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

(*Electronically submitted therefore unsigned)*

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 5 May 2022.

APPEARANCES

Counsel for the plaintiff: Adv. Leon Peter

[15] At [10].

Instructed by:	Rossouws, Leslie Inc
Counsel for the defendant:	Adv. A. Theart
Instructed by:	Viljoen Attorneys
Date of hearing:	15 March 2022 (additional heads of argument filed on 23 March 2022 and 4 April 2022)
Date of judgment:	5 May 2022.