

REPUBLIC OF SOUTH AFRICA



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

Case Number: 7960/2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
4 July 2023	_____
DATE	SIGNATURE

In the matter between:

ASSETLINE SOUTH AFRICA (PTY) LTD

Applicant

and

MLM AND ASSOCIATES INC

First Respondent

ROSE MOSIMA LESHIKA

Second Respondent

JUDGMENT

Mia, J

[1] This is an application for an order that the first and second respondents pay the amount of R2 035 600.44, the one paying the other to be absolved, plus interest at the rate of 5% per month from 21 June 2020 to the date of the final

payment. Furthermore, the property owned by the second respondent, Section No. 13 as shown and more fully described on Sectional Plan No. SS 000324/15 in the scheme known as CEDAR TREE OFFICE PARK in respect of the land and building or buildings situated at FOURWAYS EXTENSION 45 TOWNSHIP, Local Authority: City of Johannesburg, of which section the floor area, according to the said sectional plan is 146 (one hundred and forty six) square metres in extent (the property), be declared specially executable. The applicant also requested costs on the attorney and client scale. The application is opposed by the respondents.

- [2] The applicant is Assetline South Africa (Pty) Ltd, a company registered and incorporated in terms of the company laws of South Africa, having its principal place of business at 2nd Floor, 108 Elisabeth Avenue, Parkmore, Sandton. The first respondent is MLM Associates Inc. an incorporation in terms of the company laws of South Africa, with its chosen *domicilium citant et executandi*, at 9 Origin, Creek Lane, Steyn City, Fourways. The second respondent is Ms Rose Mosima Leshika, an adult female businesswoman, and director of the first respondent residing at 9 Origin, Creek Lane, Steyn City, Fourways.
- [3] Both the opposing and replying affidavits were filed late. The applicant did not take issue with the late filing of the opposing affidavit and sought the same consideration in respect of the late filing of its replying affidavit. In the absence thereof, it tendered an explanation for the late filing of the replying affidavit citing admission to the hospital of the applicant's attorney as well as certain religious holidays occurring in September 2021, which prevented the attorney and counsel from working and attending to finalising the affidavit. The submission was that it was pertinent to consider all the relevant facts. In my view, this consideration applies to both the opposing and replying affidavits, and both affidavits are condoned and accepted.
- [4] The applicant and first respondent entered into a written agreement in terms of which the applicant advanced a loan to the first respondent in the amount of R1 050 000. The second respondent stood surety and co-principal debtor for the first respondent in respect of the amounts the applicant loaned to the first respondent. The debt was secured by passing a mortgage bond over the

property owned by the second respondent. The property over which a mortgage bond was passed is commercial property from which the second respondent conducts her practice as an occupational therapist. The first and second respondents (the respondents) oppose the application on the basis that the applicant did not conduct an affordability assessment in terms of Regulation 23A of the National Credit Act 34 of 2005 (the NCA) when concluding the second agreement. The respondent also alleged that the applicant is not a registered credit provider. The respondents stated that the loan is thus null and void as no money was advanced to the first respondent when the second agreement was concluded. The monies that were advanced were to the second respondent when the first agreement was concluded. The respondents advanced further that the interest rate amounts to extortion or oppression and the loan agreement should thus be set aside.

[5] The applicant and the second respondent concluded a loan agreement on 3 October 2018, pursuant to which the applicant advanced an amount of R1 050 000 to the second respondent. Pursuant to this agreement, the second respondent passed a covering mortgage bond over the immovable property in favor of the applicant. Prior to concluding this agreement, the applicant considered the second respondent's risk. Two banks had refused to provide loans to her. The applicant, notwithstanding this consideration, considered the second respondent's position and indicated that it conducted an affordability analysis in relation to the second respondent. Considering her assets, in particular, the property, it decided to grant the loan and entered into an agreement. This loan was due to be repaid by 2 May 2019. However, the second respondent defaulted on her obligations in terms of this agreement and requested more time to enable her to discharge her indebtedness. The applicant agreed to the request on condition that the first respondent assumed responsibility for the debt.

[6] Accordingly, on 19 August 2019, the applicant and the first respondent concluded a written loan agreement (the second agreement), pursuant to which the applicant advanced the amount of R1,050,000 to the first respondent. In terms of this agreement the applicant claims payment where the interest

accrued on the loan amount at a rate of 3.5% per month. In the event of a default on the agreement, the interest rate increased and would accrue at a rate of 5% per month, which over a period of 12 months equals to 60% per annum. The first respondent was obliged to repay the loan amount and interest by 31 May 2020. The second respondent stood as surety for and co-principal debtor, for the first respondent for the amounts owing to the applicant. The amount was secured by passing a mortgage bond over the immovable property owned by the second respondent. .

[7] The first respondent defaulted in terms of the agreement and failed to repay the amount timeously. Letters of demand were sent by e-mail and through the sheriff. On 1 June 2020, the amount of R2 035 600 was due in terms of the second agreement concluded with the applicant plus interest at a rate of 5% per month.

[8] The material terms of the agreement advanced by the applicant are:

- a. that the applicant advances a loan of R 1 050 000;
- b. the first respondent acknowledged that as of 31 May 2019, the loan amount, together with interest and costs owing, was R 1 089 950;
- c. the first respondent unconditionally acknowledged its indebtedness to the applicant for the loan amount;
- d. the debt would accrue interest at a rate of 3.75% per month from June 2019 to the date upon which the debt plus interest and costs had been paid in full to the applicant;
- e. the first respondent would pay monthly instalments of interest calculated at 3.75% per month on or before the first day of each and every month to the applicant;
- f. the first respondent acknowledged and agreed that it had conducted investigations into the interest rate applied, and was satisfied that the rate was market- related and acceptable to it;

- g. the first respondent undertook to repay the entire debt, plus any interest and costs that remained owing to the applicant, by 31 May 2020;
- h. the first respondent agreed to pay an amount of R575 per month to the applicant as an administration fee, which would be paid at the same time as payment of interest;
- i. as security for the first respondent's indebtedness under and in terms of the agreement, the second respondent would stand as surety for and co-principal debtor with the first respondent for the amounts owing to the applicant;
- j. it was recorded that the second respondent had already passed a first covering mortgage bond over the immovable property in favour of the applicant in the amount of R 2 100 000;
- k. it was recorded that the first covering bond continued to serve as security for the respondent's obligation to the applicant in terms of the agreement and suretyship;
- l. in the event of the first respondent defaulting in regard to its obligations in relation to the agreement or being unable to pay or threatening to stop or suspend payment of any amount in terms of the agreement:
 - i. The applicant would be entitled to claims costs on an attorney client scale should it be necessary to institute legal action;
 - ii. The first respondent would be obliged to pay a default loan management fee in the amount of R500 on a daily basis from the date of default until the date of final payment to the applicant;
 - iii. All costs incurred by the applicant due to the first respondent's fault would be payable by the first respondent;
 - iv. Interest would be levied on the outstanding debt at 5% per month compounded monthly in arrears from date of default until date of final payment;

- m. A certificate issued by any director or manager of the applicant would constitute a liquid document for all legal purposes, and it would not be necessary to prove the appointment of the person signing the document;
- n. The parties agreed the loan agreement novated and supersedes all previous and other agreements except for the first covering mortgage bond, which would continue to serve as security for the loan amount in the agreement.
- o. On 8 August 2019, the second respondent, acting personally concluded a written deed of suretyship in favour of the applicant.
- p. The first respondent executed a continuing covering mortgage bond over the property in favour of the applicant. The second respondent acknowledged she was indebted to the applicant in the amount of R2 100 000.

[9] The issues for determination as agreed between the parties are:

- a. Whether the prior agreement between the applicant and the second respondent effects the validity of the subsequent agreement?
- b. Whether the original agreement was novated by the new agreement?
- c. Whether the NCA finds application in the matter, and if so, whether there has been compliance with it and if not the consequence of any non-compliance.
- d. whether the interest rate charged by the Applicant is usurious.
- e. whether a reserve price ought to be set for the sale of the commercial immovable property.

The validity of the second agreement

[10] Having regard to the first and second agreement it is not in dispute that both agreements were concluded between the parties. The second agreement states that it supersedes all prior agreements. The respondents seek to have

the agreement set aside on the basis that the applicant was not a credit provider or that the interest rate was too high and falls foul of the *in duplum* rule. These considerations have been addressed by the Court in *Paulsen and Another v Slip Knot Investments 777(Pty) Ltd*¹ where the court held at para [39]:

“Even if Slip Knot were to be required to register under s 40(1), its failure to do so would not render this agreement void. Section 40(4) provides for the consequences of a credit provider failing to register in accordance with s 40(1): any agreement with that credit provider is 'an unlawful agreement and void to the extent provided for in s 89'. Therefore, in order to determine the validity of the agreement, s 40(4) must be read with s 89(2)(d). Section 89 is contained in ch 5 of the NCA, entitled 'Consumer Credit Agreements'. The term 'credit agreement' in this chapter can only be understood to refer to those credit agreements which are subject to the Act. To understand the term differently would render many of the provisions in this chapter entirely meaningless.”

[11] The assertions made by the respondents are not correct. On both agreements, it is clear that the applicant is a credit provider. This provides more than sufficient proof. The view in *Paulsen*² regarding unregistered credit providers suggests that the agreement is rendered void only to the extent provided in s 89.

[12] Section 89(2) provides:

“Subject to subsections 3 and 4, a credit agreement is unlawful if-

- a. At the time the agreement was made the consumer was an unemancipated minor unassisted by a guardian, or was subject to-
 - i. An order of a competent court holding that person to be mentally unfit; or
 - ii. An administration order referred to in section 74(1) of the magistrates Courts act, and the administrator concerned did not consent to the agreement,

¹ *Paulsen and Another v Slip Knot Investments 777(Pty) Ltd* 2015 (3) SA 479 (CC)

² *Paulsen and Another v Slip Knot Investments 777(Pty) Ltd* 2015 (3) SA 479 (CC)

And the credit provider knew, or could reasonably have determined that the consumer was the subject of such an order;

- b) the agreement results from an offer prohibited in terms of section 74(1);
- c) ...
- d) ...”

[13] According to the second respondent she was in default of the first agreement and during the period that she had an opportunity to extend the period in which to pay the applicant, the applicant insisted that the second agreement be concluded with the first respondent. There is no proof relating to affordability in relation to first respondent. The applicant knowing that two banks had previously refused a loan, entered into the second agreement aware that the first respondent was the alter ego of the second respondent, was aware that she had defaulted on the agreement and still concluded the agreement with the first respondent. The applicant accepted the same security, namely that the mortgage bond, which the second respondent pledged as security to continue serving as security for the loan.

[14] The second respondent indicates that she was in default and the agreement permitted her to extend the loan. She did not extend the loan and was compelled to sign the second agreement which she now seeks to be excused from asserting that both loans constitute reckless credit and should be declared void. Clause 17 of the agreement concluded on 19 August 2019, provides for such supersession and novation. The clause states:

“ The parties including the borrower and Leshika acknowledge and agree that this agreement novates replaces and supersedes all previous agreements between Assetline and or the borrower and or Leshika... save and except for the Registered Mortgage Bond which in terms of this agreement, remains in place as continuing security cover ...”

[15] The second agreement, concluded on 19 August 2019 is clear in terms of superseding the previous agreement. The second agreement supersedes the first agreement as provided in clause 17 of the agreement. The question of novation is similarly addressed. Thus the prior agreement between the applicant and the second respondent is superseded by the subsequent agreement as provided by the later agreement and is novated. There is no proof attached to the applicant's application that it conducted an affordability assessment in relation to the second agreement. The applicant was aware that the two financial institutions had refused credit to the second respondent and that the second respondent had defaulted on the agreement it had concluded with it in 2019. The offer could be interpreted as an offer in terms of s 74(1) when regard is had to the second respondent being the alter ego of the first respondent. In the alternate, the agreement is reckless as there was no affordability assessment, and none is attached indicating that it was conducted. Consequently the second agreement, having replaced the first, is declared void.

[16] To the extent I am wrong in declaring the second agreement void, the NCA provides in section 101(2) that:

(2) A credit provider who is a party to a credit agreement with a consumer and enters into a new credit agreement with the same consumer that replaces the earlier agreement in whole or in part may charge that consumer an initiation fee contemplated in subsection (1) (b) in respect of that second credit agreement, only to the extent permitted by regulation, having regard to the nature of the transaction and the character of the relationship between the credit provider and consumer."

[17] On this basis, I therefore conclude that , the applicant, was not entitled to charge the respondents a further initiation fee as the agreement replaced the agreement between the same parties, namely the applicant and the second respondent, who was surety and co-principal debtor.

[18] A further consideration regarding the application of the NCA is whether the interest was usurious. The NCA provides that the interest may not exceed the unpaid balance of the principal debt. Section 103(5) provides

“Despite any provision of the common law or a credit agreement to the contrary, the amounts contemplated in section 101 (1) (b) to (g) that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the default occurs.”

[19] The principal debt was R 1 050 000; thus the interest could not exceed the amount of R 2 100 000. The interest in the amount of 5% per annum exceed what is permitted under the NCA. The applicant conceded this aspect in its heads of argument. The interest that was applicable in the event that agreement was not void was limited under the provision of section 103(5).

[20] The applicant seeks that the property be declared specially executable. The submission made on behalf of the respondents is that the property is valued at R3.3 million rand and may be sold for substantially less than its value. For that reason, it may place the respondents at a disadvantage, the property being realised for less than its value. To the extent that the absence of a reserve price will foreseeably result in the sale of the property at a lower price and may be prejudicial, I am of the view that a reserve price be determined. But that is not necessary in the present matter as the agreement is declared void.

[21] The agreement makes provision for costs on the attorney and client scale. I am satisfied that the respondent raised concerns that were relevant and has succeeded to show that such costs are justified.

[22] Consequently, I grant an order as follows:

Order:

The application is dismissed with costs on attorney and client scale.

S MIA
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant:

Adv. J M Hoffman
instructed by SWVG Inc

For the Respondent:

Adv. S. Mathiba
instructed by Preshnee Govender
Attorneys

Heard: 31 January 2023

Delivered: 4 July 2023