

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



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

Case Number: 44429/2021

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

4 April 2024 _____

In the matter between:

INVESTEC BANK LIMITED

Applicant

And

OLIVIER

CHARLES

ZOUZOUA

Respondent

JUDGMENT

Mdalana-Mayisela J

Introduction

[1] This is an application brought by the applicant against the respondent for payment in the amount of R2,163,672.91, plus interest as well as the order that the property described as ERF [...], C[...] estate township, Johannesburg measuring 2,503 square metres, held by deed of transfer number T54732/2007 (“the property”) be declared specially executable.

[2] In January 2007, the respondent applied to the applicant for a loan vis-à-vis the purchase of a vacant stand in C[...] estate township. The loan application in the amount of R848,000.00 (“first loan”) was granted in April 2007. On 25 April 2007, a first continuing covering mortgage bond was registered over the property as security for the first loan. The first loan was payable in 12 monthly instalments after it was advanced to the respondent. The first monthly instalment was debited in September 2007. The first loan was paid up in July 2008.

[3] In October 2007, the respondent applied to the applicant for a further advance of R2,2 million in order to construct a home on the property (“second loan”). The applicant approved the second loan, and the total facility limit of R3,109,405.00 in October 2007. The respondent elected to accept the second loan, and the total facility limit in August 2008 (“the loan agreement”). The loan agreement would begin on the Commencement date and endure for 240 months thereafter, and the initial monthly instalment was R38,854.02. A second continuing covering mortgage bond was registered over the property as the security for the second loan.

[4] The bonds account has fallen into arrears on numerous occasions, and remains in arrears. The respondent has frequently been unable to meet his obligations under the loan agreement.

[5] In terms of clause 8 of the loan agreement, if the respondent failed to pay any amount payable in terms of the loan agreement timeously and in full, the total

amount owing would, without any further action by either party be immediately due and payable and the applicant would be entitled to demand that the respondent pays all of his indebtedness under the loan agreement and upon demand in accordance with the NCA and the indebtedness would become immediately due and payable.

[6] In terms of clause 9 of the loan agreement, a certificate issued by any manager or assistant manager of the applicant as to any indebtedness of the respondent in terms of the loan agreement or any other fact relating to the loan agreement shall, unless proven otherwise, be prima facie evidence of the respondent's indebtedness to the applicant.

[7] The application is opposed by the respondent on the following grounds:

[7.1] The deponent to the founding affidavit lacks authority to sign same.

[7.2] There was no compliance with section 129(1) of the National Credit Act¹ ("the NCA") because the section 129(1) notice was not sent to his new *domicillium* address.

[7.3] The lending practice of the applicant in respect of the loan agreement constitutes reckless credit in contravention of ss 80 and 81 of the NCA, and that it must be declared reckless credit agreement and set aside in terms of s 83 of the NCA.

[8] In addition to above grounds, the respondent filed a notice to strike out paragraphs 42, 43, 46.2, 48, 56, 62 and 64 together with the annexures thereto marked as RA1, RA2, RA3, RA6 and RA9 of the replying affidavit on the grounds that they are vexatious, scandalous or irrelevant, they introduce new evidence, and same was not disclosed in the rule 35(12) response.

Order

[9] Having heard counsel and after considering the matter, I ordered that:

¹ Act 34 of 2005.

1. *Judgment is granted in favour of the applicant against respondent in the amount of R2,163,672.91 (two million, one hundred and sixty three thousand, six hundred and seventy two rand and ninety one cents) together with interest calculated at a rate of 10.25% per annum (being the applicant's prime rate at 11.75% less 1.5%) with effect from 5 September 2023, calculated daily and compounded monthly to date of payment, both days inclusive.*
2. *The property described as ERF [...], C[...] estate township, registration division J.R, the province of Gauteng, measuring 2,503 square meters, held by deed of transfer number T54732/2007 ("the property") be declared specially executable.*
3. *The registrar of this Court is directed to issue the relevant warrant(s) of execution as to enable the Sheriff to attach and execute upon the property in satisfaction of the judgment debt, costs and interest thereon.*
4. *The sale in execution of the property shall be subject to a reserve price of R3,700,000.00.*
5. *Should the reserve price, as determined by this Court in paragraph 4 above, not be achieved at a sale in execution, and unless written agreement is reached with the respondent as to a lower reserve price, the applicant may approach this court on these papers as amplified for an order to proceed with a sale in execution with a lower reserve price or without a reserve price.*
6. *A copy of this order is to be personally served on the respondent as soon as practically possible after this order is granted.*
7. *In the event that personal service is not possible, service on the respondent may take place by way of service by affixing at the respondent's place of residence being the property which service shall be in compliance with rule 46A of the Uniform Rules of Court and the Practice of this Court.*

8. *The respondent is directed to pay the costs of this application on an attorney and own client scale.*

[10] The respondent has requested reasons for the order. Those reasons follow below.

Application to strike out

[11] Rule 6(15) of the Uniform Rules of Court provides that “*the court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate costs order, including costs as between attorney and client. The court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted.*” The application must be on notice in terms of rule 6(11).²

[12] Scandalous matter means allegations which may or may not be relevant but which are so worded as to be abusive or defamatory. Vexatious matter means allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy. Irrelevant matter means allegations which do not apply in hand and do not contribute one way or the other to a decision of such matter.³ A decisive test for irrelevant matter is whether evidence could at the trial be led on the allegations now challenged in the pleading. If evidence on certain facts would be admissible at the trial, those facts cannot be regarded as irrelevant when pleaded.⁴

² Erasmus Superior Court Practice Vol 2 2nd edition D1-90.

³ Vaatz v Law Society of Namibia 1991 (3) SA 563 (Nm) at 566 C-E; Erasmus Superior Court Practice Vol 2 2nd edition D1-90 to D1-91.

⁴ Golding v Torch Printing and Publishing Co (Pty) Ltd and Others 1948 (3) SA 1067 (C) at 1090.

[13] The respondent's application is based on the grounds that the aforesaid paragraphs are vexatious, scandalous or irrelevant; they introduce new evidence when the pleadings have closed, and the respondent will not be allowed to answer to the allegations contained therein; and the said information was not disclose in the response to rule 35(12) notice served on the applicant. The application to strike out is opposed.

[14] I refused to strike out the aforesaid paragraphs and annexures for the following reasons. The respondent in his answering affidavit contended that the lending practice of the applicant in respect of the loan agreement constituted reckless credit, and contravened sections 80 and 81 of the NCA, and that it must be declared reckless credit agreement in terms of section 83 of the NCA. The applicant in the aforesaid paragraphs and annexures is dealing with this contention and producing evidence to show that it complied with sections 80 and 81 of the NCA. The purpose of a replying affidavit is to put up facts that refute the respondent's case. The aforesaid paragraphs and annexures are not vexatious or scandalous. They are relevant to the merits of the respondent's defence.

[15] The applicant has sought indulgence to produce this evidence in its replying affidavit. It explained that upon receipt of the rule 35(12) notice it had difficulty in obtaining the requisite documentation and information, given the substantial period of time that had passed from inception of the loan agreement to the institution of the legal proceedings, being in excess of 12 years. In order to locate the documentation and information that was considered at the time, it had to, *inter alia*, consider various historic databases and storage facilities, attempt to access previous employees e-

mail correspondence and profiles, and engage employees who were no longer employed by it. All of the aforesaid activities undertaken by it took an extended period of time, and consequently it was not in possession of such documentation at the time it received the rule 35(12) notice.

[16] The respondent is required to satisfy the Court that he would be prejudiced in his case if the striking out application is not granted. He alleged that the aforesaid paragraphs and annexures introduced new evidence and he would not be allowed to answer to the allegations contained therein. The respondent was invited by the applicant to file an additional affidavit in response to the replying affidavit, but he elected not to file it. During the hearing of the main application, he did not seek an indulgence to file an additional affidavit. I found that he would not be prejudiced in his defence if the striking out application is not granted. Accordingly, I refused to grant the striking out application.

Section 129(1) notice

[17] In his answering affidavit the respondent contended that the applicant has not complied with section 129(1) of the NCA in that it has not sent a section 129(1) notice to his new *domicilium* address. The applicant brought an interlocutory application where it sought leave to deliver a fresh notice in terms of section 129(1) of the NCA. The interlocutory application was opposed by the respondent. On 7 February 2023 the Court granted the interlocutory application and adjourned the main application in terms of section 130(4)(b)(i) of the NCA until 10 days after the applicant has complied with the interlocutory order.

[18] The applicant complied with the interlocutory order by emailing the fresh section 129(1) notice on 8 February 2023, sending a copy via registered mail on 14 February 2023, and the Sheriff serving a copy on the applicant on 10 February 2023. The respondent did not respond to the section 129(1) notice. The applicant filed a supplementary affidavit dated 28 March 2023 where it gave notice to the respondent for the resumption of the main application.

[19] I find that the applicant has complied with section 129(1) of the NCA, and this ground of opposition has fallen away.

Authority of the deponent to the founding affidavit

[20] In his answering affidavit the respondent disputed the authority of Shelley Anne Cianfanelli, a deponent to the founding affidavit. Rule 7(1) of the Uniform Rules of Court provides for the procedure to be followed in disputing such authority. It reads as follows:

“7(1) Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.”

[21] The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on

behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority.⁵

[22] The respondent has not filed a notice in terms of rule 7(1) disputing that the applicant's attorney is authorised to bring this application. Therefore, this application necessarily is that of the applicant.

[23] There is no need that Cianfanelli should additionally be authorised to bring this application. The authority of the applicant's attorney is sufficient. In any event, the applicant has attached a resolution to its papers to prove that Cianfanelli is an authorised 'A Signatory' to sign the court papers.

[24] I am satisfied that the applicant has brought this application. The point *in limine* of the lack of authority is dismissed.

Reckless credit agreement

[25] The respondent raised a defence that the loan agreement entered into between the parties constitutes reckless credit in that the applicant did not conduct any form of assessment as required by the NCA at the time the loan agreement was concluded, and that his obligations under the loan agreement should be set aside in terms of s 83 of the NCA.

⁵ Eskom v Soweto City Council 1992 (2) SA 703 (W).

[26] Reckless credit is dealt with in ss 80 and 81 of the NCA. Section 81(3) prohibits a credit provider from entering into a reckless credit agreement with a prospective customer. In terms of s 81(2)(a)(i), a credit provider cannot enter into a credit agreement without first taking reasonable steps to assess the consumer's general understanding and appreciation of the risks and costs of the proposed credit. In terms of s 81(2)(a)(ii), the credit provider is obliged to take into account the debt repayment history of the consumer, and in terms of s 81(2)(a)(iii), the consumers existing financial means, prospects and obligations. In terms of s 80(1)(a), a credit agreement is reckless if the credit provider failed to conduct an assessment as required by s 81(2), irrespective of the outcome had the proper assessment been made at the time. In terms of s 80(1)(b), a credit agreement is reckless if, having conducted the assessment the information points to the probability that the consumer did not fully understand and appreciate the risks, or that he/she would be over-indebted if he/she entered into the credit agreement.⁶

[27] Section 83 of the NCA provides as follows:

"83 Court may suspend reckless credit agreement

- (1) Despite any provisions of law or agreement to the contrary, in any Court proceedings in which a credit agreement is being considered, the Court may declare that the credit agreement is reckless, as determined in accordance with this Part.*
- (2) If a Court declares that a credit agreement is reckless in terms of Section 80(1)(a) or 80(1)(b) (i), the Court may order-*
 - (a) Setting aside all or part of the consumer's rights and obligations under that agreement, as the Court determines just and reasonable in the circumstances; or*
 - (b) Suspending the force and effect of that credit agreement in accordance with sub-sections (3)(b)(i)."*

⁶ National Credit Regulator v Dacqup Finances CC trading as ABC Financial Services-Pinetown and Another (382/21)[2022] ZASCA 104 (24 June 2022) para [4]

[28] The respondent raised a defence of reckless credit in terms of s 80(1)(a). He is not relying on s 80(1)(b). A bald allegation that there was reckless credit will not suffice.⁷

[29] The applicant dealt with this defence in its replying affidavit and annexed the relevant documentation. It submitted that it conducted the assessments required in terms of s 81(2) in October 2007 when the application for further advance was made by the respondent, and in August 2008 when the loan agreement was concluded. The Background Information Form produced by the applicant and which was captured by it on 11 August 2008 before the loan agreement was concluded, reflected the following note:

“Charles Zouzoua is 47 years old and co-owner and Managing Director of Gatsheni Management Consultants. Charles has more than 15 years experience with international companies in sub-Saharan Africa. Seven of these years were spent in general management positions.

Charles’s history includes the turn-around of Celtel in both Gabon and Malawi, where he served as managing director from 2004 until 2007, and the expansion of Coca-Cola’s businesses in Cote d’Ivoire, Mali, Niger- and Burkina Faso.

Charles has a Bachelors degree in Business Economics from the National University of Cote d’Ivoire, and Masters in International Management from the American Graduate School of International Management (Thunderbird) in Arizona, USA. He has also completed various advanced training courses including the Advanced Management Programme from London Business School and a course in Change Management.”

⁷ Standard Bank of South Africa v Panayiottis (08/00146)[2009] ZAGPHC 22 (6 February 2009).

[30] The applicant submitted that the above note shows that the respondent is a highly educated individual. On the strength of his education, and by virtue of the fact that he previously had a home loan facility with the applicant, as well as the instalment sale facility and continued to conduct his current account with the applicant, it reasonably concluded that the respondent understood and appreciated the risks, costs and obligations of the loan agreement as is required in terms of s 82(1)(a)(i) of the NCA.

[31] The applicant furthermore submitted that it reasonably assessed the respondent's debt repayment history as a consumer under the loan agreement in terms of s 81(2)(a)(ii). At the time of concluding the loan agreement, the respondent was a foreign national and the applicant was aware that his primary banking account/s and credit facilities in South Africa were with the applicant. It considered, *inter alia*, the following factors concerning the respondent's debt repayment history and the credit agreements:

[31.1] The respondent had properly conducted himself in respect of the current account.

[31.2] He had satisfactorily serviced his obligations under the other two credit facilities with the applicant from their respective inception dates to date of the assessment in August 2008.

[31.3] The respondent had settled the first loan prior to the due date for such settlement.

[31.4] It also noted that there was no adverse information against the respondent by other credit providers.

[32] The applicant further was aware that the respondent held funds abroad, as is evidenced, *inter alia*, by the fact that his monthly salary was paid into an account held outside South Africa and portions thereof were transferred to his facilities with the applicant.

[33] In addition to the above, in the application for current account made in 2003, the respondent submitted a letter of undertaking and declaration of assets in terms of which he confirmed, *inter alia*, that he was in possession of foreign assets; he held foreign bank accounts; he had not applied for similar facilities through another authorised dealer; and he could deal freely with his foreign assets and could retain income thereon, overseas.

[34] The applicant conducted an assessment of the respondent's existing financial means, prospects and obligations as required by s 81(2)(a)(iii). During that assessment the respondent disclosed that he was a salaried employee; his salary was paid in United States Dollars; his annual income was R1.6 million (an increase of R200k since October 2007); his net asset value was in excess of R7 million; and he had investments worth R1.8 million.

[35] The applicant attached a six months bank statement (February 2008 – July 2008) of the respondent's current account, and a pivot table prepared by Dean

Solomon, its credit analyst that was considered at the time of concluding the loan agreement. The said documents showed that the respondent received a total surplus income of R1,361,536.64 after the expenses were paid.

[36] The respondent serviced the loan agreement diligently until October 2016 when the bonds account fell in arrears. The applicant submitted that in all of the circumstances, it objectively and reasonably assessed that the respondent could more than comfortably afford the instalments of R38 000.00.

[37] I accept the evidence tendered by the applicant showing that it conducted the assessments stated above. The respondent was afforded an opportunity to dispute this evidence and he failed to do so. I am satisfied that the applicant complied with the requirements of s 81(2)(a) of the NCA at the time the loan agreement was concluded. The defence of reckless credit agreement raised by the respondent has no merit and it must fail.

Initiation and legal fees

[38] The respondent contended that the applicant charged initiation fees and debited legal fees to the loan facility. This contention is not correct. The legal fees noted on 25 April 2007 were for the registration of the first mortgage bond. The legal fees noted on 20 October 2008 were for the registration of the second mortgage bond.

[39] It is common cause that second bond is a building loan facility. The total facility was availed to the respondent in various tranches and by way of drawdown

requests. The charges incurred and debited to the loan facility were for administrative duties and requirements, such as progress, inspection and valuation reports. Those charges were agreed to by the respondent. I find that there is no merit in this contention.

Value of the property and primary residence

[40] The respondent is disputing the value of the property and contends that it is low. The applicant has tendered the expert evidence for the value of the property. The respondent does not profess to be not an expert in such field and has not tendered the expert evidence to substantiate his contention. I reject this contention.

[41] The property is the respondent's primary residence. In my order I have set a reserve price of R3,700,000.00 for the sale in execution of the property. The respondent has repaid the substantial amount of the loan facility. The value of the property and the reserve price exceed the indebtedness owed under the loan agreement. After the property has been sold and debt settled, the respondent will have more than enough funds to secure alternative accommodation.

Costs

[42] The loan agreement provides for payment of costs by the respondent on an attorney and own client scale. The parties in the loan agreement also agreed on the rate of interest applicable in the event of the respondent's default.

[43] therefore make the order as set out above.

**MMP Mdalana-Mayisela
Judge of the High Court
Gauteng Division**

(Electronically submitted by uploading on Caselines and emailing to the parties)

Date of Judgment: 4 April 2024

Counsel for the Applicant: Adv M De Olivier

Instructed by: ENS Africa attorneys

Counsel for the respondent: MB Mhango

Instructed by: Bazuka and Company Incorporated