

✓ ✓

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

CASE NO: 55809/2017

In the matter between:

16/1/18

ABSA BANK LIMITED

PLAINTIFF

and



LORAINÉ MARITZ

DEFENDANT

JUDGMENT

Murphy J

1. The plaintiff has applied for summary judgment against the defendant in the sum of R1 079 948,66, together with interest thereon at 11,55% per annum from June 2017, being the amount due to it in terms of a loan advanced against the security of a mortgage bond over Erf 536, Van der Bijl Park South West. It also seeks orders declaring the property specially executable and authorising the issue of a warrant of execution against the property.

2. The loan constitutes a credit agreement as defined in Part C of the National Credit Act¹ ("the NCA").

3. In her affidavit opposing summary judgment, the defendant does not deny the conclusion of the agreement or the amount of the loan; she merely opposes the

¹ Act 34 of 2005

application on the ground that the transaction was "reckless credit" in that the credit was granted to her under a credit agreement concluded in circumstances described in section 80 of the NCA. In essence, she maintains that the plaintiff failed to conduct a proper risk assessment of her credit position before granting the loan.

4. The relevant part of section 80 of the NCA provides that a credit agreement is reckless if, at the time that the agreement was made, the credit provider failed to conduct an assessment as required by section 81(2) of the NCA, irrespective of what the outcome of such an assessment might have concluded at the time; or the credit provider, having conducted an assessment as required by section 81(2) of the NCA, entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement; or entering into that credit agreement would make the consumer over-indebted. In terms of Section 81(2) of the NCA a credit provider must not enter into a credit agreement without first taking reasonable steps to assess 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; and iii) existing financial means, prospects and obligations.

5. If a court declares that a credit agreement is reckless, it may make an order setting aside all or part of the consumer's rights and obligations under the agreement, as it determines just and reasonable in the circumstances; or it may suspend the force and effect of the agreement; and in cases of over-indebtedness may restructure the consumer's obligations.² The court accordingly has considerable discretion. It is unlikely to make an order relieving the consumer of all its obligations if the result would be the unjust enrichment of the consumer at the expense of the credit provider. Much will depend on the facts, the equities of the situation and the extent of the consumer's exposure. Whether or not there is a prospect that a

² Section 83(2) and (3) of the NCA

consumer might obtain relief in terms of section 83 of the NCA depends therefore on the facts.

6. Rule 32(3) obliges the defendant, if she is successfully to resist summary judgment, to satisfy the court that she has a *bona fide* defence to the action and to “fully disclose the nature and grounds of the defence and the material facts relied upon therefore”. All that the court enquires into is whether the defendant has “fully” disclosed the nature and grounds of his defence and the material facts upon which it is founded; and whether on the facts so disclosed, the defendant appears to have a *bona fide* defence 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.³ In *Standard Bank of South Africa Ltd v Kelly*⁴ Binns-Ward J helpfully 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)”.

7. The defendant alleges that the credit provided to her was granted without an adequate assessment in terms of section 81(2) of the NCA having been undertaken. This she maintains gives rise to a *bona fide* defence sufficient to resist the application for summary judgment. She makes her case in a few paragraphs in the opposing affidavit. In paragraphs 3.1.3 and 31.1.4, she states:

“No assessment of my financial situation was completed by the applicant and no credit check was done. At that stage I was selling immovable property and only earned commission, which fluctuated month on month.

³ *Maharaj v Barclays National Bank Ltd* 1976(1) SA 418 (A); and *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA)

⁴ *Standard Bank of South Africa Ltd v Kelly* (unreported case no. 23427/2010 WCC).

I merely had an interview with a representative of the applicant and the loan was granted. I don't know whether any background of financial checks were made, any references consulted and verified at the time of my application for the loan from the applicant."

8. In paragraphs 4.2 and 4.8 she elaborates as follows:

"I indicated to the applicant that I was a sales person who sold immovable property, that my income was not guaranteed and that the applicant, knowing thereof, still granted the loan to me. In this regard it is submitted that the loan was reckless credit in terms of section 80 of the NCA 34 of 2005, which stand to be ventilated during a trial....

At the time of the application for the loan I was under debt review for some other credit providers [see para 4.9.1 of the plea to the summons of the applicant]. This information was available on the records of the National Credit Regulator. I am not aware, nor was I asked about any financial difficulty of any other information. I was only required to hand in 3 months of earnings [which was commission on sales of immovable property] and which was accepted by the applicant. I have disclosed to the applicant that I only earn commission and that the amount per month fluctuated in that some months I don't receive commission and other amounts I do receive a substantial amount. This was accepted by the applicant."

9. The defendant makes no mention of or reference to clauses 45 and 46 of the credit agreement she signed. These clauses are declarations regarding her financial status and her appreciation of the risks, including that: i) she perused the information in respect of her personal, financial and account particulars that she provided to the plaintiff; ii) the personal, financial and account details provided to the plaintiff were correct; iii) the financial information provided to the plaintiff was honest and accurate; iv) the loan would not cause her to be over indebted; v) she did not apply for debt review; vi) no process for a debt review determination pending; vii) she understood the risks and costs involved in terms of the loan; and viii) she understood her rights and obligations in terms of the loan. In clause 48 she confirmed that she had signed the agreement in accordance with her free will; and in clause 49 she confirmed that she had read and understood all the terms and conditions of the agreement.

10. The plaintiff argued that it is 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. The acceptance of bald allegations that a proper risk assessment was not done will create an unsafe precedent in summary judgment applications.

11. It is apparent from the defendant's averments that she is not certain that an adequate assessment was undertaken; nor has she made any attempt to explain why her declarations and confirmations that the risks and costs of the loan had been fully explained should not be accepted at face value or why she signed an acknowledgement of her awareness of the terms and conditions of the loan, the rights and obligations under it, and the risks associated with it. She does not aver that she did not understand or appreciate the risks and she does not set out how and to what extent she in fact became over-indebted as a consequence of the transaction.

12. Furthermore, there is no information in the opposing affidavit to indicate on what basis a court might be persuaded to embark on the debt review that would be necessary before it might grant any relief under s 83(2)(b) of the NCA, or as to why it might consider it just and reasonable to set aside all or part of the defendant's obligations as permitted in terms of s 83(2)(a) of the Act. In the circumstances the defendant cannot be said to have set out the material facts upon which her defence is based with sufficient particularity and completeness to satisfy the court that a *bona fide* defence has been disclosed.

13. Moreover, the defendant did not disclose the nature and content of the financial information she in fact disclosed to the plaintiff when the assessment was done. She has not stated what her income and expenses were at the time she applied for the loan or what they are currently. She has also contradicted herself. In paragraph 3.1.3 she stated that no assessment of her financial situation was done by the plaintiff. Yet in paragraph 2.4 she stated that at the time of the application for the loan, she was only required to hand in 3 months of "earnings" which was accepted by the plaintiff, and that she went to an interview with a representative of the plaintiff prior to the loan being granted. On her own version, therefore, an assessment was in fact done. But it is impossible to assess if she understood the risks etc. (section 80(1)(b)(i) of the NCA) or if the loan resulted in over-indebtedness (section 80(1)(b)(ii) of the NCA)

because she fails to provide any information about her actual financial position now or then. The defendant consequently has given insufficient information in the opposing affidavit to indicate on what basis a court might be persuaded to embark on the debt review that would be necessary before it might grant any relief under section 83(2)(b) of the NCA, or as to why it might consider it just and reasonable to set aside all or part of her obligations.

14. The defendant states that at the time of the loan application she was under debt review with other credit providers. No proof of debt review is annexed and no details of the alleged debt review are disclosed in the affidavit. She offers no explanation as to why she explicitly and falsely declared to the plaintiff that she was not under debt review at the time she applied for the loan.

15. In the circumstances, the defendant has not set out the material facts upon which her defence is based with sufficient particularity and completeness to satisfy the court that a *bona fide* defence has been disclosed.

16. The defendant further relies upon her constitutional right of access to adequate housing. She provides no information as to why she cannot come by suitable alternative accommodation. Her bald averments in this regard do not disclose a *bona fide* defence either.

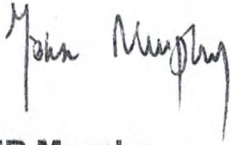
17. In the premises the plaintiff is entitled to summary judgment and the following orders are made:

17.1. The defendant is ordered to pay the plaintiff the sum of R1 079 948, 66 together with interest thereon at the rate of 11,55% per annum, capitalised monthly from 22 June 2017 until the date of payment.

17.2. The immovable property Erf 536 Vanderbijl Park South West 1 Township Registration Division I.Q., Province of Gauteng, Measuring 911 square metres held by Deed Transfer No. T87934/14 subject to the conditions therein contained is declared specially executable.

17.3. The Registrar of this court is authorised and directed to issue a warrant of execution against the immovable property.

17.4. The defendant is ordered to pay the costs of suit, including the costs of this application, as between attorney and client.

A handwritten signature in black ink, appearing to read 'John Murphy', with a stylized, cursive script.

JR Murphy

Judge of the High Court

Date heard: 24 November 2017

For the plaintiff: Adv AP Ellis

Instructed by: Strauss Daly Inc

For the defendant: Adv HCJ van Rensburg

Instructed by: Bailie Janke Snyman Attorneys

Date of judgment: