

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



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

Case number: 26467/2012

In the matter between:

ABSA BANK LIMITED

Plaintiff

And

KGANAKGA, MALECIA CONSTANCE

Defendant

JUDGMENT

SATCHWELL J:

INTRODUCTION

1. This judgment concerns the application of subsections 81(2) (a) and (b) of the National Credit Act 34 of 2005 ('the NCA '). Plaintiff is a bank which has claimed payment of an amount due under a mortgage loan agreement which defendant has pleaded amounted to 'reckless' granting of credit in terms of section 80 of the Act.

2. Plaintiff made an offer to purchase immovable property in KwaZulu Natal ('the Elysium land') for the sum of R 900 000 (nine hundred thousand rand) in July 2007 which was accepted¹. Pursuant to the sale agreement, application was made to ABSA for mortgage loan finance in the amount of R 900, 000 which sum was not approved but a loan in the amount of R 720, 000 was approved². Interest in the amount of 11.2% at the time of the granting of the loan was to be levied and monthly repayments in the amount (as then calculated) in the amount of R 7, 935. 29 were to be made in 240 instalments.
3. Such loan to defendant was to be secured by registration of a covering mortgage loan over the Elysium property which was so registered in the Registrar of Deeds, Pietermaritzburg on 25th September 2007³.
4. It is common cause that the mortgage loan agreement constitutes a credit agreement in terms of the National Credit Act. ⁴
5. Defendant has defaulted on the repayments to be made and plaintiff, based on a certificate of balance⁵, seeks judgment against defendant for payment of the sum of R 692, 414.48 plus interest on this sum at the rate of 7.20% per annum as from 18th May 2012 plus costs of suit on the attorney client scale and an order declaring the immoveable property specially executable.
6. Defendant has pleaded that plaintiff was obliged in terms of section 81(2)(a) of the Act to take reasonable steps to ensure that the Defendant had a general understanding of the risk in the credit transaction but failed to take reasonable steps to ensure that she understood the risk, being the substantial difference between the value of the property (averred to be not more than R 425, 000) and the loan amount of R 720,000. Defendant has further pleaded that plaintiff ought to have known that defendant was purchasing the property purely for commercial purposes but failed to enquire, in terms of section 81(2)(b), of defendant if she understood the risk in the credit transaction and to advise her whether or not the credit transaction would achieve any successful purpose. Accordingly, it is pleaded that

¹ Document at pages 1 – 8 of the Bundle.

² Document at page 9 – 18 of the Bundle.

³ Document AB2.

⁴ Plaintiff led evidence that there was a fire at the data storage facility in which original documents of ABSA were kept and that original documents pertaining to defendant's loan and bond were destroyed at that time. What has been handed in to court have been electronic copies – but not signed copies because they are exchanged electronically. Correctly, defendant did not dispute these documents and accepted that they were the best evidence possible and available.

⁵ Page 116 of the Bundle.

plaintiff concluded the credit transaction and loaned money to defendant recklessly.⁶

THE ALLEGED MANIPULATIONS OF THE SELLER AND HIS AGENTS

7. Although not pleaded, the story of the misrepresentations and possible fraud of one Cecil Uren and his assistant, Patricia, featured in the defendant's case. She had been invited to attend a presentation at the Wanderers Club where the marvels of investment in land in KZN were touted and the possibilities of profits to be made through purchase and subsequent subdivisions and then resale were extolled. Defendant through the services of the said Patricia and a person known as Debbie Mulder (apparently a bond originator) made the offer to purchase the Elysium property for R 900, 000. At all times, defendant intended to acquire the land, keep it for a short while, subdivide it and then sell the subdivisions on. She saw this as an investment opportunity. Debbie facilitated the granting of the mortgage loan finance by Absa. Defendant took transfer of the property. It subsequently emerged that the immovable property is not capable of subdivision, was never worth R 900, 000 and is thought to have only been worth about R 420, 000 at the time of purchase in 2007.
8. Defendant understandably feels that misrepresentations were made to her by Cecil Uren and his compatriots. She feels that she wanted to make an investment and has been diddled out of hard earned monies because that investment was never sound and the anticipated profits were never likely to be forthcoming.
9. Another person, subject to the same experience, Ms Daisy Mohlomi, also gave evidence about the slick presentation, the interactions with Patricia and Debbie, the difference between the purchase price and the actual value of the land.
10. From the documentation it was clear that Uren, through his company Early Light, had purchased the property but only took transfer at the same time that transfer was passed to defendant. It was a back to back transaction as commonly takes place. There was an attempt to make something of this but I can see no relevance to this litigation.
11. Mr Roland Pardey, a registered valuer, gave evidence as an expert that he conducted a number of valuations of Elysium properties giving their values as at 2007 and 2013. He used the comparable sales approach. Although prices were not easily attainable, he concluded that in 2007 the market was at its peak but that

⁶ See paragraphs 7.2 a) – h) of Defendant's plea at pages 62 to 64 of the pleadings bundle (the paragraphs themselves not being numbered).

defendant's property would never have achieved the sale/purchase price of R 900,000 and no more than R 420,000. The property was under one hectare in size and it would not be possible to subdivide same.

12. Pardey's evidence also resulted in handing in of a document which he had compiled from the Deeds Register which indicated that a farm had been subdivided, the various portions sold on, Cecil Uren's company had made purchases and then sold on to persons such as the defendant with simultaneous and back to back registrations resulting in considerable profits to Cecil Uren's company.
13. Defendant and other purchasers (such as Ms Mohlomo) approached ABSA with their complaints about Uren and his company, Prinsloo was instructed to investigate. Uren had dealt with the bond originator and not directly with the bank. Debbie Mulder works for B.A. Betterbond/Bettabond. Prinsloo looked for irregularities but found no wrongdoing or fraud or irregularities within ABSA. Both defendant and Mohlomi were indignant about the role of ABSA whom they obviously felt had not investigated sufficiently, had not engaged with them personally in processing the bond application and registration, had not reported back to them.
14. The relevance of all this evidence is difficult to ascertain in the precise context of this litigation. The question is whether or not any portion of this sad tale has any bearing on the provisions of section 80 and 81 of the National Credit Act.
15. Defendant is an adult woman with a Ph.D qualification. She never visited the Elysium property nor conducted any inspection in regard thereto. She accepted everything she was told by Cecil Uren and Patricia and Debbie. Her intention was to make an investment and, in due course, make a profit from this land. Her dreams came to naught.
16. Neither Cecil Uren nor Patricia have any connection with ABSA and plaintiff cannot be held liable for any misrepresentations they may have made. Debbie Mulder is not an employee of ABSA but is a bond originator (apparently working for another entity) who approaches banks to obtain loan finance for persons such as the defendant. Plaintiff cannot be held liable for any misrepresentations which she may have made.

THE NATIONAL CREDIT ACT

Prohibition of granting of 'reckless credit'

17. The preamble to the NCA describes its purpose, *inter alia*, as to provide for the general regulation of consumer credit and improved standards of consumer information, the prohibition of unfair credit and credit marketing practices, promotion of responsible credit granting and use and prohibition of reckless credit granting. Section 3 of the Act confirms these purposes.
18. Section 80(1) of the NCA states that a credit agreement is "reckless" if, at the time the agreement was made, (a) the credit provider failed to conduct an assessment required by section 81(2) or, (b) having conducted such required assessment, 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 the credit agreement would make the consumer over-indebted.
19. The assessment to be conducted in terms of section 81 require the credit provider to take 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 repayment 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 a consumer has such a purpose applying for that credit agreement.

Regulation of credit not other interactions

20. The overarching context of this legislation is regulation of consumer credit, promotion of responsible credit granting and prohibition of reckless credit granting. The only interactions and agreements which are regulated are those which pertain to credit - marketing, granting and receiving, terms and implementation. Section 80 deals with the circumstances within which "a credit agreement is reckless".
21. It deals with no other interactions whether they be offers to purchase, agreements of sale, lease agreements, subdivision agreements and resulting applications, partnership agreements, company memoranda or shareholders agreements, deeds of trust. The legislation is not concerned with other commercial engagements between persons or entities. The NCA confines itself to 'credit agreements'.

22. It must be remembered that not all credit agreements involve or are mortgage loan agreements. Mortgage loan agreements are only one class of credit agreement. The provisions of sections 80 and 81 apply to multiplicities of credit agreements where there is no registration of mortgage bonds over immovable property.
23. Accordingly, the assessment which is to be conducted in order to comply with section 81 (2) and (3) specifically deals with prohibition of entering into “a credit agreement” in certain circumstances. This is when reasonable steps have not been taken to assess both the position of the consumer in terms of subsection (a) and the reasonable basis of success of “any commercial purpose” in “applying for that credit agreement” in terms of subsection (b).

Section 81(2)(a) - the consumer

24. Insofar as the consumer is concerned, the assessment must cover three issues. I do not propose to set out any *numerus clausus* of examples of how those issues are to be covered but merely, by illustration of some, to assist in determining whether or not plaintiff, in this case, did meet the requirements of section 81 (2) (a).
25. Firstly, the consumer’s state of mind as it relates to the consumer’s understanding and appreciation of the risks and costs of the proposed credit and her rights and obligations under a credit agreement. The understanding of the consumer pertains only to risks and costs of the credit which is sought not to the risks of that which is to be acquired with the credit or for which the credit will be utilised. What springs to mind is that the credit granter must take reasonable steps to assess that the proposed consumer understands and appreciates what is meant by credit, by a loan, what it means to pay in instalments, what the penalties are for failure to make payment of an instalment, what is the concept of interest and that it may be calculated on the full amount of credit which remains and how it is calculated and at what rate. The credit granter should ensure that the proposed consumer understands that there are risks associated with failure to pay interest or capital or an instalment at all or timeously. The credit granter should see that the proposed consumer understands that the written document holds primacy over any spoken discussions. The credit granter should ensure that the proposed consumer understands that payment of an amount which is less than the agreed monthly instalment will mean that both capital and interest are not paid and that the total amount owed may increase notwithstanding that the smaller payments have been made. The consumer should know what she has to do and what the bank has to do each month and throughout the duration of the credit agreement. Where the loan is secured by any security, the credit granter must see that the prospective consumer understands what is meant by and how such security is used in relation to credit,

what purpose is achieved thereby, that immovable property may be at risk if the instalments are not paid.

26. Second, is the consumers previous experience and behaviour as a consumer under credit agreements. The consumer should be asked to disclose her own history insofar as she has previously utilised credit and the manner in which that was handled. There should be disclosure (if required by the credit granter) of any civil judgments in money taken against the consumer.
27. Third, the finances of the proposed consumer at the time of application need be disclosed to ensure that she can afford to pay the instalments in terms of the credit agreement. Future prospects should be taken into account. So should those other expenses and obligations of the consumer which must be met before any credit instalments can be repaid.
28. In sum, the credit granter must take reasonable steps to assess that the proposed consumer understands and appreciates what she is getting herself into, what it means to have entered into certain obligations and what rights she has in relation to the credit granter, what the risks are of borrowing too much or failing to pay full or any instalments; the credit granter must do the arithmetic on income and expenses, other assets, prospective income and expenses; the credit granter must see whether or not the prospective consumer is a good or bad risk insofar as previous borrowings and repayments are concerned.
29. This entire assessment pertains to the “proposed credit”, the “credit agreement” in particular and earlier “credit agreements”. This assessment does not pertain to any other interactions or agreements with third parties except insofar as such are themselves “credit agreements”.

Section 81(2)(b) - The purpose of applying for credit

30. Insofar as the credit agreement itself is concerned, there are numerous provisions in the NCA which regulate the content thereof. However, section 81(2) (b) deals with only one aspect thereof. That is the possible success or otherwise of ‘any commercial purpose’ if that is the purpose of applying ‘for that credit agreement’.
31. The commercial purpose does not pertain to any other or underlying agreement with other persons. It pertains only to the purpose of applying for the credit.
32. ‘Commercial’ is defined in the Shorter Oxford English Dictionary as “trading” , “of and related to trade” and “viewed as a matter of profit and loss”. There is no

definition in the NCA. ‘Commercial purpose’ in the obtaining of credit would be where the credit itself is to be used for trading – running a business, paying off debtors of a business, leasing business premises, acquiring equipment used in the running of a business, buying a share in a business, funding a business through an overdraft facility.

33. Clearly, many applications for credit have no connection with and do not touch sides with immovable property or registrations of a mortgage bond or mortgage loan agreements.
34. The fact that there is an application for credit and it is accepted by both credit granter and consumer that the granting of such credit will be secured by a mortgage bond registered over property does not mean that the requirement of such security will always mean that the purpose of obtaining credit is to enable the purchase of immovable property. It is quite possible that a consumer could apply for credit to fund the education of children at university, to pay out partners in a business enterprise, to purchase equipment for use in a business enterprise, to fund expenses ranging from medical treatment to expensive travel to renovations to other immovable property, to provide a pool of funds to enable casino gambling or investing on the Johannesburg Stock Exchange. The registration of a mortgage bond means no more than that the credit granter requires more than the promise to repay by a consumer who wishes to borrow money and that the credit granter has decided that immovable property is the most secure and best risk available to the credit granter.
35. Accordingly, the purpose of applying for credit may vary notwithstanding that a mortgage bond over immovable property is offered as security. Where a prospective consumer makes a ‘mortgage bond application’⁷ and (i) an offer to purchase property which has been accepted by a seller is produced⁸ and (ii) the mortgage loan agreement states that the proceedings of the credit granted are to be paid to the ‘seller’ of the immovable property⁹ and (iii) there is reference in the mortgage loan agreement to the “property which the Borrower is buying”¹⁰ and the “purchase price” – then it is safe to assume that everyone knows that the purpose for which the credit is sought is for the purpose of acquiring immovable property.

⁷ Page 9 onwards of the Bundle.

⁸ Common cause that the Offer to Purchase at page 1 of the Bundle was handed in.

⁹ Clause 1.18 of the mortgage loan agreement.

¹⁰ Clause 13.1 of the mortgage loan agreement.

36. In and of itself, the mere acquisition of immovable property is not a “commercial purpose”. The hope or expectation of profit from the eventual sale of immovable property is not trade or commercial enterprise. It is the making of an investment which has had favourable results. Such may happen by chance if a purchaser of immovable property acquires a residential property, lives there for forty years and then sells the property in order to downsize.
37. Such may happen by design if a purchaser of immovable property acquires land or a dwelling or an office block and sells same on at a profit within a shorter or longer time. If the making of profit was the primary intention and the buying and selling of the property was a trading activity or mercantile enterprise, then SARS may well conclude that this was a ‘commercial enterprise’ in respect of which tax (other than capital gains tax) should be levied on such business dealings. But the funds which have been granted as credit were not granted for a business enterprise or a trading deal or a mercantile exchange – the credit was made available to purchase property not to engage in commerce or trade.

THE FACTS OF THIS CASE

Application for mortgage loan finance

38. The plaintiff engaged with and granted credit to a highly qualified woman with a Ph.D who not only owns her own home in Johannesburg but has registered a mortgage bond over that property which she has paid off. She has prior experience and knowledge of obtaining credit secured by mortgage bond over property.
39. Defendant explained how Uren had told her and others that she would purchase the land, within one year the land would be subdivided and her property would be subdivided and could then be sold on as a profit. This was an area of sugar canne farms and the property would benefit from the development.
40. Defendant made application for credit and made available her identity document, her salary advice, her IRP 5 being her employees tax certificate, proof of her address, her banking details and a bank statement in respect of her FNB cheque account. She used the services of Debbie Mulder to submit all the documents – Lynette Prinsloo knew her to be a bond originator employed by Bettabond/Betterbond an aggregator of Exclusive Home Loans and Conveyancer van Rensburg testified that he knew her to be a mortgage or bond originator.

41. An electronic assessment was activated as per FPZ (being the documents at pages 32 and 33) of the Bundle. According to Lynnette Prinsloo, a specialist investigator at ABSA, the bank compiles a 'credit scorecard' based on all information furnished. The grading contained in the scorecard assesses risk (pertaining to the customer) and risk grade (pertaining to the purchase price etc).
42. Prinsloo described how the system assesses the risk involved. Personal details are checked, financial details such as income and expenditure considered, at least three month bank statements are to be provided and bank accounts are checked, customer profile considered (in the present case defendant was in fulltime employment), a credit bureau provides information on other commercial agreements (such as Telkom accounts), whether there are any outstanding civil judgments against the applicant (none in respect of defendant), the maximum instalment which could be paid based on the applicant's disposable income after household expenses have been paid, computation of how much was available to defendant to fund her payments, the amount of free residue available to the applicant to pay. All this information can be extracted from pages 32 and 33 of the Bundle when read with other documents.
43. In the present case, the application for mortgage loan finance in the amount of R 900, 000 was initially declined by the system and then, when sent to a credit manager, was approved in the lesser amount of R 720,000 as per the grant (at page 34 of the bundle).
44. According to Lynnette Prinsloo a valuation was performed on the Elysium property. Valuations are done to assess if the security offered is sufficient to underpin the loan. The valuation does not determine the outcome of the application for finance but it does impact on the scorecard percentages. Prinsloo pointed out that, if the security was considered insufficient, the loan could still be approved on provision of additional security. In the present case, the valuation was performed by an external company – Spectrum valuers who used F. Maartens for this purpose. The valuation is at page 20 of the Bundle and was conducted on 7th August 2007. It is not particularly informative - the property is described as "vacant land domestic", deeds office information is given and purchase information. The valuation of the land is stated to be R 900,000.

Availability of advice and enquiries re the NCA requirements

45. Prinsloo testified that she is aware of the NCA and that all employees do some training thereon. However, no bank employee makes holds discussions re the NCA with the applicant or explains risk to the applicant. It is the conveyancing attorney

who is legally qualified and who explains the import of the relevant provisions of the NCA to the purchaser or bond applicant when the transfer or bond documents are signed. The means whereby the bank ensures that the conveyancer is compliant with the duties of the credit granter in terms of sections 80 and 81 is to require the conveyancer's confirmation in a certificate, the conveyancer being mandated to sign on behalf of the bank.

46. Prinsloo stated that there was no indication on any documentation that the application for the home loan finance was for anything other than purchase of immovable property. The codes at page 32 of the Bundle only deal with residential property. If a loan was required for commercial purposes then there is a different type of loan applicable – 'Commercial Property Finance' – where this was for an 'ordinary' home loan.
47. Defendant signed the documentation pertaining to registration of transfer into her name and registration of the mortgage bond over the Elysium property. At issue was whether or not defendant ever attended at the conveyancer's offices where the representative of the plaintiff bank could ever have taken the steps to assess her understanding of risk and costs of the credit, her rights and obligations under the credit agreement.
48. The conveyancing attorney, Pieter de Wet Janse van Rensburg, was adamant that she must have attended at his offices. He did not recall that he ever went to her home although he does 'quite often' go to clients. Defendant must have been attended to by one of his conveyancing ladies to sign the documents – the transfer and bond documents usually being signed together – it being a process which can take some hours and which he would not personally supervise. Where required, he would have taken her oath and commissioned documents as indicated thereon.
49. He said it did not seem 'possible' that these conveyancing documents could have been signed without defendant attending at his offices or that Debbie Mulder alone was the only person ever to present defendant with any documents to be signed.
50. Defendant said she "does not remember" ever signing any documents at Roodepoort – where the conveyancer's offices are situated – and "doesn't remember going to Roodepoort" and "I don't remember doing that" ie signing documents at Van Rensburg's offices and that "I cannot recall going".
51. Her evidence was initially that Patricia and Debbie had come to her home on two occasions when all documents were signed. Under cross-examination she said that she only signed documents "on one occasion". This could not be possible since the

sequence of documents first required an offer to purchase to be accepted, then an application for the bond finance, then signature of the transfer and bond registration documents. Defendant then took the view that Debbie and/or Patricia must have come to her home more than twice and that she had signed documents on more than one occasion. She became more certain that she had not been to conveyancer Van Rensburg's offices in connection with this transaction.

52. When asked who had brought the documents to her house, defendant was careful in her answer and responded (after thinking) that they were brought by Debbie.
53. Neither Debbie nor Patricia ever explained the contents of any of the documents to defendant. But then defendant said that one or both did 'explain the loan and the issue of repayment'. She also understood that she had an arrangement with Cecil Uren that, during the first year of the bond there would be payment by 'early trading' which apparently meant that Uren or his company would advance funds for a period of time.
54. Defendant did not remember if anyone had explained the issue of legal costs to her or how transfer costs were calculated.
55. Defendant's evidence was that she had obtained a loan for her Kew property, registered a bond thereover, knew she had signed a loan agreement to repay, knew that the bank could call up the loan if she defaulted on her instalments, that if she could not pay the bond that the property could be sold. As far as the Elysium property was concerned, she said that her understanding was that it was a development. She appeared not to want to concede that she participated in the same transactions in respect of the Elysium property as she had with the Kew property. In response to the question that this transaction was 'the same as the Kew property', her answer was 'that was not the way it was sold to me'.
56. However, she was aware of the 20 year period over which the instalments would be paid. Because she was so committed to the investment and the development she said there was only going to be one year of repayment and then the property would be subdivided and sold. She never thought she would keep the property for 20 years and did not think about the possibility that the property could be sold to pay the indebtedness if the loan repayments were not made.
57. Initially she said that Uren had made the monthly repayments but when presented with proof of debit order repayments debited on her own FNB cheque account she conceded these payments had been made by her.

Conveyancers certificate

58. Van Rensburg gave evidence that he had signed a conveyancer's certificate (document 66.2 of the bundle) which includes, in paragraph 6 thereof, a statement that

"I hereby confirm that as required by the National Credit Act (No 34 of 2005, as amended from time to time) and in order to avoid reckless credit, I have explained the credit agreement(s) to the consumer concerned (including security documents where applicable) and the preponderance of information at the time of conclusion thereof, indicated that the consumer generally understood or appreciated his rights, costs and obligations under the proposed credit agreement(s). In doing this I have also, amongst other things, specifically discussed the matters prescribed by you from time to time."

59. Under cross-examination it became somewhat obvious that Van Rensburg did not have deep or detailed knowledge of the NCA. For instance, he was unable to quote chapter and verse of the sections.

60. However, in 'broad terms' he was able to indicate a number of matters on which he believed it was necessary to satisfy himself: that the client knows the amount she was borrowing, the purpose of the amount borrowing or how it is to be spent, the authorities to pay and the guarantees presented, the first payment explained, the consequences of not paying the bond. As far as the 'reasonable steps' to be taken in terms of section 81 he said he would make sure that the consumer understood the amount, the purpose, the repayments, when repayments were due and the consequences of not paying. He referred to the risk of not being able to repay which would mean that the asset might be attached or repossessed by the bank. Other risks would generally include risks of insurance. All these issues would be covered in the process of the client signing the relevant documentation.

61. When question on the purpose of obtaining the credit, Van Rensburg indicated that the documentation being signed was in respect of a residential mortgage and he understand it was sufficient to know that the loan was being taken out for purposes of purchasing the property. When pressed, he questioned whether he had a duty to advise any client who had the intention of selling on the property.

CONCLUSION

62. Plaintiff and defendant have clearly been at odds throughout in their understanding of the import of the NCA with the bank arguing that the Act applies to credit agreements whilst the defendant is more concerned with the underlying sale and purchase agreement.
63. I have already commented at length on the NCA, the purposes of the Act, that the Act is limited to regulation of credit agreements, that the issue of security is not an essential part of credit agreements, that credit agreements cover multiplicities of interactions and agreements where neither security nor mortgage may be involved. Section 81(2)(a) requires an assessment of the consumer's understanding and appreciation of risk, the consumer's previous experience of credit and the financial position of the consumer.
64. Section 82 (1) of the NCA permits the credit provider to determine, for itself, the evaluative mechanisms and procedures to be used in meeting its assessment obligations provided that such "results in a fair and objective assessment and must not be inconsistent with the affordability assessment regulations made by the Minister". This subsection confirms that the evaluation mechanisms pertain to affordability.
65. I have regard to the assessment mechanism of the plaintiff as described by Prinsloo and Van Rensburg and as recorded in the documentation. There is both an electronic computer evaluation and there is a human intervention when thought necessary. What is taken into account has already been discussed in this judgment. The provision of the information utilised to compile this assessment has not been in dispute. I am satisfied that reasonable steps are in place to assess and that such assessment did take place in regard to the defendant's debt repayment history and her financial means, prospects and obligations.
66. My only concern is whether or not reasonable steps have been taken to assess the defendant's own general understanding and appreciation of the risks and costs of the credit agreement as well as her rights and obligations under the agreement.
67. On the one hand, defendant is certain that Debbie and Patricia advised her of very little – which would not help the bank since these ladies did not work for plaintiff. On the other hand, defendant was doubtful but not absolutely certain that she had not been to the conveyancers office and been advised of anything. Insofar as attendance at the conveyancer's offices is concerned, defendant's responses trouble me. On the issue of going to the conveyancer she did not 'remember' but she was far more certain that "I have absolutely never been to ABSA".

68. The Conveyancer was certain that the documentation could only have been signed at his office. His explanation of what needed to be explained to meet the requirements of section 81(2)(a) of the NCA was more than sufficient.
69. Defendant's indignation at the scam to which she had been exposed and the loss of her investment appears to have clouded her attitude towards the bank itself. She seems to have been most concerned that the bank was acting differently than when she purchased her Kew property and had a direct relationship with the bank. She was also indignant that she had been assured that, while the investigation into the Uren transactions was underway, her bond would be 'ringfenced'. Finally, both she and Ms Mohlomi felt that the bank had not reported back to them on the investigation into Uren which had taken place.
70. Defendant's distress in discovering that the purchase price of R 900, 000, which did reflect her willing buyer's valuation of the property, bore no relation to other sales then or now obtainable in the area; that the property could not be subdivided; that there was no development is all absolutely understandable. But those are misrepresentations or risks taken in respect of an agreement of sale not in relation to the application for credit.
71. It is on this point that I find I cannot assist defendant. The difference between the value of that which she bought at the time that she bought it and the value which it had to and for her versus the value of that same merx to other persons is not a risk for purposes of the granting of credit. If she had bought shares in Anglo American in 2007 with monies loaned from the bank could she now complain that the bank did not ascertain that those shares would decline in value out of all recognition? The answer is, of course, no.
72. The NCA is not about the risk in the value of that which is acquired with credit. It is about risk in ability to pay for credit.
73. The assessment which is required to be conducted in terms of section 81 of the Act must be situate in context. Defendant is a highly educated woman who has previously satisfactorily entered into a credit agreement. She did not tell the court that she did not understand the concept of the bond or capital or interest or instalments or that failure to pay instalments could place the security at risk of attachment and sale in execution.
74. Instead, she made it clear that, although she knew all those factors, in this particular case she had no concern about these issues because she intended to subdivide and sell her property within a shorter rather than longer period of time.

Her entire attitude to this credit agreement has been polluted by her determination to see this application for credit as distinct from other applications for credit by reason of the promises made by those who presented her with this opportunity.

75. I do not find that there was a 'commercial purpose' in applying for this credit. Her purpose was to obtain funds to purchase immovable property. Her ultimate hopes and intentions in relation to this property cannot be the concern of the credit provider. If the credit provider was to examine and assess every hope of profit in every acquisition of property (immovable or otherwise), funding of studies (fine arts versus medicine) and so on, the credit providers would be intruding into areas which the Legislature can never have envisaged.
76. There was no business or mercantile or trade interest in the application for credit. The acquisition of immovable property (unless perhaps a commercial long lease or units for rental purposes) is not a commercial undertaking. It is the acquisition of an asset. What Cecil Uren and Patricia and Debbie and defendant may have known or believed – that there would be a subdivision and development of the land, does not necessarily make this a commercial venture.
77. Even if I were to find that the duty rested upon the credit provider to pertinently enquire of the consumer as to her purpose in applying for credit, the answer would obviously have been "to buy a piece of land". Does the credit granter have to go further and ask about the improvements to be made to the land – whether by way of erection of a residential dwelling, a garage, a swimming pool, a kitchen extension, subdivision into two or more portions, building another dwelling or cottage or tennis court on the new portion? I cannot see that this could or should be within the competency of a credit provider. In any event, such improvements do not create a commercial purpose.
78. In the result I cannot find that the plaintiff was 'reckless' as contemplated in the National Credit Act in its granting of credit to defendant.
79. An order is made as follows:
 - a. Defendant is to make payment to plaintiff:
 - i. of the sum of R 692, 414.48 (six hundred and ninety two thousand, four hundred and fourteen rand and forty eight cents);
 - ii. Of interest on the aforesaid sum at the rate of 7.20% per annum as from 18 May 2012 to date of final payment;
 - iii. Costs of suit on the attorney and client scale.

- b. The immovable property, Erf 160 Elysium Township, Registration Division ET, the Province of Kwa-Zulu Natal, Measuring 4977 Square Metres, Held by Deed of Transfer T 6401/07, is declared special executable.

80.

81. Reasonable steps in circumstances –

82. Commercial – nobody told bank.

83. KS – assessment = ability of consumer to meet credit obligations not value of merx.

84. Agreed that not for defendant to volunteer information but for bank to ask for information. Provider to make enquiry and pose questions. Must enquire purpose of transaction.

85. Noted by Van Rensburg that asked re commercial purpose. = 2nd assessment not dealt with.

86. Pye – what do with property is own business not part of credit.

87. Section 8 (4) (d) = mortgaged agreement or secured loan = credit agreement.

She appeared not to want to concede that she participated in the same transactions in respect of the Elysium property as she had with the Kew property. In response to the question that this transaction was 'the same as the Kew property', her answer was 'that was not the way it was sold to me'.

DATED AT JOHANNESBURG 18th MARCH 2016

SATCHWELL J

Counsel for Plaintiff: Adv Pye

Attorneys for Plaintiff: Tim Du Toit & Co Inc.

Counsel for Defendant: Adv Lesomo

Attorneys for Defendant: Seokane Lesomo Inc

Dates of hearing: 08, 09 and 10th March 2016.

Date of judgment: 18th March 2016.

