REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)

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

18/10/2021
....
SIGNATURE DATE

CASE NO: A58/2020

In the matter between:

FIRSTRAND BANK LTD	Appellant
and	
NESTA NEL	First Respondent
VUSIMUZI CHURCHILL MONTGOMERY NKAMPBULE	Second Respondent
OLD MUTUAL FINANCE (PTY) LTD	Third Respondent

JUDGMENT

MASHILE J:

INTRODUCTION

[1] This appeal emanates from the magistrate's Court of Barberton. The appeal follows upon an order by Magistrate LM Mhlanga on 10 November 2020 that the Appellant had granted reckless credit to the Second Respondent. The appeal seeks to overturn the whole judgment and order of the decision of the Magistrate. The case comes before this Court with leave of the Court *a quo*. The Respondents are not opposing the appeal. As such, no opposing papers have been filed and neither the Respondents nor their representatives appeared before this Court on the date of the hearing of the appeal.

FACTUAL MATRIX

[2] To have a proper perspective of this matter, terse factual background that led to the matter before the Court *a quo* is imperative. On 16 April 2019, the First Respondent applied for debt review. On 7 May 2019, the First Respondent advised the Appellant that she has applied for debt review. On 14 May 2019, the Appellant provided the First Respondent with certificates in terms of which the details of the Second Respondent's indebtedness to the Appellant was disclosed.

[3] The indebtedness of the Second Respondent stems from two personal loan agreements concluded between the parties on 3 September and 2 December 2015 respectively. In terms of those agreements, the Appellant advanced certain amounts to the Second Respondent. More than 3 years after the advancement of

the credit, the Second Respondent experienced financial hardships, which led to his default in payment of monthly instalments.

[4] On 28 May 2019, the First Respondent presented to the Appellant a recommendation in terms whereof she suggested that firstly, the Second Respondent's indebtedness to the Appellant be paid off by the reduction of the respective amounts payable under both personal loan agreements. Secondly, that the shortfall in monthly instalments be recovered by extending the period over which the initial loans were to be settled.

[5] The Appellant accepted the First Respondent's proposal as described *supra* in respect of the loans. On 12 June 2019, final acceptance letters were remitted to the First Respondent setting out the conditions under which her recommendation was accepted. The Appellant subsequently restructured the Second Respondent's account in accordance with the valid and binding debt rearrangement agreement that was concluded with the First Respondent. The Appellant expected the Second Respondent to pay the agreed amounts to the Appellant as per the newly concluded agreement but he did not. Upon his failure to pay, the Appellant informed the First Respondent of the Second Respondent's non-payment on 28 May 2019.

[6] On 15 August 2019, the First Respondent served the present application on the Appellant. As part of the relief sought, she required the Court *a quo* to grant an interim order against the Appellant compelling it to supply documents that relate to reckless credit.

GROUNDS OF APPEAL

[7] Principally, the appeal is premised on four grounds. These are that:

7.1 The Court *a quo* erred in finding that the credit granted by the Appellant to the Second Respondent was reckless;

7.2 The Court *a quo* further erred by upholding the prayer for interim order against the Appellant to supply documents as it relates to reckless lending;

7.3 The Court *a quo* erred by not dismissing the Application for Debt Review as being inappropriate in the circumstances of this matter; and

7.4 The First Respondent entered the arena and acted beyond the scope of her statutory duties.

<u>ISSUES</u>

[8] The issues for decision are not different from the grounds of appeal. Was the credit that the Appellant granted to the Second Respondent some 3 years prior to debt review application reckless? Is the magistrate's court statutorily competent to grant specific performance? Given the facts in this matter, was the relief granting the debt review proper?

<u>LEGAL FRAMEWORK</u>

[9] This matter is based on various provisions of the National Credit Act, 34 of 2005 ("the NCA"). As such, it will be useful to first describe the different provisions. The starting point must be Section 80, which provides that:

"80(1) A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119(4)—

(a) *the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time; or*

(b) *the credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that-*

(i) *the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement; or*

(ii) *entering into that credit agreement would make the consumer over-indebted."*

[10] Section 81(2) states that:

(2) *"A credit provider must not enter into a credit agreement without first taking reasonable steps to assess-*

(a) *the proposed consumer's-*

(i) *general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;*

(ii) *debt re-payment history as a consumer under credit agreements;*

(iii) *existing financial means, prospects and obligations; and*

(b) *whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement."*

[11] Section 81(4) sets out what will constitute a defence to an allegation that credit was recklessly granted. It provides that:

"(4) For all purposes of this Act, it is a complete defence to an allegation that a credit agreement is reckless if—

(a) the credit provider establishes that the consumer failed to fully and truthfully answer any requests for information made by the credit provider as part of the 10 assessment required by this section; and

(b) a court or the Tribunal determines that the consumer's, failure to do so materially affected the ability of the credit provider to make a proper assessment."

[12] To the extent that the Appellant relies on the provisions of Section 166, entitled: 'Limitations of bringing action', it is important to cite it in full below:

"(1) A complaint in terms of this Act may not be referred or made to the Tribunal or to a consumer court more than three years after—

(a) the act or omission that is the cause of the complaint; or

(b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased."

[13] In *Wesbank, a Division of FirstRand Bank Limited v Michelle Barnard and others* **Case no: A05/18** Mbombela Circuit Court delivered on the 29 November 2018, this Court held that:

"[17] In a nutshell a debt counsellor can seek a declaration of reckless credit only under the following circumstances:

17.1 the consumer must have sought a declaration of reckless credit in his/her application for debt review.

17.2 the debt counsellor must make a determination of whether any of the consumers' credit agreements appear to be reckless, and

17.3 the debt counsellor must then reasonably conclude that any of the consumer's credit agreements appear to be reckless."

[14] Regulation 24(2) of the NCA provides that a debt counsellor (the First Respondent) is obliged to notify credit providers that a credit receiver had applied for debt review within 5 days after the application for debt review. If a Debt Counsellor fails to do so within the stipulated period, he or she can in terms of Regulation 3 apply to the National Credit Regulator for an extension of such time. The National Credit Regulator may grant such extension upon good cause shown. Lack of compliance with the time prescribed in Regulation 3 and failure to apply for condonation for the extension of the time will necessarily result in a dismissal of the debt review application.

EVALUATION

DECLARATION OF RECKLESS CREDIT

[15] The Appellant contended that the Court *a quo* could not have made a finding of reckless credit without any evidence in that regard having been levied. Moreover, the Court *a quo* seems to have been on a frolic of its own when it granted the order because it is not sought in the notice of application. This must be correct. The notice of application on which the First Respondent relied when she launched the application reads as follows:

"BE PLEASED TO TAKE NOTICE that NESTA NELL (hereinafter referred to as '"the Applicant') intends to make application to this Court for and order in the following terms:

(1) *That the First Respondent be declared over-indebted as set out in Section 79 (1) of the National Credit Act 34 of 2005 (as amended)*

(2) *That the First Respondents payments to the other Respondents be re-arranged in the following manner:*

a. *that the period for payment in respect of each credit agreement with each Respondent be extended and the amounts payable per month be reduced accordingly; and / or*

b. *That such rearrangement be reviewed at the Court's discretion after a period of time to be determined by the above Honorable Court.*

(3) *An interim order as per Annexure X be granted against 3rd and 4th Respondents, compelling them to supply documents as it relates to reckless credit;*

(4) *Ordering that any Respondents who oppose this application be ordered to pay the costs of the application; and*

(5) *Further and/ or alternative relief."*

[16] The Court *a quo* should, on this basis alone, have dismissed the application simply because it is not what the Second Respondent wanted. The issue pertaining to the Second Respondent's over indebtedness is irrelevant to this matter.? it is important to note that at the time when the Second Respondent applied for credit in 2015, the question of over indebtedness did not feature anywhere. His over indebtedness now, if any, cannot be ascribed to the credit that was advanced some 3 to 4 years earlier. The Second Respondent complied with the terms and conditions of the loan agreements until he over committed himself later. The loan agreements were not the cause of his over indebtedness.

[17] The Court *a quo* could not have declared the Appellant to have granted reckless credit because according to the Wesbank case *supra* circumstances under which a credit provider can be so declared are circumscribed. These are firstly, that the

consumer must have sought a declaration of reckless credit in his/her application for debt review, which I have already dealt with *supra*. Secondly, that the debt counsellor must make a determination of whether any of the consumer's credit agreements appear to be reckless. Thirdly, that the debt counsellor must then reasonably conclude that any of the consumer's credit agreements appear to be reckless.

[18] The debt counsellor could not have made a determination that the loan agreements appeared to be reckless because there was no evidence demonstrating that at the time when the loans were advanced, the Appellant did not observe the provisions of Sections 80(1) and 81(2). The Court *a quo* therefore misdirected itself when it declared the transactions to be reckless credit because it lacked basis to make that determination. The misdirection warrants intervention by this Court.

PRESCRIPTION IN TERMS OF SECTION 166

[19] There is another reason why the Court *a quo* misdirected itself and that is to be found in Section 166 of the NCA, which I have quoted in full *supra*. The essence of the provision in Section 166 is that a complaint cannot be referred to a tribunal or consumer court 3 years after the act or omission that is the cause of the complaint or in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased. The credit was advanced in September and December 2015 respectively. The First Respondent launched the debt review application on 15 August 2015 being outside of the 3-year period prescribed in Section 166. This simply means that the Court *a quo* should not have entertained the application at all as it is in contravention of the provisions of the NCA.

LACK OF COMPLIANCE WITH REGULATION 24(2)

[20] Insofar as Regulation 24(2) of the NCA is concerned, the Appellant stated that the Second Respondent applied for debt review on 16 April 2019 and the First Respondent only informed the Appellant about the application on 7 May 2019. Regulation 24(2) requires that the credit provider be informed of the application within 5 days of the date of the launching and that if a debt counsellor fails to comply with the period laid down in the Regulation, he or she must apply for condonation. The National Credit Regulator can, on good cause shown, grant such condonation.

[21] The First Respondent's failure to comply with Regulation 24(2) is glaring and it is not denied. The Second Respondent applied for debt review on 16 April 2019 but news of this only reached the Appellant on 7 May 2019 being approximately 15 days after the expiry of the 5-day period mentioned in Regulation 24(2). Additionally, she made no attempt to apply to the National Credit Regulator for condonation. The Court *a quo* ought to have dismissed the application on the ground of lack of compliance with the Regulation.

SPECIFIC PERFORMANCE

[22] The interim order granted by the Court *a quo* that the Appellant is directed to furnish certain documents relating to reckless credit in prayer 3 of the notice of application is incompetent. In this regard, it is important to note that Section 46 of the Magistrate's Court Act 32 of 1944 specifically sets out matters over which the magistrate's court does not have jurisdiction. The Section provides:

"46 "Matters beyond the jurisdiction

(1) ..

(2) *A court shall have no jurisdiction in matters-*

(a) in which the validity or interpretation of a will or other

testamentary document is in question;

(b) *in which the status of a person in respect of mental capacity is sought to be affected;*

(c) *in which is sought specific performance without an alternative of payment of damages, except in-*

(i) *the rendering of an account in respect of which the claim does not exceed the amount ^determined by the Minister from time to time by notice in the* Gazette;

(ii) *the delivery or transfer of property, movable or immovable, not exceeding in value the amount ^-determined by the Minister from time to time by notice in the* Gazette;

(iii) *the delivery or transfer of property, movable or immovable, exceeding in value the amount determined by the Minister from time to time by notice in the* Gazette, *where the consent of the parties has been obtained in terms of section 42 of Act 56 of [1984.]*

(d) *in which is sought a decree of perpetual silence."*

[23] The magistrate's court is therefore barred from dealing with matters pertaining to specific performance without the alternative of a damages claim or unless it forms part of the 3 exceptions mentioned in the Section. The Court *a quo* therefore granted this order in violation of the provisions of the Magistrate's Court Act 32 of 1944. As such, the order cannot be countenanced to stand.

COSTS

[24] Here the Appellant's complaint is that it is plain that the debt review application launched by the First Respondent was objectively a non-starter in many respects. The launching of that application, regardless of the defects associated with it,

meant that the First Respondent descended into the arena, which act should make her vulnerable to a cost order of the appeal. The Appellant points out that this is borne out by the fact that the First Respondent and not the consumer, the Second Respondent, deposed to the replying affidavit.

[25] Furthermore, the First Respondent sought and was granted relief that was not supported by the notice of application. In fact, the relief was not even foreshadowed in the founding affidavit, which of course means that it is not one that the Second Respondent wanted. Even the evidence before the Court *a quo* did not in any manner suggest that the credit that was advance in 2015 led to the Second Respondent's over indebtedness. This probably is an explanation why the Second Respondent never sought a relief declaring that the Appellant had granted reckless credit to him. It is in this sense that I stated earlier that the Court *a quo* was on a frolic of its own when it declared the transactions to have been reckless credit.

[26] The numerous defects in the debt review application are indicative that it should never have been brought in the first place. The appeal was a clear sign that not all was well with the application that had been granted by the Court *a quo*. The First Respondent would, despite that fact, not withdraw its opposition promptly to avoid gratuitous costs being incurred. When the First Respondent ultimately withdrew, costs that could have been avoided had already been sustained. The question is who should be liable for them? Since the First Respondent is the party who could have ensured that such costs were not suffered, it should be mulcted with the costs of the appeal.

CONCLUSION

[26] In the result, I propose the following order:

1. The appeal is upheld;

2. The order of the Court *a quo* is set aside and substituted for:

"The application is dismissed with costs"

3. The Respondents are liable for the costs of appeal and those of the Court *a quo*.

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

I agree,

D GREYLING-COETZER
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 18 October 2021 at 10:00.

APPEARANCES:

Counsel for the Appellant:	**Adv BD Stevens**
Instructed by:	**CF Van Coller Inc**
	C/O Cochrane Inc
Counsel for the Respondent:	**No appearance**

Instructed by:	**EDJ Attorneys** **C/O Gerrie Groenewald Attorneys**
Date of Judgment:	**18 October 2021**