

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO:2018/28419

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
<u>7/3/2019</u>	
DATE	MOKOSE SNI

In the matter between:

MAKDA: FATIMA (nee HADJEE)

Applicant

and

MFC, a Division of Nedbank Limited

1st Respondent

ABSA BANK LIMITED

2nd Respondent

COTWALL: JHAVEED

3rd Respondent

RHOKEM MOTORS

4th Respondent

AUTO INTEGRITY

5th Respondent

CAPITEC BANK LIMITED

6th Respondent

JUDGMENT

MOKOSE J

- [1] The applicant seeks an order to declare two credit agreements concluded with the first and second respondents declared reckless credit agreements in accordance with Section 80 of the National Credit Agreement Act 34 of 2005 ("the NCA") and ancillary thereto, the applicant seeks additional relief that the applicant's obligations under the said agreements be set aside.
- [2] The basis of the declarator sought is that the first and second respondents failed to conduct the requisite credit assessment as envisaged by Sections 81(1) and 81(2)(a) of the NCA, alternatively, the applicant contends that Section 80(1)(b) of the NCA is applicable and that restitution be ordered due to an alleged fraud that was perpetrated by the third respondent.
- [3] At the commencement of the matter, the applicant abandoned the alternative order sought that restitution be ordered due to a fraud having been perpetrated by the third respondent.
- [4] The common cause facts are the following:
- (i) on 1 November 2017 the applicant attended at the dealership and personally signed the credit agreement with the first respondent to purchase a Jeep Grand Cherokee vehicle from the fifth respondent;
 - (ii) the release form was duly signed by the applicant who then took delivery of the vehicle;
 - (iii) on 2 November 2017 the applicant attended at the dealership and personally signed the credit agreement with the second respondent to purchase a BMW motor vehicle from the fourth respondent;

- (iv) the applicant signed the release note and took delivery of the vehicle.

[5] The applicant's case is that the requisite credit assessment as envisaged by Section 81(2) of the NCA was not conducted by the first and second respondents. If the credit assessment had in fact been conducted as alleged, they chose to extend credit without demanding an explanation from the applicant regarding a discrepancy in her expenses as listed on the credit application. The applicant further alleges that she had failed to fully disclose her income and expenditure. As such, the first and second respondents as credit providers could never have acted reasonably and had in fact acted irrationally.

The law

[6] Section 80(1) of the NCA provides as follows:

- (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.

[7] Section 81(1) of the NCA provides as follows:

"(1) When apply for a credit agreement, and while that application is being considered by the credit provider, the prospective consumer must fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section."

[8] Section 81(2) provides as follows:

"(2) When a determination is to be made whether a credit agreement is reckless or not, the person making that determination must apply the criteria set out in subsection (1) as they existed at the time the agreement was made, and without regard for the ability of the consumer to –

- (a) meet the obligations under that credit agreement; or
- (b) understand or appreciate the risks, costs and obligations under the proposed credit agreement,

at the time the determination is made.

[9] Section 81(4) provides as follows:

"(4) For all purposes of this Act, it is a complete defence to an allegation that 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 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."

[10] When making a determination whether a credit agreement is reckless or not, one needs to turn their attention to the period when the consumer applied for credit. If during this period a credit provider failed to conduct an assessment or, if having conducted an assessment, a credit provider entered into a credit agreement with the consumer despite the fact that a preponderance of information available to the credit provider indicated that the consumer did not understand or appreciate the risk, costs or obligations under the proposed credit agreement or entering into that credit agreement would make the consumer over-indebted, the credit agreement is reckless.

[11] Furthermore, Section 81(2) of the NCA provides that a credit provider must take reasonable steps in its assessment as described by Louw J in the matter of Absa Bank v De Beer¹ where he said the following:

"The first requirement is that 'reasonable steps' must be taken to assess the proposed consumer's existing means, prospects and obligations. To me this also means that the assessment must be done reasonably, i.e. not irrationally. Only a reasonable assessment will comply with the following phrase in the preamble to the Act – 'to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting.'

[12] A prospective consumer's obligation commences the moment he or she applies for credit and continues to exist while the credit application is being considered by the credit provider. The consumer must fully and truthfully disclose the information required by the credit provider.

¹ 2016 (3) SA 432 at para [60]

- [13] The applicant in the matter in *casu*, contends that the requisite credit assessment as envisaged in Section 81(2) of the NCA was not conducted by the first and second respondents. The applicant argues that she did not know and understand the true nature of the Absa agreement in particular, nor did she appreciate the risks and her obligations in terms of the said agreement. As a result of the agreements concluded, she does not have the means to comply with her obligations in terms of the credit agreements and tenders the return of the vehicles by handing over tracking reports in respect of such vehicles.
- [14] The first respondent denied that no credit assessment had been made at all or that it was not done adequately and in terms of the NCA. From the papers on hand, it is evident that a full and proper credit assessment was done with the information provided by the applicant to ensure that she was indeed in a financial position to honour her obligations.
- [15] The second respondent was of the view that there was a dispute of facts fundamental to the application and not only in respect of the alleged fraud and that the allegations should have been tested in cross-examination. In support of this contention, counsel for the second respondent brought to the court's attention statement of accounts which showed large amounts of monies having been received into the applicant's bank account, far in excess of the amounts declared as her earnings in the credit application. However, counsel for the second respondent realised that this should have been brought in *limine* for consideration by the court. He however, agreed with the submissions of the first respondent that the assessment had been made in terms of the NCA.

[16] Counsel for the second respondent also brought to the court's attention the fact that the applicant was a forty-year old Grade 12 teacher. The second respondent was of the view that bearing in mind the trite principle of *caveat subscriptor*, the applicant should not be assisted in the application before the court.

[17] After counsel for the applicant indicated that he was abandoning the allegations of fraud on the part of the fifth respondent, counsel for the fifth respondent did not make any submissions but to confirm that the applicant participated in some meaningful way in the application by submitting her driver's licence.

[18] The court in the matter of *Edwards v Firstrand Bank Ltd t/a Wesbank*² reiterated that:

"Human experience has shown that contracting parties often attempt to evade their contractual obligations by denying that they were aware or assented to the terms of an agreement. This is why our courts adopted the caveat subscriptor rule years ago. This entails that a person who claims not to have read or appreciated the terms to which he has bound himself cannot generally escape the consequences of not having read the document before signing it. In other words, he has assented to what appears in the document above his signature."

[19] It is evident from the papers before this court that the applicant was not coerced into signing the credit agreements. She took delivery of the vehicles and made several payments of the monthly instalments. There is no evidence of duress or misrepresentation on the part of the respondents' employees. This is not evidence of a person who did not understand or appreciate the risks and obligations of the agreements. The court also takes note of the fact that the applicant does not dispute

² 2017 (1) SA 316 (SCA) at paragraph [47]

that an application for credit was made by her nor does she dispute that she signed and acknowledged delivery of the said vehicles. Accordingly, I am of the view that no case has been made out by the applicant for the relief sought.

Reckless credit

- [20] The applicant seeks an order that the credit agreement concluded with the respondents be declared reckless and set aside. The applicant makes a bald allegation that Absa failed to conduct a credit assessment at all and secondly, that despite the credit assessment, Absa should not have granted the credit as she was found to have understated her expenses. Accordingly, the credit provider could not have acted reasonably in extending credit to a party that is untruthful.
- [21] From the answering affidavit, the second respondent went to great lengths to explain not only how the assessment was done, but also how credit applications are assessed and processed. The second respondent averred further that the result of the assessment revealed that there still remained a surplus of income after all the applicant's declared and verified expenses were calculated.
- [22] In terms of the NCA, the time for determining whether an agreement is reckless is the time when an agreement is entered into. It is evident from the papers that despite the information the applicant furnished herself, Absa nevertheless increased the amount of living expenses to a minimum amount having consulted the credit bureau records. This is evidence that the second respondent took reasonable steps to assess the applicant's obligations under the instalment sale agreement, her debt repayment history and her existing financial means.

[23] The court in the matter of Horwood v Firststrand Bank Ltd³ held that where a credit provider has taken the required 'reasonable steps to assess' the matters referred to in Section 81(2) NCA, the credit agreement is not reckless in terms of Section 80(1) of the NCA whether or not the assessment is tainted by a consumer's incomplete or untruthful answers.

[24] I am of the view that the applicant has failed to meet her onus of proving that the credit assessment performed was contrary to the provisions of the NCA. Accordingly, the applicant has failed to make out a case for this relief and the application must accordingly fail.

Costs

[25] Counsel for the second respondent made submissions to the court that costs be awarded on a scale as between attorney and client to mark its displeasure with the applicant's conduct, particularly her admission to providing false information to her lenders.

[26] Counsel for the first respondent did not make out a case for a costs award on the scale as between attorney and client. He merely asked the court to award cost on a party and party scale

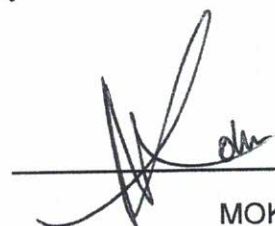
[27] Counsel for the fifth respondent however made submissions that the applicant was not justified in launching these motion proceedings as against it and as such, is entitled to a cost order.

³ 2011 JDR 1151 (GSJ)

Costs

[28] I am of the view that the costs should follow the result. Strong argument and reasons were not made to award the costs on a scale as between attorney and client and as such, the following order is made:

- (i) the application is dismissed;
- (ii) the applicant is ordered to pay the costs of the first, second and fifth respondents on a scale as between party and party.



MOKOSE J

Judge of the High Court
of South Africa

Gauteng Division,
Pretoria

For the Applicant:

Adv R Bhima instructed by
Hajibey-Bhyat Inc

For the First Respondent:

Adv CJ Welgemoed instructed by
Strauss Daly Attorneys

For the Second Respondent:

Adv R Scholtz instructed by
Lowndes Dlamini Attorneys