IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case no. **6115/2017**

In the matter between:

VKB LANDBOU (PTY) LTD Applicant

and

HERMANUS CHRISTIAAN JOHANNES VAN DEVENTER Respondent

CORAM: **I VAN RHYN AJ**

HEARD ON: **26 APRIL 2018**

JUDGMENT BY: **I VAN RHYN AJ**

DELIVERED: **5 JULY 2018**

INTRODUCTION:

[1] The Applicant, VKB Landbou (Pty) Ltd carries on business as a financier of farmers and farming activities with its principal place of business in Reitz, Free State Province.

[2] The Respondent is Mr H C J Van Deventer, a farmer and owner of several farms in the district of Reitz. The Respondent has been a client of the Applicant since approximately 1983.

[3] The Applicant's claims against the Respondent are for payment of an amount of R1,563,097.77, interest on the said amount as well as a declarator that the two agreements, ("Memorandum van Ooreenkoms" and "Perfekteringsooreenkoms") concluded between the parties authorising the Applicant to sell four immoveable properties and specified moveable assets, are valid and enforceable and authorizing and ordering execution of the said agreements. In the alternative, should it be found that the agreements are not valid and enforceable, Applicant claims payment and perfecting of the notarial bonds.

[4] The amounts due in terms of the various agreements and the interest rates claimed are not in dispute. The Applicant complied with s 129 of the National Credit Act 34 of 2005 (hereinafter

referred to as “the NCA”) The Respondent raises the following three defences namely:

(a) That the various credit agreements entered into between the Applicant and Respondent constitute reckless credit and that the Respondent’s obligations under the various agreements should be set aside,

(b) In the alternative, the Respondent prays that he be declared over-indebted and that the force and effect of the credit agreement be suspended until the date as determined by this Court and that his obligations are restructured in terms of Section 87 of the NCA,

(c) In addition to the defences stemming from the NCA the Respondent further relies thereon that the agreements so concluded were unconstitutional in that the Respondent’s rights to constitutional freedom and equality enshrined in Sections 18, 22, 23, 25 and 31 of the Constitution of the Republic of South Africa has been infringed upon as the Respondent was forced to sign the documentation upon which the Applicant relies on in the present application.

[5] The Respondent has lodged a counter-application based on the alleged reckless credit and/or over-indebtedness and therefore seeks such a declarator and the setting aside of his obligations under the various agreements, alternatively that he be declared over-indebted and suspending and/or restructuring his obligations.

[6] Initially, due to the Respondent's repeated acknowledgements of debt over a long period, the Applicant refrained from dealing with the chronological history of the Respondent's indebtedness to the Applicant. However, due to the allegations regarding "reckless credit" and the Respondent's contention that he is "over-indebted" the Applicant, in its replying papers, painstakingly provided evidence pertaining to previous credit agreements concluded between the parties since 21 April 1999.

[7] Applicant appended copies of the Respondent's credit applications covering a period of approximately eighteen (18) years from which it is evident that the Respondent, on numerous occasions, applied for credit facilities disclosing his assets, his income, liabilities and confirming his ability to make payment.

[8] The Applicant, in its replying affidavit and answering affidavit to the Respondent's counter application, contended that the Respondent made bold and vague allegations concerning non-compliance with the NCA but fails to substantiate the same and/or furnish particulars and/or facts in support of the allegations.

[9] The Applicant and the Respondent concluded a series of consecutive credit agreements emanating as far back as 1999 and resulting in the Respondent's present indebtedness to the Applicant in the amount of R1,563,097.77 plus interest. As security for the debt, four covering bonds over four of the Respondent's farms and three notarial bonds over the Respondent's immovable property were registered. The securities are not in dispute and were registered during the period 1992 to 2013 and remained valid and enforceable.

[10] On 19 June 2015 the Respondent requested that payment of his debt be deferred. An application for credit was completed and signed by the Respondent. The Respondent failed to make the payments due on 30 September 2015 and requested a further deferment.

[11] The Applicant was by then entitled to claim payment of the full outstanding balance on the Respondent's two relevant accounts with the Applicant and to perfect the securities. The Applicant however granted the Respondent an extension in respect of the amounts due on the one account but required that the amount due in terms of the second account, namely the term loan be settled in full.

[12] Respondent obtained a facility of R1,360,000.00 for a further period of twelve (12) months and the four covering bonds and three notarial bonds were given as security. The Respondent agreed to make five payments in the amount of R75,000.00 each on the dates agreed upon between the parties.

[13] The Respondent admitted the amount due to the Applicant, the interest charged on the amount in arrears and his liability towards the Applicant. The Respondent failed to make the payments as agreed upon. On 21 December 2016 the outstanding amount due was R1,608,352.14. As a result of the Respondent's default, Applicant was, once more entitled to claim payment of the amount due and to perfect the securities over the Respondent's immovable and movable properties.

[14] The Respondent again requested a further deferment of payments. The Applicant granted extension for payment until 1 September 2017. The Applicant drafted three further agreements. On 1 February 2017 the Respondent admitted liability for the amount due and signed the agreement referred to as the “Skriftelike Onderneming” (Annexure “VKB22”). He requested an indulgence to seek independent legal advice prior to signing the agreements referred to as the “Perfekteringsooreenkoms” (Annexure “VKB23”) and the “Memorandum van Ooreenkoms” (Annexure” VKB24”)

[15] The Respondent was awarded the opportunity to obtain legal advice before returning and signing the latter two agreements on 24 February 2017. Again the Respondent admitted his indebtedness to the Applicant and undertook to pay the amount due before 1 September 2017. In terms of the perfecting agreement the Respondent agreed that the notarial bonds are to be perfected and the secured movable assets listed, be delivered to the Applicant, despite remaining in the possession of Respondent.

[16] The Respondent furthermore confirmed that he has no defence against the claim for payment of the amount due and consents to

judgment for the amount due, the calling up of the notarial bonds and the sale of the movable assets by way of an auction, should he default on making the agreed payments.

[17] In terms of the “Memorandum van Ooreenkoms” the Respondent confirmed his indebtedness to the Applicant, he consents to judgment for payment of the outstanding amount and the exercise of the Applicant’s right in terms of the covering bonds over the four farms.

[18] The Respondent failed to make payment of the amount due on 1 September 2017. The Plaintiff complied with the provisions of Section 129 of the NCA by handing a notice in terms thereof, dated 8 September 2017, to the Respondent who acknowledged receipt thereof.

[19] During a meeting on 24 October 2017 at Reitz (held not without prejudice) between the legal representative of the Applicant and the former attorney acting on behalf of the Respondent, the Respondent furnished valuations of his assets and made a payment offer to the Applicant. The payment offer was rejected

and the Applicant informed the Respondent that an auction will be scheduled.

[20] In his opposing affidavit the Respondent contends that he experienced financial difficulties for a long period of time and even though it was expected of the Applicant to be more circumspect in the management of his account since the NCA came into operation, he states that the Applicant "*… went into overdrive in an effort to increase my indebtedness to it and to snatch at every possible opportunity to increase its security for this indebtedness*."

[21] The Respondent denies that the Applicant complied with the provisions of Section 81 of the NCA even though he has no independent recollection of whether it was done or not.

<u>THE RELEVANT PROVISIONS OF THE NCA</u>:

<u>Reckless Credit.</u>

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

"*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 …*

(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.*"

[23] "*Reckless credit*" is defined in Section 1 of the NCA as "*the credit granted to a consumer under a credit agreement concluded in circumstances described in Section 80.*" The provisions of Section 83 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 make an 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)."

Over-indebtedness

[24] Section 79(2) of the NCA defines when a consumer is over-indebted.

"***79 Over-indebtedness***

(1) A consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, having regard to that consumer's –

(a) Financial means, prospects and obligations; and

(b) Probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment.

(2) When a determination is to be made whether a consumer is over-indebted or not, the person making the determination must apply the criteria set out in ss (1) as they exist at the time the determination is being made.

(3) When making a determination in terms of the section, the value of –

(a) Any credit facility is the settlement value at that time under that credit facility; and

(b) Any credit guarantee is –

(i) The settlement value of the credit agreement that it guarantees, if the guarantor has been called upon to honour that guarantee; or

(ii) The settlement value of the credit agreement that it guarantees, discounted by a prescribed factor."

[25] Section 81(2) of the NCA provides as follows:

"*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."

[26] Section 78(3) of the NCA provides that "*financial means, prospects and obligations*" with respect to a consumer or prospective consumer, includes income received by the consumer, the financial means, prospects and obligations of other adults with whom income and obligations are customarily shared and if the consumer has or had a commercial purpose for entering into a credit agreement, the reasonable estimated future revenue flow from that business purpose.

[27] A party who raises a defence of over-indebtedness must plead and prove the defence, which includes proving that he is over-indebted as envisaged in Section 79 of the NCA[1]. Having regard to the wording of Section 79, such proof must inevitably involve details of, *inter alia*, the consumer's financial means, prospects and obligations. Financial means would include not only income and expenses, but also assets and liabilities. Prospects would include prospects of improving the consumer's financial position, such as increases and even liquidating assets.

The evidence relating to reckless credit and over-indebtedness

[28] Respondent's credit application on 21 April 1999 disclosed assets to the amount of R480,900.00, an income of R300,000.00 and a liability to Landbank in the amount of R60,000.00. Four (4) years later, on 13 June 2003, the Respondent, in a further credit facility application, disclosed assets to the value of R2,190,291.00 and liabilities amounting to R445,608.00. The Respondent, almost yearly applied for a credit facility confirming and certifying his assets, liabilities and income from farming and rental.

1 Standard Bank of South Africa LTD v Panayiotts 2009(3) SA 363 (WLD) at 366 [8]

[29] In 2008 the Respondent's assets had increased to the amount of R7,878,977.00 with liabilities amounting to R858,969.00. The Applicant again conducted a comprehensive credit assessment and credit was granted, based on the large surplus assets and substantial anticipated income of approximately R2,400,000.00.

[30] At the time of the Respondent's application for a credit facility of R1,800,000.00 in July 2013 his assets were reflected to be R10,310,832.00. His assets exceeded his liabilities by approximately R9,000.000.00 indicating that he was solvent by a substantial margin and clearly able to service his debt. The Respondent provided the financial information, confirmed the correctness thereof on each credit application and signed the documentation confirming the following:

> "*Ek sertifiseer hiermee dat die inligting hierin vervat korrek en volledig is en dat ek bewus is dat dit gebruik sal word om kredietfasiliteite te oorweeg.*"

[31] Subsequent to the Respondent defaulting in December 2015 and obtaining a deferment until December 2016 with a further

extension until September 2017, no further securities were required and no additional credit was granted. Therefore, no credit application and/or assessment was required.

[32] The Respondent contends that he was a "*struggling farmer in dire straits as far as cash flow was concerned*". The mere fact that he regularly applied for credit is, according to him, proof thereof. He furthermore states that his "*factual solvency*" does not alter the fact that credit was extended recklessly. In his replying affidavit in the counter application he however states that he truthfully submitted information to the Applicant.

[33] The Respondent appended a valuation of his livestock and farming equipment, dated 23 October 2017, to his opposing affidavit. The livestock was valued at R1,138,000.00 and the farming equipment at R202,100.00, totalling R1,340,100.00. A valuation of the Respondent's six (6) farms, dated 1 February 2018 amounts to R8,800,000.00.

[34] Over-indebtedness refers to a situation where, after a careful assessment is conducted and all available information processed, a determination is made that the particular consumer is, or will be

unable to satisfy all the obligations under all the credit agreements to which he is a party, in a timely manner. In order to do the above, a consumer's financial means, prospects and obligations and probable propensity to satisfy all the obligations under all the credit agreements to which the consumer is a party in a timely manner, as indicated by the consumer's history of debt repayment, must be taken into account.[2] Reckless credit or lending, on the other hand, involves a situation where the consumer becomes over-indebted as a result of the granting of reckless credit.

[35] Upon reading the pre-amble of the Act it seems as if there is a one-sidedness in that obligations exist only for the credit provider, however, the fact that it mentions "*granting and use*", clearly indicates that certain obligations exists for the prospective consumer as well. One of the objects of the NCA is the discouragement of reckless credit extension. There are certain measures in place to prevent reckless credit. It place obligations on both credit provider, as well as the consumer. The most important obligation the Act places on a credit provider, is by making the conduction of a pre-agreement financial or affordability assessment on behalf of the consumer compulsory.

2 Section 79(1)(a) of NCA

[36] If the credit provider fails to conduct such assessment, the credit agreement entered into between the credit provider and the consumer is classified as reckless lending or reckless credit, irrespective of what the outcome of the assessment might have been. In the event that the credit provider conducts an affordability assessment, and the outcome of the assessment indicates that the consumer does not understand the risks, costs, or commitments made in terms of the agreement, the agreement will also be classified as reckless lending or credit.

[37] On the other hand the consumer needs to join the credit provider in the task of preventing reckless credit which, may in the end, lead to over-indebtedness. In terms of the provisions of Section 81(1) of the NCA the consumer is required to answer completely and truthfully any questions, or provide all information requested by the credit provider upon applying for credit or while the application is being considered by the credit provider. The information which the consumer needs to provide is much more elaborate than a mere affordability assessment and therefore the complete and utmost honesty of the consumer is crucial in the credit application process.

[38] The Respondent alleged that during the period 2006-2008 he was desperate and was therefore in no bargaining position to negotiate a credit agreement. He however continued to apply for further credit facilities from the Applicant, *inter alia* to settle his debt with Landbank. The Respondent indicated that due to being the owner of valuable assets, the Applicant did not have any interest in his ability to repay the credit advanced, but was only interested in the security. This statement is totally without substance. It begs the question whether, if this was indeed his perception of the Applicants intentions, why he did not apply for credit facilities at another financial institution to repay his debt with the Applicant and continue a more advantageous relationship with another credit provider.

[39] It is common practise for agricultural financiers to require security for advancing credit facilities to farmers. The Respondent obviously used the financial assistance afforded to him to further his farming operations for grain production and cattle/sheep farming. He was able to increase his assets considerably since 1999 as is evident from the numerous lists of assets and inspection reports appended to the Applicants papers.

[40] The Respondent regularly applied for an increase in his credit facility, with the Applicant in turn requiring additional security. Even though the Respondent was aware that he had to repay the credit advanced to him since December 2014, he failed to sell any property in a so called “controlled manner” or at all and now blames the Applicant for his failure to fulfil his financial obligations. The Respondent’s vague and unsubstantiated allegations that he was not in an equal bargaining position is clearly false. He was provided with an opportunity to obtain legal advice before entering into the agreements, which forms the subject of the present application with the Applicant

[41] The Respondent completed the application forms, furnished the information and particulars pertaining to his financial means, prospects and obligations and advised to his probable propensity to satisfy all his obligations under the credit agreements. There is no evidence before me to indicate that he was forced in any manner to conclude any of the agreements. The Respondent failed to set out his defence of reckless credit with sufficient and convincing particularity. In fact the only evidence pertaining to the numerous credit agreements concluded between the parties was submitted by the Applicant.

[42] The Respondent is a businessman with many years of experience in the farming industry. His relationship with the Applicant over the past 35 years clearly indicates that he is familiar with the risks associated with farming, the regular droughts, extreme weather conditions in winter and the risks of incurring credit. Furthermore, in terms of the provisions of Section 81(1) of the NCA the Respondent is required to answer completely and truthfully any questions and provide all information required by the Applicant upon applying for credit. Should there be an allegation against the credit provider that the credit agreement constitutes a reckless credit agreement and the credit provider is able to establish that the consumer failed to entirely and truthfully answer any request for information made by the credit provider during its assessment in terms of Section 81 it may be a complete defence against such allegation.[3]

[43] Of importance however is the Respondent's contention that his livestock and farming equipment is valued at R1 340 100,00 and his immoveable property at R 8 000 000.00. He then alleges that the Applicant's application to sell the four immoveable properties

[3] Section 81(4) NCA

for a mere short fall of R 240 000.00 is an indication of the "*ulterior motive*" of the Applicant to put his farms up for sale "*to be picked up at a basement bargain price*". Clearly the Respondent is on his own version, not over indebted The Respondent dismally failed to provide sufficient information to substantiate the defence of reckless credit. The Respondent's defences of over-indebtedness and the allegations that he was forced into "*signing the documentation that the Applicant relies on*" is an obvious stratagem to delay the Applicant's claim.

[44] At the hearing of the application, Mr Zietsman SC on behalf of the Applicant informed the Court that the Respondent has made a substantial payment of more than R700 000.00 and therefore requested an order for payment of the balance being R728 097.77. Surprisingly the Respondent's counsel, Mr Sander had no knowledge of the fact that the Respondent made the payment with the inevitable result that his arguments that the Respondent is over indebted due to reckless credit advanced by the Applicant did not pass muster.

[45] The purpose of the NCA is to provide a more efficient and equitable credit system by balancing the rights of credit providers

and consumers. The long title to the Act describes the statute as being intended to promote a fair and non-discriminatory marketplace for access to consumer credit and for that purpose, amongst other matters, to promote responsible credit-granting and *use,* and for that purpose to prohibit reckless credit-granting and to provide for debt reorganisation in cases of over-indebtedness*.*

[46] In SA Taxi Securitization v Mbatha[4] it was found that since the enactment of the NCA there seems to be a tendency by consumers to make bald allegations that they are 'over-indebted' or that there has been 'reckless-credit'. With reference to the Standard Bank of South Africa v Panayiotis case Levenberg AJ held that these allegations should not be:

> "*'inherently and seriously unconvincing' should contain a reasonable amount of verificatory detail, and should not be 'needlessly bald, vague or sketchy'. A bald allegation that there was 'reckless-credit or there is 'over-indebtedness' will not suffice"*

[4] 2011 (1) SA 310 (GSJ) at 315 [26]

[47] Levenberg AJ held that the intention of the legislature was not to shift the balance of power to the extent that all the power in the credit relationship would amass into the hands of the consumer and found as follows:

"*[38] Interpretation of the various sections of the NCA involves an attempt to balance the interests of both lenders and borrowers in such a way as to facilitate the flow of credit in a responsible manner, and to provide debt relief where appropriate. The financial stability of credit providers is in this context as important as that of the consumers. The more successful the credit provider, the more credit that is available in the capital markets and the more favourable the rates that are available to consumers. Consumers benefit when credit providers are successful. The failure of credit providers adversely affects consumers and the flow of credit. Both groups are dependent upon each other and that is why a balancing act is necessary."*[5]

[48] The NCA does not envisage that a consumer may claim to be over-indebted whilst at the same time retaining possession of the moveable and/or immoveable property which form the subject matter of the agreement between the parties.[6] Mr Zietsman SC contented that the Applicant will obviously not proceed to sell the

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5 At 317 H-J

6 Standard Bank of South Africa v Panayiotis at 375 [77]

immoveable property of the Respondent if the proceeds of the moveable property will be sufficient to discharge the Respondent's indebtedness with the Applicant.

[49] It is evident that proper assessments were conducted by the Applicant. The Respondent, being a longstanding client of the Applicant indicated that there was a reasonable prospect that he would be able to yield a satisfactory income (supplemented by a rental income) to service the credit facility advanced to him. The advancing credit did not make the Respondent over-indebted. His solvency position remained sound by reason of his good net-asset position.

[50] The agreements entered into by the parties all provide for payment of costs by the Respondent on an attorney and own client scale. Similarly the parties agreed upon the rate of interest applicable in the event of the Respondent's default.

[51] In the premise, the Respondent has not discharged his onus that the credit was recklessly granted or that he is over-indebted. Accordingly the counter-application should fail. The Applicant is

entitled to the relief claimed in the draft order submitted by Mr Zietsman SC.

[52] Accordingly, I make the following orders:

1. Respondent to pay to the Applicant the amount of R728,097.77;

2. Interest as follows:

2.1 On the amount of R1,563,097.77 at the rate of 20% per annum, calculated from 1 November 2017 to 19 April 2018;

2.2 On the amount of R1,433,097.77 at the rate of 20% per annum, calculated from 20 April 2018 until 23 April 2018;

2.3 On the amount of R848,097.77 at the rate of 20% per annum, calculated from the 24th April 2018;

2.4 On the amount of R728,097.77 at the rate of 20% per annum, calculated from 25th April 2018 to date of final payment.

3. That the "*Memorandum van Ooreenkoms*", annexure "VKB24" to the founding affidavit, is valid and enforceable.

4. Plaintiff is entitled and authorized to sell the following immovable properties of the Respondent by auction, in terms of clause 3 of the said annexure "BKB24":

4.1 Remainder of the Farm Sarona 1089, district Reitz, Free State Province, held by Certificate of Registered Title T4732/2006;

4.2 The Farm Nebo A957, district Reitz, Free State Province, held by Certificate of Registered Title T4732/2006;

4.3 The Farm Tevrede 1088, district Reitz, Free State Province, held by Certificate of Registered Title T4737/2006;

4.4 Remainder of the farm Makwasi 690, district Reitz, Free State Province, held by Certificate of Registered Title T4732/2006.

5. Respondent is ordered to comply with clause 3 of annexure "VKB24" referred to in paragraph 3 above, and allow Applicant to sell the immovable properties in terms thereof, failing which the Sheriff is authorized to enforce such compliance.

6. The "*perfekteringsooreenkoms*" annexure "VKB23" to the founding affidavit is valid and enforceable.

7. The Plaintiff is entitled and authorized to sell by auction, in terms of clause 7 of the said annexure "VKB23", Respondent's movable assets listed in annexure "B" to the said annexure "VKB23" and also attached to the Notice of Motion as annexure "B1" and "B2" respectively,.

8. Respondent is ordered to comply with clause 7 of the said annexure "VKB23" and allow Applicant to sell the movable assets in terms thereof, failing which the Sheriff is authorized to enforce such compliance.

9. Respondent is ordered to pay the Applicant's costs on an attorney and own client scale.

I VAN RHYN AJ

On behalf of the Applicant:	Adv. P ZIETSMAN SC
Instructed by:	HORN & VAN RENSBURG ATTORNEYS
On behalf of the Respondent:	Adv. A SANDER
Instructed by:	E G COOPER MAJIEDT ATTORNEYS