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

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

SIGNATURE

DATE: 11 June 2024

Case No. A2023/108765

In the matter between:

ASSETLINE SOUTH AFRICA (PTY) LTD

Appellant

and

MLM ASSOCIATES INC

First Respondent

ROSE MOSIMA LSHIKA

Second Respondent

CORAM: MUDAU J, MALINDI J AND WILSON J

JUDGMENT

WILSON J (with whom MUDAU J and MALINDI J agree):

1 The appellant, Assetline, loaned R1 050 000 to the second respondent, Ms. Leshika. The loan was short-term, and bore a monthly interest rate of 5% in case of default. Ms. Leshika did not repay the amount on time, and approached Assetline for an extended repayment period. Assetline agreed to extend the repayment period, on condition that liability for the debt be assumed by the first respondent, MLM, in terms of a new loan agreement. MLM is Ms. Leshika's company. Assetline also required that Ms. Leshika

stand surety for MLM's obligations under the new agreement, and that a commercial property Ms. Leshika owns continue to be mortgaged as security for the debt. Ms. Leshika agreed to all of these stipulations.

2 In due course MLM, too, defaulted on the loan, and Assetline applied to the court below for a money judgment in the sum of R2 035 600.44. This was the capital amount secured plus interest. Before us it was accepted that the amount now due is R2 100 000, being the total amount presently recoverable under the *in duplum* rule for both the capital advanced and the interest due. Assetline also sought judgment interest in the sum of 5% per month, an order declaring Ms. Leshika's mortgaged property specially executable, and costs on the attorney and client scale, all of which was provided for in the loan agreement.

3 The court below dismissed Assetline's application. It did so on the basis that the agreement between MLM and Assetline constituted reckless credit within the meaning of section 80 (1) (a) of the National Credit Act 34 of 2005, in that Assetline failed to conduct an assessment of MLM's ability to repay the loan. That sort of assessment is required by section 81 of the Act before credit agreements to which the Act applies are entered into. Having found that the agreement between MLM and Assetline constituted reckless credit, the court below held that the loan agreement was void, no doubt relying on its powers under section 83 (2) of the Act to do so. On that basis the court dismissed Assetline's application with costs.

4 Assetline now appeals against that order. It contends that the court below was wrong to exercise its powers under the National Credit Act, because the

Act does not apply to the agreement Assetline concluded with MLM. Section 4 (1) (b) (read with sections 9 (4) and 7 (1) (b) of the Act) makes clear that the Act does not apply to a loan of more than R250 000 when advanced to a juristic person. In this case, MLM is a juristic person, and the value of the loan exceeds R250 000. In light of this, Assetline contends, the court below had neither the power to declare the agreement reckless nor the power to void it.

5 It seems to me that Assetline's argument must be correct. On the plain text of section 4 (1) (b), the National Credit Act does not apply to the agreement between MLM and Assetline.

6 At the hearing of the appeal, Ms. Lipshitz, who appeared for the respondents, did not attempt to argue otherwise. She instead argued an entirely new point, which was not pursued in the court below. This was that the agreement between MLM and Assetline is void because it constitutes an unlawful "supplementary agreement" within the meaning of section 91 (2) of the Act. That section states that "[a] credit provider must not directly or indirectly require or induce a consumer to enter into a supplementary agreement or sign any document that contains a provision that would be unlawful if it were included in a credit agreement."

7 The argument was that the agreement between MLM and Assetline was merely an attempt to supplement the prior agreement between Ms. Leshika and Assetline. The purpose of the supplementation was unlawfully to exclude the application of the National Credit Act. The effect of the exclusion was that Ms. Leshika no longer had the rights she would have had as a

principal debtor under the prior agreement. These rights included the rights to notice of her default and of alternatives to litigation and execution under section 129 (1) of the Act, and the right to apply for debt review under section 86 of the Act. Ms. Lipshitz contended that Assetline had in effect done an end-run around the National Credit Act by inducing Ms. Leshika to cause her company, MLM, to assume her personal debt under a new agreement to which the Act does not apply.

8 It is entirely plausible that this was the purpose of inducing Ms. Leshika to cause her company to assume her personal debt. But that does not in itself mean that the agreement between MLM and Assetline was an unlawful “supplementary agreement” as envisaged in section 91 (2). The purpose of section 91 (2) is to prevent a credit provider from inducing a consumer to agree to additional stipulations, beyond the scope of an otherwise lawful credit agreement to which the National Credit Act applies, that have the effect of defeating the protections that the Act imports by law into that agreement. It envisages that both the main agreement and the unlawful supplementary agreement deal with the same loan transaction, such that the supplementary agreement “supplements” the main agreement in the true sense: by setting out additional terms binding on the parties. It is in this sense that the Supreme Court of Appeal in *National Credit Regulator v Lewis Stores (Pty) Ltd* 2020 (2) SA 390 (SCA), at paragraph 32, held that the word “supplementary” in section 91 (2) should be deployed.

9 What happened in this case was different. The agreement between Assetline and MLM did not supplement the agreement between Assetline and Ms.

Leshika. The parties to the agreement were different, and the purpose of the transaction was not to add to the terms of the loan advanced to Ms. Leshika, but to enable MLM to assume Ms. Leshika's debt under an entirely new arrangement. In other words, the loan agreement between Assetline and MLM did not supplement the loan agreement between Assetline and Ms. Leshika. It novated and replaced that agreement. That sort of device is beyond the scope of the mischief to which section 91 (2) addresses itself.

10 At best for the respondents, Assetline in fact contravened section 91 (1) of the Act, which provides that "[a] credit provider must not directly or indirectly, by false pretences or with the intent to defraud, offer, require or induce a consumer to enter into or sign a credit agreement that contains an unlawful provision as contemplated in section 90". Section 90 of the Act prohibits terms of credit agreements that have the "general purpose" of "defeating the purposes of policies" of the Act; that "deceive the consumer"; or that "deprive" the consumer of the rights set out in the Act. It is conceivable that Assetline is open to the criticism that the arrangement into which it induced Ms. Leshika was a fraudulent effort to deprive her of her rights under the National Credit Act. I do not suggest that this is what Assetline in fact did or intended – merely that the facts of this matter are open to that interpretation.

11 However, Ms. Lipshitz wisely disavowed any reliance on section 91 (1) of the Act. Section 91 (1) was not relied on in the court below, and reliance on it would have entailed alleging and proving that Assetline had acted "by false pretences or with the intent to defraud". This was not alleged or proven in the

court below. Assetline was given no opportunity to respond to such a case, and the evidence before us was far too thin to fairly assess any such claim.

12 It follows from all of this that Assetline's appeal must be allowed. The court below ought not to have concluded that the National Credit Act applies to the agreement between Assetline and MLM. But for that conclusion, the court below would have been bound to grant the relief Assetline sought. For the reasons I have given, Ms. Lipshitz's creative argument based on section 91 (2) of the National Credit Act cannot be grafted onto the facts of this case. Section 91 (1) of the Act might have applied to the facts of this case, but a claim under that provision was not advanced in the court below, and could not, as Ms. Lipshitz accepted, fairly be determined on appeal.

13 Accordingly, Assetline is entitled to the relief it sought in the court below. In light of what is said in the judgment of the Constitutional Court in *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) at paragraphs 96 to 100, we are bound to award Assetline its interest at the contractual rate. But the decision in *Slip Knot* also entitles us to direct that the interest due on the judgment amount will not commence from the date of judgment in the court below, but from the date of this judgment. Given the potentially excessive impact of the rate of interest agreed to in this case, we intend to exercise that entitlement.

14 For all these reasons –

14.1 The appeal is allowed with costs.

14.2 The order of the court below is set aside, and is substituted with the following order –

1. The first respondent and the second respondent shall pay, jointly and severally, the one paying the other to be absolved, to the applicant the amount of R2 100 000.00 (two million and one hundred thousand rand).
2. The first respondent and the second respondent shall pay to the applicant interest on the amount of R2 100 000.00 (two million and one hundred thousand rand) at a rate of 5% per month (compounded monthly in arrears).
3. The following immovable property owned by the second respondent is declared specially executable –
 - (a) Section No. 13 as shown and more fully described on Sectional Plan No. SS 000[...] in the scheme known as CEDAR TREE OFFICE PARK in respect of the land and building or buildings situate at FOURWAY EXTENSION 45 TOWNSHIP, Local Authority: City of Johannesburg, of which section the floor area, according to the said sectional plan is 146 (one hundred and forty six) square metres in extent; and
 - (b) an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the sectional plan.

(These properties are held by deed of transfer number: ST3[...] and is subject to the conditions set out in that deed).
 - (c) An exclusive use area described as Storeroom S5 measuring 10 (ten) square metres being as such part of the common property, comprising the land and the scheme known as CEDAR TREE OFFICE PARK in respect of the land and building or buildings situated at situate at FOURWAYS EXTENSION 45 TOWNSHIP, Local Authority: City of Johannesburg, as shown and more fully described on Sectional Plan No. SS000[...].

(This property is held by notarial deed of cession number SK15[...] and is subject to the conditions set out in that deed).

4. The first and second respondents are directed, jointly and severally, the one paying the other to be absolved, to pay the costs of this application on the scale as between attorney and client.”

14.3 The interest due in terms of paragraph 2 of the substituted order will run from the date on which this appeal judgment is handed down.

S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 11 June 2024.

HEARD ON: 22 May 2024

DECIDED ON: 11 June 2024

For the Appellant: JM Hoffman
Instructed by Swartz Weil Van der Merwe
Greenberg Attorneys

For the Respondents: T Lipshitz
Instructed by Gwina Attorneys