

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 25872/2018

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

Date: 17 July 2024 JA Kok

In the matter between:

The Standard Bank of South Africa Ltd

APPLICANT

and

Koen, Jeandré

RESPONDENT

JUDGMENT

Kok AJ

Introduction

[1] The plaintiff instituted action against the defendant for payment in the amount of R1 174 013.19 plus interest and costs. The plaintiff's claim stems from a written home

loan agreement and continuing covering bond in relation to a sectional title property concluded on 22 August 2007.

- [2] I am indebted to counsel for their comprehensive heads of argument and the way in which they argued their respective cases. Where appropriate I relied on their heads in crafting this judgment.

Facts

- [3] The agreement was entered into between the plaintiff, the defendant and Mr SJ Koen, in terms whereof the plaintiff agreed to extend to the defendant and Mr SJ Koen, the defendant's father, a capital amount of R 955 000.00 for the purchase of the property. The plaintiff duly performed in terms of the agreement, and lent and advanced the monies to the defendant and his father. Mr SJ Koen was subsequently sequestrated in 2009 and the property sold. The balance remained unmet, hence the action brought by the plaintiff against the defendant.
- [4] The trial commenced on 26 February 2024. On 23 February 2024 the plaintiff served a supplementary discovery affidavit, discovering a Mortgage SA home loan application and salary advices. On the day of the trial, the plaintiff presented the defendant with copies of the documents as described in its supplementary discovery affidavit, as a Mortgage SA home loan application and salary advices for the defendant and his father. Due to the late discovery, the matter was postponed to 13 March 2024 for the trial to proceed. On 5 March 2024 the defendant filed a notice in terms of Rule 35(3) and (6) for further discovery of documents believed to be in the possession and control of the plaintiff. The plaintiff replied that the assessment of the affordability documents does not constitute a document that is capable of further discovery.
- [5] The plaintiff called one witness, Mr Dipesh Ghiwala, to testify on behalf of the plaintiff. Mr Ghiwala is an adult male employed as a Manager: Personal Private Banking of the plaintiff. He testified that by virtue of his position and employment

with the plaintiff he has access to all the records, system notes and documents in the Plaintiff's internal computer systems. He confirmed the agreement that was entered into between the plaintiff and the defendant. During Mr Ghiwala's testimony the defendant conceded that the plaintiff complied with its obligations in terms of section 129 of the National Credit Act 34 of 2005 (NCA).

- [6] He testified that the purpose of the loan facility extended to Mr SJ Koen and the Defendant was for the purposes of acquiring an immovable property. He testified that when the facility is approved, the plaintiff would open an account in the name of the applicants and the total costs of credit would be debited to the applicants' account, and then those monies are used to pay the seller of the property on the applicants' behalf. He identified the mortgage bond which was executed by the Defendant and Mr SJ Koen in favour of the Plaintiff and its terms. He testified that the plaintiff no longer holds its security under the home loan agreement as the property has been sold. He further testified that there was a balance due to the plaintiff as there was a shortfall on the sale of the property.

- [7] Mr Ghiwala confirmed a certificate of balance issued by the plaintiff confirming the outstanding amount. The original certificate of balance was handed up to the court, which certificate indicates the amount outstanding to be R1 460 468.01, together with interest thereon at the rate of 7.4% per annum from 23 February 2024 to date of payment.

- [8] He testified that an affordability assessment or a means test is a process where the bank assesses information for the purposes of establishing whether an applicant can afford a certain credit facility. The process is initiated on receipt of a home loan application. The plaintiff received a digital joint application from a bond originator supported by pay slips. A bond originator is an agent who acts on behalf of the bank's customers, and they are mandated by the consumer. The bank also has a mandate with the bond originator and they act as a middle man between the customer and the bank. He identified the home loan application report and the information contained therein. He testified that when the bank receives an application with more than one applicant the process of establishing affordability is

the same as in the case where there is a single applicant except for the fact that where there is a joint application, the affordability is assessed based on the combined income and expenditure of both applicants.

[9] He testified that Mortgage SA was the bond originator who submitted the application to the bank on behalf of Mr SJ Koen and the defendant. He further testified that the home loan application report recorded the applicants' (the defendant and Mr SJ Koen) bank accounts held in their names, their respective incomes and their respective expenditures. He further testified that it was apparent from the information recorded in the home loan application report was that there was sufficient net income to satisfy the monthly repayment under the proposed home loan agreement. In establishing whether the applicants (Mr SJ Koen and the Defendant) could afford the proposed credit to be extended to them the bank considered their incomes as well as their expenditure which was supported by pay slips. He further testified that he knows that an affordability assessment was conducted on the Defendant and Mr SJ Koen as a result of the fact that it reflects on the system of the plaintiff.

[10] During cross-examination Mr Ghiwala testified that he was a 29 year old male that started his employment with the plaintiff during August 2021, and that he has been employed in his current position since October 2023. Mr Ghiwala conceded that he was not in the employ of the plaintiff during 2007 when the agreement was entered into between the plaintiff and the defendant.

[11] Mr Ghiwala confirmed that he was not in a position to testify how the system operated and worked at the time when the agreement was concluded in 2007. He could only testify as to how the system currently operates.

[12] Mr Ghiwala was referred to the latest supplementary discovered documents. Mr Ghiwala testified in chief that the documents on the system was received from a bond originator (Mortgage SA). These documents would have been used in the process of conducting an affordability assessment. It was put to him in cross-

examination that in light of these documents being on the system, he assumed that an affordability assessment had been done.

- [13] Despite confirming during cross-examination that the documents that were before the court was all of the documentation obtained from his system, Mr Ghiwala later conceded that the impugned late discovered documents was not on his system but was provided to him by another employee of the plaintiff. No evidence was tendered on the identity of the other employee or by such employee.
- [14] Mr Ghiwala conceded that these documents were sent by facsimile from Lelanie Els of Mortgage SA to Standard Bank GT Hub, and that neither the plaintiff nor the defendant is the author of those documents.
- [15] Mr Ghiwala further had to concede that he was not in a position to testify what these documents were used for, as he was at that stage not in the employ of the plaintiff. In his view these documents would have been used as part of the assessment process.
- [16] In re-examination Mr Ghiwala clarified that the affordability assessment is a process that is captured online within the bank's system. An affordability assessment would have been done based on the documents received from the system and the notes contained within the plaintiff's internal system. In this specific instance he reached out to a specific department who then provided him with the Mortgage SA document. The document was on the bank system already. When it was put to him that he initially testified that he had access to all internal documents but later testified that he had to go to a different department on a different system and that is where the Mortgage SA document came from, he agreed, and testified that it came from a different department and that the document got uploaded to the system for this specific matter, but that it was still within the bank's system.
- [17] The defendant, Mr Jeandré Koen, was the only witness called for the defendant's case. He testified as follows. He did not recognise the home loan application report;

he saw the document the first time at the trial on 26 February 2024. He recognised his payslip for 28 February 2007. When asked how Mortgage SA came into possession of his payslip, he testified that he provided his payslip to the estate agent, Cindy, and that she was the estate agent of the sectional title property. He met Cindy when she showed him and his father the property and then again when his father requested him to meet with Cindy at a restaurant in 2007 and that he had to bring his payslip to the meeting. His father also attended the meeting with Cindy. He was not requested by Cindy to produce any other documents and he did not provide any other documents. He did not provide any documentation which contained his income and expenditure to the bank, or to Cindy, or to Mortgage SA. He was at no point requested by Cindy or Mortgage SA or the bank to provide his income or expenditure. Some time after the meeting with Cindy, he he was required to sign the home loan agreement. There was no correspondence between him and the bank.

- [18] Under cross examination the defendant testified as follows. He attended university, he has a degree and is an educated person. He had the necessary skill to read documents and appreciate them. He conceded that he entered into the agreement with the plaintiff. He conceded that he accepted the terms of the agreement and that he was bound to its terms. He conceded that when he signed the agreement he understood the costs, risks and obligations under the agreement. He was led to believe by his father that he would only become the co-owner of the property and not a co-principal debtor. He conceded that he read the agreement later but he did not read it on the day that he signed it. He conceded that he was a borrower under the agreement and that the Plaintiff advanced an amount to himself and his father. He conceded that he was a co-debtor under the agreement. He conceded the execution of the mortgage bond and its terms. He could not confirm whether Cindy was the bond originator as he did not stay for the whole meeting with his father and Cindy and he only knew Cindy as an estate agent. He conceded that he provided Cindy with his payslip. When put to him that the only reason he provided the payslip to Cindy was for the purposes of establishing whether he could afford the loan, he said that at the time did not know what it was for, and he provided his payslip as his father requested. When it was put to him whether his evidence was that Cindy

fabricated his income and expenses he said he would not be able to tell. When it was put to him that the plaintiff's evidence was that the bank conducted an affordability assessment based on the information received by it from the mortgage originator, he testified that he does not agree as he never provided his expenses. When he was asked why he did not approach the bank on the basis that they extended him a loan which he could not afford, he indicated that he thought he was only becoming the co-owner, and that he would not be paying. The defendant conceded that he did not know what was discussed between his father and the bond originator or the bank.

The defendant's case

- [19] The defendant pleaded that the agreement was reckless in terms of sections 80 and 81 of the NCA in that at the time the agreement was entered into, the plaintiff failed to conduct any assessment, alternatively failed to conduct a proper assessment of the defendant. Insofar as the plaintiff may have conducted a credit assessment (which was denied), the defendant pleaded that the agreement was entered into by the plaintiff despite information available to the plaintiff indicating that the defendant did not generally understand or appreciate the risks, costs or obligations under the proposed agreement, and/or that entering into the agreement would render the defendant over-indebted.

- [20] The defendant submitted that the credit provider bears the onus to prove that a pre-agreement assessment was conducted. This is a round-about way of submitting that the credit provider bears the onus to prove that reckless credit was not granted.

- [21] The defendant submitted that the plaintiff's witness was merely the person who had access to the system and who could print documents from the system. He could not testify whether or not an affordability assessment was done at the time when the agreement was concluded.

- [22] The defendant argued that the documents provided by the plaintiff was unsubstantiated and inadmissible as evidence of an assessment being done; that these documents only served as information that was allegedly provided to the bank by an unknown or unconfirmed source and not as evidence of an affordability assessment being done.
- [23] The defendant's evidence was that he was never requested by the plaintiff, Mortgage SA or Cindy (the estate agent and/or bond originator) to provide information and documentation regarding his expenditure and at no stage did he do so. The defendant therefore submitted that it would have been impossible for the plaintiff to have conducted an affordability assessment of the defendant's income and expenditure in compliance with sections 80 and 81 of the NCA.

The plaintiff's case

- [24] The plaintiff submitted that in terms of Rule 22 of the Uniform Rules of Court and *SA Taxi Securitisation (Pty) Ltd v Mbatha and two similar cases* 2011 (1) SA 310 (GSJ) paras 26 and 56, the defendant should have specifically pleaded that he did not provide his expenses to the plaintiff or the bond originator. The plaintiff argued that the defendant failed to properly plead his defence of reckless credit, and that all evidence elicited from the defendant during his examination in chief surrounding the affordability assessment should be struck from the record alternatively disregarded by the court.
- [25] The plaintiff referenced various authorities to the effect that for corporate entities such as the plaintiff, it is sufficient if the witness called to testify on behalf of the corporation relies on records in the corporation's possession.¹

¹ *Shackelton Credit Management (Pty) Ltd v Microzone Trading 88 CC and another* 2010 (5) SA 112 (KZP) para 13; *Dean Gillian Rees v Investec Bank Limited* [2014] ZASCA 38 paras 14 and 15; *Barclays National Bank Ltd v Love* 1975 (2) SA 514 (D) at 515H-517B; *Standard Bank of South Africa Ltd v Secatsa Investments (Pty) Ltd and others* 1999 (4) SA 229 (CPD) 235A; *Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2009 (3) SA 384 391H-392B.

- [26] Plaintiff's counsel submitted that the plaintiff is a large corporate banking institution. Mr Ghiwala gave evidence that he is employed as a manager of the Plaintiff. Mr Ghiwala derived his knowledge from the systems, system notes and records of the plaintiff which by virtue of his position he is entitled to access and peruse. Based on the cited authorities, it was not required that Mr Ghiwala had to be in the plaintiff's employment or personally present when the assessment was undertaken to testify that it had occurred.

Analysis

- [27] The defendant's submission that the credit provider bears the onus to prove that reckless credit was not granted, is without merit. The authority cited for this submission - *ABSA Bank v Coe Family Trust and others* 2012 (3) SA 184 (WCC) - does not hold so. In terms of *Absa Bank Limited v Potgieter* [2017] ZAECPHC 8 para 43; *Mahomed v Standard Bank of South Africa Ltd and another* [2019] ZAGPPHC 241 para 22; *Land and Agricultural Development Bank of South Africa v Engelbrecht NO and others* [2020] ZALMPPHC 43 para 12, the defendant bears the onus to prove that credit was recklessly granted.
- [28] The defendant repeated the wording of sections 80 and 81 of the NCA in his plea. When the defendant testified and in his closing address, it became clear on what basis he argued that reckless credit was granted - that he did not provide his expenses to the plaintiff or the bond originator. This submission only implicates sections 80(1)(a) and 81(2)(a)(iii) of the NCA. The other instances of reckless credit did not form part of his argument.
- [29] The defendant did not set out the basis for his submission that the "document" that the plaintiff relied on was inadmissible. No original affordability assessment document exists; the assessment was undertaken electronically, as a process, by capturing information and demonstrated by electronic system notes. The plaintiff's witness testified that by virtue of his position in the bank he could access the electronic information and testify as to what he witnessed on his computer screen.

- [30] Section 1 of the Electronic Communications and Transactions Act 25 of 2002 defines a "data message" as "data generated, sent, received or stored by electronic means and includes ... (b) a stored record". Section 15 of this Act provides that "(1) In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence - (a) On the mere grounds that it is constituted by a data message; or (b) If it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form. (2) Information in the form of a data message must be given due evidential weight". The plaintiff adduced the relevant evidence in the only way that it could have done so.
- [31] "Whether or not a credit grantor has taken the required reasonable steps to meet its assessment obligations is to be determined objectively on the facts and circumstances of any given case" - *Absa Bank Limited v Potgieter* [2017] ZAECPHC 8 para 43 and *Horwood v FirstRand Bank Limited* [2011] ZAGPJHC 121 para 5.
- [32] The defendant testified that at no stage did he provide his expenses to the estate agent/bond originator, Mortgage SA or the bank. The plaintiff's witness testified that the income and expenditure of the co-applicants (the defendant and his father) appeared on the internal computerised system of the plaintiff, which means it was entered on the plaintiff's system as received from the bond originator. The onus rested on the defendant to prove that credit was recklessly granted to him in that he did not provide his expenses. He did not call his father or the estate agent/bond originator to testify to shed light on how his expenses was recorded by the bond originator. On the available evidence, on the probabilities and determined objectively, the plaintiff performed a proper affordability assessment.
- [33] The plaintiff did not provide any authority for its submission that all evidence elicited from the defendant about the affordability assessment should be struck from the

record alternatively disregarded by the court. To my mind Rule 22(5) provides the remedy that the plaintiff could have used when it was confronted by the defendant's mere repetition of the applicable sections of the NCA in his plea.

- [34] I could not find caselaw dealing with a plea in a case of alleged reckless credit. *SA Taxi Securitisation (Pty) Ltd v Mbatha and two similar cases* 2011 (1) SA 310 (GSJ) para 26 held that a defence based on the NCA may not amount to a mere assertion that reckless credit was granted; sufficient detail must be provided to substantiate the defence. *Mbatha* dealt with a summary judgment, not a trial. *ABSA Bank Ltd v Malherbe* [2013] ZAFSHC 78 para 78 held that the defendant cannot merely repeat the factors in the NCA without explaining how the credit provider violated these factors, but this was likewise a summary judgment matter. *FirstRand Bank Limited v Moodley* [2016] ZAGPJHC 107 para 12 followed *Mbatha* but this matter was heard on application, not a trial. Van Heerden CM & Boraine A "The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005" [2011] De Jure 24 para 2.6 submit that the same principles should apply to a consumer's plea in a trial and cite *Neugebauer & Co Ltd v Bodiker & Co (SA) Ltd* 1925 AD 316 319 and *FPS Ltd v Trident Construction (Pty) Ltd* 1989 (3) SA 537 (A) 542 in support. The view that I took during the trial when plaintiff's counsel objected, was that the defendant set out his defence in sufficient particularity. I may well have been wrong.
- [35] The rules relating to a pre-trial conference, discovery and the defendant's plea provide safeguards to prevent a trial by ambush. Both parties submitted at various stages of the trial that the other party ambushed them. The defendant argued for a postponement when one of the affordability assessment documents was provided to them on the day of the trial. I granted the postponement, although the information in this document should have been known to the defendant as it was information provided by the co-applicants for the home loan. When it became clear during the defendant's testimony what the exact basis of his defence would be, the plaintiff objected on the basis that this defence was not pleaded. At that point the plaintiff's witness had already testified that an affordability assessment was done on both applicants' income and expenses as provided by the bond originator and the

narrowing of the defence did not impact on its case. The defendant bore the onus of proving that a proper assessment was not done and chose not to call the defendant's father or bond originator as witnesses. Had a pre-trial conference been held, the parties' respective cases could have been properly canvassed and none of the parties would have been surprised during the trial.

- [36] I agree with plaintiff's submission that the evidence of the plaintiff's representative be accepted that an affordability assessment was done, and that he knew so as it reflected on the system notes of the plaintiff's computer systems. The plaintiff relied on the information provided to it by the bond originator, as reflected on the computer systems, and performed an affordability assessment based on the income and expenses of the defendant and the defendant's father as co-applicants. The combined income and expenses showed a considerable surplus and the home loan was therefore affordable. Section 80 and 81 of the NCA was not breached.

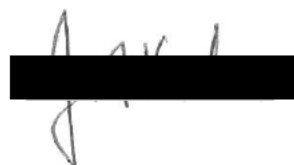
Costs

- [37] The plaintiff did not argue for a special costs order, although there were grounds on which to do so. During a late stage in the trial, after substantial evidence had been led, counsel for the defendant indicated that the defendant no longer disputed the conclusion of the home loan agreement and its terms, the execution of the mortgage bond and its terms, and the plaintiff's compliance with section 129 of the NCA. The plaintiff pointed out from the outset and during the trial that the plaintiff had been prejudiced by the defendant's failure to attend a pre-trial, specifically with the view of limiting the issues. The Plaintiff made numerous requests to the defendant, without success, to attend a pre-trial conference: 13 December 2019; 23 January 2020; 3 July 2020; 10 July 2020; 13 July 2020; 22 July 2020; and 17 August 2020. The impugned documents to be discovered ought to have been raised and canvassed during a pre-trial conference.

ORDER

In the result, the following order is granted:

1. Judgment in favour of the plaintiff for R1 174 013.19, with interest.
2. Party and party costs, including the costs of appearance on 26 February 2026.



 JA Kok

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

For the applicant:	C Barreiro
Instructed by:	Haasbroek & Boezaart Attorneys Inc
For the first respondent:	P Marx
Instructed by:	Schickerling Inc
Date of the hearing:	26 February, 13 and 27 March 2024
Date of judgment:	17 July 2024