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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 2023-037065

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

**S. VAN ASWEGEN
10 OCTOBER 2024**

In the matter between:

ROSE MOSIKA LSHIKA

Applicant

(Id No: 8[...])

and

SB GUARANTEE COMPANY (RF) PROPRIETARY LIMITED

Respondent

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded onto the online file. The date and time for hand-down is deemed to be 10h00 on 10 October 2024.

JUDGMENT

VAN ASWEGEN AJ:

Introduction

- [1] This is the Applicant's application for Leave to Appeal in terms of section 17(1)(a)(i) of the Superior Courts Act, Act 10 of 2013. The Applicant applied for leave to appeal against the whole of the judgment granted by me on 15 May 2024, dismissing the defence of reckless lending contemplated in Section 81(2) of the National Credit Act, 34 of 2005 ("the NCA").
- [2] On 5 February 2018, the Applicant and Standard Bank of SA Limited (the Credit Provider) ("Standard Bank") concluded a Home Loan Agreement in terms of which it agreed to lend and advance the sum of R5 160 000.00 to the Applicant ("Home Loan Agreement").¹
- [3] As security for the Home Loan, Standard Bank required, *inter alia*:
- [3.1] a guarantee by the Respondent to Standard Bank in terms of which the Respondent undertook to pay to Standard Bank the amount owing in terms of the Home Loan Agreement in the event of a default by the Applicant thereunder.
- [3.2] an indemnity by the Applicant in terms of which the Applicant indemnified the Respondent against any claim made by Standard Bank in terms of the aforesaid Guarantee; and
- [3.3.] a Mortgage Bond registered in favour of Standard Bank for the capital sum of R5 160 000.00.²
- [4] The Respondent pursued a securitised claim, relying on the provisions of a written Indemnity Agreement read with the provisions of a mortgage bond granted against in its favour by the Applicant which agreements form part of a suite of agreements between the Applicant, the Respondent and Standard Bank of SA Ltd (Credit Provider). The suite of agreements consists of i) the loan

¹ FA2

² FA3

agreement between Standard Bank and the Applicant herein as well as ii) the agreements mentioned in paragraph 3 herein before as security for the loan.

- [5] It is common cause that the Applicant breached the terms of loan agreement. After Standard Bank complied with the relevant default procedures, it elected to cancel the loan and called upon the Respondent to perform in terms of the Guarantee.
- [6] The Respondent in turn, instituted motion proceedings against the Applicant in terms of the indemnity she provided and foreclosed upon the immovable property provided as security.
- [7] The Applicant opposed the relief sought by raising an argument of reckless credit and pleaded that the immovable property is her primary residence. She pleaded that should the property be declared specially executable. Such an order would consequently infringe on her right to adequate housing as protected by section 26 of the Constitution of the Republic of South Africa, 1996.
- [8] After hearing arguments by both parties, I dismissed the defence of reckless credit. Furthermore, taking into consideration and assessing all the relevant factors, I found that it was just and equitable to declare the immovable property executable.
- [9] The Applicant's counsel argued that leave to appeal should be granted as I erred in three respects in granting the judgment namely that:
- [9.1] The distinction between the indemnity agreement and mortgage bond in respect of the National Credit Act's, ("NCA")³, application is immaterial in the^[1]_{SEP} determination of prevention of reckless lending. Counsel argued a^[1]_{SEP} *'distinction without difference'*;

³ Act 38 of 2005.

[9.2] The Court's approach and determination is at odds with section 81(2) of the NCA in respect of the duty to satisfy the requirement of affordability assessment; and

[9.3] The matters of *SA Taxi Securitisation (Pty) Ltd v Mbatha*⁴; *SA Taxi Securitisation (Pty) Ltd v Molete*; *SA Taxi Securitisation (Pty) Ltd v Makhoba*⁵ are distinguishable and/or at odds with *Absa Bank Limited v De Beer & Others*.⁶ The distinction between an indemnity agreement and a mortgage agreement is immaterial to the application of the NCA.

[10] I will now deal with and discuss the aforesaid grounds in considering whether I should grant leave to appeal.

First And Third Grounds Of Appeal:

Distinction between indemnity and loan agreement is immaterial

[11] In paragraphs 34 and 35 of the judgment I specifically alluded to the distinct difference between a cause of action reliant on a loan agreement secured by a mortgage bond and a cause of action based upon the enforcement of an indemnity agreement.⁷

"There is a distinct difference between a cause of action dependent upon a loan agreement secured by a mortgage bond as opposed to the enforcement of the indemnity agreement... the defence of reckless credit is not one which can assist the respondent in the enforcement of the indemnity agreement."

⁴ 2011 (1) SA 310 (GSJ)

⁵ 2011 (1) SA 310 (GSJ)

⁶ 2016 (3) SA 432 (GP)

⁷ 2024 JDR 2042 (GJ)

[12] The Applicant's counsel argued that the distinction between the mortgage bond and indemnity agreement goes to the heart of the determination of the Applicant's claim. The distinction created is - it was argued - incorrect and inconsequential. It was merely to circumvent the application of the NCA.

[13] It was further argued that the Indemnity agreement did not:

[13.1] exist independent from the mortgage agreement;

[13.2] did also not create any special and/or separate and independent claim or cause of action and

[13.3] neither did it create special immunity from the NCA.

[14] It is common cause that the Respondent entered into a loan agreement with Standard Bank (the Credit Provider) subsequent to which funds were advanced to the Respondent by Standard Bank with which she purchased the immovable property.

[15] The legal nexus that bounds the Applicant and the Respondent flows from the indemnity agreement. The Applicant did not advance credit and/or funds to the Respondent. The amount advanced was based on the loan agreement secured by the mortgage bond entered into between the Respondent and Standard Bank.

[16] I pause to have regard to the exact wording of section 8 of the NCA as it pertains to credit agreements in terms of the NCA.

Section 8(1), 8(4) and 8(5) of the NCA states:

"8. **Credit agreements**

(1) *Subject to subsection (2), an agreement constitutes a credit agreement for the purposes of this Act if it is –*

- (a) a credit facility, as described in subsection (3);
- (b) a credit transaction, as described in subsection (4);
- (c) a credit guarantee, as described in subsection (5); or
- (d) any combination of the above.

...

(4) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is ^[17]~~SEP~~

(a) ...

(b) an incidental credit agreement, subject to section 5(2);

(c) an instalment agreement;

(d) a mortgage agreement or secured loan;

(e) a lease; or

(f) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of –

(i) the agreement; or

(ii) the amount that has been deferred. (my underlining)

(5) *An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit guarantee if, in terms of that agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which this Act applies.*" (my emphasis)

[17] It is accordingly clear from the reading of section 8 that a loan secured by a mortgage bond is a credit transaction as contemplated by section 8(4)(d) of the NCA.

[18] The question for consideration is accordingly whether an indemnity agreement does constitute a credit agreement under the NCA as was argued by the Applicant's counsel.

[19] A credit agreement is referred to and depicted in section 8(1) of the NCA as an agreement in terms of which payment of a debt is deferred, and fees or charges are payable by the consumer for such deferment. It includes credit facilities, credit transactions, and credit guarantees as further elaborated in sections 8(2), 8(3), and 8(4).

[20] Section 8(4)(f) relates to any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of the agreement or amount deferred.

[21] In the aforesaid definitions of credit agreements, it is clear that a credit agreement:

[21.1] is a legal contract between a lender (credit provider) who lends money to a consumer;

[21.2] the contract must be for monies lent;

[21.3] the amount of money owed is deferred or delayed and

[21.4] interest or a fee is levied or charged as the costs of lending money.

[22] A “*Credit Provider*” means:

[22.1]. the lender under a secured loan;

[22.2] the party to whom an assurance or promise is made under a credit guarantee; or

[22.3] the party who advances money or credit to another under any other credit agreement

[23] In the matter before me it is abundantly clear that Standard Bank is the credit provider⁸ who lend money to the Applicant (consumer) in terms of a written loan agreement⁹ secured by a mortgage bond.¹⁰ The amount of money owed was deferred¹¹ and interest is charged¹² at the costs of the money lending.

[24] I am of the firm opinion that the indemnity agreement¹³ between the Respondent and the Applicant is not a credit agreement. The indemnity agreement is firstly not entered between the Applicant and the Credit Provider – Standard Bank and is furthermore not credit granted in terms of which payment of an amount owed by one person to another is deferred.

[25] The word *indemnity* means security or protection against a financial liability. It typically occurs in the form of a contractual agreement made between parties in which one party agrees to “hold harmless” the other party – either by promising

⁸ See clause 2.1 at 002-76.

⁹ 002-46

¹⁰ 002-67

¹¹ Clause 5 at 002-47

¹² Clause 3 at 002-46

¹³ FA4 at 002-75

not to hold the other liable for a wrong, or to pay for losses or damages suffered by the other party.

[26] The Applicant, as the borrower in this matter (consumer), indemnifies and holds the Respondent as guarantor harmless from and against all loss, damage, costs, expenses and liabilities which the Respondent may suffer or incur as a result of or in connection with any claims which may be made against the Respondent by Standard Bank arising out of or in connection with the guarantee.¹⁴

[27] I am of the firm persuasion that it is clear from the loan agreement and the Indemnity agreement (clauses 1.1.8 and 2.1 thereof)¹⁵ that Standard Bank is indeed the Credit Provider and the Applicant the consumer.

[28] The indemnity agreement is:

[28.1]. neither a credit agreement

[28.2] nor has the Respondent advanced any credit and/or funds to the Applicant in terms of which payment of an amount owed by one person to another is deferred.

[29] The Applicant counsel's submission that there are no authorities that deal with whether an indemnity agreement is a credit agreement is incorrect. In both the matters of *SB Guarantee Company (RF) Proprietary Limited v Edwoud Frederick Botes*¹⁶; and *SB Guarantee Company (RF) (Pty) Ltd v Muhammad*¹⁷ it was held that an indemnity agreement is not a credit agreement.

[30] I am in agreement with the aforesaid judgments that an indemnity agreement is definitely not a credit agreement. The aforesaid courts have indeed recognized the distinction between:

¹⁴ Clause 3 at 002-76.

¹⁵ 002-76.

¹⁶ (87458/2019) [2024] ZAGPPHC 161 para 16.

¹⁷ (35048/2019) [2020] ZAGPJHC 291 (16 November 2020) para 25.

[30.1] an indemnity agreement and a credit agreement;

[30.2] the credit provider (Standard Bank of SA Ltd) and SB Guarantee Company (RF) Proprietary Ltd as Plaintiff claiming based upon the indemnity agreement.

[31] Liability under an indemnity agreement furthermore does not involve the deferral of a debt nor the payment of any fees or charges associated with the deferment of payment, which is a defining characteristic of a credit agreement under the NCA.

[32] A credit guarantee¹⁸ under section 8(5) involves a third party guaranteeing the debt of a consumer to a credit provider. In this matter, the Respondent guarantees the debt of the Applicant to Standard Bank of SA Ltd. If the primary debtor defaults, the third party settles the debt. An indemnity, however to the contrary, involves no such relationship to a credit agreement. It is a distinct and separate undertaking to cover specific liabilities without the need for a debt to exist between the credit provider and indemnified party.

[33] An indemnity agreement is therefore not a credit agreement as is contemplated in the NCA. The fact that the Applicant's counsel refers to an indemnity agreement as an agreement contemplated in the NCA in one form or the other under:

- i) an incidental agreement or;
- ii) an instalment agreement or;
- iii) a mortgage agreement or;
- iv) secured loan or;

¹⁸ 002-80

- v) any other agreement in terms of which payment of an amount owed by one person to another is deferred and any charge of fee interest is payable to the credit provider in respect of an agreement or the amount deferred.

is clearly indicative of the Applicant's own inability to classify the indemnity agreement under section 8 of the NCA.

[34] Upon questioning the Applicant's counsel and seeking of him to categorise the indemnity agreement as a credit agreement under one of the sub- sections of section 8 of the NCA, the counsel was unable to do so. Counsel merely collectively referred to it being a credit agreement in terms of section 8 of the NCA.

[35] I am accordingly of the view that an indemnity agreement is not a credit agreement as defined in section 8 of the NCA. The distinction between a cause of action based upon a loan secured by a mortgage bond and a cause of action placing reliance on an indemnity agreement is therefore not immaterial as alleged by the Applicant, but significant and even relates to different entities.

[36] The Applicant's first and third grounds of appeal can accordingly not stand. An indemnity agreement is simply put not a credit agreement subject to the NCA.

GROUND 2

Section 81(2) of the NCA – Affordability Assessment

[37] The Applicant's defence is one of reckless lending. A defence of reckless lending is available to a consumer against a credit provider in terms of the NCA.

[38] Section 1 of the NCA defines "reckless credit" as credit granted to a consumer under a credit agreement concluded in circumstances described in section 80 of the NCA.

[39] In terms of section 80(1) of the NCA, a credit agreement is reckless if,

- (a) at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, 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.*

[40] It is therefore of the utmost importance to the Applicant that the NCA apply to the matter at hand.

[41] Section 81 provides:

- "(1) *When applying 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.*
- (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 works 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.

3) A credit provider must not enter into a reckless credit agreement with a prospective consumer."

[42] From the above section, it follows that a credit provider has a duty to conduct an affordability assessment. The consumer will also provide to the credit provider that which the credit provider seeks it to provide. The burden of proof falls on the credit provider to demonstrate that it conducted an affordability assessment.

[43] The Applicant further referred the court in its Heads of Argument to the minimum standard assessment in respect of assessing the affordability. The Code of Banking Practice, clause 8.1.4 provides as follows:

"Assess your ability to afford and willingness to repay the credit and applied for, this credit assessment may take into account a range of factors, such as:

- (i) your income and expenses and statement of assets and liabilities;*
- (ii) how you handled your financial affairs in the past;*
- (iii) how you have conducted your previous and existing accounts with us;*
- (iv) information obtained from credit risk management services and related services, and other appropriate parties, for example employers, other lenders and landlords; and*
- (v) any security or collateral provide.”*

[44] It is evident from the Applicant's Heads of Argument that the affordability assessment had to be done by the credit provider. The Respondent in this matter is not the credit provider, Standard Bank is the credit provider.

[45] Any assessment had to be executed and performed by Standard Bank. There was no obligation on the Respondent to do an affordability assessment as the latter was not:

[45.1] a credit provider;

[45.2] the indemnity agreement is not a credit agreement.

[45.3] the NCA is not applicable;

[46] The Applicant and the Respondent entered into an indemnity agreement which is not a credit agreement in terms of the NCA. It accordingly follows that the Applicant is not a credit provider and had no obligation to satisfy itself that no adverse listings were reflected on the relevant credit bureau or to assess the existing financial means, prospects and obligations of the consumer. The party who had to do this was the credit provider – Standard Bank. The Applicant has admitted in its Heads that Standard Bank had to conduct an assessment.

[47] It is of the utmost importance to keep in mind that the Applicant in this matter is SB Guarantee Company (RF) Proprietary Limited and not Standard Bank. These

two entities are distinct and separate. Standard Bank, as a credit provider's duty to conduct an affordability assessment in terms of section 81 of the NCA, cannot be ascribed or attributed to the Applicant as the indemnity agreement is not subject to the NCA. The Applicant is also not a credit provider.

[48] The Applicant signed the home loan agreement during 2018 and defaulted in 2021.

[49] In terms of section 80(2) of the NCA the question whether reckless credit was granted is determined regarding the time the agreement was made. In this case the agreement was concluded in 2018.

[50] From 2018 until 2021, the Applicant could pay her monthly instalment which is indicative of an ability to pay on the Applicant's side.

[51] The Applicant's second ground of appeal does also not pass the muster and must also fail.

[52] A court may grant leave to appeal if the Judge concerned is of the opinion that:

[52.1] the appeal would have a *reasonable prospect of success*; or

[52.2] that there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.¹⁹

[53] I will only consider myself with whether the appeal will have a reasonable prospect of success as there is no compelling reason why the appeal should be heard.

¹⁹ Section 17(1)(a)(i) and (ii) of Superior Courts Act 10 of 2013

[54] Reasonable prospects are prospects that are "not remote but have a realistic chance of succeeding". In other words, there must be a "sound rational basis for the conclusion" that there are prospects of success on appeal.²⁰

[55] The use of the word "would have a reasonable prospect of success" to be applied by me in determining whether to grant leave to appeal means that I must be satisfied that the party has a realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is simply not enough.

[56] This Court has held that the test is that the judge considering leave to appeal must have "a measure of certainty that another court will differ" from the court whose decision is sought to be appealed against."²¹ In other words, section 17(1) of the Act presupposes a measure of certainty that an appeal would reach a different outcome.²²

[57] After considering the grounds of appeal raised and finding that these grounds will be unsuccessful for the reasons as set out here in before, I am of the firm opinion that another court will not come to a different conclusion.

[58] In light of the aforesaid the leave to appeal cannot succeed.

[59] I accordingly make the following order:

1. The application for leave to appeal is dismissed with costs.

S. VAN ASWEGEN

²⁰ MEC for Health, Eastern Cape v Mkhitha 2016 JDR 2214 (SCA).

²¹ Acting National Director of Public Prosecutions v Democratic Alliance in Re: Democratic Alliance v Acting National Director of Public Prosecutions [2016] ZAGPPHC 489 at para 25;

²² Vresthena (Pty) Ltd v The City of Tshwane Metropolitan Municipality (2022) ZAGPPHC 697 (28^{SEP} September 2022) at para 7; Tshwane Economic Development Agency (TEDA) SOC Ltd v Mogaladi [2022] ZAGPPHC 669 (15 September 2022) at para 7

Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 13 September 2024
Supplementary Heads filed by Applicant: 20 September 2024
Supplementary Heads filed by Respondent: 30 September 2024

Judgment: 10 October 2024

Appearances:

For Applicants: AM Pheto
Instructed by Macbeth Incorporated

For Respondent: S Jacobs
Instructed by Stupel and Berman Attorneys