REPORTABLE

REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. 2010/36853

DATE:21/09/2011

In the matter between:

MERLE COLINETTE HORWOOD Applicant

and

FIRSTRAND BANK LTD Respondent

JUDGMENT

MEYER, J

[1] The applicant seeks an order that each one of five credit agreements concluded by the respondent bank with her be declared a reckless one in terms of s 83(1), read

with s 80(1)(a) or with s 80(1)(b) of the National Credit Act ('the NCA'),[1] and for an order setting aside part of her rights and obligations under each one in terms of s 83(2)(a).

[2] S 81(3) of the NCA provides that a 'credit provider must not enter into a reckless credit agreement with a prospective consumer.' In terms of s 83(1), a court may declare a credit agreement to be reckless and, as a consequence thereof, may *inter alia* make an order in terms of s 83(2) setting aside all or part of the consumer's rights and obligations under the credit agreement as the court determines just and reasonable in the circumstances.

[3] The credit agreements in issue relate to credit that the respondent extended to the applicant by way of two personal loans, two credit card loans, and, most importantly in these proceedings, a loan secured by two mortgage bonds over an immovable property owned by the applicant and which is situated at the South Coast. The gravamen of the applicant's case in respect of each credit agreement is that the respondent had failed to conduct a proper assessment of her financial ability to pay the credit that was extended to her and that, had a proper assessment been undertaken, a loan amount in excess of R215 000.00 would not have been approved in the case of the loan secured by the two mortgage bonds and no credit in terms of the other agreements would have been extended to her.

[4] In the words of Ponnan, JA, in *Desert Star Trading 145 (Pty) Ltd and Another v No 11 Flamboyant Edleen CC and Another*,[2] '[t]o determine when exactly a credit

1 Act No. 24 of 2005.

2 2011 (2) SA 266 (SCA).

agreement is a reckless one, it is to s 80 that one must turn, …'.[3] In terms of that section of the NCA, a credit agreement is reckless if, '… at the time when that agreement was made, or at the time when the amount approved in terms of the agreement is increased …' [4] the credit provider either '… failed to conduct an assessment as required by s 81(2) …', or, '… 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 the … consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement … or entering into the credit agreement would make the consumer over-indebted.'

[5] The requirement of s 81(2) of the NCA is that the credit provider takes 'reasonable steps to assess' the matters referred to in that section before entering into the credit agreement. S 82(1) permits a credit grantor to '… determine for itself the evaluative mechanisms or models and procedures to be used in meeting its assessment obligations under section 81, provided that any such mechanism, model or procedure results in a fair and reasonable assessment.' The credit provider must accordingly take reasonable steps to assess the relevant matters and the mechanisms, models and procedures used by it must result in a fair and objective assessment.

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3 Para [14].

4 The reckless credit provisions of the NCA commenced on 1 June 2007 (Proclamation 22 in GG 28824 of 11 May 2006) and do not apply retrospectively (Schedule 3, item 4(2) read with s 172(3) of the NCA. See also: *African Bank Ltd v Myambo N.O. and Others* 2010 (6) SA 298 (GNP)).

Whether or not a credit grantor has taken the required reasonable steps to meet its assessment obligations is in the light of the wording of these provisions to be determined objectively on the facts and circumstances of any given case.

[6] S 81(1) of the NCA places the obvious obligation upon the prospective consumer to fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by s 81, and it is, in terms of s 81(4), '… a complete defence to an allegation that a credit agreement is reckless …' if it is established that the consumer failed to do so and that such failure '… materially affected the ability of the credit provider to make a proper assessment.' S 81(4) contains a requirement of materiality and it is accordingly not every failure by a consumer to fully and truthfully answer the credit provider's requests for information as part of the prescribed assessment that entitles the credit provider to this complete defence.

[7] I have mentioned that the requirement of an assessment, the absence of which renders a credit agreement reckless in terms of s 80(1)(a), is for the credit provider to conduct one '… as required by section 81 (2) …', which section enjoins a credit provider not to enter into a credit agreement '… without first taking reasonable steps to assess …' the matters referred to in that section. In contrast, s 80(4) affords a credit provider with 'a complete defence' if a consumer's failure '…to fully and truthfully answer any requests for information made by the credit provider as part of the assessment …' materially affected the ability of the credit provider '… to make a proper assessment.' A failure on the part of a credit provider to take reasonable steps to assess the prescribed matters renders the credit agreement a reckless one and a failure on the part of a consumer to fully and truthfully answer requests forming part of the compulsory

assessment arms a credit grantor with a complete defence if the consumer's failure materially affected the ability of the credit provider to make a proper assessment. In my view the correct interpretation of these provisions is that where a credit provider has taken the required 'reasonable steps to assess' the relevant matters referred to in s 81(2), the credit agreement is not a reckless one in terms of s 80(1), whether or not the assessment was tainted by a consumer's incomplete or untruthful answers. The complete defence provided for under s 81(4) is a defence which may, as the respondent has done in this matter, be raised in addition to one that a credit provider's assessment obligations under s 81 have been met.

[8] It is common cause that the applicant purchased a vacant stand, which is situated at Hibberdene on the South Coast, on 11 April 2005, for the sum of R165, 000.00 with the intention of building a dwelling thereon. Payment of the purchase price and of the transfer costs of about R50,000,00 was financed by means of a loan, which the applicant obtained from the respondent at that time. The respondent avers that the loan amount approved in terms of that 2005 loan agreement was the sum of R875, 00.00, which amount also included a building loan to finance the building of a dwelling on the vacant stand. The applicant avers in reply that she was unaware that the loan facility granted to her in terms of the 2005 loan agreement was the sum of R875, 000.00. Transfer of the vacant stand into the applicant's name was registered on 25 July 2005, and the mortgage bond that was registered over it in favour of the respondent at the time secured an indebtedness of R875, 000.00.

[9] The applicant, assisted by a mortgage originator, Mr Paul Oosthuizen of Marcia G Home Loans CC, to whom the applicant refers as her financial advisor and also as

her consultant, made application to the respondent for additional funds during May 2007. It is common cause that the parties thereafter entered into an agreement on 4 July 2007. The respondent avers that the amount of R875, 000.00 approved in terms of the 2005 loan agreement was in terms of this 2007 loan agreement increased by an amount of R200, 000.00 to a total principal debt of R1, 075, 000.00. The applicant avers that the agreement concluded between the parties on 4 July 2007 constituted a new loan agreement and that the principal loan amount approved in terms thereof is the sum of R1, 075, 000.00. The applicant's averment in this regard is refuted by her averment in her founding affidavit that she made 'application for additional funds from the home loan / access bond with the respondent in respect of the immovable property in question', by the documents provided by the respondent, which the applicant admits show that a further loan amount of R200, 000.00 was granted to her on 4 July 2007, and by the second mortgage bond that was registered over the property in favour of the respondent during 2007, which mortgage bond secures an indebtedness of R240, 000.00.

[10] The applicant contends that the reckless credit provisions of the NCA apply to her entire indebtedness presently under consideration since she made 'the greatest majority of withdrawals' from August 2007, which is after the commencement of the reckless credit provisions on 1 June 2007. There is no merit in this contention. It is clear from the wording of s 80 of the NCA that the relevant time for determining whether or not a credit agreement is reckless is when it was concluded or when the amount approved in terms thereof was increased. The times of withdrawal of amounts approved in terms of a credit agreement are not relevant to this determination. Mr A Gautschi SC, who

appeared with Mr A Bester for the respondent, correctly, in my view, submitted that it would be an impossibility for a credit provider to make the prescribed assessment every time a consumer, for instance, utilises a credit card. The reckless credit provisions of the NCA, in my view, accordingly only apply to the loan amount of R200, 000.00, which amount constitutes an increase on 4 July 2007 within the meaning of s 80(1) of the NCA of the amount approved in terms of the 2005 loan agreement.

[11] The applicant contends that this credit agreement is a reckless one within the meaning of s 80(1)(a) of the NCA based on her averment that no proper assessment was conducted by the respondent as required by s 81(2). It is not suggested that the applicant had any commercial purpose for applying for the increased credit of R200, 000.00.[5] She avers in her founding papers that she required funds during 2007 to undertake alterations at her house in Centurion. It has also not been established that the respondent failed to take reasonable steps to assess the applicant's general understanding and appreciation of the risks and costs of the increased credit and of her rights and obligations as a consumer under the credit agreement that the respondent concluded with her on 4 July 2007.[6] The issue is whether or not the respondent took reasonable steps to assess the applicant's debt repayment history as a consumer under

5 See: S 81(2)(b) of the NCA.

6 See: S 81(2)(a)(i) of the NCA.

credit agreements[7] and her financial means, prospects and obligations[8] before that credit agreement had been concluded with her.

[12] The applicant avers in her founding affidavit that her monthly earnings at the time were approximately R8, 000.00 and an additional sum of R6, 000.00 from her late husband's pension. She further avers that she had a total indebtedness exceeding R1,1 m at the time pursuant to credit that had been extended to her by a variety of other institutions. The respondent avers that the applicant *inter alia* presented to it an income compared with expenses showing a substantial monthly net income available to her to satisfy the monthly repayments of the increased loan amount. The respondent avers that the applicant showed that she had available an amount of R52, 332.99 per month to meet the monthly debt repayments of R11, 272.29. The applicant's income presented to it, was according to the respondent, in line with her income that had previously been presented to it during 2005 before the original credit agreement had been concluded with her. The applicant's debt repayment history with the respondent was satisfactory. The expenses which the respondent avers were presented to it by the applicant do not disclose any debt repayments under other credit agreements. The applicant's risk profile obtained from a credit bureau, according to the respondent, showed the applicant to be a satisfactory credit risk.

7 See: S 81(2)(a)(ii) of the NCA.

8 See: S 81(2)(iii) read with s 80(2) of the NCA.

[13] In reply the applicant takes issue with the correctness of all the information relating to her income and expenses upon which the respondent alleges it relied. She denies that she furnished incorrect information to the respondent and she points out that the relevant documents, which the respondent produced as part of its answering papers, had not been signed by her. An applicant is entitled to adduce relevant evidence in a replying affidavit that serves to refute the case put up in the answering affidavit.[9] The applicant in this instance, however, elected not to disclose the true information relating to her income and expenditure that she had furnished to Mr Oosthuizen, who, on her own version, represented her in making application to the respondent for the increased loan amount and who conveyed information on her behalf to the respondent. She failed to adduce the relevant primary facts or evidence to refute the respondent's averments on this issue.[10]

[14] The applicant contends that the respondent was not entitled to '… only rely on information provided to it by the Applicant…'. The applicant seems to suggest that the respondent was enjoined to verify the information that was supplied to the respondent on her behalf. I find this contention untenable in the circumstances of this matter. The applicant was an existing client of the respondent, the credit extended to her was merely an increase of an existing credit facility by R200, 000.00, from R875, 000.00 to R1, 075, 000.00, her past repayment history of the loan granted to her by the

9 See: *Reiter v Bierberg & Others* 1938 SWA 13 at pp 14 – 15).

10 See: *Radebe and Others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at p793D; *Swissborough Diamond Mines v Government of the RSA* 1999 (2) SA 279 (TPD) at p 324D – F.

respondent originally was satisfactory, her income presented to the respondent was in line with her income that had previously been presented to it during 2005, and she had an acceptable credit rating. S 81(1) of the NCA obliges a prospective consumer to fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by s 81. Absent indications that would reasonably alert a credit provider to the contrary, which has not been established on the facts of this matter, a credit provider is, in my view, entitled to accept for this purpose the veracity of the information provided to it by or on behalf of a prospective consumer. The respondent, in my view, on the facts and circumstances of this matter acted reasonably in accepting the correctness of the information furnished to it on behalf of the applicant.

[15] The respondent has, in my view, met its statutory prescribed assessment obligations at the time when the loan amount in this instance was increased. The credit agreement in terms of which the amount originally approved was increased is not a reckless one within the meaning of s 80(1) of the NCA. This finding and my view of the meaning of the relevant provisions of the NCA earlier in this judgment make it unnecessary for me to deal with the s 81(4) defence raised by the respondent. I should mention that an important issue that was not raised or argued by counsel is what test for materiality is enacted in s 81(4) of the NCA.[11] I leave this question open.

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11 Compare the subjective test for materiality that applied to untrue representations made to insurers, which was introduced by s 63(3) of the repealed Insurance Act, No. 27 of 1943 (see: *Qilingele v South African Mutual Life Assurance Society* 1993 (1) SA 69 (A), at p 75C – H; and *Theron AA Life Assurance Association Ltd* 1995 (4) SA 361 (A), at p 376 C – I) and re-enacted by s 59(1) of the Long-Term Insurance Act, No. 52 of 1998, which commenced on 1 January 1999, and by the corresponding s 53(1) of the Short-Term Insurance Act, No. 53 of 1998, which also commenced on 1 January 1999 (see: *Joubert v ABSA Life Ltd* 2001 (2) SA 322 (W), at p 326 F) and the objective test for materiality that applied to cases of non-disclosure of information to insurers under the common law (*Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A), at p435F; *President Versekeringsmaatskappy*, at 216D – G – I; and *Certain Underwriters of Lloyds of London v Harrison 2004 (2) SA 446 (SCA)*, at p 449B – C and at pp 451J – 452C), which test was enacted in s 59 of the Long-Term Insurance Act and in s 53 of the Short-Term

[16] I now turn to the two personal loan and two credit card loan agreements, which it is common cause, the respondent concluded with the applicant. The applicant has not refuted the respondent's averments relating to the credit that was extended to her in terms of these credit agreements. Instead, she 'submits' in reply that '… the crux of this matter centres on the home loan application and credit in excess of R900, 000.00 granted by the respondent to the applicant and that the balance of the credit is secondary thereto.' The applicant's counsel, Mr M Mostert, did not at the hearing persist in seeking any relief insofar as the credit agreements relating to the credit cards is concerned. I accordingly deal only briefly with the two personal loans that were granted to the applicant.

[17] The respondent's averments and documents produced by it to support its averments that the first personal loan was paid up and that it was effectively substituted by the second personal loan are merely baldly denied by the applicant without any attempt at dealing with the specific averments made by the respondent. It is common cause that the credit agreement in respect of the second personal loan was concluded after the commencement of the reckless credit provisions of the NCA. The applicant baldly states that no proper assessment was undertaken by the respondent prior to the conclusion of that credit agreement. However, the respondent's answer, which, in my view, establishes that it met its statutory prescribed assessment obligations, is not in any way refuted by the applicant in reply.

Insurance Act to apply to cases of non-disclosure of information and untrue representations made to insurers when these sections were amended by sections 19 and 35 of the Insurance Amendment Act 17 of 2003, which Act commenced on 1 August 2003.

[18] Finally, the matter of fees for two counsel. I consider the briefing of senior and junior counsel on behalf of the respondent to have been a reasonable precaution and necessary.

[19] In the result, the following order is made:

The applicant's application is dismissed with costs, including the fees consequent upon the employment of one senior and one junior counsel.

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P.A. MEYER
JUDGE OF THE HIGH COURT

21 September 2011

Date of hearing:	1 June 2011
Date of Judgment:	21 September 2011
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