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

REPUBLIC OF SOUTH AFRICA

Date of hearing: 9 June 2017 Date of judgment: 26 July 2017

Case number: A5049/2015

Case number court a quo: 33795/2012

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~

(3) REVISED.

...25/7/2017..... **.....**
DATE SIGNATURE

In the matter between:

LORAINE PHILOMENA GOSSAYN **First Appellant**

STEPHEN ANTHONY GOSSAYN **Second Appellant**

and

NEDBANK LIMITED **Respondent**

JUDGMENT

BRENNER, AJ:

1. The issues in this full bench appeal involving a money judgment and foreclosure proceedings under four loans secured by altogether four mortgage bonds over fixed property are whether the provisions of section 81(2) of the National Credit Act, number 34 of 2005, ("the NCA"), applies to the consolidation agreement described below, and, if so, whether the respondent failed to comply with such provision. The latter enquiry would involve analysing whether the appellants were at the time of the conclusion of the consolidation agreement and whether, as a result, the respondent committed an act of reckless lending.

2. In the trial court, before the Honourable Ms Justice Victor, judgment was granted on 18 February 2015 against the first and second appellants, Loraine Gossayn ("Mrs Gossayn") and her husband, Stephen Gossayn ("Mr Gossayn"), in favour of the respondent, Nedbank Limited ("Nedbank"), for payment of the sum of R12 012 755,21 plus mora interest and costs.

3. Certain immovable property registered in Mrs Gossayn's name was declared specially executable, namely:

    a. portion 424 (a portion of portion 163) of the Farm Paardeplaats 177 registration division IQ, Gauteng Province, in extent 1,7551 hectares and held by deed of transfer T14211/1983 ("portion 424"), and

    b. portion 425 (a portion of portion 163) of the Farm Paardeplaats 177 registration division IQ, Gauteng Province, in extent 1,7845 hectares and held by deed of transfer T5827/2005 ("portion 425").

4. Leave to appeal was granted on 10 March 2015 by the trial court.

5. The subject-matter of dispute concerned four loan agreements between Mrs Gossayn, as principal debtor, and Nedbank, as lender, all of which

were consolidated into one agreement on 13 July 2011 ("the consolidation agreement").

6. Mrs Gossayn was born on […] August 1957 and Mr Gossayn was born on […] November 1956. They were married in 1979 out of community of property.

7. In 1983, Mrs Gossayn took transfer of the property then described as "Holding 19 Chancliff Agricultural Holdings". Holding 19 was excised from Chancliff Agricultural Holdings and its description was changed to that of portion 424, by endorsement dated 25 March 2008.

8. In 2005, Mrs Gossayn took transfer of the property then described as "Holding 20 Chancliff Agricultural Holdings". This property was previously owned by Mr Gossayn (from 27 November 1997) and sold for R2 950 000,00, and transferred to Mrs Gossayn, on 14 January 2005.

9. On 30 August 2002, Nedbank and Mrs Gossayn executed the first written loan agreement for the advance to her of R600 000,00. As security for this loan, on 23 June 2003, a mortgage bond was registered in favour of Nedbank for R600 000,00, over portion 424, being what was then described as "Holding 19 Chancliff Agricultural Holdings."

10. On 15 May 2006, Nedbank and Mrs Gossayn executed the second written loan agreement for the advance to her of R3 600 000,00. As security for this loan, on 13 June 2006, a second mortgage bond was registered in favour of Nedbank for R3 000 000,00, over portion 424, being what was then described as "Holding 19 Chancliff Agricultural Holdings."

11. On 29 November 2006, as collateral security for the debt, Mr Gossayn executed a deed of suretyship in fabour of Nedbank for the liability of Mrs Gossayn.

12. On 17 July 2007, Nedbank and Mrs Gossayn executed the third written loan agreement for the advance to her of R3 308 041,70. As security for

this loan, on 20 April 2007, a first mortgage bond was registered in favour of Nedbank for R3 300 000,00, over portion 425, being what was then described as "Holding 20 Chancliff Agricultural Holdings."

13. On 24 December 2007, Nedbank and Mrs Gossayn executed the fourth written loan agreement for the advance to her of R5 205 130,00. As security for this loan, on 25 March 2008, a third mortgage bond was registered in favour of Nedbank for R1 650 139,00, over portion 424, being what was previously described as "Holding 19 Chancliff Agricultural Holdings."

14. On 25 March 2008, Holding 19 was excised from Chancliff Agricultural Holdings and its description was changed to that of portion 424, and Holding 20 was excised from Chancliff Agricultural Holdings and its description was changed to that of portion 425.

15. In June 2008, Mrs Gossayn took transfer of four sectional title units being units 35, 9, 7 and 75 in the sectional title scheme known as Honeyvale 107. The prices for these units were, respectively, R595 000,00, R595 000,00, R595 000,00 and R995 000,00.

16. Mortgage bonds for the purchase prices were registered over the units as follows:

    a. In favour of Firstrand Bank Limited, in respect of units 35 and 75;

    b. In favour of Absa Bank Limited, in respect of units 9 and 7.

17. We interpose to mention that, on 21 February 2011, portion 424 was notarially tied with portion 425 in terms of a notarial deed of tie agreement executed on 24 January 2011. This occurred at the behest of Nedbank, so that both properties could be sold together if the need arose. A usufruct over portion 424 was also removed to unencumber Nedbank's security over the property.

18. All of the loan agreements contained acceleration clauses which provided that, on failure to timeously repay any instalment, the full amount then

owing would immediately become due, owing and payable, together with finance charges. Moreover, a certificate of balance issued by Nedbank would constitute prima facie proof of the amount then outstanding by Mrs Gossayn.

19. Between August 2002 and March 2008, Nedbank advanced capital amounts totalling R12 705 130,00 to Mrs Gossayn.

20. On 7 June 2008, within six months of the grant of the fourth loan, Mrs Gossayn defaulted on her instalment of R63 096,03. Another 23 reversals of her debit orders for the instalments occurred from December 2008 to August 2012.

21. On 15 September 2008, a close corporation styled "Cedar Country Inn 2008 CC" ("the corporation"), was incorporated, with Mrs Gossayn as its sole member. According to the financial statements of the corporation, its principal business was that of a hotel, restaurant, with convention and wedding facilities.

22. In May 2010, Nedbank and Mrs Gossayn commenced negotiations to consolidate the loans, with the then balance of the debt amounting to the sum of R9 505 130,00, excluding finance charges. Because Mrs Gossayn had consistently defaulted on her monthly repayments from May 2010, when negotiations started, and ended in July 2011, when the consolidation agreement was executed, Nedbank was not amenable to reducing the interest rate.

23. On 21 February 2011, Mrs Gossayn registered a second mortgage bond over portion 425 for R1 000 000,00 in favour of Nedbank. This constituted additional security for monies already advanced to Mrs Gossayn.

24. On 1 July 2011, the corporation executed a deed of suretyship in favour of Nedbank for the liability of Mrs Gossayn. The corporation was initially cited in the action as a third defendant but its intervening liquidation prior to trial resulted in the action against it falling away.

25. Over one year of negotiations culminated in the execution on 13 July 2011 of the consolidation agreement. The consolidation agreement relied on by Nedbank does not describe itself as such and it refers to the applicability of the NCA throughout. It is referred to as "Agreement of Loan (National Credit Act, 2005). It is entered into between Nedbank and Mrs Gossayn as a natural person. There is neither an introductory clause nor a preamble to the document to articulate that it consolidates the debt under the four loan agreements, when this is an established fact, based on the evidence. It erroneously mentions a loan to be made when all loans had already been made. It fails to express that it constitutes a novation or substitution of the previous loan agreements. Nothing turns on this, as Mr and Mrs Gossayn never disputed that the consolidation agreement was the proper cause of action giving rise to the relief sought. There is a "whole agreement" clause. And there is a clause containing a warranty from Mrs Gossayn providing:

"29.5 The Client warrants that all information provided by the Client in the application for the Loan and any other information provided to Nedbank for the purposes of such application are, to the best of the Client's knowledge and belief, both true and correct and that no information that may affect Nedbank's decision to approve the Loan has been withheld."

26. Mrs Gossayn proceeded to breach the consolidation agreement within three weeks of its conclusion: her first debit order was reversed on 3 August 2011. A certificate of balance attached to Nedbank's particulars of claim reveals a total debt of R12 012 755,81 as at 1 December 2014. One year later, on 15 August 2012, Nedbank sent a letter of demand to Mrs Gossayn in terms of section 129 of the NCA.

27. A lack of positive action to this demand resulted in the issue of summons against Mrs Gossayn, on 5 September 2012. The action was defended, and a summary judgment application brought.

28. The opposing affidavit of Mrs Gossayn is inciteful. No mention was made of a defence of reckless lending. Instead, the gravamen of Mrs Gossayn's defence amounted to the following. The third loan agreement had been

misplaced and therefore the deponent to the summary judgment affidavit could not confirm having perused this document. Nedbank had dragged its feet in negotiating the consolidation agreement and this resulted in her paying excessive fees, insurance and interest. She had been informed that the interest rate on the loans would be abated to prime less 1,9%, yet Nedbank allegedly reneged on this by reverting to the prime rate.

29. Nedbank was charging her for insurance on the properties when she had secured her own insurance cover after receipt of the section 129 notice, she had tried to communicate with Nedbank officials to resolve matters. To no avail. On 27 March 2012, she completed certain documents concerning settlement of the then arrears, and had submitted them, but Nedbank failed to reply. She was simply informed that Nedbank would make a decision on a "possible repayment plan for the arrears". There was no further reply.

30. On 15 April 2013, Nedbank applied to join Mr Gossayn and the corporation as second and third defendants to the action. The joinder was successful. Amended particulars of claim were duly filed on 8 August 2013.

31. In the defendants' amended plea, served on 21 October 2013, the defence of reckless lending was advanced. The Gossayns contended that Nedbank had failed to conduct an assessment of Mrs Gossayn's financial ability to repay the consolidated loan, as required by section 81(2) of the NCA. Alternatively, assuming the assessment occurred, Mrs Gossayn did not understand the risks associated with the consolidation agreement, and entering into same caused her to become overindebted. Accordingly, the agreement was of a reckless nature as defined by section 80(1) of the NCA.

32. In the result, the paramount issue was whether reckless lending occurred at the date of the consolidation agreement on 13 July 2011. No issue was raised by the defendants concerning reckless lending at the dates of the four loans, and any such defence was accordingly abandoned.

33. The action was enrolled for trial in February 2015. The following matters were common cause between the parties. The loans forming the subject-matter of the consolidation agreement were indeed advanced to Mrs Gossayn. The terms of the four loan agreements culminating in the consolidation agreement, and the terms of the securities, namely, the mortgage bonds, and the deeds of suretyship, were undisputed. Since the corporation had been liquidated, no relief was sought against it.

34. Three witnesses testified for Nedbank, namely, Ms Pheladi Moagi ("Moagi"), Mr Freddie Vos ("Vos"), and Mr Golden ("Golden"). An application by the defendants for absolution from the instance was dismissed. The defendants closed their case without testifying or calling any other witnesses.

35. The record had to be reconstructed in regard to the viva voce evidence adduced by Moagi and Vos, and the evidence in chief by Golden.

36. Moagi testified about the calculation of the liability of Mrs Gossayn and her husband qua surety. She drew the information from Nedbank's computer as R12 012 755,21 plus interest. She was satisfied that the figure was prima facie correct. No alternative calculation was put to her to controvert her evidence. No evidence was led by the Gossayns to contradict the calculation.

37. Vos was the relationship manager of the defendants. He dealt with them on a regular basis. He was satisfied from the information supplied by them that Mrs Gossayn had enough assets to cover the debt before execution of the consolidation agreement. Vos could not recall whether he had prepared a pre-agreement quotation.

38. Golden was the senior manager of Nedbank whom Mrs Gossayn approached to renegotiate her debt, to extend the length of the repayment of same and thereby reduce the monthly instalments. No further advance was to be made. The account was in the legal department at the time. Golden asked Mrs Gossayn for signature of an

application form and for financial statements and management accounts of the corporation. He testified that, usually, a credit assessor would obtain a "pre-agreement and quote". Golden was unable to confirm whether this occurred.

39. The application form was signed by Mrs Gossayn on 5 April 2011. The form reflects her gross assets as being worth R30 600 000,00, and liabilities as R9 675 000,00. Her income is recorded as R280 000,00 per month and her expenses as R77 000,00 per month, leaving disposable surplus income of R203 000,00. The application contains a warranty that Mrs Gossayn has "fully answered all questions and responded to requests for information truthfully as part of the assessment process", and that she "is not aware of any other information that may affect this application negatively."

40. Golden testified that Nedbank's affordability test was conducted by referring to Mrs Gossayn's net income as declared in her form, the net income of the corporation as recorded in its financial statements at February 2010 and February 2011 and management accounts to 15 May 2011. The financial statements were signed by Mrs Gossayn, who, in the result, associated herself with the accuracy thereof.

41. For the financial year to February 2010, the corporation had earned a net after tax profit of R661 219,00 while for the year to February 2011, its net after tax profit was R1 120 793,00.

42. The turnover figures were verified by perusal of Nedbank's bank statements as the parties banked with Nedbank.

43. The financial statements revealed that the corporation paid rent to Mrs Gossayn for renting portions 424 and 425 from her. The statements for February 2011 indicated that rent of R1 048 735,00 was paid by the corporation to Mrs Gossayn, that the corporation generated a net profit of R1 473 740,00, and had retained income of R1 120 793,00, and that Mrs Gossayn withdrew R199 760,00 from the corporation for this period.

44. Two credit committee meetings took place over the negotiation period from circa May 2010 to July 2011, and the financial information supplied by Mrs Gossayn was duly considered, after which Nedbank concluded that she could afford to repay the debt at monthly instalments of R76 480,04 over a period of 360 months.

45. During cross-examination, a further asset of Mrs Gossayn's came to light, namely, her credit loan account against the corporation of R2 195 253,00 as at February 2011. While it was put to Golden that the loan account could not be called up, it is noteworthy that, for the year to February 2011, the corporation earned a net profit before tax of R1 473 740,00.

46. It was conceded that the total cost of the restructured loan was R27 553 474,60. Golden explained that this was the cost for extending the repayment period to 360 months from July 2011 until final repayment of the debt. This was disclosed in the consolidation agreement.

47. We turn to an analysis of the facts in the light of the prevailing law. The first question which falls for determination is whether the consolidation agreement is a credit agreement falling within the purview of section 81(2) of the NCA. The first and second loans were concluded before the coming into operation of the NCA on 1 June 2006. The third and fourth agreements were however concluded after the commencement of the NCA and undisputedly constituted credit agreements. It was not the defendants' case that reckless lending had occurred when the third and fourth loans were granted. It was however their case that reckless lending occurred in July 2011 when the consolidation agreement was concluded. It was a proven fact that, under the consolidation agreement, no additional credit facility was advanced.

48. The term "consolidation agreement" is referred to in the NCA but it is not defined in the NCA. This is a lacuna to which the legislature's attention should be drawn.

49. A credit transaction is defined in section 1 of the NCA to mean an agreement that meets the criteria set out in section 8(4) of the NCA. Such section in turn, includes an agreement in terms of which "payment of an amount owed by one person to another is deferred". At first blush this definition would include the consolidation agreement forming the subject matter of this litigation.

50. The NCA refers to consolidation agreements in a different context, section 88 of the NCA is helpful, our emphasis included:

> "***88. Effect of debt review or re-arrangement order or agreement.-***
>
> *(1) A consumer who has filed application in terms of section 86(1), or who has alleged in court that the consumer is over-indebted, must not incur any further charges under a credit facility or enter into any further credit agreement, other than a consolidation agreement, with any credit provider until one of the following events has occurred-*
>
> *(4) If a credit provider enters into a credit agreement, other than a consolidation agreement contemplated in this section, with a consumer who has applied for a debt re-arrangement and that re-arrangement still subsists, all or part of that new credit agreement may be declared to be reckless credit, whether or not the circumstances set out in section 80 apply."*

51. The concept 'credit agreement' is followed by an exclusion from that category: the phrase reads – 'credit agreement, other than consolidation agreement'. Thus, generally 'credit agreement' (as used in the NCA) would include a transaction which is a consolidation agreement but in this instance (being the circumstances referred to in section 88) the category of credit agreement ie consolidation agreements, are to be excluded. Section 88 accordingly supports the interpretation that the consolidation agreement in question, which deferred repayment of the consolidated debt, was a credit agreement and the obligations created in terms of section 81 (2) of the NCA accordingly arose.

52. The third and fourth loan agreements fell squarely within the NCA. It is correct that when the consolidation agreement was concluded no new advances were made, but the debt was reviewed so as to extend the duration of the repayment period, payment was thus deferred The

subject-matter of the restructured debt was the debt which arose under the previous four loans.

53. We have approached this appeal assuming, without finding, that section 81 (2) of the NCA has application. It is unneccessary having regard to the facts of this case, to pronounce upon this issue. We also deem it unwise to do so as the facts of this case are unusual in that two of the credit agreements were concluded prior to the coming into operation of the NCA and two of the credit agreements were concluded thereafter.

54. We turn to the defence of reckless lending, based on sections 80(1) and 80(2) of the NCA, our emphasis included:

> *"**80. Reckless credit***
>
> *80(1) A credit agreement is reckless if, at the time that the agreement was made, or at the time that the amount approved in terms of the agreement is increased, other than an increase in terms of section 119(4)-*
>
> *(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.*
>
> *(2) When a determination is to be made whether a credit agreement is reckless or not, the person making that determination must apply the criteria set out in subsection (1) as they existed at the time the agreement was made, and without regard for the ability of the consumer to-*
>
> *(a) meet the obligations under the credit agreement; or*

(b) understand or appreciate the risks, costs and obligations under the proposed credit agreement,

at the time the determination is being made."

55. Section 81 states:

"81. Prevention of reckless credit

81(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 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 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.

(4) For all purposes of this Act, it is a complete defence to an allegation that a credit agreement is reckless if-

(a) the credit provider establishes that the consumer failed to fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section; and

(b) a court or the Tribunal determines that the consumer's failure to do so materially affected the ability of the credit provider to make a proper assessment."

56. The onus was on Mrs Gossayn and Mr Gossayn to establish that reckless lending had occurred when the consolidation agreement was concluded on 13 July 2011. They failed to discharge this onus.

57. Messrs Vos and Golden testified that an assessment within the purview of section 80(1) was indeed performed. Nedbank's investigations into the affordability of Mrs Gossayn to sustain the contemplated instalments ensued over a protracted period of over one year, during which two credit committees were convened to consider the restructuring of the debt. During the course of this period, Mrs Gossayn provided details of her assets and liabilities and income and expenditure.

58. Mrs Gossayn warranted the accuracy of same and confirmed that she knew of no facts which might have a material affect on her financial position. She provided annual financial statements of the corporation for the years to February 2010 and February 2011, prepared by accountants and signed by her. She provided management accounts to 15 May 2011.

59. In the main, Mrs Gossayn provided information in respect of which she bore personal knowledge, and concomitantly warranted its accuracy.

60. Golden confirmed that Nedbank's bank statements were checked to verify turnover figures supplied to it.

61. By way of aside, Mrs Gossayn made no mention of a defence based on reckless lending in her affidavit resisting summary judgment. Her complaints were of a superficial nature and, albeit that this is academic, she did not provide enough detail to warrant a triable defence at that juncture.

62. It was up to Mrs and Mr Gossayn to give evidence personally to controvert the veracity or inadequacy of the evidence advanced by Nedbank in proving its financial assessment process, and regarding the financial information produced by her to it. The Gossayns could have engaged an independent forensic accountant to assist them in the exercise. They did not provide a basis to challenge the certificate of balance relied on by Nedbank.

63. They made a choice not to take the court into their confidence, as pointed out by the trial court. It was never put to Messrs Vos and Golden under

cross-examination that the documents provided by Mrs Gossayn to Nedbank were false. Had Mrs Gossayn testified, she would have had some difficulty in explaining any such assertion.

64. Portion 424 was registered in her name in 1983, with no accompanying bond, which means that she did not require finance secured by a bond to acquire it. Portion 425 was transferred to her by her husband in 2005 for a price of R2 950 000,00 with no accompanying bond, which again meant that she did not require bond finance to pay the price, although the possibility of a donation cannot be excluded. The prices for her four sectional title units were financed in full by mortgage bonds.

65. Although not directly relevant, no evidence was advanced concerning what Mrs Gossayn did with the substantial amount of money lent to her by Nedbank over a period of six years. Plainly, Mrs Gossayn showed bad faith in the end, because payment of the first instalment post the date of signature the consolidation agreement was dishonoured. This in the face of Nedbank's good faith in attempting to restructure the liability, to accommodate what she claimed to be a cashflow issue. The evidence of the witnesses for Nedbank stood uncontested, and the defence of reckless lending failed.

66. The appeal being unsuccessful, costs must follow the result. Nedbank engaged Senior Counsel. The matter was sufficiently complex to justify his engagement. Accordingly, the costs of one Senior Counsel are justified.

67. The following order is granted:

    a. The appeal is dismissed;

    b. the appellants are directed, jointly and severally, to pay the costs of the appeal, including the costs of Senior Counsel.

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T BRENNER
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

We agree.

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E MOLAHLEHI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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I OPPERMAN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

It is so ordered.

Appearances

For the Appellants:	Adv G Olwagen-Meyer
Instructed by:	Swanepoel Attorneys
Counsel for Respondent:	Adv HJ Smith SC
Instructed by:	Cliffe Dekker Hofmeyer Inc Attorneys