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

**CASE NUMBER: 2017/23569**

REPORTABLE: NO  
OF INTEREST TO OTHER JUDGES: NO

REVISED: NO  
**27 SEPTEMBER 2021**

In the matter between:

**FIRST RAND BANK LIMITED**

Applicant

and

**MADIGAGE, ELIAS ASHTON**

First Respondent

**MADIGAGE, LINAH MAKHAYA**

Second Respondent

**JUDGEMENT**

*This judgement is handed down electronically by circulation to the parties or their legal representatives via email and by uploading same onto CaseLines. The handing down of this judgment is deemed to be 27 September 2021.*

**MOOKI AJ:**

[1] First Rand Bank Limited and the respondents concluded a loan agreement on 30 August 2007. The loan is “a credit agreement” in terms of the National Credit Act, 34 of 2005 (“the Act”).

[2] I refer to the applicant as “the Bank” for ease of reference. The second respondent did not file a confirmatory affidavit. The first respondent is thus the only respondent who gave evidence in response to the application. I refer to the first respondent as “Elias” for ease of reference, to signify the response to the relief sought by the Bank. I refer to “respondents” as required by the context.

[3] The Bank seeks relief that the respondents be ordered to pay R764 757.67, interest in the above amount at the variable rate of 9.60% per annum, calculated daily and compounded monthly from 26 May 2017 to date of final payment. The Bank also seeks to have the residence of the respondents, Erf [...] Leboeng Township, Registration Division I.R. Province of Gauteng, measuring 250 square metres and held by deed of transfer No. T[...], be declared specially executable. Lastly, the Bank seeks costs on the attorney and client scale.

[4] The respondents admit the terms of the loan agreement. The terms include respondents being liable for collection costs; that all fees and charges be debited to the bond account, and that the Bank could institute proceedings to recover outstanding monies and seek an order declaring the property immediately executable. Elias opposed the application essentially on the ground that the Bank failed to comply with section 81(2) of the Act.

[5] Section 81(2) of the Act requires that a credit provider make the prescribed assessment before advancing credit. Elias does not contend that the Bank did not assess the respondents. He could not say either way when the Bank launched this application. Elias pleads that the respondents could not recall whether the Bank concluded an affordability assessment before granting respondents credit.

[6] Elias sought documents from the Bank about the financing advanced to the respondents by the Bank. The Bank then supplied information in the respondents' bond application form. Elias contends that information from the Bank about respondents shows that the Bank did not conduct "a proper assessment" for purposes of section 81(2) of the Act, with the result that the loan agreement constitutes "reckless credit."

[7] Elias relies on the six considerations referred to below in support of the contention that the Bank did not conduct "a proper assessment."

[8] First, he contends that the Bank used outdated salary advices when determining the respondents' nett income. He pointed out that the assessment was done on 14 June 2007, with reference to salary advices for February 2007 (in relation to the second respondent) and April 2007 (in relation to Elias).

[9] The Bank, in response to the claim about the salary advices, contends that respondents assured the Bank that their information pertaining to the bond application constituted a "full and truthful disclosure." The Bank pointed out that the respondents provided the Bank with the salary advices and that the respondents did not say information in the salary advices was incorrect or irrelevant at time of the assessment. The respondents reiterated and confirmed information in the two salary advices in other supporting documents that the respondents gave the Bank.

[10] Second, the Bank gave the respondents a schedule of expenses. Elias "cannot recall" if the respondents gave the Bank information on expenses and the amount shown on the expense schedule detailing the respondents' monthly expenditure. Elias pointed out that the respondents did not confirm information in the schedule of expenses "by way of our signatures."

[11] The Bank pointed out that the respondents supplied the Bank with the schedule of expenses. This was after the Bank requested the respondents to provide the Bank with a list of their expenses as part of the bond application. The schedule reflected part

of the respondents' expenses at the time. The schedule also reflected information from the salary advices.

[12] Third, Elias contends that the Bank did not consider an ITC Report on the respondents in 2007. He pointed out that the Bank supplied the respondents with an ITC Report for 2008, as opposed to a report for 2007 when the Bank gave the respondents credit.

[13] The Bank denies considering an ITC report concerning the respondents only in 2008. It contended that it used the ITC report in 2007 before concluding the loan agreement. The Bank explained that the ITC records reflect all historic and recent history as at the date of the printing of the records.

[14] Fourth, Elias avers that the Bank failed to obtain at least three months bank statements from him. The Bank replied that it requested each respondent to provide three months bank statements.

[15] Fifth, Elias denied that the respondents signed the bond application form. The Bank replied that the respondents do not say that information in the bond application form is incorrect or irrelevant or that the respondents did not submit the bond application documents.

[16] Sixth, Elias contends that the amount claimed by the Bank includes legal fees, which the Bank debited to the respondents' account when that should not have been the case. The Bank produced a schedule, demonstrating that the amount claimed in the certificate of indebtedness has no legal fees.

[17] The respondents accept that the Bank conducted an assessment. They dispute that the assessment was "proper." They contend that the Bank failed to comply with section 81(2) of the Act.

[18] The Bank points out that the respondents do not say the Bank did not conduct an affordability assessment, but that it was not a “proper assessment”. The Bank pointed out that section 81(4) of the Act obliged the respondents to disclose information “fully and truthfully”, failing which the respondents are barred from raising a defence of reckless credit.

[19] The Bank denies not having made a proper assessment. The Bank considered various information made available to it by the respondents, including a list of their income and expenses, bank statements, bond application form and salary advice.

[20] The respondents had a joint surplus in the amount of R5358.00 on assessment for the loan. The total monthly payment was R4459.96. The respondents do not say they were over indebted at the conclusion of the loan agreement. They made monthly payments from October 2007 until 15 July 2009, when they applied for debt review. They did not pursue the debt review and never secured a debt-rearrangement order.

[21] The respondents defaulted in their obligations in terms of the loan agreement. They are in arrears. The Bank quantified their indebtedness in a certificate, being the amount claimed in the notice of motion. The Respondents admit the statement of account and the summary of the respondents’ bond account; save that the amounts includes legal costs that the Bank was not entitled to charge. The amounts claimed by the Bank do not include legal costs. The respondents did not file a reply affidavit. They thus did not take issue with Bank’s denial.

[22] The Bank complied with the formal requirements such as sending the respondents notices as required by the Act. There was no response to the notices.

[23] I am satisfied that the Bank has shown that the full outstanding amount owing in terms of the loan has become due and payable. There is no merit to the contention that the credit agreement is reckless credit because the Bank did not comply with section 81(2) of the Act.

[24] The considerations relied upon in opposing the relief sought by the Bank are unmeritorious. It bears pointing out that the respondents do not aver that information in their bond application was inaccurate or irrelevant when the Bank was assessing the respondents. More importantly, the respondents do not say what information should have been considered but was not so considered. Similarly, the respondents do not say information considered by the Bank did not reflect the status of the respondents at the time when the Bank undertook the assessment.

[25] The opposing affidavit raised spurious defences. This is illustrated by a denial that the respondents signed the bond application form. This denial is to be seen in the light of the respondents having made payments pursuant to the loan agreement for more than 10 years. The signing of the application form is raised as a defence after more than a decade of the respondents making payments pursuant to the loan agreement.

[26] The fact is that the respondents furnished the Bank with information about the respondents' finances. The Bank considered such information and concluded that the respondents had a joint surplus of R5 358 and that the loan repayment was R4 459.96. The respondents do not say the figures are inaccurate. They do not say they were overindebted when the Bank assessed their finances for purposes of advancing credit to them.

[27] I am also satisfied that the Bank may execute against the property. The Bank drew the Respondents' attention Rule 46(1)(a)(ii). The Bank invited the respondents to place facts and submissions for the court's consideration in terms of Rule 46(1)(a)(ii). The respondents were advised that the Court may otherwise order that the property be specially executable which would permit the Bank to sell the property in execution. The respondents did not furnish such facts or made submissions. The opposing affidavit merely state that the invitation was "noted." The respondents do not contend that they or their dependants will lose access to housing should the property be sold in execution.

[28] The respondents have not established a basis for a finding that the Bank could not arrive at “a fair and objective assessment” in relation to the respondents’ then application for credit. This is more so because the respondents do not contend, for example, that the expenses that the Bank considered did not reflect the expenses by the respondents at the time. Similarly, the respondents do not contend that information in the salary advices used by the Bank did not reflect the circumstances of the respondents when the Bank assessed the respondents for credit. More fundamentally, the respondents do not contend, for example, that they had no general understanding and appreciation of the risks and costs of the credit then proposed by the Bank or that they became over-indebted as a result of the credit advanced to them by the Bank.

[29] The real substance to this application is not that the Bank failed to comply with the Act. The substance is that the respondents failed to meet their obligations towards the Bank. The respondents were aware that they could undergo a debt review. They did not pursue that avenue. Their resistance to the relief sought by the Bank is unmeritorious.

[30] I make the following order:

1. The respondents are ordered to pay the applicant the amount of R764 757.67.
2. The respondents are ordered to pay interests in the amount in paragraph (a) at the variable rate of 9.60% per annum, calculated daily and compounded monthly; from 26 May 2017 to the date of final payment.
3. The immovable property known as Erf [...] Leboeng Township, Registration Division I.R. Province of Gauteng, measuring 250 square metres, and held by Deed of Transfer No. T[...], is declared specially executable.

4. The respondents are ordered to pay costs on the attorney-and-client scale.

**O. MOOKI**

*Acting Judge of the High Court  
Gauteng Local Division, Johannesburg*

<b>Heard:</b>	21 July 2021
<b>Judgment:</b>	27 September 2021
<b>Applicant's Counsel:</b>	C Denichaud
<b>Instructed by:</b>	Roy Suttner Attorneys
<b>First Respondent's Counsel:</b>	F Greeff (Attorney)
<b>Instructed by:</b>	Greeff & Van Wyk Attorneys.