IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

Reportable

Case No.: 24190/2009

In the matter between:

ABSA BANK	Plaintiff
and	
TRUSTEES FOR THE TIME OF THE COE FAMILY TRUST	First Defendant
SHAIEK COE	Second Defendant
ZULEIGHA ABDEROEF	Third Defendant

CORAM	:	**D M DAVIS J**
JUDGMENT BY	:	**DAVIS J**
FOR THE PLAINTIFF	:	**ADV J W JONKER**
INSTRUCTED BY	:	**HEYNS & PARTNERS INC**
FOR THE FIRST, SECOND & THIRD RESPONDENT	:	**ADV M HARRINGTON**
INSTRUCTED BY	:	**GUNTER & ASSOCIATION**
DATE OF HEARINGS	:	**1 SEPTEMBER 2010**
DATE OF JUDGMENT	:	**01 SEPTEMBER 2010**

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 24190/2009

DATE: 1 SEPTEMBER 2010

In the matter between:

ABSA BANK Plaintiff

and

TRUSTEES FOR TIME THE BEING OF THE COE

FAMILY TRUST 1st Defendant

PLUS TWO OTHERS 2nd and 3rd Defendants

JUDGMENT

DAVIS, J:

This is an application for summary judgment against the first defendant, *inter alia*, for the payment of monies lent in advance, as well as for an order declaring certain immovable property executable in terms of the mortgage bond and so far as second and third defendants are concerned, based on deeds of suretyship in respect of the first defendant's obligations.

The application for summary judgment was opposed,

essentially on the following bases by the defendants:

1. The extent to which the plaintiff complied with section 92(2) of the National Credit Act 34 of 2005 ('the Act'), particularly as regards the existence of a pre-agreement statement and the quotation in the prescribed form.

2. The extent to which the provision of credit by plaintiff constitutes so called "reckless credit", especially insofar as no assessment, as required by section 81(2) of the Act, was carried out and insofar as third defendant was a student, earning no income at the time that the credit was granted.

Summary Judgment

The issue with regard to reckless credit was debated at some considerable length between the Court, Mr Jonker, who appeared on behalf of the plaintiff and Mr Harrington who appeared on behalf of the defendants. Accordingly, it appears that it would be best to deal with this question at the outset. There is, however, one further preliminary issue which must be dealt with, that is the question of the nature of the proceedings as they unfolded before this Court. There was some debate as to what this Court should order were it to refuse summary

judgment in that the key issues are legal questions. To some extent, the implication was, that were summary judgment to be refused, there may not be triable issues which would remain for the purposes of further proceedings.

The authorities appear to indicate that summary judgment should not be granted, when any real difficulty as to a matter of law arises. But if a court is satisfied that the defence is unarguable, judgment will be granted. Summary judgment seems also inappropriate for dealing with clearly arguable questions of law that should properly be dealt with on exception. If, however, a case can be decided on a crisp point of law, there is no reason at all why the point should not be determined in an application for summary judgment. See in particular Herbstein & Van Winsen Civil Practice of the High Court of South Africa (5th Edition), Volume 1 at 540-541.

In the present dispute, there is a question of law that needs to be determined. Following the authorities, it appears to me that this Court needs, at the very least, to determine the nature of these legal defences and their justification, in order to further determine whether this is a matter which is appropriate for the grant of summary judgment or for a referral to trial. With these preliminary remarks, I turn to deal with the question of reckless credit.

Reckless Credit

Section 81 is headed "prevention of reckless credit". Subsection (1) provides:

> "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."

Subsection (2) indicates what assessment is required:

> "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 financial means, prospects and obligations.

(b) Where 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."

Subsection (4) is also relevant to this dispute. It provides:

"For the purposes of this Act, it is a complete defence to an allegation that the credit agreement is reckless if:

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

(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."

Defendant has averred that no proper assessment was conducted in terms of section 81(2) and accordingly this failure is a defence which would justify the refusal of summary judgment. I should add that there is nothing on the papers to

indicate whether a proper assessment was conducted. Mr Jonker referred me to clause 11 of the mortgage loan agreement which forms the basis of the claim and, in particular, clauses 11.1 to 11.4 which read thus:

> The borrower states that
>
> 11.1 he undertakes his risks and costs, as well as his rights and obligations under this agreement;
>
> 11.2 entering into this agreement will not cause him to become over-indebted as contemplated in the National Credit Act;
>
> 11.3 he has fully and truthfully answered all and any requests for information made of him by or on behalf of the bank leading up to conclusion of this agreement.
>
> 11.4 the bank has given the borrower a pre-agreement statement and the Quotation.

In short, Mr Jonker submitted that these clauses constituted part of an agreement which had been entered into voluntarily between the parties. Thus, these provisions indicated that the defendants understood the risks and costs and the rights and obligations of the agreement. Defendants had thereby confirmed that the agreement would not cause them to become

over-indebted as contemplated in the Act, confirmed further that they had fully and truthfully answered all and any requests for information made of them by or on behalf of the bank, which led up to the conclusion of the agreement. Further they accepted that the bank had provided them with a pre-agreement statement and the Quotation as was indicated.

In short, Mr Jonker's submission was that this agreement, entered into voluntarily between the parties, covered all the requirements for a prescribed assessment. He went further and submitted that it was not open to the defendants to raise a defence of reckless credit, because, in terms of section 81(4), if it is established that the consumer failed to fully and truthfully answer requests for information made by the credit provider, this was a complete response to the averments of defendants. In short, having entered into the agreement, possessed of all of the details, to which I have made reference, the defendants cannot now raise questions relating to over-indebtedness nor that they did not understand the inherent risks, because they had entered into a contract which had specifically made provision for these issues. In short, section 81(2) of the Act was not of application when clauses 11.1 – 11.4 of the agreement so concluded, confirmed the veracity of the answers given by defendants. There could be no justifiable defence raised because the provisions of section

81(4) now came to the assistance of plaintiff as credit provider.

Summarised, plaintiff's case is that defendants are not able now to put up the defence it has set out when their financial position was confirmed in terms of the agreement. In particular, clauses 11.2 and 11.3 were not fully and truthfully answered and hence section 81(4) provides a full defence to plaintiff. Accordingly, in Mr Jonker's view, the plaintiff had complied with its obligations in assessing the financial position of first defendant. This was further confirmed in the conveyancer's certificate of compliance which was attached to the papers.

By contrast, Mr Harrington, submitted that section 81(2) governed this dispute, notwithstanding the terms of the contract. If section 81(2) of the Act could be so circumvented by the provisions of a standard form contract, this would ultimately subvert the key purposes of the Act. In this connection, he referred to section 90 of the Act, entitled "unlawful provisions of a credit agreement", subsection (2) of which provides that:

> "A provision of a credit agreement is unlawful if:
>
> (a) Its general purpose or effect is to;

(i) defeat the purposes or policies of this Act;

(ii) deceive the consumer;

(iii) subject the consumer to fraudulent contact.

(b) it directly or indirectly purports to:

(i) waive or deprive the consumer of a right set out in this Act;

(ii) avoid a credit provider's obligations or duty in terms of this Act;

(iii) set aside or override the effect of any provisions of this Act;

(iv) authorise the credit provider to;

(aa) do anything that is unlawful in terms of this Act; or

(bb) fail to do anything that is required in terms of this Act."

In this context, a considerable debate took place between counsel about the purposes of the Act. Section 3, as is now the case with modern forms of legislation, sets out the purpose and application of the Act. To the extent that it is relevant, section 3 provides:

"The purposes of this Act are to promote and

advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry and to protect consumers by:

(b) ensuring consistent treatment of different credit producers and different credit providers.

(c) promoting responsibility in the credit market by;

(i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers;

(ii) discouraging reckless credit granting by credit providers and contractual default by consumers.

(d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers."

While the Act may not be classified purely as a piece of consumer protection, it seeks to strike a balance between the interests of a credit provider and the borrower, to ensure a measure of fairness and equity within the credit market, and,

further, to prevent reckless credit agreements from being concluded, which, in turn, place the credit market in considerable jeopardy, of which a court can now take judicial cognisance, given the financial and banking crisis that has engulfed the world economy since 2008.

In my view, section 81(2) was designed to bring about some balance between the credit provider and borrower and to give teeth to the Act's purpose of ensuring that reckless credit does not take place.

Section 81(2) informs the credit provider of its duties. In this connection it needs to assess the proposed consumer's general understanding and appreciation of the risks and costs of the proposed credit, of their rights and obligations. It thus needs to assess the debt repayment history, the borrowers' existing financial means, prospects and obligations. Compare this purpose to clause 11. Clause 11 refers to over-indebtedness, but that is where the clause begins and ends. There is no indication as to whether, in terms of clause 11.3, a request for information was made of any of the defendants by and on behalf of the plaintiff, leading up to the conclusion of this agreement; that is a request for information which would have ensured that the credit process was undertaken in terms of the three pronged set of inquiries contained in section

81(2).

Section 81(4) needs to be read together with section 81(2). It clearly gives the credit provider a defence in terms of the overall purpose of the Act, to ensure fairness to both parties in circumstances where the consumers fail to fully and truthfully answer any request for information made by the credit provider as part of its assessment. But, if an assessment was not undertaken in the first place, then section 81(4) is of no relevance.

It was argued by Mr Jonker that the parties entered into an agreement and accordingly the notion of *pacta sunt servanda* must now have application. In this connection, Mr Jonker referred the Court to the decision of the Supreme Court of Appeal in Brisley v Drotsky 2002(4) SA 1 (SCA). This has proved to be a controversial judgment in that it has been interpreted as a representation of an unbending application of the doctrine of *pacta sunt servanda,* which, in turn, is incompatible with the Constitution and the constitutional commitment to a form of engagement with power imbalances which have dominated South African society for over 300 years. See, for example, L Hawthorne 2003 SA Mercantile Law Journal 271, AJ Barnard 2006(17) Stellenbosch Law Review 386; D Bhana 2007(124) SALJ 269.

The fact, however, is that the Supreme Court of Appeal has asserted this particular doctrine to be central to our law of contract Mr Jonker was thus correct to remind me that I am bound by this decision, notwithstanding any reference to the powerful criticisms of the judgment with which I fully associate myself.

However, there is a further issue which is of some significance in these proceedings. In Barkhuizen v Napier 2007(7) BCLR 691 (CC), Ngcobo, J (as he then was) confirmed the normative framework of contract law and the doctrine of *pacta sunt servanda*, as it has been set out in Brisley supra. The learned judge of the Constitutional Court went on to say:

> "[M]any people in this country conclude contracts without any bargaining power and without understanding what they are agreeing to. That will often be a relevant consideration in determining fairness. This Court must, however, operate on the basis of the evidence that was presented to the High Court and that is now before us. There is no admissible evidence that the contract was not freely concluded, that there was unequal bargaining power between the parties or that the clause was

not drawn to the applicant's attention. There is nothing to suggest that the contract was not freely concluded between the parties with equal bargaining power, or that the applicant was not aware of the clause. On the contrary, the indications are that he was aware of the time limits... [This was a case dealing with a time limitation clause in an insurance contract.] The contract required him to submit a written claim with the respondent within 30 days of the accident, but he submitted his written claim within at least eight days of the accident through his insurance broker. I am unable to conclude that the 90 day period allowed to the applicant to sue is so unreasonable that its unfairness is manifest and that, therefore, its enforcement would be contrary to public policy." (para 65-67).

In Bredenkamp V Standard Bank Ltd 2010(4) 468 (SCA) Harms DP interpreted this judgment as follows:

"I do not believe that the judgment held or purported to hold that the enforcement of a valid contractual term must be fair and reasonable, even if no public policy consideration found in the

Constitution or elsewhere is implicated." (para 50)

I was thus compelled to re-examine my reading of Barkhuizen to see whether the approach adopted by Harms DP presents the approach that I proposed to adopt. To the extent that the *dictum* of Harms DP suggests that fairness is not to be considered in an enquiry into the enforceability of a contract, that reading would be in direct conflict with Barkhuizen supra, and particularly paras 65-66 which are not considered by Harms, DP in his judgment. By contrast, if the learned Deputy President is suggesting that any enquiry into fairness can only take place through the prisma of public policy as mediated by the values of the Constitution, then nothing is added to the existing state of law as I sought to so apply it. Fairness and reasonableness in contract from part of the determination into the exercise of a party's freedom. See Barkhuizen at para 57. In so determining this question, evidence from the party seeking to assail the contract is then required.

In this case, sitting as a judge dealing with an application for summary judgment, it may well be that the defendants can produce evidence before a trial court to suggest that these clauses were not properly drawn to their attention and that the factors as set out by Ngcobo, J in para 65-66 were applicable

to the present dispute.

Harms, DP, in Bredenkamp, supra, at para 38 observes that:

> "Determining whether or not an agreement was contrary to public policy requires a balancing of competing values...Reasonable people, irrespective of any philosophical or political bent, might disagree whether any particular value judgment was 'correct', i.e. more acceptable."

The learned Deputy President also notes that:

> "Public policy and the *boni mores* are now deeply rooted in the Constitution and its underlying values." (Para 39)

These are important affirmations of the inherent contested nature of adjudication, particularly with a legally all embracing Constitution in which an inquiry into values is deeply imbricated in the judicial process. But invoking the Constitution should not be seen or employed as a bland jurisprudential war cry. Rather it behoves a court to engage with public policy in express terms, guided by the objective normative value constitutional system referred to in

Carmichele v Minister of Safety & Security & Another 2001(10) BCLR 995 (CC) at para 54. By engaging expressly with how it seeks to develop or articulate public policy, a court should explain its application of the normative framework to its chosen outcome.

Given, the nature of the three dominant values, freedom, , equality and dignity read together with the history from which the Constitution has asked the country to journey, South African law needs to come to terms with the economic and social reality that prevails in our country. (Barkhuizen at para 64). That includes an understanding that all too many people are completely or partially illiterate, possessed of poor education, have no access to legal advice or social power. In so many ways therefore legal relationships are imposed upon them, so that freedom to act cannot simply be assumed.

I cannot apply these considerations to this dispute because this Court is dealing with a summary judgment application. Therefore, to the extent that Barkhuizen and Brisley are relevant, evidence as indicated, may be relevant to the determination of the issues at trial; that is the circumstances in which the agreement was entered into and the kind, if any, of assessment that was entered into by the plaintiff in terms of section 81(2) and whether this was insufficient for the

purposes of the Act as I have outlined it. In this way, the kind of balance of interests foreshadowed in Barkhuizen, supra, ca be properly assessed.

For all of these circumstances, it appears to me that the defendant has placed before this Court a defence sufficient to raise issues which could only be determined by a trial court. Therefore, summary judgment is dismissed with costs, the plaintiff, of course, is granted leave to proceed by way of trial, but given its approach to date, a costs order is appropriate.

DAVIS, J