Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 23427/2010

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED **Plaintiff**

and

GEOFFREY WILLIAM KELLY **First Defendant**

DEIDRÉ BERNADETTE KELLY **Second Defendant**

Summary:

- *Debtor and Creditor - National Credit Act 34 of 2005 – 'reckless credit agreement' concluded as a consequence of credit provider's failure to undertake adequate credit risk assessment as required by s 81(2) of the Act - relief to consumer which court may grant in such circumstances.*
- *Practice – Summary judgment –nature of facts which consumer opposing summary judgment application in terms of uniform rule 32(3)(b) should set forth in order to establish existence of 'bona fide defence' to the credit provider's claim on grounds that consumer entitled to relief in terms of s 83(1) and (2) of the National Credit Act 34 of 2005 by reason of credit having been extended recklessly.*

JUDGMENT

Delivered on 25 January 2011

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[1] The plaintiff has applied for summary judgment against the defendants in the sum of R1 062 612,64, together with interest thereon at 10% per annum from 12 August 2010, being the amount due to it in terms of a loan advanced to the defendants against the security of a mortgage over Erf 18133, Kuils River. The transaction qualifies as a 'credit agreement' within the meaning of the National Credit Act, 34 of 2005, ('the NCA'). The defendant does not dispute the conclusion of the agreement, or the amount that is claimed by the plaintiff. It opposes the summary judgment application on the ground that the provision of the credit in question was 'reckless credit' within the meaning of the NCA. Section 81(3) of the NCA provides that a credit provider must not enter into a 'reckless credit agreement' with a prospective consumer.

[2] It is apparent from the averments in the opposing affidavit that the credit agreement in issue in the current action is only one of seven related agreements concluded by the defendants with either the plaintiff, or one or the other of two other major banks. These agreements were concluded in the context of the acquisition by the defendants of seven erven in the Kuils River area 'as investments' in early 2008. Each of these erven was purchased for the sum of R435 000. The intention, according to the first defendant, was that

'the monthly bond/loan repayments would, to an extent, have been subsidized by monthly rental received from the letting of the properties'. The mortgage bond in respect of the loan currently in issue was registered on 26 March 2008.

[3] The institution of the action was preceded, as required, by notice by the plaintiff to the defendants in terms of s 129 read with s 130 of the NCA. The unchallenged allegations in the particulars of claim suggest that the defendants did not respond to such notice by referring the claim to a debt counsellor, as provided in terms of s 86 of the NCA, with a view to an application being made for debt review or to have the agreement declared reckless.

[4] The essence of the ground of opposition to the application for summary judgment lay in the provisions of s 81(2) of the NCA, which impose an obligation on every credit provider 'not [to] 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; 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'.

Subject to subsections 82(2)(a) and 82(3), neither of which appear to find application in the current matter, a credit provider 'may determine for itself the evaluative mechanisms or models and procedures to be used in meeting its assessment obligations under s 81, provided that any such mechanism, model or procedure results in a fair and objective assessment'; see s 82(1) of the NCA.

[5]The defendants allege that the credit provided to them by the plaintiff was extended without an adequate enquiry having been undertaken either into their ability to service and repay the debt, or into the viability of the property speculation enterprise for which the relevant credit facility had been sought. In terms of s 80(1)(a) of the NCA, a credit agreement made in circumstances in which the credit provider has failed to comply with its aforementioned obligation under s 81(2) of the Act is 'reckless'.

[6]The defendants' allegations of reckless credit were advanced notwithstanding the provisions of the following clause in the standard terms and conditions of the mortgage agreement, which appeared immediately above their signatures to the agreement:

I/We confirm that:

1.1 The quotation/cost of credit ("Part A") and the terms and conditions ("Part B") have been fully explained to me/us and that I/we understand my/our rights and obligations, and the risks and costs of the loan.

1.2 I/we have been informed that I/we can refer any further questions I/we may have to you at any time.

1.3 I/we accept the offer of the loan contained in Part A and the related terms and conditions in Part B, and confirm that:

1.3.1 I/we can afford the capital and interest payments and the fees referred to in this Agreement.

1.3.2 Since application to you for the loan offered in Part A:

1.3.2.1 there has been no deterioration in my/our financial position; and

1.3.2.2 I/we have not applied for or taken up any additional credit.

1.4 To the best of my/our knowledge and belief, I am we are not aware of any existing or pending land claim in terms of the Restitution Land Rights Act No. 22 of 1994 against the property(ies) reflected in clause 14.1 of Part A. I/we undertake to notify the Bank immediately if I/we become aware of such a claim.

2. I/We confirm that I am/we are not under debt review, nor have I/we applied for debt review, as at the date of signature this Agreement by me/us (natural

persons only).

3. **I am/we are aware that I/we must not accept this Agreement unless I/we understand my/our rights and obligations, and the risks and costs of the loan.**

(The use of bold font is taken from the original.)

[7] In the event that the credit agreements were indeed reckless, as alleged by the defendants, the provisions of s 83 of the NCA would arise for consideration by the court. Insofar as currently relevant, s 83 of the Act provides:

Court may suspend reckless credit agreement

1) Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, the court may declare that the credit agreement is reckless, as determined in accordance with this Part.

2) If a court declares that a credit agreement is reckless in terms of section 80(1)(a) or 80(1)(b)(i), the court may make an order-

a) setting aside all or part of the consumer's rights and obligations under that agreement, as the court determines just and reasonable in the circumstances;

or

b) suspending the force and effect of that credit agreement in accordance with subsection (3)(b)(i).

3) .....

4) .....

It is evident, on a consideration of s 83(3)(b), that an order in terms of s 83(2)(b) of the NCA can be made only after an investigation by the court into whether or not the consumer is over-indebted at the time of the relevant court proceedings. Any determination of over-indebtedness would fall to be made with regard to the criteria and on the basis set out in s 79 of the NCA.[1]

[8] Inasmuch as the employment of the permissive word 'may' in s 83(1) of the NCA suggests that the court is not obliged to declare that a credit agreement which qualifies as reckless in terms of the aforementioned provisions to be such, the determination whether or not to make such a declaration if the agreement in question is susceptible to being so stigmatised must be governed by a consideration of the relevant objects of the statute with a view to assisting towards their achievement and, in that context, the purposefulness of making either of the orders contemplated by s 83(2)

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1 Section 79 of the NCA provides:

79 ***Over-indebtedness***

(1) *A consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, having regard to that consumer's-*

(a) *financial means, prospects and obligations; and*

(b) *probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment.*

(2) *When a determination is to be made whether a consumer is over-indebted or not, the person making that determination must apply the criteria set out in subsection (1) as they exist at the time the determination is being made.*

(3) *When making a determination in terms of this section, the value of-*

(a) *any credit facility is the settlement value at that time under that credit facility; and*

(b) *any credit guarantee is-*

(i) *the settlement value of the credit agreement that it guarantees, if the guarantor has been called upon to honour that guarantee; or*

(ii) *the settlement value of the credit agreement that it guarantees, discounted by a prescribed factor.*

(a) or (b). The court is unlikely to make any order relieving the consumer of its obligations if the result would be the unjust enrichment of the consumer at the expense of the credit provider. The release of a consumer from all or part of the obligations undertaken in terms of a reckless credit agreement will in general be informed by the statute's policy of promoting equity in the credit market and by the consideration of assisting the consumer to fully repay responsibly undertaken debt at the expense, if necessary and appropriate, of subordinating the rights of reckless creditors. These considerations cannot be addressed in a vacuum. The appropriate course will be determined on an assessment by the court of the peculiar facts of each case. This means that the court will have regard not only to the transaction as one qualifying in the abstract as reckless credit in accordance with the concept as defined in the Act, but also to its peculiar character and effect in the context of the consumer's overall credit exposure assessed on the basis contemplated by s 79 of the NCA.

9] The claims in the current matter qualify on the face of the allegations made in the summons as claims falling within the ambit of Uniform Rule 32(1), with the result that the plaintiff was entitled to apply, as it has, for summary judgment. It is evident from the aforegoing that it would be inappropriate, however, to grant summary judgment in favour of a credit provider-plaintiff in circumstances in which there was a prospect that the consumer-defendant would be able to obtain a declaration in its favour that the subject credit

agreement constituted reckless credit, together with attendant relief by way of an order in terms of s 83(2) of the NCA. To grant summary judgment against the defendant in the postulated circumstances would, by closing the doors of the court, be to deny it the benefits intended by the legislation to be available to the recipients of reckless credit. For the reasons described in the preceding paragraph, whether or not there is a prospect that the consumer-defendant might obtain relief in terms of s 83 is dependent on the facts. In the context of opposing an application for summary judgment on the grounds that an adequate risk assessment did not precede the conclusion of the credit agreement, and that a consequent entitlement has arisen to a declaration that the credit agreement was reckless and an attendant order in terms of s 83(2) of the Act, the defendant is therefore required to set out the pertinent facts in support of his/her opposition in the manner required by Uniform Rule 32(3).

10] What Rule 32(3) requires in cases in which a defendant opposes an application for summary judgment in the manner contemplated by paragraph (b) of the sub-rule has been discussed in a number of authoritative judgments. In that regard it suffices to refer to Corbett JA's oft-quoted exposition in *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A-E[2]:

> [O]ne of the ways[3] in which a defendant may successfully oppose a claim for summary

2 Cf. also *Tesven CC v SA Bank of Athens* 2000 (1) SA 268 (SCA) ([1999] 4 All SA 396) at para.s [22]-[25].
3 The other way is by providing security, as contemplated by Uniform Rule 32(3)(a).

judgment is by satisfying the Court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word 'fully', as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence. (See generally, *Herb Dyers (Pty.) Ltd. v Mohamed and Another*, 1965 (1) SA 31 (T); *Caltex Oil (SA) Ltd v Webb and Another,* 1965 (2) SA 914 (N), *Arend and Another v Astra Furnishers (Pty) Ltd*, [1974 (1) SA 298 (C)] at pp. 303-4; *Shepstone v Shepstone*, 1974 (2) SA 462 (N)). At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading. (See *Estate Potgieter v Elliot*, 1948 (1) SA 1084 (C) at p. 1087; *Herb Dyers* case, *supra* at p. 32.)

(The significance of the underlined sentence was recently emphasised in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at footnote 11.)

[11] The first defendant made the following relevant averments in the opposing affidavit made on behalf of both defendants:

'[T]he credit application in respect of the loan that forms the subject matter of this action

was done in its entirety through a so-called bond originator…with very limited financial information and at no stage were either myself or Second Defendant contacted or approached by any representative of the Plaintiff in order to do, or complete, the statutory assessment. Both myself as well as Second Defendant subsequently requested information and documentation from Plaintiff regarding the Loan Application and any assessments done, to no avail.' (para. 15)

'Had Plaintiff done a proper peremptory pre-assessment, it should have realized that we…would be, or would have become, over-indebted by the granting of the loans. To the best of our knowledge, no such pre-assessment took place, or could have taken place with the limited financial information furnished, prior to the granting of the loans.' (para. 17)

'We were never made aware of the risks and costs of the proposed credit, and the rights and obligations of a consumer under a Credit Agreement.' (para. 18)

'Furthermore our existing financial means, prospects and obligations were never fully examined before the granting of the loans.' (para. 19)

'I therefore submit that this court should declare the Credit Agreements to be reckless in terms of Section 80(1)(a) of the [NCA] based on the fact that no credit assessment was done, alternatively in terms of Section 80(1)(b)(i) and/or (ii) in that if the necessary credit assessments were indeed done, neither Second Defendant nor I understood the risks, cost and obligations under the Agreement/s.' (para. 21)

(Underlining added for emphasis.)

12] It is apparent from the first defendant's averments that he is not certain that an adequate assessment was undertaken. He speaks of 'limited financial information' having been provided, but he does not give any indication of what that information encompassed. He seems to have in mind a prescribed form of assessment as a statutory requirement, when, as has been shown with reference to the relevant provision of the NCA,[4] there is no applicable binding

4 Section 82(1) of the NCA, described in the second part of paragraph , above.

format for the required assessment.[5] On the broad-brush allegations made in the opposing affidavit, the court is unable to make any determination whether there is any cogent basis upon which a trial court might accept that the financial information provided by the defendants was inadequate to enable an adequate assessment by the credit provider.

[13] There is also no explanation in the opposing affidavit of how the alternative claim that 'if the necessary assessments were indeed done', the defendants did not understand 'the risks, costs and obligations under the Agreement/s' can be advanced in the face of the declaration signed by the defendants, quoted in para. , above. The defendants have made no attempt whatsoever to explain why their written confirmation to the credit provider that 'the risks and costs of the loan' had been 'fully explained' to them should not be accepted at face value, or how they came to sign an acknowledgment of their awareness that they should not accept the agreement unless they understood their rights and obligations, and 'the risks and costs of the loan'.

[14] Furthermore, there is no information in the opposing affidavit to indicate on what basis a court might be persuaded to embark on the debt review that would be necessary before it might grant any relief under s 83(2)(b) of the NCA, or as to why it might consider it just and reasonable to set aside all or

5 There is no suggestion in the papers that the defendants' property investment was financed in terms of a 'developmental credit agreement' as described in s 10 of the Act.

part of the defendants' obligations as permitted in terms of s 83(2)(a) of the Act.

15] In the circumstances the defendants have not set out the material facts upon which their defence is based with sufficient particularity and completeness to satisfy the court that a *bona fide* defence has been disclosed.

16] It remains to be considered whether notwithstanding the inadequacy of the opposing affidavit the court should nevertheless exercise its inherent discretion in defendants' favour and refuse summary judgment. I am not persuaded that there is any basis to assist the defendants in this regard; and indeed the defendants' counsel did not contend that there was. The relief that the defendants would be able to obtain consequent upon a declaration of reckless credit is of the nature that they would have been apply for themselves after receipt of the notice sent to them by the plaintiff in terms of s 129 of the NCA. In the absence of any explanation of their failure to have done so, it would be unfair to the plaintiff to deny it the relief, by way of summary judgment, to which it is on the face of matters entitled, merely on the vague and speculative premise that the defendants might, if given a further opportunity, later succeed in obtaining a declaration of reckless credit together with effective ancillary relief.

17] Although unnecessary in the light of the conclusion reached that the defendants have not said enough to avoid summary judgment, I shall for completeness deal briefly with the principal argument advanced in support of the application. The plaintiff's counsel placed heavy reliance on the provisions of the clause in the standard terms and conditions of the credit agreement, quoted in para. , above, read with s 81(4) of the NCA. Section 81(4) of the NCA provides:

> 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.

18] While the content of the clause relied upon by the plaintiff's counsel does suggest that some form of risk assessment by the credit provider preceded the conclusion of the credit agreement, it gives no indication of the content of such assessment. Furthermore, the content of the credit agreement gives no basis for a finding by the court in terms of s 81(4) of the Act that the defendant answered any questions in connection with the assessment untruthfully or incompletely, or that any such flaws in the information provided by the defendant materially affected the ability of the plaintiff to make a proper

assessment. The plaintiff's endeavour to rely on s 81(4) of the NCA therefore could not have succeeded; certainly not at this stage on the facts currently apparent.

[19] The following orders will issue:

1. Summary judgment is granted in favour of the plaintiff against the first and second defendants, jointly and severally, the one paying the other being absolved.

2. *Mora* interest shall be payable on the judgment debt at the rate of 10% per annum from 12 August 2010 to date of payment.

3. The defendants are furthermore directed, jointly and severally, to pay the insurance premiums on the mortgaged property, Erf 18133 Kuils River, in the amount of R173,63 per month from 12 August 2010 until such time as the judgment debt arising out of the terms of paragraphs 1 and 2 of this order has been paid in full, alternatively, until transfer of the immovable property to a third party consequent upon its sale in execution, whichever event occurs first.

4. The mortgaged property, Erf 18133 Kuils River, in the City of Cape Town, Division Stellenbosch, Western Cape, held by deed of

transfer no. T21109/2008 is declared directly executable.

5. The defendants shall be liable to pay the plaintiff's costs of suit on the scale as between attorney and own client.

A.G. BINNS-WARD
Judge of the High Court

Date of hearing:	**11 January 2011**
Date of judgment	**25 January 2011**
Plaintiff's counsel	**Adv. T Carter**
Defendants' counsel	**Adv. HE De la Rey**
Plaintiff's attorneys	**Kevin Moodley and Associates** **83 Castle Street** **Cape Town**
Defendants' attorneys	**De la Rey Attorneys** **Marais Crescent** **Durbanville**
	MacGregor Stanford Kruger **Buitengracht Street** **Cape Town**