Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 14580/2013

In the matter between:

DIRK JOHANNES WIESE First Appellant

LOUISE WIESE Second Appellant

and

ABSA BANK LIMITED Respondent

Court: Justice L J Bozalek, Justice J I Cloete *et* Justice K M Savage

Heard: 3 February 2017

Delivered: 24 February 2017

JUDGMENT

CLOETE J:

Introduction

[1] The central issue in this appeal (which is with special leave of the Supreme Court of Appeal) is whether the National Credit Act 34 of 2005 (NCA) permits a credit provider to have regard to the projected income of a separate commercial entity when assessing a consumer's ability to afford to repay a personal loan, in circumstances where the loan to be advanced to the customer is for the specific purpose of purchasing that commercial entity.

[2] The respondent bank has also raised a point *in limine*, namely whether uniform rule 49(4) in its amended form nonetheless requires an appellant to specify grounds of appeal in its notice of appeal. I will deal first with the *in limine* point.

Point in limine

[3] Uniform rule 49(3) previously provided that:

> *'The notice of appeal shall state whether the whole or part only of the judgment or order is appealed against and if only part of such judgment or order is appealed against, it shall state which part and shall further specify the finding of fact and/or ruling of law appealed against and the grounds upon which the appeal is founded.'*

[4] The aforementioned subrule was substituted by GN R472 of 12 July 2013. In its current form the equivalent is to be found in uniform rule 49(4) which provides that:

'Every notice of appeal and cross-appeal shall state –

(a) what part of the judgment or order is appealed against; and

(b) the particular respect in which the variation of the judgment or order is sought.'

[5] The appellants' notice of appeal reads as follows:

'TAKE NOTICE that the Appellants hereby note their appeal to the full bench of the abovementioned Honourable Court against the whole of the judgment of His Lordship Blignault handed down on 13 May 2014.

TAKE NOTICE FURTHER that on 18 November 2014 the Supreme Court of Appeal granted leave to appeal to the full bench of the above Honourable Court as appears from a certified copy of the order attached hereto marked "A".

TAKE NOTICE FURTHER that the Appellants seek that the order of the Court a quo should be set aside and replaced with orders:

1. *Rescinding the judgment granted by His Lordship Blignault on 13 May 2014.*

2. *Granting leave to the Appellants to defend the action instituted by the Respondents under the above case number.'*

[my emphasis]

[6] The bank contended that the notice of appeal is fatally defective in that it failed to specify the finding of fact and/or ruling of law appealed against and the grounds upon which the appeal is founded. On the other hand the appellants submitted that, given the change in the wording of the subrule pertaining to notices of appeal, this is no longer a requirement.

[7] In *Leeuw v First National Bank Limited* 2010 (3) SA 410 (SCA) at para 2 it was stated that:

> *'The appellant persisted in this court with an argument that the respondent's initial notice of appeal was fatally defective as it did not comply with Magistrates' Courts Rule 51(7)(b), which requires an appellant to state* "the grounds of appeal, specifying the findings of fact or rulings of law appealed against". *The rule is peremptory and non-compliance has been held to render the notice invalid. The object of rule 51(7) is to enable the magistrate to frame his reasons for judgment under rule 51(8) and, insofar as this had not already been done, to inform the respondent of the case he has to meet and to notify the appeal court of the points to be raised. In 1987 the Uniform Rules of the High Court were amended to provide, for the first time, for the delivery, prior to the hearing, of* "a concise and succinct statement of the main points...which [a party] intends to argue on appeal" – *so-called heads of argument. It can be said that since then the object of the notice of appeal to inform the respondent and the court was also achieved by the heads of argument, and it has almost become the rule that a full judgment is given after a trial in the magistrates' courts, which is rarely added to in terms of rule 51(8), as also occurred in this case.'*
>
> [my emphasis]

[8] In para 5 of the judgment the court continued:

> *'In this court it is not required that grounds of appeal be stated in the notice of appeal. The nature of the proceedings is such that this court is entitled to make findings in relation to* "any matter flowing fairly from the record". *The parties in their written and oral arguments have dealt with all the issues relevant to the appeal and the appellant has not pointed to anything that has been overlooked. The point, apart from being bad, had long lost its significance.'*
>
> [my emphasis]

[9] The rule of the Supreme Court of Appeal to which reference was obliquely made is rule 7(3) which states that:

> *'Every notice of appeal and cross-appeal shall –*
>
> *(a) State what part of the judgment or order is appealed against;*
>
> *(b) State the particular respect in which the variation of the judgment or order is sought; and*
>
> *(c) Be accompanied by a certified copy of the order (if any) granting leave to appeal or to cross-appeal.'*

[10] Despite rule 7 having been substituted by GN R191 of 11 March 2011, rule 7(3) itself is still couched in identical terms.

[11] A comparison between Supreme Court of Appeal rule 7(3) and uniform rule 49(4) indicates that what the Rules Board intended was that uniform rule 49(4) should mirror Supreme Court of Appeal rule 7(3) to the required extent.

[12] The following is stated in the commentary on Supreme Court of Appeal rule 7(3) in Erasmus: Superior Court Practice (2nd ed) Vol 1 at C1-9:

> *'This subrule requires a notice of appeal to state two things: (a) the part of the judgment or order appealed against; and (b) the particular respect in which the variation of the judgment or order is sought. In older cases it was held that the object of the requirement that the part of the judgment or order appealed against must be set out is to avoid embarrassment or ambiguity and where the only issue involved is apparent on the record, strict compliance with the subrule may be waived. In view of*

the second requirement of the subrule, viz that the particular respect in which the variation of the judgment or order is sought, must be stated, it would seem that compliance with the first is now essential.'

[13] In their notice of appeal the appellants stated: (a) that the whole of the judgment was appealed against; and (b) the particular respects in which variation of the judgment or order was sought.

[14] Moreover in its current form Practice Note 46(5) of the Consolidated Practice Notes of this Division (effective as from 1 July 2012) reads that:

'(5) The heads of argument of each party must be accompanied by a Practice Note indicating –

...

(b) the issues on appeal succinctly stated:...'

[15] In the present matter the appellants not only complied with Practice Note 46(5) but also filed comprehensive heads of argument dealing with the issues in the appeal. Counsel for the bank accepted that the latter was neither prejudiced in preparing for the appeal, nor taken by surprise as to what case it was called upon to meet. In addition it was clear to us from both the Practice Note and heads of argument filed by the appellants what the issues were.

[16] What is also relevant is that the powers of a court on appeal are identical in the High Courts and Supreme Court of Appeal (see s 19 of the Superior Courts Act 10 of

2013, which bears the same wording as its predecessor, namely s 22 of the Supreme Court Act 59 of 1959).

[17] In *Thompson v South African Broadcasting Corporation* 2001 (3) SA 746 (SCA) at para [4] it was stated that:

> *'Although the finding of the Court* a quo *was attacked by the applicant when applying for leave to appeal, it is noteworthy that in the heads of argument filed on his behalf it was not alluded to at all. Instead, the argument focused on legal issues. This Court was therefore justified in assuming that the applicant accepted these findings…'*

[18] To sum up therefore, it would appear that, to the extent that the older cases took the approach that the previous uniform rule 49(3) was peremptory in nature (at least in the context of appeals from the magistrates' courts), the decision in *Leeuw* (*supra*) has made it clear that this is no longer the position in the Supreme Court of Appeal. Moreover, to the extent that there was a dichotomy between Supreme Court of Appeal rule 7 and the old uniform rule 49(3), this is no longer the case. Further, and at least in this Division, Practice Note 46(5) caters for any apparent deficiency in a notice of appeal which might give cause for complaint. It follows that the point *in limine* must fail.

The merits

[19] On 5 September 2013 the bank issued summons against the appellants jointly and severally for payment of sums totalling R4 715 242.68 in respect of monies loaned and advanced together with interest and costs. The bank also sought an order

declaring the appellants' jointly owned immovable property in Onrus Rivier specially executable, given that it serves as security for the loans in the form of mortgage bonds registered over the immovable property. The appellants failed to enter appearance to defend and default judgment was granted against them in the terms sought on 6 November 2013.

[20] On 20 December 2013 the appellants applied for rescission of the default judgment. It was accepted by the parties for purposes of the appeal that the appellants provided a reasonable explanation for their default. What is in issue is whether they set out a *bona fide* defence to the bank's claim which, *prima facie*, carries some prospect of success should rescission be granted and the matter referred to trial.

[21] The first appellant deposed to the founding and replying affidavits and the second appellant filed confirmatory affidavits in support thereof. For convenience I will refer to them either as *'the appellants'* or *'Mr Wiese'*, who is the first appellant and who, it is now common cause, was the individual involved in negotiations with the bank at all relevant times.

[22] The defence raised by the appellants was that of reckless credit as provided in Part D of Chapter 4 of the NCA, and more particularly sections 80 to 83 thereof. Mr Wiese claimed that the bank granted the appellants reckless credit by approving the fourth and fifth loans (the subject of the default judgment) during October 2008 in circumstances where it had failed to conduct the required assessment in terms of

section 81(2), alternatively where it knew that the loans would render the appellants over-indebted.

[23] He maintained that, to the knowledge of the bank (by whom he was employed at the time) the total monthly instalment due and payable in respect of the loans was more than double the appellants' combined monthly income, which income was derived solely from their fixed employment.

[24] He stated that:

> *'33. Before the fourth and fifth loans were approved by the Respondent, Mr Andre Jooste (at the Respondent's Private Bank Credit Centre in Bellville) indicated to me that the Respondent, in terms of the Act, could not even consider affording further credit to the Applicants, based on our financial position and monthly income at the time.*
>
> *34. I was in the process of buying a business at the time and desperately needed money and decided to proceed with a formal loan application through the Respondent's Home Loan Department through a consultant in Strand. I am not sure what procedures and processes were followed by the Respondent thereafter, but the next thing I knew the Respondent, through Mr Jan Crafford, confirmed that the loan applications were approved.*
>
> *35. In hindsight, I believe that I should not have applied for further credit, as I knew there was no possibility that the Applicants could satisfy all the repayments in respect of the credit agreements entered into.*
>
> *36. I am advised that the Act prohibits the practice of reckless credit.*
>
> *37. I submit that the Respondent did not conduct the necessary assessment as required by section 81(2) of the Act, alternatively, I submit that the*

Respondent entered into the credit agreements on which its claim is based knowing that the said agreements would make the Applicants over indebted.'

[25] Mr Heinrich Valentine deposed to the bank's answering affidavit. He is employed as a Senior Legal Counsel (Operations Enterprise Services) in its Group Litigation team. He stated that he had personal knowledge of the facts set out therein as a result of his consideration of all relevant documents and data pertaining to the claim which had been electronically captured and stored by the bank. The appellants did not take issue with this allegation and it thus stands uncontested. In addition both Messrs Jooste and Crafford filed confirmatory affidavits in support of Mr Valentine's affidavit.

[26] The latter stated that Mr Wiese commenced his employment with the bank in March 1981 and, in his last capacity, was a so-called relationship executive at its Hermanus branch (according to Mr Wiese he was employed by the bank for even longer; as previously mentioned, Mr Wiese was still so employed when the loans were approved in 2008).

[27] According to Mr Valentine, in his position as relationship executive Mr Wiese dealt with a growth portfolio of about 60 to 70 "groups" of what he termed "medium business clients". Mr Wiese was a very experienced and knowledgeable relationship executive who was well trained in all required credit, compliance and regulatory aspects pertaining to medium business, including the relevant provisions of the NCA.

[28] These included dealing with credit applications on an almost daily basis, ensuring that they had been correctly completed and that all requirements were met before submitting them to the bank's credit department. Mr Valentine stated that:

> *'17. Since his employment in 1981 the First Applicant has had extensive training on credit applications. He was well aware of the issue of affordability and ability to make payment of instalments.*
>
> *18. In view of the aforesaid and what is stated hereunder, it is quite astonishing that the First Applicant brought an application for rescission of judgment, with specific reference to the defence of reckless credit, on the basis that he does. He knew what the processes of the Respondent were and that those processes were in place specifically to be sure that applicants for credit are able to afford the credit applied for and that reckless credit is not issued.'*

[29] Mr Valentine explained that Mr Crafford dealt with the appellant's credit application. Mr Crafford was employed by the bank for 39 years. He had considerable experience in the management of credit facilities, analysis of financial statements and liaising with clients and the bank's credit assessment department. During the last 9 years of his employment (he resigned in June 2012) Mr Crafford was employed as a credit assessor in the bank's Cape Town home loans department:

> *'20. ...As such he was responsible for the presentation and recommendations of applications to head office of those applications that fell outside the mandate of the regional office in as far as rand value was concerned. Here too the analysis and interpretation of financial statements and projections of businesses formed part of his responsibility. It would be fair to say that Mr Crafford was considered to be someone with wide ranging knowledge*

regarding the interpretation and assessment of financial statements by his seniors and colleagues.

21. *Due to Mr Crafford's experience and good judgement he was often asked by his colleagues to assist in more difficult applications. I must add that he was regarded as a more conservative assessor that* [sic] *would not take unnecessary risks. This means that he would rather have declined an application for credit if he was not sure that a case was made out for the ability to repay the instalments required for that application. Mr Crafford says that the Respondent placed a very high premium on compliance with the provisions of the National Credit Act and he strictly adhered to this approach.'*

[30] Mr Crafford recalled the appellants' credit application. He stated that the application pertained to the purchase of a going concern, a Seven Eleven convenience store franchise ("the business"), which was upgraded shortly before submission of the credit application. As part of the upgrade, arrangements were made with suppliers for the provision of suitable stock.

[31] The business was purchased in the name of a shelf close corporation, Castle Hill Trading 281 CC ("Castle Hill") of which Mr Wiese was a member from 22 October 2008. (According to the Search Works printout annexed to Mr Valentine's affidavit, Mr Wiese was in fact the sole member of Castle Hill, which was deregistered on 19 October 2010 due to annual return non-compliance; according to Mr Wiese, it was eventually placed in liquidation on 18 March 2011).

[32] Mr Crafford stated that as part of the credit assessment the ability of the business to repay the loans was considered. This is also the reason why Castle Hill ultimately bound itself as surety and co-principal debtor with the appellants to a maximum of

R3.6 million in respect of the loan indebtedness on 16 October 2008. Both the suretyship agreement and relevant resolution are annexed to the answering affidavit, and reflect that it was Mr Wiese who signed the suretyship as Castle Hill's duly authorised representative.

[33] The bank was able to retrieve from its system three entries made by Mr Crafford on about 25 September 2008. These are also annexed to the answering affidavit. Two are virtually illegible but the other reads as follows:

> *'PURCHASING A GOING CONCERN (GORDONSBAAI FRIENDLY 711) UNDER SHELF CO (CASTLEHILL TRADING 281 CC). P/PRICE R3M PLUS STOCK OF R1,5M. TAKEOVER DATE IS 03/11/2008. TAKEOVER STOCK REPAYABLE OVER 6 MNTHS. CASH FLOW PROJECTION REFLECTED THAT THE TOTAL AMOUNT WILL BE PAID IN DEC 2008. BUSINESS RECENTLY REVAMPED. APPLICANTS WILL ALSO TAKE OUT RENTAL AND STOCK GUARANTEES.*
> *GOOD ABSA RECORD. NO NEGATIVES PER CREDIT BUREAU ENQS.'*

[34] Mr Crafford stated that the cash flow projection of the business (supplied by Mr Wiese as part of the credit application) confirmed its ability to service the loan repayments due. However in order to satisfy himself independently that the business would indeed be able to do so, Mr Crafford consulted with the relevant franchisor, as well as Mr Wiese, the latter on a regular basis during the application process. Having carried out a detailed assessment, and having consulted with all relevant parties, Mr Crafford came to the conclusion that the business would be able to service the repayments and he accordingly approved the credit application. Unfortunately it transpired that the business did not succeed.

[35] Also annexed to the answering affidavit was a document signed by the appellants on 29 September 2008 in which they confirmed that the bank had complied with the provisions of the NCA. Mr Valentine stated that a detailed application would have been submitted for the kind of credit that the appellants sought, and annexed an example of a checklist similar to the one used at the time of their application. It is apparent from this checklist that a detailed assessment is carried out on a whole range of aspects and that a number of documents would have to have been submitted by the appellants, including a detailed cash flow forecast at the discretion of the credit official assessing the *'valuation'*.

[36] Mr Jooste was unable to recall discussing the application with Mr Wiese but stated that he may have done so. However, as Mr Valentine pointed out:

> *'34. In any event, on the First Applicant's own version he was informed by Mr Andre Jooste of the Respondent, prior to their application for credit, that the Respondent would not even consider affording credit to them, based on their financial position and monthly income at the time. Of course this corresponds with everything that is stated above regarding Mr Crafford's assessment and the Respondent's approach to matters of credit. It also corresponds with Mr Crafford's recollection that the application was not to provide credit to the Applicants as such but that it was for the purchase of a business and that the business would have serviced the payment of the instalments on the loan agreement.'*

[37] In his replying affidavit Mr Wiese made the following allegations:

37.1 His training and experience were limited to medium to large corporate or business clients whose turnover exceeded the annual threshold in s 7(1) of the NCA (and thus those clients who did not fall under the provisions of the NCA);

37.2 He had never dealt with personal or individual credit transactions or applications;

37.3 He knew what the banks "processes" were but only with reference to commercial or business dealings and transactions;

37.4 The loan agreements in issue are personal home loan agreements and not loan agreements for the purchase of a business;

37.5 From his experience as set out in the bank's answering affidavits he could confirm that the *'terms of and procedures for a loan in order to buy a going concern differ from that of a personal loan'*;

37.6 The bank had failed to conduct a *'detailed assessment'*; and

38.7 Mr Jooste had informed him that his application for credit would not be successful as he would be required to show that the business had been

successfully operating for at least six months, which he was not able to do given that Castle Hill only commenced trading in November 2008.

[38] Relying on the fact that personal home loan agreements were concluded between the parties, Mr Wiese maintained that:

> *'11. ...It is therefore clear that the applications for credit were not granted for the purchase of a going concern (business) in the name of Castle Hill...*
>
> *12. At the time the said applications were brought and approved, Castle Hill was merely an empty shell that intended to buy a business. The applications were signed during September 2008 and the business was only acquired during November 2008.*
>
> *13. I initially applied for a loan from the Respondent in order to buy a going concern, which application was refused by the Respondent's Private Bank division. I was advised that Castle Hill would have to show audited financial statements in order for such a loan to be granted.*
>
> *14. Only after the abovementioned loan was refused, I was referred back to the Respondent's home loans division.*
>
> *15. I again submit that the evidence to be led during a trial would support the above and show that the personal home loan agreements on which the Respondent's claim is based constitute reckless credit as envisaged in the Act.'*

[39] Also relevant are the following paragraphs in the replying affidavit:

> *'18. I again reiterate that the Respondent granted me personal home loans, and not a loan to buy a going concern. The monies were paid out to me more than*

2 (two) months before Castle Hill acquired the business and I was free to use it for any purpose whatsoever….

21. *I reiterate that the* "cash flow projection" *was an informal projection, nothing more than a guess with no real accounting value. As stated above, my original application for a loan to buy a going concern was refused based on the lack of audited financial statements and I was informed that the* "cash flow projection" *was insufficient.'*

Findings of the court a quo

[40] In its reasons for judgment the court *a quo* found that although the appellants had mentioned their over-indebtedness as envisaged in s 79 of the NCA, it was clear that their real defence was founded on those provisions pertaining to reckless credit. Indeed, in heads of argument filed in this appeal, it was submitted on behalf of the appellants that *'it is common cause that the crux of* [their defence] *is founded on Sections 80 to 83* [of the NCA]'.

[41] The judge stated that the defence of reckless credit raised was largely based on two considerations, the first being that certain documents described the loans in question as home loans and not business loans, and the second, that the loans were processed in the bank's home loans division and not its business loans division.

[42] The judge found that both considerations were irrelevant:

'The real issue is not the name or label that was placed on the loan or which division of respondent it emanated from. The question to be considered is simply whether respondent has complied with the provisions of s 80(2) [sic] *of the NCA.'*

[43] Having regard to the evidence, the judge concluded that there was nothing before him to support the appellants' allegation that the bank had failed in any of its duties under s 81 of the NCA. He thus found that the appellants had failed to show a *bona fide* defence and dismissed the application.

Grounds of appeal

[44] In the document attached to the appellants' Practice Note to which I have already referred, the grounds of appeal were essentially that the trial court erred:

44.1 In finding that it was irrelevant whether the loans were business or personal (in heads of argument it was contended that the bank cannot be permitted to change the *'very nature'* of the loan agreements);

44.2 In failing to consider that at rescission stage the court is not seized with the duty to evaluate the merits of the defence advanced, and that doubt as to its merits is not a good reason for refusal, provided that it *prima facie* is more than a delaying tactic (relying on *RGS Properties v Ethekwini Municipality* 2010 (6) SA 572 (KZD) para 12); and

44.3 In failing to apply the test set out in *Standard Bank of South Africa Ltd v Kelly and Another* (23427/2010) [2011] ZAWCHC1 (25 January 2011) para 9, namely that in summary judgment proceedings it is inappropriate to grant the relief sought by the plaintiff where there is a prospect that the consumer

defendant, having set out the pertinent facts, would be able to obtain a declaration of reckless credit in its favour.

Discussion

[45] The requirement of a *bona fide* defence which *prima facie* carries some prospect of success is comprised of two elements. First, the defence must be raised in good faith. Second, on the face of it, the defence must have some prospect of success at trial.

[46] In the appellants' founding affidavit the defence of reckless credit was based squarely on the bank having failed to conduct any assessment at all in terms of s 81(2) of the NCA. After being confronted with the bank's version, the appellants changed tack. Being unable to deny that an assessment had in fact been conducted, they claimed that the assessment had not been *'detailed'* and that the loans granted were personal rather than business in nature.

[47] The appellants must have realised that they had painted themselves into a corner by failing to disclose the pertinent facts in the first instance. In the founding affidavit Mr Wiese did not mention that he provided Mr Crafford with a cash flow projection for the business. That he was purchasing a going concern would self-evidently have made the production of a cash flow projection not only possible but something which the bank would no doubt have wished to consider. This non-disclosure is material. Furthermore, it is highly improbable that Mr Wiese would ever have considered purchasing the business had he not himself been confident of its prospects of

success. This is an individual who is well versed in medium to long term business and the risks attendant upon obtaining loan finance for that purpose. It is also most unlikely that Mr Wiese would have been prepared to agree to the appellants' immovable property (which is their home) being bonded as further security if he was not confident that the business would succeed. This gives the lie to his belated assertion that the case flow projection he supplied to the bank was *'an informal projection, nothing more than a guess with no real accounting value'*.

[48] Perhaps his most startling allegation (made for the first time in reply) was that the R4.7 million "windfall" was money that he could do with as he pleased. He did not disclose how he spent this windfall, nor did he mention how he otherwise would have managed to fund the purchase of the business. His attempt to hide behind Castle Hill as a shelf entity is both cynical and disingenuous. It was clearly shown by the bank that, at all material times, it was the common intention of the parties that Castle Hill would merely be the vehicle for the purchase of the asset, i.e. the business, for which it agreed to loan the funds. Moreover Mr Crafford's evidence that he also consulted the relevant franchisor as part of his assessment (and who would have been able to express a reliable opinion on the cash flow projection supplied by Mr Wiese) was not disputed. Having regard to the aforegoing, the only reasonable conclusion to be drawn is that the appellants did not act in good faith in raising their defence.

[49] However, if I am wrong, I am nonetheless persuaded that the defence raised has no *prima facie* prospect of success for the following reasons.

[50] Section 1 of the NCA defines a consumer as including (a) the party to whom credit is granted under a credit facility; (b) the mortgagor under a mortgage agreement; or (c) the borrower under a secured loan.

[51] Section 81(2) of the NCA stipulates that a credit provider must not enter into a credit agreement without first taking reasonable steps to assess *inter alia* (a) the proposed consumer's existing financial means, prospects and obligations; and (b) where a consumer applies for credit for a commercial purpose, whether there is a reasonable basis to conclude that such commercial purpose may prove to be successful.

[52] Section 78(3) in turn defines *'financial means, prospects and obligations'* for purposes of Part D of Chapter 4 of the NCA as including, in s 78(3)(c):

> *'If the consumer has or had a commercial purpose for applying for or entering into a particular credit agreement, the reasonably estimated future revenue flow from that business purpose.'*

[53] Accordingly therefore it was incumbent on the bank, when making its s 81(2) assessment, to have regard to the reasonably estimated future revenue flow of the Seven Eleven franchise that Mr Wiese intended purchasing through the vehicle of Castle Hill with funds to be loaned by it. This is precisely what it did.

[54] The distinction which the appellants thus seek to draw between a personal home loan and a business loan does not assist them. It is the purpose of the loan that determines what needs to be considered in assessing whether a loan may be

granted to a prospective consumer, and not the mechanism of the loan itself. It follows that any evidence adduced at trial in relation to the mechanism of the loan would be irrelevant in the context of the defence raised to defeat the bank's claims. The court *a quo* was correct in dismissing the application and the appeal must fail.

[55] While it is so that the respondent's point *in limine* was unsuccessful, little time was spent in argument before us on this issue, and it should thus have no effect on costs, which should follow the result.

Conclusion

[56] **In the result I would propose the following order:**

'The appeal is dismissed with costs.'

J I CLOETE

I agree and it is so ordered.

L J BOZALEK

I agree.

K M SAVAGE