

SOUTH AFRICA / JUDGMENT

Agattu Trading 191 (Pty) Ltd v C.M and Another (A68/2018) [2019] ZAGPPHC 175 (24 May 2019)

[2019] ZAGPPHC 175

COURT

North Gauteng High Court, Pretoria

BEFORE

Coetzee, Teffo

CASE / FILE NUMBER

A68/2018

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1)

REPORTABLE:

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED: Case
Number: A68/2018
24/5/2019
Agattu
Trading 191 (Pty) Ltd
Applicant
and
C[....]
M[....]
First Respondent
E[....]
S[....] L[....]
Second Respondent

JUDGMENT

COETZEE AJ

COETZEE AJ (TEFFO J CONCURRING)

- [1] The parties are referred to as the appellant or the credit provider, the first respondent as the debt counsellor and the second respondent as the consumer.
- [2] The crisp question in this matter is whether the credit provider in granting a short-term loan to the consumer acted recklessly.
- [3] The debt counsellor on behalf of consumer applied in the Magistrates Court ("the application") for an order:

"That the credit agreement with the sixth respondent is declared reckless, the force and effect of the credit agreement are suspended and that the relevant credit agreement be settled in accordance with the payment proposal plan."

- [4] The Court a quo held that the loan was reckless because it was premised upon the "hope" that the consumer would be able to obtain a long-term loan when the short-term loan terminated.
- [5] The appellant appealed against both the order and the cost order.

THE

FACTS

- [6] The consumer and her then husband approached Bondpro (the predecessor of the appellant) for a loan.
- [7] They were married in community of property.
- [8] Once the credit provider had conducted a credit assessment the parties entered into:

8.1 A bond loan agreement on 7 May 2008 for a deferred loan amount including deferred interest and acceptance fees of R269 240 on the terms and conditions set out there in ("the initial agreement").

8.2 A renewal credit agreement on or about 31 June 2010 in the amount of R271 200 including an acceptance fee ("the renewal agreement")

- [9] Bondpro, the original credit provider, ceded the credit agreement to the appellant.
- [10] In terms of the initial agreement, the consumers had to make twelve monthly payments of R4 394.72 to cover the interest and costs and at the expiry of twelve months, repay the full capital amount of R269 240.
- [11] The purpose of the initial loan was to consolidate the consumers' debts ("the debt consolidation") and to enable the consumers to have an improved credit record after twelve months that they could use together with their property as security to obtain a long-term loan to settle the initial loan.
- [12] It is the credit provider's business to provide short-term loans to consolidate debt and to create a good credit record for the consumer to be able to obtain long-term relief.
- [13] The affordability study showed that the financial position of the consumers prior to the debt consolidation in terms of the initial loan was a net combined disposable income of R8 308.00
- [14] The affordability study showed further that after the debt consolidation there was an increased net combined disposable income of R14 416.28 per month after payment of the monthly loan instalment of R4 394,72.
- [15] What was in dispute was whether the consumer was over indebted in respect of repayment of the capital amount of R269 240 after 12 months.
- [16] The credit grantor when granting the initial loan relied upon the assets and liabilities, the income and expenditure and the prospect of a further loan to be obtained during or at the expiry of the twelve-month period to enable the consumer (and her husband) to repay the capital amount.
- [17] The credit provider contended that when assessing the ability of the consumer to repay the full capital amount, one may have regard to the assets of the consumer. It contemplated that if necessary, the consumer and her husband had to dispose of the immovable property in Atteridgeville to settle the amount due in terms of the credit agreement if no long-term loan could be obtained.
- [18] The initial loan contained a provision that in the event of any default, the credit provider could execute upon the Atteridgeville property. The renewal loan, which is dealt with below, contained a stronger term that if after eight months after entering into the loan agreement the consumer had not obtained a long-term loan, the consumer undertook to put the property onto the market for sale to acquire the funds to settle the capital amount.

The renewal agreement

- [19] Three events occurred during the 12 months after the granting of the initial loan to the consumer.
- [20] The consumer and her husband failed to pay the initial loan instalments for August and September 2008.
- [21] The consumer and her husband incurred further debts from the date of the granting of the initial loan to increase their monthly liabilities to R22 649.00 per month.
- [22] They failed to obtain a long-term loan from a major financial institution when the capital amount fell due. The credit provider assisted them to apply for the loan.
- [23] The credit provider assisted the consumer who agreed with the credit provider to extend the repayment term for another twelve months. They entered into a renewal agreement (the renewal loan) on 31 June 2010.
- [24] By this time the consumer and her husband were divorced, and the property was transferred to the consumer.
- [25] The consumer and her husband entered into a renewal loan, other than what is alleged in the consumer's replying affidavit that a further loan was entered into.
- [26] The terms of the renewal agreement were similar to that of the initial agreement in that the monthly payment would cover the interest and costs and that the capital amount was repayable at the expiry of twelve months.
- [27] In terms of the renewal agreement, the loan amount was increased to R326 860 to cover the arrears, interest and finance charges.
- [28] The renewal loan that replaced the initial loan left the consumers with an ultimate debt of R326 860.00. The bond remained in place as security for payment.
- [29] The financial position of the consumers for purposes of the renewal agreement was that their net combined disposable income prior to the debt consolidation was R5 036.00 per month and after the debt consolidation R4061.00. This was after providing for the new bond repayment of R4502.00 per month.
- [30] The renewal agreement, which was the specific subject matter of the application in the Court a quo, contained the specific clause that if after eight months of signature of the agreement, the consumer and her ex-husband were unable to obtain a long-term loan, they would within the next four months sell the bonded property to obtain the funds to liquidate the loan.
- [31] The purposes of the renewal agreement were therefore somewhat different from those of the initial agreement. The reasons were:

31.1 The considerations were to deal primarily with the consumers' default (not because of the initial agreement, but due to their own conduct in incurring substantial additional debt after the conclusion of the initial agreement;)

31.2 Dealing with the resultant risk caused solely by the subsequent

conduct of the consumers that had placed their property in jeopardy by no fault of the credit provider. The initial agreement had to be extended to assist them to dispose of the property.

31.3 The additional liabilities incurred by the consumers after concluding the initial agreement exposed them to a liability of more than threefold that of the remaining monthly debt obligations after the debt consolidation.

[32] The consumer and her ex-husband fell in arrears in respect of the renewal loan and the consumer on 1 December 2013 applied for a debt review.

[33] The debt counsellor undertook a debt review.

[34] The debt counsellor applied to the Court a quo to make a finding that the consumer was over indebted. The Court a quo ruled that that application had to await the outcome of the subsequent application to declare the initial and renewal loans reckless. The application to declare her over indebted is still pending.

The pleaded cause of action in the Court a quo

[35] In the founding affidavit the debt counsellor on behalf of the consumer pleaded the cause of action as follows:

"4.8 It would appear as if the 3rd respondent has failed to comply with its duties under the National Credit Act and that the credit agreement was granted recklessly. The fact that the consumer and the husband did not qualify for a loan with a major financial institution to settle the 12th instalment and final instalment of the first loan agreement is indicative thereof that they would not have qualified for a loan to settle the final instalment of the second credit agreement i.e. the renewal agreement of June 2012."

[36] The debt counsellor on behalf of the consumer in the replying affidavit amplified the cause of action as follows:

"2.5 The second respondent's failure to take into consideration whether the consumer was able to afford the final of R250 000 within a year of the granting of the loan is tantamount thereto that the second Respondent did not do a credit assessment prior to the granting of the loan. "(own emphasis).

[37] The credit provider opposed the application on the basis that proper credit assessments were done and that the granting of credit was not reckless.

Reckless credit - the legal framework

[38] The National Credit Act ("the Act" provides as follows:

"80 Reckless credit

- (1) A credit agreement is reckless if, at the time that the agreement was made ... -
 - (a) -; 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) -; 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 that 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.

[39] Regard must be had also to the section dealing with over indebtedness:

"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.

[40] The section dealing with reckless credit requires the following:

"81 Prevention of reckless credit

- (1)
- (2) A credit provider must not enter into a credit agreement without first taking reasonable steps to assess-
- (a) the proposed consumer's-
- (i) -;
- (ii) debt re-payment history as a consumer under credit agreements;
- (iii) existing financial means, prospects and obligations;”
- [41] It is common cause that when the initial and renewal agreements were entered into regulation 23A was not yet operative. It now reads as follows:
- “... a debt counsellor, when assessing the consumer's application for a debt review, must refer to section 79 and further consider the following:*
- “(a) A consumer is over-indebted if his I her total monthly debt payments exceed the balance derived by deducting his I her minimum living expenses from his I her net income.*
- (b) Net income is calculated by deducting from the gross income, statutory deductions and other deductions that are made as a condition of employment;
- (c) Minimum living expenses are based upon a budget provided by the consumer, adjusted by the debt counsellor with reference to guidelines issued by the National Credit Regulator.”
- [8] A party (the consumer) who raises a defence of over-indebtedness must plead and prove the defence, which includes proving that he is over-indebted as envisaged in section 79 of the NGA.”
- [42] The credit provider maintains that it in any event complied with the requirements of the regulation.

The findings and the reasoning of the Court a quo

[43] On 23 November 2017 the magistrate granted the application in terms of the notice of motion with costs on an attorney and client scale.

[44] The main finding of the magistrate was that there was a question as to:

"... did the respondent proceed to assess the value of the applicants' assets and liabilities? There is no evidence before me suggesting that an assessment of the value of the assets and liabilities of the applicant was done therefore the advance of credit by respondent applicant, rendered the applicant over indebted, taking into account the income generated and proven by way of salary advices of both applicants."

- [45] The Court a quo relied upon ASSA Bank Ltd v De Beer and Others[1] where the Court held that it was beyond reason to have concluded that the farming operation for which the moneys were lent and advanced may prove to be successful and hence the agreement would be declared reckless.
- [46] The Court a quo further held that upon renewal of the loan, it should have been clear that the consumer did not get the approval when the initial loan expired but still the credit provider proceeded to advance the renewal loan.
- [47] The Court a quo held that a credit assessment was in fact done by the credit provider before approving a loan. The appellant did not appeal this finding.

Analysis

- [48] The debt counsellor in the application relied upon the following grounds for the alleged reckless granting of credit:

48.1 Neither the consumer or her husband was able to afford the final capital payment after twelve months. The consumer would remain perpetually indebted to the credit provider.

48.2 The credit provider was not entitled to rely upon a liquidation of assets to meet the repayment obligation after 12 months.

48.3 The credit provider was unable to raise a long-term bond to acquire capital to liquidate its own loan. The consumers did not qualify for a long-term bond with a major financial institution when they entered into the initial loan agreement. Such a long-term bond after 12 months was an uncertain event and could not be considered as income.

- [49] The credit provider had to assess "the existing financial means, prospects and obligations" of the consumer before extending credit.
- [50] The Court a quo held that the credit provider in fact carried out a credit assessment but in effect held that the assessment was inadequate in that there was no valuation of the assets of the consumer.
- [51] The credit provider submitted that, as pleaded, the consumer relied upon a contravention of section 80(1)(a) in that no credit assessment was done. In the absence thereof, the loan was reckless. The finding of the Court a quo was that the assessment lacked a valuation of the assets of the consumer and thus the assessment was not in compliance with section 80(1)(a).
- [52] This prompted the appellant shortly before the hearing of the appeal to launch an urgent application for leave at the hearing of the appeal to adduce new evidence. The application was opposed. The parties agreed to submit the evidence alluded to by the appellant in the application with the leave of the Court. The evidence comprised three valuations of the Atteridgeville property done at various dates. The parties agreed that the valuations were what they purported to be.

- [53] Having regard to the cause of action as pleaded by the consumer and amplified in her replying affidavit, she attempted to place before the Court a quo a case based upon section 80(1)(a), that is, that the credit provider did not conduct a credit assessment, or at least did not conduct an assessment in accordance with section 79.
- [54] The consumer challenged the evidential value of the valuations by pointing to different sizes of the property and different values having been arrived at. The criticism missed the point as the Court a quo held that there were no valuations. This judgment deals below with the evidence relating to the value of the property in the absence of the valuations themselves. Having held that an assessment had been done save for considering the value of the property, the finding stands to be set aside in the light of the valuations now placed before Court.
- [55] The credit provider submits that, apart from the valuations introduced in evidence, the Court a quo erred in finding that there was no evidence before the Court suggesting that no assessment was done in respect of the value of the assets, in particular the immovable property. The valuations now entered into evidence confirmed what was already before the Court a quo.
- [56] The evidence of the value of the property before the Court a quo in any event was that:
- 56.1 The property formed part of the joint estate of the consumer and her husband;
- 56.2 In terms of the initial agreement they accepted and acknowledged that the minimum replacement value of the property was R676 962.00;
- 56.3 The parties agreed for the purposes of the Pre-Agreement Statements and Quotations, depending on the particular date of assessment, on more conservative market values respectively of R480 000.00 and R550 000.00;
- 56.4 All parties concerned seem to have reasonably relied upon the above values as being correct and there is no evidence to suggest that these values were in fact incorrect at the material times that they were agreed. There is no evidence to suggest that the values were unreliable or prejudicial in any way whatsoever;
- 56.5 The consumer and her husband did not take issue with any of the values or that they have been included in the assessments.
- 56.6 The credit provider accepted the property as sufficient for purposes of a covering mortgage bond;
- 56.7 The consumer did not in the founding affidavit attack the value of the property or make out a case that the property was not valued and that this was the cause of any over indebtedness. The consumer simply never pleaded it. The criticism of the consumer of the valuations has no merit.

- [57] The only reasonable inference to be drawn is that the credit provider was reasonably satisfied by information that it had in hand during its affordability assessment that the value of the property rendered adequate security to cover the obligations of the second respondent and her ex-husband in the event of their default under the initial agreement or the renewal agreement.
- [58] The appellant contended that once the Court should have concluded that a proper credit assessment was done, the consumer had to plead and prove an over indebtedness to show that the loan was granted recklessly. The submission is that the consumer did not plead or prove this. This submission is correct.
- [59] It is also correct that because the application to declare the consumer over indebted was still pending when the application to declare the loan reckless was heard, the Court a quo was not in a position to make a finding in respect of over indebtedness.
- [60] The main contention of the consumer was that the final payment in terms of the renewal loan was unaffordable and therefor the loan was reckless. The consumer's submission is that the prospect of the consumer at the expiry of the initial loan to obtain a long-term loan from a financial institution was nothing more than a "hope" and certainly not a reasonable prospect as required by the Act.
- [61] The appellant contended that it acted reasonably in having had regard to the financial means, prospects and obligations of the consumer at the time of granting the loan. The prospect of the consumer to obtain a loan to service the final payment was a reasonable prospect. It was not a mere "hope" as the Court a quo held.

What jeopardized the repayment of the loan was the reckless conduct of the consumer in incurring substantial additional debt and failing to keep up the loan repayments after the granting of the initial loan.

- [62] The consumer acted against the aims of the Act when she incurred substantial additional debt after entering into the initial loan. She did not act responsibly as the Court required of her in *Kubyana v Standard Bank of South Africa Ltd*[2] where the Constitutional Court held:

"One of the main aims of the [National Credit Act] is to enable previously marginalised people to enter the credit market and access much-needed credit. Credit is an invaluable tool in our economy. It must, however, be used wisely, ethically and responsibly. Just as these obligations of ethical and responsible behaviour applied to providers of credit. so to the consumers.· own emphasis)

- [63] The credit provider acted reasonably in considering the consumer's financial means, prospects and liabilities. It was entitled to take into account the prospect of the consumer to obtain a long-term loan provided she complied with the debt consolidation and payment of the monthly instalments. With an improved debt record and the security of the property she would be able to obtain a long-term loan. If not, the property could still be sold.

[64] The consumer's submission that the credit provider should not have had regard to the asset as it merely served as security for the loan cannot be correct.

[65] Such a submission is not supported by the facts.

65.1 Firstly, the renewal agreement contained a provision that specifically required the consumers to sell the property after eight months if they were unable to obtain a long-term loan. The parties clearly contemplated the selling of the fixed property.

65.2 In the assessment the credit provider may have regard to the selling of assets to meet the loan as was held in *Standard Bank of SA v Panayiotts*[3] where the Court held that in the assessment the credit provider may have regard to the selling of assets to meet the loan obligation:

"[8] A party (the consumer) that raises a defence of over indebtedness must plead and prove the defence, which includes proving that he is over indebted as envisaged in section 79 of the NGA.

[9] Having regard to the wording of section 79, such proof must inevitably involve details of, inter-alia, the consumer's financial means, prospects and obligations. Financial means would include not only income and expenses, but also assets and liabilities. Prospects would include the prospects of improving the consumer's financial position, such as increases, and even, liquidating assets.

[10] In the case of an instalment agreement, secured loan, lease or mortgage agreement (all of which involves goods as the subject matter of the agreement,) the consumer's financial means and prospects must include the prospect of selling the goods in order to reduce the consumer's indebtedness."

65.3 The Court in *SA Taxi Securitisation (Pty) Ltd & others v Mbatha; SA Taxi Securitisation (Pty) Ltd v Molete; SA Taxi Securitisation (Pty) Ltd v Makhoba*[4] held that in the case of a credit agreement relating to a taxi which served as security for repayment of the loan, the consumer cannot retain the vehicle and claim relief in the form of a reckless loan. The vehicle must be surrendered. The same applies in this case. There is no reason why the consumer should retain the security but be relieved of the obligation to timeously surrender it for sale.

[66] There is no merit in the submission of the consumer that the sale of the fixed property should have been included in the "Income" section of the assessment failing which the credit provider cannot rely on it as part of the credit assessment having regard to the financial means, prospects and obligations of the consumer. Nothing turns on where the information was recorded, provided the credit provider has correctly considered the information.

- [67] The Court a quo erred in finding the initial agreement and the renewal agreement reckless. The Court a quo failed to have regard to the purpose of the initial agreement to consolidate the debt and to provide the consumer with an improved credit record. With an improved credit record and the property as security, she would have been able to obtain long-term finance to get out of debt.
- [68] When the credit provider considered the prospect that the consumer would qualify for long-term credit after twelve months it was not relying upon a "hope" as the Court a quo found but on a reasonable prospect.
- [69] The Court a quo also erred in finding that the credit provider extended further (reckless) credit in terms of the renewal agreement. The renewal agreement merely extended the period in which the consumer had to repay the capital amount and to provide the consumer with an opportunity to sell the property if no long-term finance could be obtained.
- [70] The Court a quo erred in finding that the consumer had made out a case for reckless lending. The cause of action as pleaded related to section 80(1)(a) that no assessment was done and not 80(1)(b)(ii) that relates to credit resulting in over indebtedness.

[71] The appeal succeeds.

[72] It is ordered that:

72.1 The order of the Court a quo is set aside and is substituted by an order dismissing the application with costs

72.2 The second respondent pays the costs of the appeal which costs include the costs of the urgent application.

ACTING JUDGE OF THE HIGH COURT

I agree

TEFFO J

JUDGE OF THE HIGH COURT

It is so ordered

APPEARANCES

On behalf of Appellant

: Adv. PG Nel

Instructed by

: Koegelenberg Attorneys

On behalf of Second Respondent : F Greeff of Greeff & Van

Wyk Attorneys

Date of Hearing

: 2 May 2019

Date of Judgment

: 24 May 2019

[1] 2016 (3) SA 432 (GP)

[2] 2014 (3) SA 56 (CC)

[3] 2009 JOL 23095 (GP) paras 8-19

[4] 2011 (1) SA 310 (GSJ)

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Prepared on 12 October 2026 · Esheria