IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case No.: 4704/2016

In the matter between:

HAZEL DAWN SMITH Applicant
ID - [4...]

and

AFRICAN BANK Respondent
(Registration number: 1975/002523/06)

HEARD ON: 25 MAY 2017

JUDGMENT BY: DAFFUE, J

DELIVERED ON: REASONS DELIVERED ON 12 JUNE 2017

REASONS FOR JUDGMENT

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[1] Hazel Dawn Smith, a 74 year old widow, filed an application against African Bank Ltd in terms whereof she *inter alia* seeks orders declaring that reckless credit was advanced to her in respect of two credit agreements as well as alternative relief.

[2] I heard argument by counsel on behalf of the parties on 25 May 2017 where after the application was dismissed with costs. I indicated that my reasons would follow in due course. These are my reasons.

[3] Applicant cited the respondent as African Bank Ltd, registration number 1975/002523/06. This citation is wrong. African Bank Ltd with the mentioned registration number was placed under curatorship which entity underwent a name change and is presently registered as Residual Debt Services Ltd referred to in the answering affidavit as RDS. A new entity, African Bank Ltd with registration number 2014/176899/06 was incorporated and by operation of law, in particular s 54(3) of the Banks Act, the assets and liabilities of RDS including the rights and liabilities in the two relevant credit agreements, were transferred to African Bank Ltd registered in 2014, as opposed to the Bank registered in 1975. Save for the facts mentioned herein, nothing further turns around this issue. I shall not distinguish between the two African Banks and shall refer to either of them as the respondent.

[4] Before I deal with the allegations contained in the papers, it is important to remember that in motion proceedings the affidavits not

only serve as the pleadings, but must also contain the essential evidence that would ordinarily be led at the trial. See *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) at para [28]. A party in motion proceedings is obliged to state the facts as well as the conclusions drawn from such facts in his/her affidavit and is not allowed to base an argument on passages in documents annexed to the papers, unless the conclusions sought to be drawn from such passages have been canvassed in the affidavits. See *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust* 2008 (2) SA 184 (SCA) at 200B-E. An applicant must make out his/her case in the founding affidavit and will not be allowed to do so and/or to rely upon new matter in the replying affidavit. See *Van Zyl and Others v Government of the Republic of South Africa and Others* 2008 (3) SA 294 (SCA) at 307E – 208A and *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA) at 552A.

[5] In line with Plascon Evans final relief may only be granted in motion proceedings if the facts averred by the applicant which have been admitted by the respondent, justify such an order. In certain instances a denial by the respondent of a fact alleged by the applicant may not be such as to raise a real and *bona fide* dispute of fact and if the court is satisfied with the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof. In motion proceedings, as a general rule, decisions of fact cannot properly be founded on a consideration of the probabilities, unless the court is satisfied that there is no real and genuine dispute on the papers regarding the facts in question, or that the one party's allegations are so far-fetched or clearly

untenable that they may be rejected on the papers or that *viva voce* evidence would not disturb the probabilities appearing from the papers. See *Administrator of the Transvaal and Others v Theletsane and Others* 1991 (2) SA 192 (A) at 197A-B.

[6] Applicant entered into four credit agreements with the respondent, to wit:

(1) a credit card agreement entered into in Johannesburg on 7 March 2008 whilst she was still resident in Gauteng;

(2) a loan agreement entered into on the same day in terms whereof R23 000 was lent and advanced to her;

(3) five years later, on 8 April 2013, and when applicant was still resident in Gauteng, a further loan agreement was entered into in terms whereof an amount of R127 300 was lent and advanced to her; and

(4) a year later, on 22 May 2014 and at Bloemfontein, applicant entered into a further loan agreement in terms whereof an amount of R151 900 was lent and advanced to her.

It is clear from the papers that the 2013 loan agreement was settled with a portion of the proceeds of the 2014 loan agreement. The loan agreement entered into on 7 March 2008 for the amount of R23 000 was also settled earlier.

[7] Therefore, the two credit agreements that applicant seeks to be regarded as reckless credit in accordance with s 80 of the National Credit Act, 34 of 2005 (“the NCA”) are the credit card agreement of 7 March 2008 entered into in Johannesburg and the last loan agreement of 22 May 2014 entered into at Bloemfontein. It is

doubtful whether this court has jurisdiction to adjudicate upon the agreement entered into in Johannesburg, but for purposes hereof and on the basis of no formal objection by respondent, I accepted that I could adjudicate applicant's claim in this regard.

[8] It is extremely peculiar that applicant, having made use of a credit card over a period of eight years, all of a sudden decided to insist that no credit should have been advanced to her in this regard. The respondent is accused of granting reckless credit now, whilst she had the benefit of the credit card and accompanying credit facilities for many years.

[9] Applicant failed to set out in this application her respective monthly expenditure at the two relevant stages, i.e. in March 2008 and May 2014 when the two agreements were entered into. The court has also not been informed as to what her assets and liabilities were at these stages. However, it is apparent that her income was disclosed in 2008 and 2014.

[10] Applicant presented her present monthly net income and expenses. The court has been informed as to the outstanding debts due to entities such as Absa Bank, Nedbank, Foschini/American Swiss and Edcon. Although the agreements with these entities were entered into before 2008, applicant failed to set out what was due and owing in respect of each of these accounts on the relevant dates in March 2008 and May 2014 respectively. She merely stated the outstanding amounts as at the stage when the founding affidavit was deposed to. It is apparent that applicant's existing debt obligations are mostly revolving credit

or credit facilities and that the balances relied upon by her have nothing to do with her debt in either March 2008 or May 2014.

[11] Having set out a list of her present creditors and the amounts now due to them, the following is stated in paragraph 14:

> "I humbly submit that as appears from what has been set out herein, it is clear that the inference can be drawn that the Respondent did not conduct an assessment as required by Section 81(2) of the NCA, which in turn, I am advised, would mean that these credit agreements were recklessly granted, in terms of section 80(1) of the NCA, alternatively, I submit that even had the credit provider conducted an assessment, which I deny, the Respondent entered into these credit agreements with me despite the fact that the preponderance of information available to the Respondent indicated that I will not be able to afford the instalments, and that entering into those credit agreements would make me over indebted."

Applicant merely quoted the relevant sections of the NCA, but otherwise relied on speculation or unfounded conclusions without placing sufficient and relevant information before the court as to her exact financial position in March 2008 and May 2014 respectively, being the relevant dates. On page 3 of annexure "H6" to the founding affidavit – the 2014 credit agreement – applicant declared under her signature that her total monthly expenses, i.e. all her living expenses – were R1 070. The declared amount in respect of the first agreement was R1 200. She failed to address this at all. Despite applicant's declarations, respondent made the affordability assessments based on living expenses of R1210 (in 2008) and R2 277 (in 2014). The court cannot make a determination on whether reckless credit was granted as a result

of applicant's failure to inform the court in respect of her debt obligations at the time of entering into the two credit agreements. If applicant's living expenses at the time in 2008 and 2014 were as high as now alleged in her founding affidavit, her expenses would have been materially greater than presented to respondent and consequently, she would have failed to fully and truthfully answer requests for information during the pre-agreement assessment contrary to the provisions of s 81(1) of the NCA and this would have materially affected respondent's ability to make a proper assessment. In such a scenario respondent would have an absolute defence in terms of s 81(4).

[12] It appears from the papers that applicant was staying with her daughter when the first two credit agreements were entered into. One can hardly expect a daughter to charge her elderly father or mother rental or for water and electricity usage, but this is exactly what applicant now claims is payable by her on a monthly basis. I do not know with whom she is living at this stage and her expenses may be different from those in 2008 and 2014. She failed to indicate with whom she living now and whether these expenses were indeed her expenses during 2008 and 2014 respectively. I do not believe that to be the case. I also note that she now claims R500 per month for a fuel expense. It is not clear whether this was an expense in either 2008 or 2014. An exorbitant amount of R1655.84 is claimed in respect of monthly insurance. There is no indication whether this is for short or long term insurance premiums. I doubt whether it could be long term insurance, bearing in mind the age of the applicant. If it is for short term insurance,

applicant must be the owner of or in possession of numerous valuable assets the details which she failed to disclose.

[13] Contrary to the vague version of applicant, respondent has set out in detail why the application should be dismissed. Affordability assessments were done in respect of both credit applications and it is apparent that detailed information was obtained, not only from applicant, but also from the Experian Credit Bureau.

[14] I am satisfied that the granting of the credit card facility and the loan agreement did not constitute reckless credit. Applicant's allegation in this regard must be regarded as false and stands to be rejected. Respondent granted credit based on the application of its Risk and Credit Affordability Assessment Policy which indicated that applicant was not over-indebted at the time when the credit agreements were entered into in 2008 and 2014. Contrary to the vague averments made by applicant, respondent presented the court with clear, concise and persuasive evidence of the assessments carried out on each occasion.

[15] Applicant's counsel submitted that draft regulations issued during 2014 had to be complied with during the affordability assessment of applicant which respondent failed to do. The regulations relied upon were merely in draft form and it is unnecessary to consider them at all. The 2006 regulations did not deal with credit assessment or reckless credit. Therefore, no regulations dealing with affordability assessment were promulgated until 7 March 2015 when the Minister published regulations which included affordability assessment regulations. I am not prepared, bearing in

mind the Plascon Evans test to be applied, to accept that the reasonable monthly expenses calculated by respondent in respect of the affordability assessments could be regarded as incorrect, far-fetched or untenable, especially in the light of applicant's disclosure at the time.

[16] I agree with respondent that applicant's failure to present the court with proper facts as it existed at the time of the conclusion of each of the credit agreements is fatal. Applicant's application, and the founding affidavit in particular, does not pass the test applicable to applications as set out *supra*. She failed to show that reckless credit was granted to her or that she was at any stage over-indebted as stated in s 79 of the NCA.

[17] Contrary to applicant's vague and unconvincing version, respondent presented the court with material facts upon which its defence is based as well as the evidence in support of such defence. I do not deem it necessary to summarise the assessments conducted by respondent. There is no room for a finding that respondent's version is untenable or far-fetched or so improbable that it should be rejected on the papers. Personally I doubt whether I would have taken the risk of lending the particular amounts to applicant, but I am mindful of the fact that I should not adopt an over-critical armchair approach towards respondent. If courts were to take such a stance towards credit providers when evaluating whether reckless credit has been granted, it would chill the availability of credit and especially to less affluent members of our society, the previously disadvantaged sector in particular.

[18] Applicant, being the unsuccessful party, should be burdened with the costs of the application. This is in accordance with the general rule that costs should follow the event. In exercising my discretion in this regard, I could not arrive at any other order. Therefore I issued the orders set out in paragraph 2 *supra*.

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J.P. DAFFUE, J

On behalf of applicant:	Adv L Collins
Instructed by:	Jordaan Rijkheer & Partners Bloemfontein
On behalf of respondent:	Adv JG Dobie
Instructed by:	McIntyre & Van der Post Bloemfontein