THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MIDDELBURG LOCAL SEAT

CASE NO: A16 / 2020

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

25 October 2021 .....
DATE SIGNATURE

In the matter between:

CAPITEC BANK LIMITED **APPELLANT**

and

ABEDNICO THULANI MAHLANGU **FIRST RESPONDENT**

NESTA NELL **SECOND RESPONDENT**

J U D G M E N T

RATSHIBVUMO J:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 25 OCTOBER 2021.

[1] **Introduction.**

This is an appeal against the judgment of the Magistrate for the District of Thembisile Hani, held at Kwamhlanga (the court *a quo*) in which the Magistrate found that the credit agreement between the credit provider (the Appellant) and the consumer (the First Respondent) was reckless in terms of section 81 of the National Credit Act no. 34 of 2005 (the Act). The court *a quo* proceeded to declare that the First Respondent was over-indebted and that he must not enter into any further credit agreement until his obligations have been fulfilled.

[2] The above order was made after an application for debt review was brought by the debt counsellor (the Second Respondent) following a request to her by the consumer. The consumer and the credit provider were cited in the court *a quo* as the first and the third respondents respectively There were eight other respondents who were the creditors to the consumer who are not parties to this appeal. Only the Appellant appeals against the finding by the court *a quo*. The appeal is against the finding of recklessness on the part of the Appellant by the court and not against the further part of the order in which the First Respondent was declared over-indebted. The Appellant also appeals against the costs order in which it was ordered to pay the costs on client and attorney scale. The appeal is unopposed, with the Second Respondent having chosen to abide by the outcome of this appeal, to avoid further litigation expenses.

[3] **Before the court *a quo*.**

The application was brought by the Second Respondent after she had investigated the First Respondent's over-indebtedness and made a preliminary finding to the effect that the credit agreement entered into between him and the Appellant on 15 May 2013, was reckless. On 28 August 2018, Second Respondent sent the notices to all the creditors as envisaged in section 86(4) of the Act. She further requested all the documents on which the credit providers (in particular, the Appellant) relied on in providing credit to the consumer. By the time the debt review application was launched on 25 April 2019, she had not received any documents from the Appellant. Her preliminary finding was made for reason that no proof of affordability was made available to her. She only had sight of the documents she had asked when they were filed alongside the answering affidavit prepared for the Appellant on 17 July 2019. The Appellant chose not to deal with its alleged failure to cooperate in its answering affidavit. In its heads of arguments, the Appellant avers that the Act does not impose any sanction on the credit provider who fails to comply with section 86(5)(b) (failure to cooperate with the debt counsellor).

[4] The gist of the contention made out by the Second Respondent which formed the backbone of the findings by the court *a quo* is to be found in the table she prepared in her replying affidavit which she summarised as follows:

	Appellant	Second Respondent Determination
Gross income	8 930.25	8 930.25
Other income	5 000.00	No proof of income provided

Less statutory deductions	819.25	818.67
Net income	13 111.00	8 111.58
Less living expenses	5 800.00	5 800.00
Less monthly debt repayments	761.00	761.00
Amount available to repay debts after expenses, debts that existed at the time of inception of the contract and statutory deductions but before new monthly instalment in terms of the credit agreement with the Appellant	6 550.00	1 550.58
New monthly instalment in terms of the credit agreement of the Appellant	2 782.79	2 782.79
Surplus or shortage of amounts left over after all debts obligations, prospects and financial means have been calculated	3 767.21	-1 232.21

[5] It was submitted by the Second Respondent that according to section 78(3)(b) of the Act, the person within the consumer immediate family or household, who shares in the financial means also shares in the obligations and must be assessed together with the consumer. She averred further that the Appellant neglected to provide proof of the consumer's additional income. According to her, the Appellant did not conduct an affordability assessment in compliance with regulation 23A. She concluded therefore that the additional household income should have been calculated as zero. Failure to do this by the Appellant was presented as a direct cause for the consumer to approach the debt counsellor with request to be declared over-indebted.

[6] The Appellant contended on the other hand that the client-level calculation yielded a positive disposable income of R5 565.58 and the household-level calculation yielded a positive disposable income of R6 550.00. The client-level calculation, rather than the household-level calculation, was the one adopted and applied by the Appellant when deciding whether to grant credit to the First Respondent and the terms on which it would do so. For this reason, it was contended that it was not even necessary to obtain any proof of the household income as the credit was not approved based on the household-level calculation in the first place.

[7] The *court a quo* accepted the submissions by the Second Respondent and found that the Appellant was reckless in entering into the credit agreement referred to above. In reaching this decision, the court *a quo* noted that the credit agreement in question was for an amount of R98 728.34, and was for a period of 64 months in which R2 782.79 instalments would be paid by the consumer. Before entering into this agreement, the First Respondent provided his salary slip and three months' bank statement to the Appellant. The court *a quo* accepted the Appellant's version to the effect that affordability calculation that was done on 15 May 2013 preceding the signing of the loan agreement was as follows:

Client affordability calculation:

Total income A		8 111.00
Client income (Nett salary)	8 111.00	
Total expenses B		2 545.42
- Client's Living expenses - Client's NLR & CCA instalments	1 784.42 761.00	
Disposable income (A-B)		5 565,58

Household affordability calculation:

Total household income A		13 111.00
Client income (Salary) + Client other income (in addition to salary) + Household income (other members of the household)	8 111.00 0.00 5 000.00	
Total household expenses B		6 561.00
+ Client's NLR & CCA instalments + Household NLR & CCA instalments + Household Living expenses	1 637.00 0.00 5 800.00	
Household Disposable income (A-B)		6 550.00

[8] Court *a quo* noted that from the above, the affordability assessment reflected that the First Respondent's disposable income was R5 565.58 and the combined household disposable income was R6 574.00. Due to the fact that the First Respondent disposable income was lesser of the two amounts, loan was approved on the amount of R5 565.58 which was the First Respondent's disposable income. Relying on sections 81 and 78(3) of the Act and Regulation 23A(8), the court *a quo* found that the Appellant was obliged to include in its calculation any other adult person within the consumer's immediate family or household to the extent that the consumer or the prospective consumer and that other person customarily – (i) share their respective financial means and (ii) mutually bear the respective financial obligations.

[9] The court *a quo* was of the view that the Appellant was reckless in its assessment in particular because,

> "[T]here is no documentary proof of the income of the "household" income of R5 000.00. There is no indication what the relation between the consumer and the contributor of the household income is. There is no documentary proof of the "household living expenses." There is no documentary evidence on what contribution the consumer is making towards the household living expenses.

> Household expenses clearly are an indication that the consumer also contributes towards those expenses. Those expenses were not included in the consumer's affordability calculation of his assessment. No documentary evidence is attached. Thus the [appellant] failed to account for additional income amount of R5 000.00 and further failed to make a proper case how it relied on household income over the consumer's income."[1]

[10] **On appeal**

The Appellant raised no new issues before us to those argued before the court *a quo*. The submissions made are to the effect that the court *a quo* erred in finding that the Appellant was obliged to do household income assessment in calculating the First Respondent's affordability as he qualified for a loan on his own individual assessment. The Appellant submitted therefore that there was no need to assess the household affordability or even require proof of the income thereof. It was further submitted that even if the loan was granted based on the household income assessment (of which it was submitted that it was not), there was no evidence or affidavit presented by the consumer that suggested that his household income disclosed prior to signing the credit agreement, was not true. It was submitted therefore that the court *a quo* erred in not accepting that the First Respondent had an additional household income of R5 000.00.

[11] The Appellant further submitted that section 81(4) of the Act provides a complete defence to an allegation that a credit agreement was reckless if the consumer fails to fully and truthfully answer any request for information by the credit provider as part of the assessment. It was also the appellant's contention that the court *a quo* erred in making its findings based on the Affordability Assessment Regulations (the AAR) which only

[1] "See p23-24 of the court *a quo*'s judgment.

came into operation on 14 September 2015, some six months after the credit agreement between the Appellant and the First Respondent had been signed.

[12] Submissions were also made by the Appellant over the fact that the Second Respondent founding affidavit contained little or nothing to substantiate her application, as in her own words, the conclusions were based on probable facts which she did not have at the time as the Appellant failed to furnish her with the documents she had asked. The Appellant submitted that the Second Respondent only had facts on which the application could stand, after the answering affidavit was filed together with those documents. The Appellant argued therefore that a case in application proceedings has to be made out in the founding affidavit and not in the replying affidavit as was the case before the court *a quo*.

[13] It is my respectful view that this argument raises too much dust that can easily cloud the issues to be decided. The Second Respondent could not have accessed these documents unless they were provided by the Appellant. The Appellant had a statutory obligation to cooperate with the Second Respondent when asked to provide the said documents[2] and it chose not to. As pointed to above, the Appellant seemed to have laboured under the understanding and impression that there is no sanction provided in the Act for failure to cooperate with the debt counsellor by the credit provider.

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[2] See section 86(5) of the Act which provides,

> "A consumer who applies to a debt counsellor, and <u>each credit provider</u> contemplated in subsection (4)(b), <u>must</u> -
>
> (a) <u>comply with any reasonable requests by the debt counsellor</u> to facilitate the evaluation of the consumer's state of indebtedness and the prospects for responsible debt re-arrangement; and
>
> (b) participate in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement." [Own emphasis].

While these facts (about the credit provider not availing requested documents) were expressly mention in the founding affidavit, the Appellant chose not to respond or justify its failure to cooperate. If credit providers were to be allowed to behave in this manner, it would defeat the whole purpose and scope of the Act. No application would be successfully made out in founding affidavits, and there would also be no consequences for failure to cooperate on the part of credit providers. The purpose of the Act can be gleaned from its preamble which provides,

> "To promote a fair and non-discriminatory marketplace for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information; to promote black economic empowerment and ownership within the consumer credit industry; to prohibit certain unfair credit and credit-marketing practices; to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting; to provide for debt re-organisation in cases of over-indebtedness; to regulate credit information; to provide for registration of credit bureaux, credit providers and debt counselling services; to establish national norms and standards relating to consumer credit; to promote a consistent enforcement framework relating to consumer credit; to establish the National Credit Regulator and the National Consumer Tribunal; to repeal the Usury Act, 1968, and the Credit Agreements Act, 1980; and to provide for related incidental matters." [Own emphasis].

[14] After all, it was for the Appellant to raise this aspect as a point *in limine* to be decided by the court *a quo*, and it chose not to do so but file an answering affidavit. The court *a quo* would then have had an opportunity to apply the same test as in exception to a pleading in that (i) the founding affidavits alone fall to be considered, and (ii) the averments contained in those affidavits must be accepted as being true.[3] I am not as such convinced that

[3] *Valentino Globe BV v Phillips* 1998 (3) SA 775 (SCA) at 779F–H; *Executive Officer, Financial Services Board v Dynamic Wealth Ltd* 2012 (1) SA 453 (SCA) paragraph 19.

the case for the second respondent was not made out in the founding affidavit. It could be that the supporting documents were only referred to in the replying affidavit as they had been withheld by the Appellant. I am satisfied that the Second Respondent's affidavit sets out facts enough to establish the basis for the granting of the relief sought.

[15] **The applicable law.**

The court *a quo* made an order to the effect that the First Respondent was over-indebted and also ordered a rearrangement of his obligations in terms of section 85 read with section 87 of the Act. Section 85 provides as follows.

> *85. Court may declare and relieve over-indebtedness*
>
> Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may -
>
> (a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of section 86(7); or
>
> (b) declare that the consumer is over-indebted, as determined in accordance with this Part, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness.

It is however clear from the wording of this section that those who crafted it did not have in mind a consumer whose case is being brought to court by a credit counsellor as *in casu*. Otherwise there would be no need to refer him/her to one.

[16] Section 87 on the other hand provides,

> *87. Magistrate's Court may re-arrange consumer's obligations*
>
> (1) If a debt counsellor makes a proposal to the Magistrate's Court in terms of section 86(8)(b), or a consumer applies to the Magistrate's Court in terms of section 86(9), the Magistrate's Court must conduct a hearing and, having

regard to the proposal and information before it and the consumer's financial means, prospects and obligations, may –

(a) reject the recommendation or application as the case may be; or

(b) make –

(i) an order declaring any credit agreement to be reckless, and an order contemplated in **section 83(2) or (3)**, if the Magistrate's Court concludes that the agreement is reckless;

(ii) an order re-arranging the consumer's obligations in any manner contemplated in section 86(7)c(ii); or

(iii) both orders contemplated in subparagraph (i) and (ii).

(2) The National Credit Regulator may not intervene before the Magistrate's Court in a matter referred to it in terms of this section. [Own emphasis].

[17] Section 83(2) & (3) referred to in section 87 of the Act provides as follows.

83. Declaration of reckless credit agreement

….

(2) If a court or Tribunal declares that a credit agreement is reckless in terms of section 80(1)(a) or 80(1)(b)(i), the court or Tribunal, as the case may be, 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) If a court or Tribunal, as the case may be, declares that a credit agreement is reckless in terms of section 80(1)(b)(ii), the court or Tribunal, as the case may be-

(a) must further consider whether the consumer is over-indebted at the time of those proceedings; and

(b) if the court or Tribunal, as the case may be, concludes that the consumer is over-indebted, the said court or Tribunal may make an order-

> (i) suspending the force and effect of that credit agreement until a date determined by the Court when making the order of suspension; and
>
> (ii) restructuring the consumer's obligations under any other credit agreements, in accordance with section 87. [Own emphasis].

[18] In the words of Sutherland J (as he then was), writing for the full court in *Janse van Vuuren v Roets and Others and a similar matter*,[4]

> "The court or tribunal must "declare" a credit agreement reckless in order to trigger the powers embodied in the section. Section 83 confers powers to deal specifically with both a reckless credit agreement and the consumer's consequential over-indebtedness. If the court or tribunal does make a declaration of recklessness, the court or tribunal is thereupon, also empowered, in terms of section 83(3)(b)(i), among other powers, to make an order as contemplated in section 87. As with the other two channels, there is convergence in an order as contemplated by section 87."

[19] The powers of the court to declare a consumer over-indebted and to make consequential orders in terms of section 83(3)(b) of the Act are only triggered upon a finding by that court that a credit agreement was reckless. Strangely, this appeal is not aimed at the outcome of the application, but the process through which that outcome was triggered. The order in which the First Respondent was declared over-indebted is a roof on top of the reckless lending structure. Without a finding on recklessness on credit agreement, this roof lacks a structure on which it would rest. An attack on the means by which the end was reached, while the end is left intact, is in my view absurd and illogical in that it takes away the prerequisite without which the court *a quo* would not be able to make the orders that both the Appellant and the respondents agree that they should be left intact.

[4] 2019 (6) SA 506 (GJ) paragraphs 24-25.

[20] It was the court *a quo*'s finding that a credit provider was obliged to take practical steps to assess the consumer or joint consumers' discretionary income to determine whether the consumer has the financial means and prospects to pay the proposed loan agreement. The court *a quo* reasoned that section 78(3) of the Act describes "financial means" as including the financial means, prospects and obligations of any other adult person within the consumer's immediate family or household, to the extent that the consumer, or prospective consumer, and that other person customarily share their respective financial means; and mutually bear their respective financial obligations. It therefore found that the consumer's financial means, prospects and obligations were not properly assessed if his household financial means and obligations were left out of the calculations. To enter into a credit agreement without calculating these, was found to be reckless lending.

[21] The court *a quo* also relied on *Absa Bank Ltd v De Beers and Others*[5] where Louw J held,

> "[T]he first requirement is that 'reasonable steps' must be taken to assess the proposed consumer's existing means, prospects and obligations. To me this also means that the assessment must be done *reasonably*, ie not irrationally. Only a reasonable assessment will comply with the following phrase in the preamble to the Act — 'to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting'.

[22] There is no doubt that Regulation 23A referred to in the judgment by the court *a quo* had not come into operation yet. This was conceded to by the Second Respondent in the heads of argument before the court *a quo*, an aspect that the court also took cognisance of in its judgment. It is not clear

[5] 2016 (3) SA 432 (GP) paragraph 60.

as to why it continued to make reference thereto even after acknowledging that the AAR had not come into operation at the time of the signing of the credit agreement. What is clear though is that its reasoning was based on the applicable law (the Act) and proper applications of the case law principles. The court *a quo*'s findings in this regard cannot be faltered in this regard as there was no misdirection.

[23] The Appellant's argument to the effect that the court *a quo* erred in failing to find that the First Respondent informed it that there was R5 000.00 household income is misplaced. There is no dispute to this aspect and this disclosure had no bearing to the court *a quo*'s finding. The court *a quo* steered away from making a finding on this issue as it did not comprise issues in dispute. The dispute was on whether the Appellant had an obligation to assess and investigate this disclosure. What had a bearing was the Appellant's failure to properly assess it, to demand documentary proof thereof, its failure to establish the nature of relationship between the consumer and the person who gives rise to the household income and how the consumer contributes to the household expenses, that resulted in the finding of reckless credit agreement.

[24] The same fate should follow the argument that section 81(4) of the Act provides a complete defence to an allegation that a credit agreement was reckless if the consumer fails to fully and truthfully answer any request for information by the credit provider as part of the assessment. There was no finding to the effect that the consumer failed to answer questions truthfully. Without this finding, this defence does not arise. The duty to properly assess the consumer's financial means exist irrespective of whether he/she answered any questions truthfully. If this defence was to take away the credit provider's obligation to still assess the consumers'

financial means, there would be no need to even demand the consumer's salary advice and bank statements in that, the credit provider would simply rely on the consumer's word knowing that if it turns out to be untrue, then it would serve as a complete defence. This would negate the true purpose of the Act.

[25] Had a proper assessment been done, the Appellant would have known first if the figures disclosed were true. Further to this, the relationship between the consumer and the person in the household proximity would have been established together with their joint contributions and expenses into and from the household income. This was unfortunately not done and yet the credit agreement was entered into. This was nothing short of recklessness.

[26] **Costs.**

Costs order falls within the discretion of the trial court and the court of appeal shall only interfere if this is not exercised judicially. The basic rule with regard to costs is that, apart from statutory limitations, all costs awards are in the discretion of the court. The court's discretion is a wide, unfettered and equitable one, which has to be exercised judicially with due regard to all relevant considerations. These would include the nature of the litigation being conducted before it and the conduct of the parties (or their representatives). As a matter of policy and principle a court should not, and must not, permit the ouster of its discretion because of an agreement between parties with regard to costs.[6]

[27] I take note of the fact that the Appellant was aware as per notice of motion that costs order would be sought against any of the parties who chooses to oppose the application. The Appellant took a conscious decision to oppose

[6] *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) paragraph

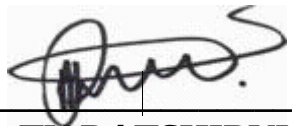
the application irrespective. It also knew how weak or strong its case was going to be. It was equally aware that in terms of the credit agreement it signed with the First Respondent, it agreed that the costs scale to be paid in case of litigation against him was that of attorney and client.[7] The costs order made could therefore not have come unexpectedly on its part.

[28] In determining if the court's discretion was exercised judicially, I take into account that the court *a quo* ordered the costs against the Appellant on scale of attorney and client as a way to frown against its failure to cooperate with the Second Respondent when it neglected to furnish the documents she had requested. The Appellant was obliged to co-operate in terms of section 86(5) of the Act. It offered no explanation for its failure to do this. There is no basis therefore to find that the court *a quo* did not exercise its discretion judicially. There is therefore no reason to interfere with the finding of the court *a quo* on costs order.

[29] Consequently, the following order is made:

[29.1] Appeal is dismissed.

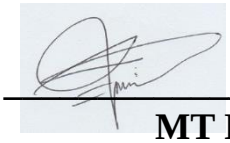
[29.2] No order as to costs as the appeal is unopposed.



TV RATSHIBVUMO
JUDGE OF THE HIGH COURT

[7] See Clause 5.5 of KJL1 on p. 100 of the Bundle.

I agree.



MT MANKGE
JUDGE OF THE HIGH COURT

FOR THE APPELLANT	**: ADV A BREITENBACH SC**
	: ADV C CILLIERS
INSTRUCTED BY	**: VAN DER SPUY & PARTNERS** **CAPE TOWN** **C/O LEON VAN DEN BERG INC** **MIDDELBURG**
DATE HEARD	**: 10 SEPTEMBER 2021**
JUDGMENT DELIVERED	**: 25 OCTOBER 2021**