IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

18/12/15

Case number: 26749/2011

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED

18/12/15 .....
DATE SIGNATURE

In the matter between:

ABSA BANK LIMITED **Plaintiff**

and

HERMANUS DE BEER **First Defendant**
JACOBA JOHANNA DE BEER **Second Defendant**
JUANI LABUSCHAGNE **Third Defendant**

Heard: **13 and 14 November 2014**
Delivered **18 December 2015**

JUDGMENT

A.A.LOUW J

Introduction

[1] The plaintiff's claim against the first and second defendants is for payment of the amount of R1 740 737 plus interest thereon at the rate of 8,65% per annum from 7 February 2014 based on a mortgage loan agreement dated 14 January 2008. There was an initial loan granted to the first and second defendants in the amount of R651 000 which was secured by mortgage bond B20458/06. The second loan of 14 January 2008 contains a clause 32 which states that it replaces any previous loan agreement. On 31 January 2008 the second mortgage bond B8980/08 was registered.

[2] The claim against the third defendant, the daughter of the first and second defendants, is based on a suretyship dated 13 February 2006.

[3] The plaintiff further claims as against the first and second defendants, who are married in community of property, an order declaring the property known as portion 282 (a portion of portion 253) of the farm Rietfontein 485 North West Province to be declared specially executable. This property is held by them in terms of deed of transfer 136421/2002 and its size is 5,7 hectares. It is situated in the Hartbeespoort area west of Pretoria. This is the primary, and in fact only, residence of the first and second defendants.

[4] The defendants' defence and counterclaim are premised on the following contentions:

4.1 non-compliance by the plaintiff with the provisions of section 129 of the National Credit Act, 34 of 2005, ("the Act");

4.2 that the credit was granted recklessly. In a conditional counterclaim in this regard it is prayed that the credit agreements be set aside alternatively be suspended in terms of the relevant provisions of the Act.

[5] Thus, the issues to be decided are whether section 129 of the Act was complied with; whether credit was granted recklessly and, if so, what remedy should be ordered.

Common cause facts

[6] The following facts are common cause on the pleadings and in terms of admissions made at the pre-trial:

6.1 That the plaintiff and the first and second defendants entered into a written mortgage loan agreement on 14 January 2008. The terms of the mortgage loan agreement are conceded and admitted.

6.2 The registration and the terms of mortgage bond no. B20458/2006 in favour of the plaintiff for the sum of R651 000.00 on 13 February 2006, as well as mortgage bond no. B8980/2008 in favour of the plaintiff for the sum of R500 000.00 on 31 January 2008.

6.3 The third defendant bound herself as surety and co-principal debtor in favour of the plaintiff for the due and proper

performance by the first and second defendants of their liabilities towards the plaintiff.

6.4 That the loan amount so lent and advanced was received by the first and second defendants.

6.5 Should I find that the plaintiff is successful with its claim, that the quantum amounts to R1 740 737.78, as at 6 February 2014, plus interest on the said amount at a rate of 8.65% per annum, calculated from 7 February 2014 to date of payment.

6.6 Should I find that the defendants are liable, then and in such event it is admitted by the defendants that their liabilities will not be liquidated within a reasonable period without having to execute against the first and second defendants' immovable property.

The evidence

[7] The first defendant was employed by the Western District Municipal Council (Randfontein) until his retirement in 2002. He was then 60 years old.

[8] He received a lump sum of R640 000 as pension. Furthermore he received a monthly retirement annuity of R647.

[9] He and second defendant with whom he is married in community of property, bought the abovementioned smallholding near Hartbeespoort. The purchase price was R100 000.

[10] The property was undeveloped. The rest of his funds were used for fencing, boreholes, building a dam and to start to build a house. Before he had completed all of this he had nothing left of his pension lump sum. At age 56 his wife who was an administrative officer at the department of Pathology, at the University of Pretoria, retired and received a pension lump sum of R200 000.

[11] Her pension was used to complete the house, buy the necessary machinery for small-scale farming and for living costs.

[12] Thereafter both of them had no fixed income except for the mentioned R647 per month annuity. The first defendant testified that he planted about 4ha with lucerne and beans from which he received some income.

[13] Already during 2003 he had to start borrowing from the bank and a bond in the amount of R100 000 was registered on 13 June 2003. A second bond in the amount of R200 000 was registered on 11 April 2005. The first defendant was clearly not farming profitably. His evidence was that at the end of 2005 he had a cash flow problem for he had to make further small improvements on the plot and buy equipment. He had no income except for some from the lucerne. He therefore for the third time approached the bank for a loan which was granted in the amount of R651 000 secured by a bond registered on 13 February 2006. The pre-existing loans were consolidated and the bonds of R100 000 and R200 000 were cancelled. In respect of the 2006 loan he saw a Ms du Plooy at the Pretoria North branch of the plaintiff

and stated to her that he had no fixed income. He was not asked for any statement of income and expenses.

[14] Throughout the period I have already referred to, the first and second defendants received financial contributions from their family including children, one of which is the third defendant.

[15] The solution seemed to be that the property had to be sold. The first and second defendants received an offer to purchase from Engel & Völkers estate agents acting for a purchaser in his capacity as director of a company to be formed. The contract was signed during June 2007 for a purchase price of R2 750 000. The purchaser's object was to develop the property as a township. Condition 9.2.1 was that the rezoning process within a period of two years had to be successful. In the meantime the only amounts payable by the purchaser were R10 000 a month for six months as from 1 August 2007 and thereafter R15 000 for the remaining period it will take to open a township register.

[16] Regarding these payments Mr de Beer testified that the first and second months went well but thereafter he battled to get the money from the purchaser and in any event never received R15 000 but only R10 000 per month when he did receive payment.

[17] During the end of 2007 he realised that he again had to approach the bank for a further loan.

[18] He filled in a form at the bank in which he applied for a further R300 000. This application was not approved by the bank.[1]

[19] He thereafter discussed his predicament with his daughter and son-in-law. He said that he did not speak to the bank again but that they did. His daughter banks with ABSA Pretoria North and one day they phoned him to say that the loan application had been approved. They had to attend at the bank's attorneys to sign the documentation. It was only in the office of the attorneys that he saw that the loan amount ("totale hoofskuld") in terms of clause 1.2.4 is R1 151 430 i.e. the then existing R651 000 loan plus a further R500 000. He objected for he had only requested a further loan for R300 000. There was some discussion about that but eventually he and his wife signed on 14 January 2008.

[20] He emphasise that once again he was not asked by the bank to provide any statement of his income and expenditure from the farming. His wife was not earning anything. One must see this in the light of the fact that he was nearly 66 years old, his wife a few years younger. Their daughter remained bound as surety.

[21] Before this last loan was approved he gave the bank a copy of the contract of sale of their property. In any event this contract was cancelled by the purchaser on 13 October 2008 and that was therefore the end of any income from that source.

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[1] See in this regard the comment of Mr Prinsloo in para 8 of his report below

[22] The plaintiff's dilemma is that all its source documentation regarding the different loan agreements were destroyed in a fire. Thus it is not in possession of any of the original home loan application forms with the supporting documentation from time-to-time. In cross-examination the first defendant was referred to the standard home loan application form, exhibit "A82". He said that he had completed the form. His income and expenditure were more or less even and his only fixed income was the annuity. He further admitted that he signed the declaration at the end of the form – exhibit "A85".

[23] When he was referred to the bank's scorecard (exhibit "B124") in respect of the 2006 loan he stated that the gross income reflected there was the total income of all three the defendants. This version was confirmed by the only employee of the bank called as a witness, Ms Prinsloo, who also confirmed the same regarding the 2007 scorecard in respect of the 2008 loan (exhibit "A126 – 127").

[24] Towards the end of cross-examination it was put to the first defendant, with reference to exhibit "B83", that the instalment was reduced from R13 816 to R6 910 on the request of the defendants. This was not denied, neither the fact that for up to 22 months the defendants were able to keep to this arrangement.

[25] I found the first defendant to be a reliable and honest witness. He answered forthrightly. The only mistake he made was to say that his daughter, the third defendant, was not involved in the 2006 loan but as I have pointed out in para 2 above she did in fact sign during 2006.

[26] In argument the first defendant is said to not have played open cards with the court by not providing full discovery in respect of his income and expenditure at the relevant times, his Nedbank account and existing financial means, prospects and obligations as well as his debt repayment history as a consumer under a credit agreement. However, no basis was laid that any of the defendants were in possession of such relevant documentation and neither were those documents called for by employing rule 35(3).

[27] One crucial aspect which was not put in dispute was that the income of R30 500 as gross income and the nett income of R19 825 on the 2006 scorecard represent the income of all three the defendants added together. It is further to be noted that the property valuation on this scorecard is R950 000.

[28] It is so that the defendants bear the burden of proof in regard to their defence/counterclaim of reckless credit, but in the same breath it must be mentioned that it is the plaintiff's dilemma that it is no longer in possession of the documents due to a fire that destroyed its storage facilities.

[29] For this reason also the plaintiff is unable to rely on s 81(4) as a defence. This subsec reads as follows:

> "*(4) For all purposes of this Act, it is a complete defence to an allegation that a credit agreement is reckless if-*
>
> *(a) the credit provider establishes that the consumer failed to fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section; and*
>
> *(b) a court or the Tribunal determines that the consumer's failure to do so materially affected the ability of the credit provider to make a proper assessment.*"

[30] There is indeed no evidence that the defendants provided incomplete or untruthful information to the plaintiff.

[31] The second witness was Juani Labuschange, the third defendant. She testified that she is self-employed. She has a "party" shop and also does disciplinary hearings. She testified that the bank never did a financial enquiry on her. Her bank statements are before court and her evidence was that she breaks even. It is evident from various entries in her statements that she pays herself a salary from time-to-time.

[32] She says she was unable to pay a R14 000 per month instalment during 2008 and thereafter. She further testified with reference to exhibit "A10" that when she arrived at the attorney she thought she would sign a surety for a loan of R300 000 but that the attorney said R500 000 was granted. In stating this she is obviously mistaken as the latter loan was the 2008 loan whilst the said exhibit is dated 18 February 2006. The fact is that since that date she has stood surety for the obligations of her parents.

[33] Nothing of substance came to light during her cross-examination.

[34] I cannot see why an in-depth inquiry into her finances is relevant as the counterclaim based on ss 80-83 of the Act relates only to the first and second defendants.

The expert evidence of Adriaan Jacobus Prinsloo

[35] The defendants called a formidable witness in support of their plea of reckless credit. Prinsloo obtained a B.Com (Accounting) and obtained his MBA with a thesis titled "Credit Policy for the Bank". He is a member of the SA Institute of Professional Accountants.

[36] He was employed by Saambou Bank Ltd from July 1991 to September 2002. He was the Assistant General Manager (Risk Management) from 1991 to 1998 and General Manager (Credit Manager) from 1998 to 2002. He was self-employed for a couple of years before he was approached by FNB Home Loans to join the bank as Head of Strategic Credit (Home Loans). He held

this position from September 2004 until his retirement during last year. As such his responsibilities included the following:

> Responsible for Credit Policy (and guidelines, procedures)
>
> Responsible for full aspect of credit initiating
>
> Responsible for the quality of credit lending
>
> Represent FNB Home Loans at First Rand Group Credit
>
> Responsible for full spectrum of assessing and approving credit
>
> Member of the First Rand Retail Credit Committee.

[37] His global exposure is the following: Visited Britain (banks and retailers) and Australia (banks) to gather information on Credit Scoring, Credit Lending, functioning of business Processes and Mortgage lending (& interest rates) respectively.

[38] He was awarded the prestigious "Laureate Award" from the University of Pretoria (MBA Business School) in 2000.

[39] He states that the four major banks apply very much the same policy and criteria to assess whether to grant credit. Only income that is reliable, consistent and sustainable should be taken into account. A bank cannot rely on temporary income or donations.

[40] Of all income there should be proper proof. If a person is self-employed financial statements of that enterprise are required.

[41] He makes the self-evident point that a scorecard is only as reliable as the information fed into the computer. He states it as follows in his second report which he also confirmed in evidence (exhibit "C103"):

> "*Scorecards are only effective and only gives proper results if the input information to it is correct, etc, etc.*"

[42] *"A meaningful amount of information therefore on the loan application (and the applicant) has to be captured correctly in the scorecard to come to a decision of approve, decline, or refer the application*" he states at exhibit "C103".

[43] He points out that on the scorecard exhibit "B126" the further advance amount ("FA Amount") as well as the final maximum loan amount ("Final ML Amount") are the same namely R500 000. This is obviously wrong as the further advance of R500 000 meant that, which is common cause, the loan agreement of R1 151 430 was entered into. This, on my own calculation, then means that the "loan to value percentage" is not 20% but 46%. Interesting, but I accept that the plaintiff is not in a position to explain that now, is that the value of the property (when one compares the 2006 to the 2007 scorecard), in that short period increased from R950 000 to R2 500 000.

[44] In cross-examination he made the fair concession that he cannot comment on the ABSA scorecard. In fact in his second report (exhibit "C103") he states that a scorecard has numerous criteria some of which are treated very confidentially by banks. He in any event stated that he believed the

information was not correctly captured as the adjusted expenses of as he put it "three households" cannot be R6 308. It also seems clear to me that three adults cannot survive on that amount although the reference to three households is, strictly speaking, not correct – the first two defendant live on the a farm whilst the third defendant lives in Pretoria North.

[45] Having consulted with the defendants and having perused the available documentation he formed the following opinion and gave the following reasons in his rule 36(9)(b) report (exhibit "C92-102"):

> *"I came to the conclusion that based on the interpretation of the NCA, and more specifically sections 80 to 82 of the NCA, intensive banking credit experience, as well as background information provided above, that the loan granted the Defendants, constitutes reckless credit.*
>
> *Herewith my opinion and reasons for my opinion (in my opinion I will refer to the Defendants as "Applicants", as I deal with their application for a loan agreement)*
>
> *1)* *<u>Proper proof of income of all Applicants must all times be obtained</u>*
>
> *This is crucial in any form of credit lending. A credit lender must at all times make sure that the income stated by the Applicant(s), is indeed the actual income. An Applicant(s) can easily over indebt themselves. They*

also don't always have the knowledge of expenses, and what effect new debt will have on their cash flow. The validity of the proof of income documents must be scrutinized. Documentation so provided, will help the bank in determining the permanent nature of such income. Determining the sustainability of the income is essential as a mortgage bond is to be repaid over a period of normally 20 years.

In casu, this couldn't have been done without proper proof of income. According to the Applicants, the Plaintiff didn't ask for any proof of income.

2) *The Applicant(s) existing and future expenses/ commitments must be investigated/scrutinized/verified.*

Applicant(s) usually understate their expenses/ commitments in an effort to present a favourable financial position to a bank, just to obtain the loan applied for. Applicant(s) also usually don't prepare proper monthly budgets of all their expenses/commitments. A bank must determine whether the total income that it must prove, is sufficient to repay stated expenses/commitments, as well as the new requested loan commitment. In casu, this wasn't done.

3) *The bank must do a calculation of total income, less total expenses/commitments, less repayment on new loan applied for, to determine if the Applicant(s) has sufficient cash flow*

This calculation is necessary to determine whether the Applicant(s) still has a positive cash flow left after the new finance was granted.

In casu, this couldn't have been done as the Applicants', cash flow was simply not sufficient as stated above. The Applicants relied on a once off sale of their property for cash flow [see point 6 hereunder]. It is also against the interpretation of the NCA to only lend against the value of the property.

The Applicants' income and commitments/expenses have to be evaluated as well. In casu, proper calculation or evaluation of the Applicants' income and expenses/ commitments have not been done.

4) *The bank must take the age of the Applicant(s) into consideration when granting the loan, and not grant a loan and/or reduce the repayment term of the loan if the Applicant is too old*

The Applicant, in the person of the First Defendant, was 65 years + old when the total loan of R1 150 000.00 was granted by the Plaintiff. This means the loan was to be repaid by the Applicant at the age of 85. The Applicant was already on pension at age 65 when the loan was granted, with no income except the R650.00 p/m annuity. At age 85, the Applicant will be far beyond his working life to secure income to repay the loan. This act could also be interpreted to be immoral under these circumstances.

5) *A bank should not grant a "flexi facility" on a mortgage bond to an Applicant when he is too old*

As the Applicant, in the person of the First Defendant, was 65 years old when the total loan of R1 150 000.00 was granted, it means the Applicant could have still owed the bank R1 150 000.00 at age 85, when the loan had to be repaid in full. At age 85 the Applicant will be far beyond his working life to secure income to repay the loan. This act could also be interpreted as immoral under

these circumstances. The Applicant, in the person of the Second Defendant, married in community of property to the First Defendant, was also on the verge of retirement and would her salary income also terminate long before the loan has been repaid.

6) *[The following section deals with the sale of their property during June 2007] <u>The bank or it's agent (normally it's panel attorney) should scrutinize the Offer to Purchase contract of its client, when its client buy or sell property</u>*

This is required to protect the interests of its client in terms of the contract. The relevant offer to Purchase in this case, was very one sided in favour of the purchaser, especially in terms of the escape clause. The Plaintiff must have known that the purchaser was an estate agent, who is very familiar with Offers to Purchase, which has put the Applicants in a disadvantaged position with the purchaser. This specific Offer to Purchase is also not the normal average "run of the mill" contract, in the sense that the Applicant's purchase price for their property would not have been paid on transfer, but would only take effect after months of upfront payments by the purchaser, and only if and when a township development was approved and if and when stands were sold. In casu the risk of possible default by the purchaser should have

been explained to the Applicants, as the purchaser's repayment capability hasn't been assessed at all by the Plaintiff.

7) *Financing smallholdings and/or farms are most of the times higher risk than normal residential property.*

This is more so true in this case, as the smallholding under mortgage was earmarked for further development which is very risky. Potential selling of the property is therefor much riskier. The proceeds of the sale were therefore far less certain, and the Plaintiff should have known that before granting the loan to the Applicants.

8) *Past credit history of the Applicants must be taken into account*

This is to determine the Applicants' credit record. The Applicant, in the person of the First Defendant, applied previously for a further loan with the Plaintiff, which was declined. This should have had the red lights flickering when the Applicant applied for the loan after July 2007.

9) *The Applicants applied for R300 000.00 further loan after July 2007, after which the Plaintiff granted R500 000.00. The loan granted shouldn't have been increased by the Plaintiff from R300 000.00 to R500 000.00*

> *As it was at the time of granting the loan after July 2007, the Applicant couldn't afford the repayments on a regular long term basis on the existing loan granted. To be instrumental in over indebting the Applicants for even more than what they applied for, constitutes reckless credit."*

[46] The final portion of his report reads as follows:

> *"Over my years of experience, the facts of this case prove one of the worst examples of reckless credit, under circumstances where the Plaintiff disregarded the above factors in toto, and simply replied on the security value of the Defendants' property (which constitutes their sole residence at their advanced age), in order to have granted the loan agreement."*

[47] I do not deem it necessary to deal with the evidence of the last witness called by the defendants nor the evidence of the first witness called by the plaintiff. Their evidence related only to the s 129 notice. The reason therefore will soon become clear.

Evidence for the plaintiff

[48] The only bank employee that was called was Ms Lynette Prinsloo, a specialist investigator into mortgage loan fraud. She has 27 years' experience in the field.

[49] She firstly confirmed that all the bank's documents relating to the 2006 and 2008 loans were destroyed in a warehouse fire on 28 August 2009. There were no backups. The only remaining information in the possession of the plaintiff was on its mainframe and the bond and title deeds which were kept at another site. Although she did not mention it, it is evident that the loan agreement itself was also not destroyed.

[50] At the outset she stated the obvious principle that the income and expenses should be verified so that it can be ascertained whether there is a sufficient surplus for the instalment and some extra money for a rise in rates.

[51] She gave a detailed account of how the computerised system of decision-taking on the granting of a loan works. This obviously starts from the completed form with supporting documents. The process moves through various departments and is fully automated. It is only if the system detects a possible problem or query that it is referred for a "manual" decision. She states that the "R" on the 2007 scorecard ("B126" line 6) could mean that this application was referred to a credit manager. This seems to be quite probable as there are various queries at the top of the next page and we have the evidence of the first defendant that the R300 000 loan application was first declined.

[52] She confirms that the R6 308 reflects the total household expenses of all defendants. I have already expressed my view in that regard and have also referred to the defendants' expert's view.

[53] In any event the most crucial part of her evidence is that not only were the household expenses of the three defendants lumped together, but also, from the outset, their gross income. Thus the gross monthly household income of R27 000 on exhibit "B126" is the total income of the first, second and third defendants. I found that astounding and put it to her that a surety only comes into the picture when the principal debtors have failed to comply with their obligations. She agreed, and also with the proposition that the surety on her own must be able to pay the monthly instalment. This was not the case with the third defendant.

[54] In any event such an approach is irrational and cannot amount to a reasonable assessment of the creditworthiness of the consumers i.e. the first and second defendants.

[55] She added that it is no longer the bank's approach to add the income of the surety from the outset. This was discontinued by ABSA in 2008 during the time of the worldwide financial and banking crisis. Importantly she then conceded that it was the wrong approach and the loan should not have been granted.

[56] This concluded the evidence.

Relevant provisions of the Act

[57] The concept "reckless credit" is defined in s 80(1)(a) and (b) of the Act. For present purposes I find it only necessary to quote the first subsection which reads:

> "*80 Reckless credit*
>
> *(1) A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119 (4) –*
>
> *(a) the credit provider failed to conduct an assessment as required by section 81 (2), irrespective of what the outcome of such an assessment might have concluded at the time; or"*

I quote the remaining subsecs of s 81(I already quoted s 81(4) above):

> " *81 Prevention of reckless credit*
>
> *(1) When applying for a credit agreement, and while that application is being considered by the credit provider, the prospective consumer must fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section.*
>
> *(2) A credit provider must not enter into a credit agreement without first taking reasonable steps to assess-*
>
> *(a) the proposed consumer's-*

(i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;

(ii) debt re-payment history as a consumer under credit agreements;

(iii) existing financial means, prospects and obligations; and

(b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement.

(3) A credit provider must not enter into a reckless credit agreement with a prospective consumer."

Lastly I need to refer to s 83:

""83 Court may suspend reckless credit agreement

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

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

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

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

Discussion

[58] The question is whether in terms of s 83(1) I must declare the present credit agreement as reckless. An agreement is reckless in terms of s 80(1)(a) if "the credit provider failed to conduct an assessment as required by section 81(2)..." (my emphasis).

[59] It is argued on behalf of the plaintiff that the fact that the scorecard exists shows that the bank conducted an assessment. This is surely so, but in my view, for two reasons the assessment made does not comply with s 81(2).

[60] The 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 i.e. 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".

[61] It is clearly irrational to have taken the third defendant's i.e. the surety's income into account in coming to the conclusion that the "existing financial means" existed to pay the instalments. As already pointed out above a surety does not fall within the definition of a consumer in s 1 of the Act. Furthermore the surety remains totally out of the picture until the principal debtors have failed to comply with their obligations.

[62] A second reason is that the assessment also falls foul of s 81(2)(b). All the loans were for a commercial purpose, namely farming on the first and second defendants' smallholding. We have the following uncontested figures which were needed to acquire the property and to keep the farming operation going:

2002	-	R640 000	-	His pension lump sum
2003	-	R100 000	-	First loan from the plaintiff
2004	-	R200 000	-	Lump sum from second defendant's pension
2005	-	R200 000	-	Second loan from the plaintiff
2006	-	R651 000	-	Third loan from the plaintiff
2008	-	R500 000	-	Fourth loan from the plaintiff

[63] How, on these figures, an employee of the bank could conclude that the farming may prove to be successful, is beyond me. It seems that money was just being poured into a bottomless pit. The first defendant was surely idealistic to believe he could produce the necessary income for survival and service of the ever-mounting debt from small-scale farming which is farming

with lucerne and poultry on approximately 5ha. Furthermore we have the first defendant's evidence that apart from filling in the application form, the plaintiff never required proper income/expenditure accounts supported by the necessary source documents, not to even mention audited accounts.

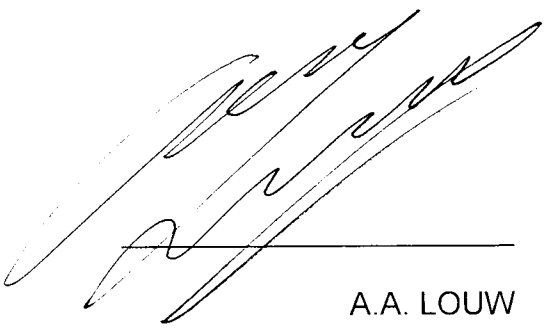
[64] On these two grounds I declare the agreement as reckless. Consequently my discretion arises in terms of s 83(2) to either set aside the agreement or to suspend the force and effect of the agreement. The remedy must be "just and reasonable".

[65] To my mind the following factors weigh in favour of exercising the first option namely s 83(2)(a):

1. The extent of the recklessness is clear. When the global financial and banking crisis hit, the plaintiff realised it could no longer continue in this fashion and the practice of taking the surety's income into account in order to determine whether the principal debtors qualified was stopped
2. The first and second defendants are elderly. The first defendant was nearly 66 when the 2008 bond was registered. His wife was 60.
3. The property which the plaintiff seeks to be declared executable is the only, and thus primary home of the first and second defendants.

[66] I make the following order:

1. The plaintiff's claim against all defendants are dismissed.
2. All the rights and obligations of the first and second defendants in terms of the mortgage loan agreement annexure "G" to the declaration are set aside.
3. The plaintiff is ordered to instruct its attorney and to sign the necessary documentation in order to have mortgage bonds B20458/06 and B8980/08 cancelled.
4. The first and second defendants are ordered to pay the reasonable costs related to the cancellation of the bonds.
5. The plaintiff is ordered to pay the costs of the action which include the costs of the claim and counterclaim.



A.A. LOUW

Judge of the High Court