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Dispute Resolution ALERT

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Credit providers have a general duty to conduct proper affordability assessments prior to granting loans or providing credit of any sort to debtors. Failure to adequately do so may amount to reckless credit.



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From promise to peril: The duty of credit providers to conduct proper affordability checks

Credit providers have a general duty to conduct proper affordability assessments prior to granting loans or providing credit of any sort to debtors. Failure to adequately do so may amount to reckless credit.

Section 80 of the National Credit Act 34 of 2005 (NCA) deals with reckless credit and states that a credit agreement is deemed to be reckless if, at the time that the agreement was made, the credit provider failed to conduct an assessment in accordance with sections 81 (2)(a)(ii) and (iii), read with Regulation 23A of the NCA.

The case of *Chaity Investments CC v Schoombie* (case number 26100/2017 Johannesburg High Court 7 September 2023) considers the extent to which credit providers have an obligation to conduct such affordability assessments and determine whether a customer understands the agreement they are about to enter into.

Facts of the case

The applicant, Chaity Investments CC (Chaity Investments), and respondents, Mr and Mrs Schoombie (the Schoombies), entered into a loan agreement on 10 December 2015, supported by an acknowledgement of debt and mortgage bond over their immovable property.

Prior to Chaity Investments' involvement, the Schoombies had registered a mortgage bond over the property with Absa. On 19 May 2015, Absa had sold the immovable property in execution due to the Schoombies falling behind with their monthly bond payments. It is unclear whether or not Chaity Investments was aware of this fact. The property was sold to a third party who subsequently offered to sell the property back to the Schoombies. The Schoombies obtained a pension pay-out, which they used as a part-payment towards the purchase price. The Schoombies applied and successfully obtained a loan from Chaity Investments towards payment of the balance. When the Schoombies defaulted on their monthly instalments, Chaity Investments sought a monetary judgment against them, including an order to declare the property as specially executable to cover the debt.



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The Schoombies' primary defence in this regard was that the agreements constituted reckless credit, as defined by section 1 of the NCA, namely "*the credit granted to a consumer under a credit agreement concluded in circumstances described in section 80*". They contended that Chaity Investments proceeded with the credit agreement despite indications that the Schoombies did not fully understand the risks associated with the credit agreement.

Chaity Investments brought forth that it had conducted an assessment as per the NCA's requirements, and that it found the Schoombies had the financial prospects to repay the credit. It further stated that the Schoombies were intelligent individuals who understood the transaction and its associated risks and costs.

This, however, resulted in a dispute of fact, as the Schoombies claimed to be pensioners with minimal income from

social grants, who had previously defaulted on loan payments, as evidenced by the Absa execution sale. The question arose as to whether a proper assessment was conducted and whether the information provided by the Schoombies was accurate.

Issues to be determined

Section 81(2)(a) of the NCA states that a credit provider should not enter into any agreements without first taking proper steps to assess the borrower's understanding of the risks and costs involved, along with their rights and obligations therein, their debt re-payment history, and existing financial means, prospects, and obligations. Failure to do so could lead to the credit agreement being set aside. This assessment should be done in accordance with sections 81(2)(a)(ii) and (iii) of the NCA read with Regulation 23A of the NCA, which sets out further requirements and criteria in the assessment process.

The court was posed with the question of whether Regulation 23A applied to this case, as Regulation 23A(2)(k) states that it does not apply to mortgage agreements that fall within certain thresholds. The court held that the issue was not whether the regulation applied, but rather whether reasonable steps had been taken in the assessment process, as section 81 of the NCA, which prescribes the assessment, still applied. Even if the regulation did not apply, the credit provider would still have had to conduct the necessary assessments in accordance with section 81(2)(a). The court further held that section 81 should be read together with section 82 of the NCA, which provides that a creditor may determine for itself the evaluation mechanisms or models and procedures to be used in meeting the requirements as set out by section 81.

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The decision

The court held that Chaity Investments did not seem to place sufficient information before the court that it had conducted a fair assessment of whether or not reasonable steps had been taken to assess the Schoombies' creditworthiness. Chaity Investments only relied on the information provided to it by the Schoombies. In other words, it did not sufficiently vet whether this information was correct.

The court held that there is a further onus placed on the borrower during the application process, namely to fully and truthfully answer any questions posed by the credit provider. It stated further that it is a complete defence to an allegation that a credit agreement is reckless if the credit provider establishes that the borrower failed to answer any requests fully and truthfully for information made by the credit provider as part of the assessment required by the act. Whilst the borrower is required to merely answer these truthfully, the responsibility

leans more on the credit provider to ask sufficient questions to gather the necessary information.

The court stated that even a superficial assessment done by Chaity Investments would have shown that the Schoombies had previously failed to repay their Absa bond. However, Chaity Investments claimed that untruthful statements were made by the Schoombies.

Referral to oral argument

There was thus a material dispute of fact in this regard, namely whether or not accurate information was provided to Chaity Investments, which needed to be determined by way of oral evidence before a conclusive decision could be made as to whether the above amounted to reckless credit.

In its determination on whether the loan amounted to reckless credit, the court highlighted the key issue of whether the consumer's failure to answer the credit provider's questions truthfully, accurately, and fully materially affected the credit provider's ability to make a proper

assessment. If the credit provider does not ask the proper questions, in line with determining whether the borrower will be able to pay back the credit provider's money, this may lead to reckless credit. If the credit provider asks such questions and the borrower does not answer truthfully, misleading the credit provider, the borrower will be liable, and it will not amount to reckless credit.

If the oral evidence proves that the Schoombies did not provide truthful and accurate information, which materially affected Chaity Investment's ability to make a proper assessment, it will not amount to reckless credit. If the oral evidence proves that the Schoombies were truthful and that Chaity Investments failed to conduct a proper affordability assessment, this will amount to reckless credit and the agreement will be set aside. The outcome of this oral argument, and the factors to be considered, will no doubt be of interest to many credit providers, and we will certainly keep a watchful eye on it.

[Mongezi Mpahlwa and Luke Kleinsmidt](#)

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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