



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

REPORTABLE

CASE NO: 24343/2015

In the matter between:

NEDBANK LIMITED

Applicant

and

LEONARD ROBERT JONES

First Respondent

SONJA JOAN JONES

Second Respondent

STEPHANIE CHARLENE HODGE

Third Respondent

MAGISTRATE NAIK N.O.

Fourth Respondent

MAGISTRATE FOURIE N.O.

Fifth Respondent

FIRSTRAND BANK LIMITED

Sixth Respondent

STANDARD BANK LIMITED

Seventh Respondent

DIRECT AXIS (PTY) LIMITED

Eighth Respondent

ABSA BANK LIMITED

Nineth Respondent

EASTON BERRY INC

Tenth Respondent

WOOLWORTHS HOLDINGS LIMITED

Eleventh Respondent

MARKHAMS (PTY) LIMITED	Twelfth Respondent
THE FOSCHINI GROUP LIMITED	Thirteenth Respondent
TRUWORTHS LIMITED	Fourteenth Respondent
EDGARS CONSOLIDATED STORES LIMITED	Fifteenth Respondent

JUDGMENT DELIVERED ON 12 OCTOBER 2016

GAMBLE, J:

INTRODUCTION

[1] This application involves the interpretation of the provisions of sections 86 and 87 of the National Credit Act, 34 of 2005 (“the NCA”). It follows on the judgment in the Port Elizabeth High Court delivered by Goosen J (Beshe J concurring) in Norris¹ and seeks to review a decision by the fourth respondent (a magistrate for the district of Paarl) to vary a contractually agreed provision in a credit agreement subject to the NCA, as also an order for declaratory relief.

[2] The applicant (“the bank”) was represented by Mr SC Rourke SC from the Port Elizabeth Bar. The first and second respondents (“the Jones”)

¹ Nedbank Limited v Norris and Others 2016 (3) SA 568 (ECP)

were represented by a local firm of attorneys who, due to a lack of funds, were unable to represent them before this court and who indicated that their clients would abide the decision of the court. In light of the importance of the points raised by the bank in this matter, the court (with the prior consent of the attorneys for the bank) requested the appointment of an *amicus curiae* by the Cape Bar Council. Adv J.W. Jonker, a practitioner well versed in NCA matters, kindly offered his services. The court is indebted to Mr Jonker for his able argument which has assisted the court in coming to a just decision in this matter.

THE MATERIAL FACTS

[3] On 4 February 2010 the third respondent, a debt counsellor duly registered under the NCA, brought an application for debt review in terms of section 86 of the NCA on behalf of the first respondent and his wife (the second respondent to whom he is married in community of property) before the fourth respondent (“the magistrate”), citing the bank, as well as the 6th to 15th respondents herein, as respondents before that court by virtue of the Jones’ indebtedness to each of them in varying amounts.

[4] On 4 March 2010 the magistrate granted leave to the debt counsellor to bring the application in terms of section 86 of the NCA. He further found that the Jones’ were over-indebted in terms of section 79 of the NCA and on 8 June

2010 made an order for debt re-arrangement in terms of sections 86 and 87. For present purposes it is only necessary to deal with the re-scheduling of the bank's debt as it is the only creditor which has challenged the order.

[5] The bank is a registered credit provider under the NCA and it concluded various credit agreements with the Jones' over the years. The most recent of those was concluded on 19 January 2007 – a home loan agreement in the initial sum of R1,1m with a first mortgage bond registered over the family home to serve as the bank's security. The agreement contemplated monthly repayments in the amount of R10 491 over 336 months and recorded that the initial interest rate on the finance agreement was to be 10, 9% per annum. That rate was said to be variable at the instance of the bank.

[6] In granting the debt re-arrangement proposal the magistrate ordered that the home loan (the balance then said to be in excess of R 2, 2m) was to be restructured so that the monthly instalment would be R 4007, 06 and the interest rate would be fixed at 10.4% per annum, while the repayment period was left open-ended on the basis that the instalment would be payable "*till debt settled*". The bank points out that at the time the rearrangement order was made the contractual instalment was R 17 343, 75 per month and the interest rate 8, 9% per annum. The order granted, says the bank, is not even sufficient to cover the monthly interest payable on the loan.

[7] Dissatisfied with the nature and extent of the order, the bank sought to apply for rescission thereof on 14 November 2013 on the basis that the order was void *ab origine*. At that stage the application was grossly out of time and an application for condonation accompanied the application for rescission. This application did not proceed and was withdrawn by the bank on 23 May 2014. It seems as if the reason therefore was that there were fatal procedural defects in the application for rescission.

[8] A fresh application for rescission (together with an application for condonation for the late filing thereof) was launched in the Magistrate's Court, Paarl on 5 August 2014. On 8 April 2015 the presiding magistrate refused to condone the late filing of the rescission application and accordingly the order of 8 June 2010 stood. Undeterred by this development, the bank soldiered on.

THE BASIS FOR THE CURRENT APPLICATION

[9] On 15 December 2015 the bank approached this court and launched the present application for declaratory relief and, if considered necessary, review of the order of the magistrate of 8 June 2010. Condonation was sought for the delay in bringing the proceedings more than 5 years after the event.

[10] In the founding affidavit in support of this application a senior manager in the bank's Debt Rehabilitation and Recovery Services Department,

Ms Hartley, explains the historical background to the application as set out above. She asserts that the magistrate was neither empowered to grant an order which varied the interest rate agreed upon, nor permitted to order that the rate be fixed indefinitely. In the circumstances, it is averred, the order is void in terms of section 36 (1) (b) of the Magistrates Court Act, 32 of 1944 and may, in any event, be ignored with impunity on the basis that it does not exist as a formal order, alternatively that it falls to be rescinded in terms of the said section 36 (1) (b).

[11] The founding affidavit of Ms Hartley contains extensive detail regarding the manner in which the bank functions in terms of its so-called “Primary Lending System” and, importantly, of the liquidity requirements which the South African Reserve Bank imposes on the various commercial banks licensed to operate in the country, requirements which are in place to ensure the ongoing commercial viability of the banks. I do not think it necessary to traverse all of the detail furnished by Ms Hartley in relation to the impact which an order such as that granted by the magistrate has on a particular bank’s liquidity. Suffice it to say that the explanation is compelling and unless proper procedures are followed in re-scheduling debt the effect could be to inadvertently disturb a bank’s liquidity by increasing its debt provisions beyond that known to the bank on a day-to-day basis. The consequences, therefore, of a plethora of such orders

being granted countrywide on a daily basis can seriously impact on the general liquidity of the lending industry and has the potential to jeopardise lending to all clients, from rich to poor and from the contractually compliant to the errant. I shall revert to this aspect when I consider whether condonation should be granted or not.

[12] In the founding affidavit the bank goes on to point out that the effect of the magistrate's order for re-arrangement of the debt in question is that the consumer's obligation under the NCA will never be satisfied and it demonstrates, with reference to certain calculations, that the re-scheduled monthly instalment will not even cover the monthly interest payable on the debt, let alone reduce the capital due. This is contrary to the purpose of the NCA, and in particular sec 3 (i) thereof, which the Constitutional Court reiterated in Kubanya² has, *inter alia*, the following aim –

“[35]..... It deserves re-emphasis that the purpose of the Act is not only to protect consumers, but also to create a ‘harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements’.

² Kubanya v Standard Bank of SA Limited 2014 (3) SA 56 (CC) at [35]

THE MAGISTRATE'S POWERS TO ORDER RESCHEDULING OF THE DEBT

[13] The procedure for debt review is set out in sections 86 and 87 of the NCA. In circumstances where a debtor qualifies for debt review, a debt counsellor is consulted and the latter prepares an application to court for appropriate relief. In such application the debt counsellor may issue a proposal to the court recommending, firstly ³ that the relevant credit agreement concluded by the consumer be declared to be reckless credit. In addition, and in any event, the counsellor may make the following recommendations under section 86 (7) (e) (ii)

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‘(ii) that one or more of the consumer’s obligations be re-arranged by –

(aa) extending the period of the agreement and reducing the amount of each payment due accordingly;

(bb) postponing during a specified period the dates on which payments are due under the agreement;

³ Under section 86(7)(c)(i)

(cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or

(dd) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6.⁴

[14] The debt counsellor is then required to refer the matter to the magistrate's court with her relevant recommendation(s). In terms of section 87 the magistrate must conduct a hearing on receipt of the recommendation and after considering the matter⁵, in terms of section 87(1), the court 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

⁴ It is common cause that there are no such contraventions in this matter.

⁵ “(H)aving regard to the proposal and information before it and the consumer's financial means, prospects and obligations..”

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).

[15] From the foregoing it will be seen that the structure of the NCA contemplates that the debt counsellor is required to procure the relevant information, collate it, evaluate the situation and advise the court as to the appropriate re-scheduling which best suits the debtor's needs. If the court is then satisfied with that recommendation, and decides to act under section 87 (1) (b) (ii) it can only make an order which complies with one or more of the recommendations contained in the debt counsellor's report and, importantly, those recommendations can only be based on the provisions of section 86 (7)(c)(ii): the court cannot make an order which does not incorporate a recommendation which does not comply with the criteria set out in section 86 (7) (c) (ii).

[16] It is trite that the magistrate's court is a creature of statute and exercises no inherent jurisdiction. It may only exercise the powers conferred upon it by statute and can accordingly not adjudicate matters which fall outside of its jurisdiction. Simply put it may only issue orders which it is expressly authorised to do.⁶ And, if that court exceeds its jurisdiction, at common law the consequence is that such an order is null and void.⁷

[17] The facts in Norris are on all fours with the present matter and it is accordingly useful to have regard to the *dictum* of Goosen J in that matter-

“[42] It is obvious from these figures that the rearranged payments will not satisfy the amount outstanding to the applicant as at the date of restructuring. The clear effect of the re-arrangement order is that the first respondent, as consumer, will not meet all of his obligations to the applicant in terms of the credit agreement. Not only will the first respondent not be obliged to make payment of the full outstanding loan, the monthly payments do not even meet the requirement to reimburse the applicant for the monthly payment it is obliged to make on behalf of the first respondent in respect of credit insurance cover. The order plainly does not meet the essential

⁶ Ndamase v Functions 4 .All 2004(5) SA 602 (SCA) at [5]

⁷ The Master of the High Court (North Gauteng High Court , Pretoria) v Motala NO and Others 2012(3) SA 325 (SCA) at [12]

purposes of the NCA as set out in s 3(g) and (i) (cf BMW Financial Services (SA) Pty Ltd v Mudaly 2010(5) SA 618 (KZD); FirstRand Bank Ltd v Adams and Another 2012(4) SA 14 (WCC))

[43] *Apart from this, the magistrate also ordered that the first respondent's contractual obligations to pay interest on the outstanding balance of the loan be reduced from the fixed 17, 5% to 0%.*

[44] *Section 86(7)(c)(ii) confirms no such power upon the magistrates' court. A debt re-arrangement order has as its purpose the re-scheduling or re-arrangement of the obligations of the consumer in such a manner as to enable the consumer to meet his/her/its obligations to the credit provider. It serves to mitigate the effect of over-indebtedness by making provision for payments within the existing means of the consumer and over an extended period. A re-arrangement order does not, and cannot, extinguish the underlying contractual obligations. This much is plain from the wording of s 86(7). The order reducing the first respondent's contractual obligation to pay interest on the outstanding balance of the loan is therefore ultra vires the NCA. (FirstRand Bank v Adams*

supra para 28; SA Taxi Securitization (Pty) Ltd v Lennard 2012(2) SA 456 (ECG) para 10)”

[18] As I have attempted to demonstrate, in this matter the magistrate did not reduce the interest rate to zero but he permanently fixed it at a level which will render the debt incapable of ever being settled by the Jones’. Adopting the reasoning in Norris, with which I fully agree, it follows that the order of the magistrate of 8 June 2010 was *ultra vires* and accordingly of no force and effect.

THE APPROPRIATE STEPS TO ADDRESS THE INVALID REARRANGMENT ORDER – REVIEW OR DECLARATORY RELIEF?

[19] The immediate problem that confronts the bank in seeking to have the order reviewed and set aside is, as the Jones’ themselves say in their affidavit filed of record, the very lengthy delay of more than 5 years in bringing the application. In terms of the approach in Wolgroeiens⁸, this court exercises its inherent jurisdiction in a matter such as this and , in so doing, has the power (in the regulation of its own proceedings) to refuse to come to the assistance of an aggrieved party if the latter has been guilty of unreasonable delay in initiating review proceedings. As Navsa JA points out in SANRAL, the question of

⁸ Wolgroeiens Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978(1) SA 13 (A) at 41. See also Associated Institutions Pension Fund v Van Zyl 2005(2) SA 302 (SCA) at [41]and [42]; Gqwetha v Transkei Development Corporation Limited 2006(2) SA 603 (SCA) at [5]; SANRAL v City of Cape Town ZASCA 122 (22 September 2016) at [79].

prejudice is important and in deciding whether or not to assist the litigant the court asks itself 2 questions-

- Was there an unreasonable delay?
- If so, should the delay, in all the circumstances of the case, be condoned?

[20] Mr Rourke SC did not seek to suggest that there was anything reasonable about the delay in this matter. Rather, both counsel for the bank and the *amicus* submitted that the review of the order would occasion no prejudice to the debtors because they had had the benefit of paying to the bank over the period of the re-structured order a lower instalment than they were contractually bound to pay. I am not persuaded that this is the correct approach. As a consequence of the magistrate's order the Jones' have had all of their debt restructured and have, no doubt, regulated their domestic finances in the *bona fide* belief that they were complying with a valid order of court.

[21] One does not know what amount the debtors would have paid to the bank had a valid order been made, and what the effect thereof would have been on the amounts payable to their other creditors. Further, in light of the complaint that the re-structured monthly instalment does not even cover the interest component thereof, it is safe to assume that a significant amount of additional

interest has accrued to the Jones' home loan while the bank has all the while remained relatively inactive in addressing the situation. Simply put, there is too much water that has passed under the bridge for a fair assessment to be made of the consequences, and in particular the prejudice, of reviewing the order at this stage.

[22] In considering whether the delay in the present matter should be condoned, the court must also have regard to the fact that the parties have conducted themselves in accordance with the implementation of the order: the Jones' have paid less than they are contractually bound to do and the bank has received such payments under the court order, while the outstanding capital on the debt in question has continued to increase, given that not even the monthly interest instalment which the Jones' were required to pay under the credit agreement has been met.

[23] In my view, the review of the order at this stage would create a commercial nightmare for both parties and undoubtedly be prejudicial to the debtors. The calculation of what would have been due to the bank had the order not been made, or had the debt otherwise have been re-scheduled lawfully and the contract enforced in its original terms, will not be a simple exercise given that, as a matter of fact, the Jones' have been making part payment of what was contractually due. Resorting to mixed metaphors, it will be well nigh impossible

to unscramble the omlette in this case. For that reason alone I consider that an order for review would not be in the interests of justice. It follows, in my view, that the application for condonation of the delay in bringing the review should not be granted.

[24] The main focus of Mr Rourke SC's argument was however on the *ultra vires* point. While the legal consequences of an order made beyond the jurisdiction of the lower court are not in issue, and while it is established law (per Motala) that such an order may be ignored because it is of no force and effect *ab initio*, counsel for the bank urged the court to consider granting declaratory relief in order that the correct interpretation of sections 86 and 87 could be clearly conveyed to magistrate's courts hearing applications for debt review.

[25] Ms Hartley's affidavit reveals that orders of the sort made in this case and in Norris are all too commonplace in the lower courts and she goes on to demonstrate how the banks, while struggling to keep track of the plethora of orders made across the country, are affected by the granting of such unlawful orders.

“[35] I refer later in this affidavit to the extent to which the applicant has been negatively affected financially from unlawful re-arrangement orders of this kind. In truth, however, all credit

providers throughout the country are confronted with the same problem. I am unfortunately unable to provide any precise data concerning the extent of the problem in the industry as such data does not exist.

[36] What is clear to me, however, as someone operating within the credit industry, is that the problem is widespread with many Magistrates being under the mistaken impression that they have the jurisdiction to reduce, vary, or even extinguish interest payable when making re-arrangement orders in terms of section 86 (7)(c) when, as a matter of law, they do not. Similarly Magistrates suffer the mistaken impression that a re-arrangement order, which contemplates a monthly instalment less than the interest which accrues to the debt, falls within the ambit of the Act.

[37] This Re-arrangement Order (sic) is, to my knowledge as a consequence of my involvement in the credit industry, of a kind which is routinely made in the Magistrate's Courts across the country. It is of a kind, therefore, which has wide and far-reaching implications for both the Applicant and other credit providers in the Republic. I say so because such re-arrangement orders are unlawful, for the reasons provided in this affidavit. This

notwithstanding, many Magistrate's Courts throughout South Africa make these kinds of orders regularly and they are implemented by large swathes (sic) of those involved in the credit industry - apparently on the mistaken assumption that they are lawful. Re-arrangement orders of this unlawful kind impact negatively on the entire credit industry.

[38] In the first instance, the protection afforded to credit providers by section 3 (g) of the Act is negated when orders of this kind of granted. The credit provider concerned does not then receive all that is due to it. Stated differently, the consumer does not satisfy all her, his or its financial obligations to the credit provider as contemplated in section 3(c)(i), read together with section 3 (g) and section 3 (i) of the Act.

[39] If such orders are allowed to stand, this would represent a material credit risk which a credit provider would necessarily have to take into account routinely when determining the risks it faces both generally and specifically in respect of any particular consumer. The commercial effect of such risk being taken into account would be that those consumers who are at the margins of qualifying for credit and who would otherwise do so would now, as

a consequence of the risk being taken into account, no longer do so. This would undermine a fundamental purpose of the Act which is to extend the granting of credit to those who previously did not qualify for credit as contemplated in Section 3 (a) of the Act, as they lived on the margins of affluence.

[40] It is fundamentally important, in the circumstances that clarity be obtained from this Honourable Court in the form of the relief sought by the Applicant.”

[26] I would remark in passing that the problem of illegality does not originate with the magistrate for it is the debt counselor who makes the recommendation to the magistrate as to how the debt should be re-scheduled. It is therefore to those participants in the debt re-scheduling process that an declaratory order would primarily apply.

[27] This court’s power to issue a declaratory order is contained in section 21(1)(c) of the Superior Courts Act, 10 of 2013. The wording is similar to the erstwhile power conferred upon the court under section 19(1)(a)(iii) of the now repealed Supreme Court Act, 59 of 1959 and the jurisprudence which developed under that section is accordingly applicable. Previously it was held that courts would not pronounce upon abstract or academic points of law and

that there had to be an existing or concrete dispute between persons (albeit as to future or contingent rights) before the court would act.⁹ That position changed with the decision of the Appellate Division in *Nell*¹⁰, where the court found that an existing dispute was not a prerequisite to the exercise by the court of jurisdiction under the erstwhile section. It was only necessary that there should be interested parties upon whom the declaratory order would be binding: the necessity for an actual dispute is not required in section 21 (1) (c) nor is it implied therefrom.

[28] It has also been said that a court will not grant a declaratory order in circumstances where the legal position has been clearly defined by statute.¹¹ However, I do not understand the position to be that the issuing of a declaratory order in such circumstances is proscribed. More particularly, where there has been persistent misinterpretation of the statute in question, it seems to me essential that a court should step in and issue a declaratory order. It has also been held that where a court of competent jurisdiction has already made a similar order, the court will not grant a further declaratory order in light of the *res judicata* principle.¹²

⁹ *Ex parte Velkes* 1963(3) SA 584 (C)

¹⁰ *Ex parte Nell* 1963(3) 754 (A) at 760 A-C

¹¹ *Ex parte Noriskin* 1962(1) SA 856 (D)

¹² *Offit Enterprises (Pty) Ltd and Another v Coega Development Corp (Pty) Ltd and Others* 2009(5) SA

[29] In Cordiant Trading¹³, the Supreme Court of Appeal observed that the court considering the grant of declaratory relief should adopt a two stage approach. First, it must satisfy itself that the applicant has an “*existing, future or contingent right or obligation*”, thereby considering whether the applicant has established the requisite condition precedent for the court to entertain the matter. And, if this question is answered in the affirmative, the court must then consider whether it is an appropriate case to exercise its jurisdiction in favour of granting such relief.

[30] While the relief sought here encompasses the interpretation of a statutory provision, I am of the view that the serial misinterpretation of sections 86 and 87 by both debt-counsellors and magistrates alike throughout this court’s jurisdiction warrants pronouncement by the court of the correct position. Further, while the court in Norris has already interpreted the sections in question in similar vein that court does not function within this court’s area of jurisdiction to the extent that a plea of *res judicata* could be raised. At best, on the basis of *stare decisis* its judgment is to be regarded as persuasive. In my view, it is important that debt counselors and magistrates functioning within the area of jurisdiction of this Provincial Division should know that this court endorses the approach in Norris.

661 (SE) at 670 A-C

¹³ Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd 2005(6) SA 205 (SCA) at [18]

[31] There can be little doubt that the bank has an interest in ensuring legal certainty regarding the correct interpretation of the NCA, for it is the entity directly affected by the commercial consequences of the incorrect interpretation thereof. But, debtors too are interested persons for the purposes of granting declaratory relief, given that they are entitled to know that the section has been wrongly interpreted by magistrates: they too suffer prejudice when an unlawful order is made, particularly where this may have the effect of perpetually enslaving them in debt to the bank.

[32] In my considered view, therefore, this is a case *par excellence* where the court should exercise its discretion in favour of granting declaratory relief. A positive and unequivocal restatement regarding the interpretation of the statutory provisions in question will be in the interests of, and of benefit to, all parties who are subject to the NCA, as well as those charged with the correct interpretation thereof.

THE TERMS OF THE ORDER SOUGHT

[33] Mr Rourke SC handed up a draft order which he submitted would address the bank's concerns in this matter. I am in agreement that an order should be made in those terms save for the following. In terms of para 3 of the draft, the court was requested to make an order that –

“3. The provisions of section 103 (5) of the National Credit Act and the common law in duplum rules do not apply whilst a consumer’s obligations have been rearranged in terms of section 87 (1) (b) (ii) of the National Credit Act and he or she complies with the terms of such order...”

That relief was never incorporated in the notice of motion herein nor was it traversed in the founding affidavit. Rather, it seems to have arisen as something of an afterthought which evolved in the preparation and presentation of the case before this court. In the circumstances I do not consider that the bank is entitled to ask for such relief without more.

[34] The relief sought in prayers 1, 2 and 4 of the draft are substantially in accordance with the relief requested in the notice of motion in which an order for costs was only sought in the event of opposition. In my view, the relief contemplated in para 4 of the draft order, which is to the following effect –

“4. An order granted by a Magistrate’s Court without jurisdiction constitutes a nullity in law and is void ab origine and may accordingly be ignored as if it does not exist without the necessity of a formal order setting it aside”,

amounts to no more than a restatement of the common law position. In such circumstances, it is neither necessary nor appropriate to make an order to that effect.

[35] In my view, the order which follows is more than adequate to address the bank's concerns regarding the incorrect interpretation of the NCA in the lower courts. In addition, since there was no opposition, no order for costs falls to be made.

ORDER OF COURT

- A. A magistrate's court hearing a matter in terms of section 87 (1) of the National Credit Act, 34 of 2005, does not enjoy jurisdiction to vary (by reduction or otherwise) a contractually agreed interest rate determined by a credit agreement, and any order containing such a provision is null and void.
- B. A re-arrangement proposal in terms of section 86(7)(c) of the National Credit Act that contemplates a monthly instalment which is less than the monthly interest which accrues on the outstanding balance does not meet the purposes of the National Credit Act. A re-arrangement order incorporating such a proposal is *ultra vires* the National Credit Act and the magistrate's court has no jurisdiction to grant such an order.

GAMBLE J

I AGREE.

HACK AJ