

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)
CASE NO: 51330/09

In the matter between:

SA TAXI SECURITISATION (PTY) LTD Plaintiff

and

MBATHA, BHEKITHEMBA MISHACK Defendant

CASE NO: 52948/09

SA TAXI SECURITISATION (PTY) LTD Plaintiff

and

MOLETE, CHRISTOPHER QENEHELO Defendant

CASE NO: 53080/09

SA TAXI SECURITISATION (PTY) LTD Plaintiff

and

MAKHOBHA, AARON VELAPHI Defendant

JUDGMENT

I. INTRODUCTION

[1] In this case, three separate applications for summary judgment were argued before me simultaneously. In each instance the Applicant/Plaintiff was represented by the same counsel and each Respondent/Defendant was represented by the same counsel.

[2] In each case, the Plaintiff, SA Taxi Securitisation (Pty) Ltd (“the Plaintiff”), had financed the acquisition of a taxi by the Defendant through an agreement pursuant to which the Plaintiff leased a vehicle to each Defendant. Each Defendant was required to pay rental, which included capital plus finance charges. It is common cause that each of the lease agreements

(collectively “the lease agreements”) is a credit transaction as defined in section 1 of the National Credit Act 34 of 2005 (“the NCA” or “the Act”).

[3] Each Defendant allegedly defaulted in its obligation to pay the rental. The Plaintiff alleges that it has validly cancelled each of the lease agreements and the Plaintiff seeks to repossess each of the leased vehicles (“the vehicles”). The Plaintiff has applied for summary judgment seeking return of each of the vehicles in terms of Rule 32(1)(c).

[4] Although the Plaintiff has claimed other relief in the notice of application for summary judgment, the Plaintiff’s Senior Counsel, Mr *Subel*, indicated during the course of argument that the Plaintiff was not pursuing the other remedies sought in the notice of application for summary judgment. Accordingly, in each instance, the Plaintiff sought only return of the relevant vehicle together with costs on the attorney and client scale.¹

¹ Each lease agreement contains a provision that permits that the Plaintiff to recover attorney and client costs.

[5] In each action, the Defendant raised various defences under the NCA. In addition, in case number 09/51330 (“the first action”), the Defendant raised certain procedural defences based upon the format of the affidavit in support of the application for summary judgment.

[6] By agreement between the parties, the parties argued only those issues that arose in the first action. The parties were in agreement that, if summary judgment was granted in the first action, summary judgment should be granted in the other two actions because the substantive defences raised in all three actions were the same.²

II. THE POINT *IN LIMINE* IN THE FIRST ACTION

[7] In the first action, the Plaintiff asserts two separate claims for the return of two separate vehicles based upon two separate lease agreements.

[8] The Defendant in the first action took a point *in limine* against the Plaintiff based upon the language of the confirming affidavit.

² Case No 09/52948 is hereinafter referred to as (“the second action”). Case No 09/53080 is hereinafter referred to as (“the third action”).

[9] Paragraphs 4 and 5 of the affidavit filed in support of the application for summary judgement stated:

“4. I have read the Plaintiff’s summons, Particulars of Claim and Application for Summary Judgment in this matter. I can and do swear positively to the **claims** set out in the Summons and Particulars of Claim and verify the Plaintiff’s cause of **action**.

5. I can and do swear positively to the facts herein contained and verify that the Defendant is truly and lawfully indebted to the Plaintiff in the sum of R39 310.38 in respect of Claim A and R46 387.75 in respect of Claim B with interest upon the grounds as stated in the Summons.”

[emphasis added].

[10] The Defendant contended that the Plaintiff verified only one cause of action instead of the two causes of action that the Plaintiff relied upon. This proposition is untenable.

[11] Paragraph 4 of the affidavit refers to “*claims*”. The reference to “*cause of action*” instead of to “*causes of action*” is plainly a mere grammatical error. When the supporting affidavit is read with the notice of application and the summons, there can be no

doubt that the deponent intended to verify each claim for the return of each motor vehicle.³

[12] In any event, it is clear from the affidavit in opposition to the summary judgment application that the Defendant was left in no doubt that the Plaintiff was verifying both causes of action. The point *in limine* was not even raised in the opposing affidavit.

[13] Accordingly, even if there is a defect in the supporting affidavit, the Defendant has suffered no prejudice.

III. THE CONTRACTUAL INTERPRETATION DEFENCES

[14] In each action, the Plaintiff alleged that the Defendant had breached its agreement by failing to pay rentals on due date and that, as a consequence of the breach, the Plaintiff had terminated the agreement.

[15] In paragraph 21 of the opposing affidavit in the first action, the Defendant states:

³ *Standard Bank of South Africa Limited v Roestof* 2004 (2) SA 492 (W).

“21 The plaintiff contends that I am in breach of the credit agreement by failing to pay monies due in terms of the agreement and I am in arrears with my payments. On this basis the plaintiff sought to cancel the agreement. I have already denied that I am in breach of the agreement nor am I in arrears in the alleged amount, if at all.

22. I specifically aver that I have made and i (sic) am still making regular payments under my debt counsellor’s proposal in the National Credit Regulator’s (NCR) accredited payment distribution agent the Consumer Protection Excellence (CPE).”

[16] This denial by the Defendant that he is in default falls significantly short of the standard required by Breitenbach v Fiat, (SA) Edms (Bpk) 1976 (2) SA 226 (T) – (see below). For the denial to be effective, the Defendant would have been required to state that he had made all of his payments, when he had made those payments, and the amount of each payment.

[17] In any event, the Defendant’s denial appears to be not so much a factual one but one calculated to clarify that he has not abandoned certain defences. When read in the context of the affidavit as a whole, the Defendant’s denial seems to be premised upon two contentions:

17.1 That there can be no default under each lease agreement because the lease agreements do not specify the date of payment of instalments after the first instalment. This defence is dealt with below.

17.2 The default is not yet justiciable because the action is barred by the provisions of the NCA. This contention is also dealt with below.

[18] The language of each lease agreement is similar. The Defendant maintains that, in each action, having regard to the language of the agreement, the Plaintiff's cancellation of the agreement is invalid. The Defendants appear to have raised two points in this regard, based upon the language of the various lease agreements.

[19] Clause 9 of each lease agreement provides:

“9.1 An event of default shall occur if the Lessee –

9.1.1 fails to make punctual payment of any of the instalments ...

9.2 **Upon an event of default** or the loss, damage or destruction of the vehicle as determined in 6.1 the Lessor may, subject to the provisions of the Act and any other applicable

legislation, at its election and without prejudice to any remedy which it may have in terms of this agreement or otherwise - ...

9.2.2. **after due demand**, cancel this agreement, obtain possession of the vehicle and recover from the Lessee, as pre-estimated liquidated damages, the total amount of payments not yet paid by the Lessee, whether same are due for payment or not or the proceeds of any insurance policy paid by the Lessor in respect of the vehicle. In addition, the Lessor shall be entitled to claim from the Lessee any amount of any value added tax payable in respect of such damages. **For the purposes of this sub-clause “due demand” shall mean immediately on demand**, unless the Lessee is entitled to notice, in which case “due demand” shall mean the giving of such notice to which the Lessee is entitled.”

[emphasis added].

[20] Based upon the language of clause 9.2.2, the Defendant maintains that there should have been a demand before the Plaintiff could terminate the agreement. As far as I can understand the Defendant’s argument, it appears to be that two steps are required for the termination of the agreement. First, demand must be made and, thereafter, notice of default must be given. In other words, there must be an *interpellatio* before the Plaintiff can claim.

[21] I see nothing in the language of the lease agreements that justifies such an interpretation. On the contrary, the language of clause 9.2.2 makes it clear that, as soon as demand is made, the Plaintiff is entitled to return of the vehicle. In this respect, the allegation is made in paragraphs 15 and 27 of the particulars of claim in the first action that the agreement has been terminated “*alternatively the agreement is terminated herewith*”. As a matter of law, to the extent that demand is required, summons constitutes demand.⁴

[22] The Defendants’ second point is based upon clause 1.1 of each lease agreement which provides that:

“The first instalment will be payable on the date provided for in Part D and subsequent instalments will be payable on the stipulated Payment Date.”

The Defendants maintain that, while a date for the first instalment is stipulated in Part D of the lease agreement, the relevant lease agreement does not provide for a “*payment date*”.

Therefore, the Defendants contend that the Plaintiff should have

⁴ *Noble v Laubscher* 1905 TS 125, 126; *Alpha Properties (Pty) Ltd v Export Import Union (Pty) Ltd* 1946 WLD 518, 519-520; *Thelma Court Flats (Pty) Ltd v McSwigin* 1954 (3) SA 457 (C) 462C-D; *Middelburgse Stadsraad v Trans-Natal Steenkoolkorporasie Bpk* 1987 (2) SA 244 (T) 249.

stipulated a payment date before an event of default could have occurred. In other words, once again, the Defendants argue that there should have been an *interpallatio*. This argument is also unsustainable.

[23] In relation to the agreement that is annexure “A” to the particulars of claim in the first action, the payment date for the first and final instalments and the payment date of each instalment is clearly set out.

[24] In relation to the other agreements, each agreement contains a specific date for payment of the first instalment. Each agreement provides that payments are to be made by way of 60 monthly instalments. There can be no doubt that, upon a proper construction of the agreement, each instalment was payable on the same day in each month as the first instalment. Even if I am wrong in this, at the very least each instalment would have been payable on or before the last day of the month in which each instalment was paid. Accordingly, the payment date is stipulated and no *interpallatio* is necessary.

IV. THE STANDARD THAT THE DEFENDANT HAS TO MEET IN ORDER TO DEFEAT A CLAIM FOR SUMMARY JUDGMENT

[25] In Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T) 228

Colman J, delivering the judgment of the Full Court, held:

“It must be accepted that the sub-rule was not intended to demand the impossible. It cannot, therefore, be given its literal meaning when it requires the defendant to satisfy the Court of the *bone fides* of his defence. **It will suffice, it seems to me, if the defendant swears to a defence, valid in law, in a manner which is not inherently and seriously unconvincing.**

Another provision of the sub-rule which causes difficulty, is the requirement that in the defendant’s affidavit the nature and grounds of his defence, and the material facts relied upon therefore, are to be disclosed “fully”. A literal meaning of that requirement would be to impose on a defendant the duty of setting out in its affidavit the full details of all the evidence which he proposed to rely upon in resisting the plaintiff’s claim at the trial. It is inconceivable, however, that the draftsman of the Rule intended to place that burden upon a defendant. I respectfully agree ... that the word “fully” should not be given its literal meaning in Rule 32(3), and that no more is called for than this: that the statement of material facts be sufficiently full to persuade the Court that what the defendant has alleged, it is proved at the trial, will constitute a defence to the plaintiff’s claim. **What I would add, however, is that if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the Court to consider in relation to the requirement of *bona fides* ...”**

[emphasis added].

[26] The principles enunciated in *Breitenbach v Fiat* are no less applicable when the defendant deposing to an affidavit resisting summary judgment is relying upon defences based upon sections of the NCA. Since the enactment of the NCA, there seems to be a tendency in these Courts for defendants to make bland allegations that they are “*over-indebted*” or that there has been “*reckless credit*”. These allegations, like any other allegations made in a defendant’s affidavit opposing summary judgment, should not be “*inherently and seriously unconvincing*”, should contain a reasonable amount of verificatory detail, and should not be “*needlessly bald, vague or sketchy*”. A bald allegation that there was “*reckless credit*” or there is “*over-indebtedness*” will not suffice.⁵

[27] It is with this guiding principle in mind that I approach the Defendants’ defences in the three actions.

[28] I make a further general observation on the manner in which the Defendants have set out their defences in the three actions. The Defendants in the second and third action raise identical defences and provide identical information to the Defendant in the first

⁵ *Standard Bank of South Africa Limited v Panayiotts* 2009 (3) SA 363 (W).

action. It is almost as if the affidavits contain a laundry list of standard defences extracted from a word processor.

- [29] It is unlikely that three separate Defendants, even if bound by similar agreements with similar defences available to them under the NCA, could satisfy the summary judgment requirements stipulated in *Breitenbach v Fiat* with a series of bland and identical allegations. The details of each Defendant's experience with the Plaintiff should have been provided and these would surely have been different in some way, even if the events merely occurred on different dates.

V. THE POLICY BEHIND THE NCA

- [30] The preamble to the NCA states that the purpose of the NCA is:

“To promote a fair and non-discriminatory market place 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 reorganisation in cases of over-indebtedness ...**”

[emphasis added].

[31] Section 3 of the NCA provides that the “*Purposes of the Act*” are, *inter alia*, as follows:

“The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a **fair**, transparent, competitive, **sustainable**, responsible, **efficient**, effective and accessible credit marketing industry, and to protect consumers, by –

(a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those that have historically been unable to access credit under sustainable market conditions;

...

(c) promoting responsibility in a credit market by:

(i) encouraging **responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers**; and

(ii) discouraging reckless credit granting by credit providers **and contractual default by consumers**;

(d) promoting equity in the credit market **by balancing the respective rights and responsibilities of credit providers and consumers**;

(e) addressing and correcting imbalances in negotiating power between consumers and credit providers by ...

(g) addressing and preventing over-indebtedness of customers, and providing mechanisms for resolving over-indebtedness based on the principle of **satisfaction by the consumer of all responsible financial obligations**;

(h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and

(i) providing for a consistent and harmonised system of debt restructuring, **enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations** under credit agreements.”

[emphasis added].

[32] The purpose of the NCA is to provide a more efficient and equitable credit system by **balancing** the rights of credit providers and consumers. The intention of the legislature was not to shift the balance of power so much that all power in the credit relationship would amass into the hands of the consumer.

[33] The NCA is also structured in such a way as to prevent “*over-indebtedness*” and to provide for more efficient discharge of consumer debts. If, as the Defendants maintain, the purpose of the Act was to enable an over-indebted consumer to retain a lender’s depreciating security while at the same time not making

debt payments, the NCA would make it significantly more unlikely that over-indebted consumers would ever discharge their indebtednesses. The restoration of a lender's security to the lender while it still has value facilitates the efficient reduction and discharge of indebtedness. The retention of deteriorating security has the opposite effect.

[34] A major purpose of the Act is to assist over-indebted consumers to pay off their indebtedness. In certain limited circumstances, the NCA affords them a **moratorium** on the repayment of the indebtedness in order to enable them to get back on their feet. The Act may also allow consumers to be relieved of indebtedness that was incurred as result of reckless credit.

[35] I stress that all of these objectives are directed at the consumer's **indebtedness** – i.e. the claim for the outstanding deficiency **after** realisation of the lender's securities ("the deficiency claim"). The intention is not to unfairly deprive lenders of their security.

[36] Where a consumer is over-indebted, the creditor provider's prospects of recovering from the consumer are often effectively

limited to the recovery of the creditor's security. If lenders are unable to recover deteriorating security, such as motor cars, promptly the consequences would be economically disastrous for asset-based lenders, especially those lending to the less affluent. It would have the effect of reducing available credit and pushing up the cost of credit for those consumers who are performing their obligations. Taking these practical factors into account is part of balancing the interests of credit providers and consumers.

[37] While one purpose of the NCA is to discourage reckless credit, the Act is also designed to facilitate access to credit by borrowers who were previously denied such access. An over-critical armchair approach by the Courts towards credit providers when evaluating reckless credit, or the imposition of excessive penalties upon lenders who have recklessly allowed credit, would significantly chill the availability of credit especially to the less affluent members of our society.

[38] Interpretation of the various sections of the NCA involves an attempt to balance the interests of both lenders and borrowers in such a way as to facilitate the flow of credit in a responsible

manner and to provide debt relief where appropriate. The financial stability of credit providers is in this context as important as those of the consumers. The more successful the credit provider, the more credit that is available in the capital markets and the more favourable the rates that are available to consumers. Consumers benefit when credit providers are successful. The failure of credit providers adversely affects consumers and the flow of credit. Both groups are dependent upon each other and that is why a balancing act is necessary.

V. THE DEFENCE OF “*RECKLESS CREDIT*”

A. THE PROVISIONS OF THE NCA CONCERNING RECKLESS CREDIT

[39] Section 80 of the NCA provides:

“(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 ...–

(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

(b) the credit provider, having conducted an assessment as required by section 81(2) entered into the credit agreement

with the consumer despite the fact that the preponderance of information available to the credit provider indicated that –

(i) the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement; or

(ii) entering into that credit agreement would make the consumer over-indebted.”

[40] Section 80(2) provides that a determination of recklessness must be made based upon the circumstances that prevailed at the time that the obligation was entered into and not at the time when the determination is made.

[41] Section 80(3) sets out some of the factors that must be considered in determining whether there has been reckless credit. These include a determination of the value of any credit facility available to the borrower at the time that the credit was granted and the amount of any pre-existing credit guarantees.

[42] Section 83 of the NCA provides:

“(1) Despite any provision of law or agreement to the contrary, in any court proceeding in which a credit agreement has been 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).”

[emphasis added].

[43] Section 84(1) provides:

“(1) During the period that the force and effect of the credit agreement is suspended in terms of this Act –

- (a) the consumer is not required to make any payment required under the agreement;
- (b) no interest, fee or other charge under the agreement may be charged to the consumer; and
- (c) the credit provider’s rights under the agreement, or under any law in respect of that agreement, are enforceable, despite any law to the contrary.”

[44] Accordingly, if a Court declares a credit agreement to be reckless it can either “*set aside*” the consumer’s “*rights and obligations*”

in whole or in part or suspend the force and effect of the credit agreement.

[45] It is significant that, in relation to the suspension of a credit agreement, section 84 focuses on whether the consumer is required to make **payments** or is obliged to **pay** any interest, fee or other charge during the period of suspension. Although section 84(1)(c) contemplates that the credit provider will not be entitled to enforce its rights during the period of suspension, that sub-section must be read with sections 84(1)(a) and (b). There is no basis for reading into the language of the NCA a provision that, when suspension is appropriate, the Court also has the power to permit the consumer to utilise the security in a manner which will permit it to deteriorate during the period of suspension.

[46] It seems unlikely that the legislature ever intended that the consumer could keep the “*money and the box*”. If the consumer obtained possession and use of a motor vehicle in circumstances in which no credit should have been extended to the consumer, it would be fundamentally unfair and counterproductive for the

consumer to continue to use the vehicle while at the same time not making any payments under the agreement.

[47] If the consumer has a valid complaint that, but for the recklessness of the credit provider, the consumer would never have become involved in the credit transaction, it might be “*just and reasonable*” to “*set aside*” the agreement. In that event, the agreement would be null and void and as if it had never been. As a consequence, the credit provider, who remains the owner of the vehicle, would be entitled to restoration of the vehicle. On the other hand, the consumer, who no longer has any obligations under the agreement that has been set aside would be relieved of any further indebtedness or deficiency claim under the agreement. In certain circumstances, this would be a fair and symmetrical resolution.

[48] On the other hand, if the effect of the agreement is merely suspended, **all elements** of the agreement would have to be suspended. This would mean that the consumer would not be entitled to continue to retain possession of the vehicle during the period of suspension. At the same time, the consumer would not

have to make any payments under the agreement during the suspension period.

[49] I agree with the following statements of my sister Masipa J in *Standard Bank of South Africa Limited v Panayotts* **2009 (3) SA 363 (W) 370:**

“[77] In any event, my view is that the NCA does not envisage that a consumer may claim to be over-indebted whilst at the same time retaining possession of the goods which form the subject-matter of the agreement. Such goods should be sold to reduce the defendant’s indebtedness.

...

[81] The purpose of the NCA is, *inter alia*, to provide for the debt re-organisation of a consumer who is over-indebted, thereby affording such consumer the opportunity to survive the immediate consequences of his financial distress and to achieve a manageable financial position ...”⁶

[50] That the NCA does not contemplate the consumer retaining “*the money and the box*” is also borne out by the provisions of section 130(1) of the NCA. That section provides that the failure of a consumer to surrender its security is a factor that militates in

⁶ See also *Firststrand Bank Limited v Olivier* **2009 (3) SA 353 (SECLD).**

favour of immediate enforcement of the credit agreement by the credit provider.

B. THE MANNER IN WHICH THE DEFENCE OF “RECKLESS CREDIT” IS FORMULATED

[51] In paragraph 5 of the opposing affidavit, the Defendant, in the first action, Mbatha, has formulated the defence of reckless credit in the following fashion:

“(b) The agreement constitutes a *reckless* agreement as contemplated in section 80 [of the NCA] in that the Plaintiff failed to conduct an assessment as required of it under section 80(1)(a) of the NCA. Accordingly, I am entitled to an order setting aside and suspending the Agreement as contemplated in section 83(2) of the NCA.

(c) Even if an assessment was made (which I deny), the preponderance of information available to it would clearly have shown that I did not understand or appreciate the risk, costs and obligations thereof. Accordingly, I am entitled to an order setting aside or suspending the Agreement as contemplated in section 83(2) of the NCA.

(d) An assessment would also have shown that entering into the Agreement would have rendered me over-indebted. Accordingly, I submit that I am entitled to an order as contemplated in section 83(3) of the NCA. ...”

[52] A further allegation, which takes the matter no further concerning reckless credit, is made in paragraph 26 of the opposing affidavit.

[53] The agreement that forms the subject matter of Claim A in the first action was concluded on 24 April 2007. Part D of the NCA, which deals with over-indebtedness and reckless credit, only became effective on 1 June 2007 – i.e. after the conclusion of the first agreement of lease. In terms of Schedule 3, Transitional Provisions, Chapter 4, Part D does not apply to a pre-existing credit agreement (defined to mean an agreement that was made before the effective date and to which the NCA applies) in respect of reckless credit. Accordingly, the defence of reckless credit is in any event not available to the Defendant in the first action in relation to Claim A.

[54] The credit agreements giving rise to Claim B in the first action and the claims in the second and third actions were all concluded after 1 June 2007. Accordingly, the defence of reckless credit (to the extent that it could be a bar to the recovery of the vehicles leased) is available on these agreements.

[55] As appears from what is stated above, I do not believe that the NCA permits the consumer to retain the security while at the same time suspending its obligations under the credit agreement.

[56] In any event, even if I am wrong in that view, the Defendants have not set out their defence of reckless credit in any of the actions with sufficient particularity to comply with the requirements of Breitenbach v Fiat. In order to demonstrate that reckless credit was granted, the Defendants should have provided some particularity concerning the following:

56.1 Details should have been given of the negotiations leading up to the conclusion of the agreement. The Defendant should have identified the parties involved in the negotiations, to the extent that the Defendant is able to do so. The Defendant should also have disclosed details concerning any credit application that the Defendant signed and the circumstances in which the Defendant signed those credit applications. This information would have enabled the Court to evaluate

whether there is a basis for the allegation that no assessment was conducted under the NCA.

56.2 To the extent that each Defendant wishes to avail itself of section 80(1)(b), the Defendants should provide information demonstrating his level of education and experience at the time relating to the risk of incurring credit. This would have involved a disclosure by each Defendant of prior credit transactions that each Defendant had entered into.

56.3 If the Defendants wish to rely on section 80(1)(b)(ii), each Defendant should provide details of all of its indebtedness at the time that the lease agreement was concluded, as well as information concerning the Defendants' potential income and expenditure, including any income that might derive from the utilisation of the motor vehicle as a taxi.

56.4 Information should have been provided concerning the Defendants' current levels of indebtedness and income

and expenditure in order to enable the Court to evaluate whether the Court might, in the exercise of its discretion, either set aside the credit agreement, or suspend it.

[57] In outlining the type of information that the Defendant should have provided if it wished to avail itself of the defence of “*reckless credit*”, I do not intend to be didactic or to lay down any immutable principle of law or procedure. It may be that, even if a defendant does not provide as much information as is suggested in the previous paragraph, a defendant will nevertheless be entitled to defeat some aspect of the claim for summary judgment on the basis of “*reckless credit*”. Suffice it to say that, in the present case, the Defendants have not even come close to providing sufficient information to substantiate the defence.

VI. OVER-INDEBTEDNESS

A. THE RELEVANT PROVISIONS OF THE NCA

[58] Section 86 of the NCA permits a consumer to apply to a debt counsellor for a declaration that he is over-indebted. On receipt

of such an application, the debt counsellor is required to notify all of the consumer's credit providers and every registered credit bureau.

[59] Section 86(5) provides:

“(5) A consumer who applies to a debt counsellor, and each credit provider contemplated in subsection (4)(b), must –

(a) comply with any reasonable request by the debt counsellor 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 any negotiations designed to result in responsible debt rearrangement.”

[60] The NCA does not appear to impose any sanction on a credit provider who does not participate in the process in good faith.

[61] If, as a result of the assessment, the debt counsellor “*reasonably concludes*” that the consumer is or is not over-indebted, the debt counsellor has various options available. If a debt counsellor concludes that the consumer is over-indebted, the debt counsellor may make a proposal recommending that a magistrate's court

make various alternative orders, including an order declaring that there has been reckless credit or for rearrangement of the consumer's obligations.

[62] Section 86(10) of the NCA provides:

“(10) If a consumer is in default under a credit agreement that has been reviewed in terms of this section, the credit provider in respect of the credit agreement may give notice to terminate the review in the prescribed manner to –

- (a) the consumer;
- (b) the debt counsellor; and
- (c) the National Credit Regulator,

at any time **at least 60 business days after the date on which the consumer applied for debt review.**

(11) If a credit provider who has given notice to terminate a review as contemplated in subsection (10) proceeds to enforce that agreement in terms of part C of chapter 6, the Magistrate's Court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances.”

[emphasis added].

[63] Section 86(10) contains no limitation on the creditor's right to give notice under section 86(10), provided that the consumer is in default and 60 days have elapsed since the debt review process commenced. The creditor's right under section 86(10) does not appear to be reciprocal to the obligation to deal in good faith under section 86(5).

[64] It may be that, if the credit provider fails to comply with the good faith provisions, a magistrate may order that the debt review resume. If such an order is made, the credit provider might have to wait a further 60 days before it could enforce its rights. In the absence of such an order, there is nothing to prevent the Plaintiff from pursuing its rights in this Court, provided that it has complied with the provisions of section 86(10).⁷

B. THE DEFENCE OF OVER-INDEBTEDNESS AS FORMULATED BY THE DEFENDANT

[65] It is common cause on the papers that:

65.1 The Defendant applied for debt review under section 86 of the NCA.

⁷ See *Changing Tides 17 (Pty) Ltd v Dege*, unreported decision of the North Gauteng-Pretoria High Court under case number 55819/2009 delivered on 2 February 2010.

65.2 No order has been made by any Magistrate's Court "*rearranging*" any of the Defendant's obligations under section 87 of the NCA.

65.3 Subject to the Defendant's interpretation defence arising out of the language of the lease agreements (which has disposed of above) the Defendant was in default of its obligations to pay instalments under the various lease agreements.

65.4 Sixty days after the Defendant applied for debt review, the Plaintiff purported to give notice of termination of the debt review in terms of section 86(10) of the NCA.

[66] In the light of the common cause facts, the Defendants' defences of over-indebtedness are difficult to follow. Among other things, the Defendants have made the following allegations:

"(10) I applied to the debt counsellor Matimba Management and Labour CC to have myself declared over-indebted in terms of section 86(1) of the NCA. The debt counsellor did an assessment on me and found that I am indeed over-indebted.

(11) The plaintiff was in terms of section 86(4)(b)(i) of the Act notified of the application and was requested to provide a certificate of balance indicating the outstanding amount which was still being owed by me and such was never received.

(12) Subject to the plaintiff's failure to furnish the debt counsellor with the requested certificate of balance, an assessment was nevertheless done and the plaintiff was informed by means of a letter that my application for credit review was successful.

(13) The debt counsellor sent a proposal to the plaintiff containing the rearrangement of my obligations for consideration and bona fide reply.

(14) The plaintiff failed to reply to my debt counsellor's proposal to date. I was advised by my debt counsellor that such failure by the debt counsellor (sic) infringes upon the provisions of section 86(5)(b) of the NCA which enjoins, amongst other persons, the plaintiff (credit provider) to participate in good faith in the review and any negotiations designed to result in responsible debt rearrangement.

(15) Despite the plaintiff's failure to participate in a debt review, let alone in good faith, the plaintiff addressed a letter to me and the debt counsellor in which it purported to terminate the debt review in terms of section 86(10) of the NCA.

(16) I state that the plaintiff's purported termination lacked substance and is at odds with the spirit and purport of the NCA in that the Plaintiff never participated in the debt review process initiated by my debt counsellor but merely waited for the lapsing of the 60 (sixty day period) to terminate the debt review."

[67] Although the line of defence is convoluted, it seems to be that the Plaintiff is barred from availing itself of the provisions of section 86(10) of the NCA because the Plaintiff allegedly did not participate in good faith in the debt review procedure. I express no opinion on whether a credit provider's failure to participate in good faith in the debt review procedure may constitute a defence to a **monetary claim** under the NCA. However, I cannot see how a lender's failure to participate in good faith would entitle the borrower to retain the security while at the same time suspending all payments under the credit agreement.

[68] Moreover, as noted above, the right of the credit provider to terminate the review is not dependent upon a reciprocal obligation on the part of the credit provider to participate in good faith in a credit review.

[69] In any event, even if I am wrong on this point, the Defendants' defence of over-indebtedness falls short of what is required by Breitenbach v Fiat. For the Defendants' defence on this issue to be adequately set out, the Defendants should have provided some of the following information:

- 69.1 an outline of each Defendant's assets and liabilities, income and expenditure sufficient to enable the Court to ascertain whether the allegation of over-indebtedness is *bona fide*;
- 69.2 the date when each Defendant approached the debt counsellor and the identity of the individual debt counsellor;
- 69.3 copies of documents that each Defendant submitted to the debt counsellor or an explanation for their absence;
- 69.4 to the extent that each Defendant maintains that the "*debt counsellor did an assessment on me and found that I am indeed over-indebted*", each Defendant should have provided copies of the documents that it received from the debt counsellor (or explain the absence of such documents) and more details concerning the debt counsellor's findings;

69.5 more precise details concerning when the debt counsellor allegedly approached the Plaintiff for information concerning each Defendant's indebtedness as well as of the proposal that the debt counsellor allegedly sent to the Plaintiff;

69.6 copies of all documents generated by the debt counsellor, or an explanation for the absence of such documents.

[70] Once again, in setting out a list of information that should have been provided, I do not wish to be prescriptive or to lay down a law of the Medes and the Persians. It may be that a Defendant does not have to go as far as I have suggested in the previous paragraph. Suffice it to say that, in this case, once again, the Defendant has not even come close to complying with the requirements of *Breitenbach v Fiat*.

VII. CONCLUSION

[71] As appears from what is set forth above, the Defendant in the first action, Mbatha, has failed to set out a *bona fide* defence. As

the defences raised in the second and third actions are identical, it follows that the Defendants in the second and third action have also failed to set out a *bona fide* defence to the claims for repossession of the leased vehicles.

[72] All of the lease agreements contain attorney and client cost provisions. Accordingly, the Plaintiff is entitled to judgment compelling restoration of each of the vehicles.

[73] In each of the actions, the Plaintiff has, in its particulars of claim, claimed significantly more relief than it is entitled to by way of summary judgment. Rule 32(6)(b) permits the Court to grant a partial judgment by way of summary judgment. Of course, the grant of summary judgment on the limited issues that are justiciable in summary judgment proceedings, do not prevent the Plaintiff from pursuing the other remedies or relief claimed in the summons after it has obtained summary judgment or repossession of the vehicles.

[74] Accordingly, I make the following orders:

(1) In the first action (case number 51330/09) I grant an order against the Defendant, Bhekithemba Mishack Mbatha that:

(1.1) The Defendant return the 2007 Toyota Siyaya with engine number 4Y9188607 and chassis number AHT41YH6309081138 to the Plaintiff forthwith.

(1.2) The Defendant return the 2008 Quantum Sesfikile with engine number 2TR8108796 and chassis number JTFSX22PX06035529 to the Plaintiff forthwith.

(1.3) That the Defendant pay the costs of the action incurred by the Plaintiff so far with respect to Claims A and B (including the costs of the summary judgment application) on the attorney and client scale.

(2) In the second action (case number 52948/09) against the Defendant, Christopher Qenehelo Molete:

(2.1) The Defendant is ordered to return the 2008 Toyota Quantum Sesfikile with engine number 2TR8105909 and chassis number JTFSX22P006040643 to the Plaintiff forthwith.

(2.2) That the Defendant pay the costs of the action incurred by the Plaintiff so far (including the costs of the summary judgment application) on the attorney and client scale.

(3) In the third action (case number 53080/09) against Aaron Velaphi Makhoba:

(3.1) The Defendant is ordered to return to the Plaintiff forthwith the 2008 Cam Inyathi XGD 2.2i High Roof with engine number SF491QEO7126442A and chassis number LPBMDDE77H120147.

(3.2) That the Defendant pay the costs of the action incurred by the Plaintiff so far (including the costs

of the summary judgment application) on the attorney and client scale.

P.N. LEVENBERG, AJ
ACTING JUDGE OF THE HIGH COURT

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