Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

In the matter between:

Case No. 13564/2010

WESBANK a division of FIRSTRAND BANK LIMITED **Plaintiff**

and

NATHALIE AGATHA MARTIN **Defendant**

JUDGMENT DELIVERED ON 13 AUGUST 2010

BINNS-WARD, J:

1] In this matter the plaintiff seeks summary judgment against the defendant. The debt in question arises out of a credit agreement which is subject to the provisions of the National Credit Act 34 of 2005. The defendant had applied for debt review in terms of s 86 of the Act. Prior to the institution of the action the plaintiff gave the defendant notice in terms of s 86(10) of the Act to terminate the review. Some weeks after the institution of the action the defendant's debt counsellor applied to the magistrates' court in terms of s 87 of the Act for an order in terms of s 86(7)(c) of the Act. That application has been set down for hearing in October 2010, some two months hence.

2] The defendant contends that summary judgment should not be granted against her by reason of the application pending in the magistrates' court. She has called in aid the judgment of Kathree-Setiloane AJ in *Standard Bank of South Africa Limited v Kruger; Standard Bank of South Africa Limited v Pretorius* [2010] ZAGPJHC 28 (23 April 2010),[1] in which it was held that it was not competent for a credit provider to purport to terminate a debt review in terms of s 86(10) of the Act at a time when an application in terms of s 87 of the Act was pending before the magistrates' court. The facts in the *Standard Bank* matter are, however, distinguishable. In that matter the issue was whether it was competent for the credit provider to purport to give notice of termination of the debt review at a time when an application to the magistrates' court was pending. In the current matter, as mentioned, there was no application pending in the magistrates' court when notice was given in terms of s 86(10) and, moreover, no such application had been made by the time enforcement proceedings were instituted in this court.

3] The plaintiff, on the other hand, relies on the judgment of Kemp AJ in *SA Taxi Securitisation (Pty) Ltd v Nako and others* ZAECBHC 4 (8 June 2010)[2],

1 The judgment is available at http://www.saflii.org.za/cases ZAGPJHC/2010/28/html .
2 The judgment is available at http://www.saflii.org/za/cases/ZAECBHC/2010/4.pdf . The part of the judgment on which the plaintiff's counsel appears to have relied is at para.s [33]-[44].

which appears to hold that after notice in terms of s 86(10) of the Act has been given resort to enforcement proceedings may had by the credit provider even if there is a pending debt review application to the magistrates' court. The plaintiff's contention is that the claim based on the credit agreement in issue in the current case is no longer subject of the debt review before the magistrate; the review having been effectively terminated pursuant to the notice given by it in terms of s 86(10) of the Act.

4]The resolution of these contesting arguments lies in a proper construction of the applicable provisions of the Act with due regard to their bearing on the peculiar facts of the case. The import of the relevant provisions of the Act has been the subject of numerous judgments; and the resulting jurisprudence is by no means harmonious. That the statute has proven difficult to work with makes it all the more important to approach its construction with its apparent scope and objects foremost in mind.

5]Access to consumer credit is an essential characteristic of any modern economy. In so-called developing countries it also fulfils a particularly important societal role by providing a means to persons who would otherwise not be able to afford them of access to goods and services that in the modern world are considered necessary to achieve acceptable living standards, at least in the material sense. The provision of access to consumer credit on a scale significant enough to make a meaningful economic impact is beyond the resources of the vast majority of suppliers of goods and services. Consumer credit is therefore by and large provided by financial institutions. The extension of consumer credit is an important aspect of the business of the commercial banks. As in the case of any business, the enterprise has to be reasonably efficient and profitable if it is to be viable. The less efficient the business is, the higher the costs of its services are likely to have to be to realise the margin of profit necessary to keep it sustainable. So much for the business side of consumer credit. On the consumer side, access to credit if not responsibly managed can lead to considerable social ills. Persons who become over-indebted are in danger of losing what little capital they may have had before incurring credit-related debt. That section of society that has least in the way of material wealth is particularly susceptible to temptation to take on higher credit-related debt than is affordable and is most in need of protection against the consequences of the intemperate extension of credit. It is also that part of society that is most in need of responsible use of credit if social upliftment is to be achieved and that will be most seriously disadvantaged by avoidable increases in the cost of accessing credit.

[6] Badly drafted, as some of the provisions of the National Credit Act unfortunately are, it is nevertheless evident from the provisions of the Act read as a whole that the basic socio-economic considerations sketched in the preceding paragraph essentially informed the statute's enactment. This much may discerned in particular from the long title of Act[3] and the objects of the

3 The long title of the Act reflects that it is an Act 'To promote a fair and non-discriminatory marketplace for access to consumer credit and for that purpose

- to provide for the general regulation of consumer credit and improved standards of consumer information;
- to promote black economic empowerment and ownership within the consumer

legislation, which are stated in s 3.[4] The most salient object of the Act is to regulate consumer credit so as to promote a fair and non-discriminatory marketplace for access to consumer credit. In this regard a balance is sought to be struck between the respective rights and responsibilities of credit providers and consumers. Section 2(1) of the Act expressly states that the

credit industry;
- to prohibit certain unfair credit and credit-marketing practices;
- to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting;
- to provide for debt re-organisation in cases of over-indebtedness;
- to regulate credit information;
- to provide for registration of credit bureaux, credit providers and debt counselling services;
- to establish national norms and standards relating to consumer credit;
- to promote a consistent enforcement framework relating to consumer credit;
- to establish the National Credit Regulator and the National Consumer Tribunal;
- to repeal the Usury Act, 1968, and the Credit Agreements Act, 1980; and
- to provide for related incidental matters.'

4 Section 3 of the Act provides:

> 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 market and industry, and to protect consumers, by-
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> a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;
>
> b) ensuring consistent treatment of different credit products and different credit providers;
>
> c) promoting responsibility in the 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-
>
> i) providing consumers with education about credit and consumer rights;
>
> ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; and
>
> iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;
>
> f) improving consumer credit information and reporting and regulation of credit bureaux;
>
> g) addressing and preventing over-indebtedness of consumers, and providing

statute 'must be interpreted in a manner that gives effect to the purposes set out in section 3'. This is a somewhat curious provision because it does no more than restate a basic canon of statutory interpretation – that is that a statute must be interpreted in such a manner as, consistently with the language used in the instrument, to give effect to the evident intention of the legislature in enacting the legislation. It seems to me that the intention behind sub-section 2(1) must have been to underline and emphasise the application of this canon with the object of endeavouring to ensure that the provisions of the statute are applied evenly between credit providers and credit receivers, congruously with the achievement of the socio-economic objectives of the Act within the context of business realities.

7]The plight of the over-indebted is provided for in the Act by an institutionalised system of debt review which includes a mechanism for the rescheduling of debt repayment, where that is viable, and for the subordination or writing off of debt incurred to credit providers who have extended credit recklessly. The system acknowledges the importance to credit providers of efficient and effective debt recovery and enforcement. One of the features which reflects this acknowledgment is the provisions of s 86(10) of the Act which empowers a credit grantor to give notice to

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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.

terminate a debt review. The effect of notice given by a credit grantor in terms of s 86(10) is in fact not *ipso facto* to terminate the debt review, but rather to afford a period of notice[5] upon the completion of which the credit grantor is able, notwithstanding the debt review, to institute proceedings in a court for the recovery of the debt. It seems to me therefore that the termination of the debt review contemplated by the notice to terminate provided for in terms of s 86(10) occurs when the creditor institutes proceedings after having given such notice. It would also appear that the termination operates only in respect of the debt in relation to which the notice to terminate was given and thus if the debt review that is underway relates also to other debts, it continues in respect of such other debts unless their review is also terminated in like manner. This is not expressly provided in the statute, but it seems to follow by necessary implication from the express provisions.[6]

8] As I had occasion to set out, with detailed reference to the National Credit Act regulations, in an earlier judgment in point (see *Changing Tides 17 (Pty) Ltd NO v Erasmus and Another, Changing Tides 17 (Pty) Ltd NO v Cleophas and Another, Changing Tides 17 (Pty) Ltd NO v Frederick and Anothers* [2009] ZAWCHC 175 (12 November 2009)[7] at para.s [26]-[32]), an efficiently conducted debt review process in terms of s 86 of the Act should result, if there is to be a resultant debt rescheduling, in the lodging of an application to

5 The period of notice required before enforcement proceedings can be instituted after notice has been given in terms of s 86(10) is at least ten business days. See s 129(2) read with s 130(1)(a).
6 See, for example, Steyn, *Die Uitleg van Wette*, 5de uitgawe, (Juta, 1981) at p.48ff, s.v. '*Inbegrypende interpretasie*'; and De Ville *Constitutional and Statutory Interpretation* (2000), Ch. 3 at §15 and §16.
7 The judgment is available at http://www.saflii.org.za/za/cases/ZAWCHC/2009/175.html .

the magistrates' court, or the Tribunal,[8] as the case might be, for an appropriate order comfortably within sixty business days of the commencement of the debt review process. The timetable in the regulations was no doubt determined with due regard to the statutorily determined sixty business day period that must have passed before a credit grantor creditor may give the notice contemplated in terms of s 86(10) of the Act.

9]In *Changing Tides* I expressed the view that it was not competent for a creditor to purport to give notice of termination in terms of s 86(10) of the Act at a time when an application to the magistrates' court for a relevant order in terms of s 86(7)(c) was pending. The views expressed by me in that regard were regarded by Kemp AJ in his judgment in *SA Taxi Securitisation (Pty) Ltd v Nako and others* (supra) as *obiter dicta*, correctly so I think. The learned acting judge also appears to have understood that the views I expressed were informed on a moral rather than a legal basis. In that respect he was incorrect. They were predicated on my understanding of the content of the statute's provisions. I am given to understand by counsel that that question – whether notice can be given in terms of s 86(10) when an application in terms of s 87 is pending in the magistrates' court - has been referred for determination by a Full Bench and that a hearing pursuant to such referral is still to take place. It is therefore probably desirable that I do not expound any further views on the question save as might be strictly necessary for the determination of the current case. As will be apparent from the facts

8 An application to the Tribunal would fall to be made if a consent order was sought in terms of s 86(8)(a) read with s 138 of the Act.

described earlier, a quite different question arises in this matter: it is whether any proper basis exists to refuse summary judgment in favour of the plaintiff because the defendant's debt counsellor instituted an application for an order in terms of s 86(7)(c) some time after proceedings for the recovery of the debt had been instituted, as permitted in terms of s 130(1) of the Act.

10]It seems to me that if the institution of enforcement proceedings is authorised in terms of the Act, the party instituting them must be entitled to prosecute them to conclusion in the ordinary course, unless prevented from doing so by some or other provision of the Act. The only provisions of which I am aware or to which attention has been drawn that might impact on the conduct of proceedings properly instituted for the recovery of the debt are s 86(11) and s 130(4) of the Act.

11]Section 86(11) applies only if a magistrates' court which is hearing an application for an order in terms of s 86(7)(c) in regard to the debt review orders the review to resume. A purposive reading of s 86(11) would include within the ambit of a court 'hearing the matter', a court before which proceedings for an order in terms of s 86(7) were pending.[9] That a purposive reading is justified arises not only from the shortcomings in the drafting of the

9 I was referred to a further judgment of Kathree-Setiloane AJ, in *SA Securitisation (Pty) Ltd v Matlala* (29 July 2010) SGJHC case no. 6359/2010, in which the learned acting judge expressed the view that the court referred to in s 86(11) is the court before which enforcement proceedings are brought and not the magistrate's court before which an application in terms of s 87 is being heard or is pending. With respect, I consider that construction to be erroneous. Apart from any other consideration, if that were so what would one have to make of the words '*the Magistrate's Court hearing the matter*' when the enforcement proceedings, as in the current case, were brought in the High Court?

Act already remarked upon, which make it necessary to imply provisions to render the expressly provided framework coherent, but also from the effect of the intimation given from the bar that there is a significant backlog occasioned by logistical constraints in the hearing of applications for orders in terms of s 86(7) in the magistrates' courts. I was informed that in many such courts - Wynberg and Stellenbosch were given as examples - a hearing cannot be obtained without a wait of several months; this despite the provisions of magistrates' court rule 55 – hence the fact that the application by the defendant's debt counsellor has been set down for hearing only in October. It would be inimical to the apparent objects of the Act to penalise a debtor who had been efficiently pursuing the debt review procedures provided in terms of s 86 simply because s/he was delayed from obtaining a hearing by a backlog of cases on the magistrate's roll. Any decision in terms of s 86(11) by the magistrate at such hearing that the debt review should resume in respect of the credit agreement in issue would negate or override the effects of a notice of termination given by the credit provider in terms of s 86(10). The notion that the legislature could have intended that the incidence of that power would be dependent on the arbitrary consideration of the state of the magistrates' court roll is, in my view, untenable.

12] The juxtapositioning of the provisions of s 86(10) and s 86(11) would suggest that an order as contemplated in terms of s 86(11) might be sought and obtained within the period that follows between the giving of notice by a credit provider in terms of s 86(10) and the effective termination of the debt review of the credit agreement in question upon the institution of recovery proceedings no sooner than ten business days thereafter, as permitted in terms of s 129(1)(a) of the Act.[10] It would be most unusual for a magistrates' court by its order to be able to stay proceedings already competently instituted in another court, most especially in a court of superior jurisdiction. In the absence of clear language in the statute indicating an intention to vest the magistrates' courts with such extraordinary power, s 86(11) does not fall to be interpreted as having the effect of allowing the staying of recovery proceedings competently instituted after the expiry of the s 86(10) termination notice period. On the other hand, the apparent object of s 86(11) would be thwarted if recovery proceedings could follow even if application had been made by or on behalf of the debtor for an order in terms of s 86(7)(c) and s 86(11) during the interval following on the giving of notice in terms of s 86(10) and the expiry of the consequent minimum period of ten business days inherent in the provisions of s 129(1)(a). As I remarked in *Changing Tides* at para. [32], 'The evident purpose of the notice by a credit provider in terms of s 86(10) of the NCA is to enable the consumer and/or the debt counsellor to urgently bring an application to a magistrate in terms of s 86(7)(c), or 86(8)(b) if that has not by then already been done, alternatively, if such an application is already pending, to approach the magistrate for an order in terms of s 86(11) of the NCA that the debt review should be resumed. I can conceive of no other reason for the requirement in terms of s 130(1)(a) of the NCA that at least 10 business days must have elapsed after notice to the

10 As has been pointed out previously, the reference in s 129(1)(a) to s 86(9) is clearly erroneous and is instead an intended reference to s 86(10).

consumer as contemplated in terms of s 86(10) before a credit provider may institute proceedings for the enforcement of a credit agreement.'

13] In the current matter the plaintiff gave notice in terms of s 86(10) of the Act on 17 May 2010, more than 60 business days after the defendant had applied for debt review in terms of s 86(1). On 24 June 2010, more than a month later, the plaintiff served summons in the action. On 9 July 2010, the defendant's debt counsellor instituted an application in the Stellenbosch magistrates' court for an order in terms of s 86(7)(c) of the Act.

14] In her affidavit opposing the plaintiff's application for summary judgment, the defendant avers that she applied for debt review on 9 February 2010. She annexed a copy of a Form 17.1 notice of that date which she avers was sent by her debt counsellor to all her creditors. The defendant averred that a Form 17.2 notice was sent to the plaintiff on 25 March 2010. A copy of the notice is annexed to the opposing affidavit. There is no prescribed time period in the National Credit Act regulations within which the debt counsellor must apply to court for an order in terms of s 86(7)(c) after giving notice to creditors by way of a Form 17.2 that the debtor's obligations are in the process of being restructured. However, a debtor whose application for debt review is rejected by a debt counsellor is required, if s/he so wishes, to make an application in terms of s 86(9) for an order in terms of s 86(7)(c) of the Act within 20 business days. In *National Credit Regulator v Nedbank Limited and Others* 2009 (6) SA 295 (GNP) at 305C, Du Plessis J stated that 'matters of over-indebtedness are by nature urgent and require speedy resolution'. I respectfully agree with that statement and I can see no reason why it should not be expected of a debt counsellor to make the necessary application within an equivalent time period; 20 business days seems to me a relatively generous allowance for the necessary steps to be taken. In my view the debt counsellor should have instituted the necessary application before the end of April 2010; and at the latest within 60 business days of 9 February 2010. No such action was taken, however; and no attempt is made in the affidavit opposing summary judgment to explain the apparent inertia.

15] On the construction of the Act favoured by me, the debt counsellor was afforded a further period of at least ten days to institute the necessary application after the plaintiff gave notice in terms of s 86(10). Any application instituted at that stage should have included a prayer for relief in terms of s 86(11). That was also not done; and the failure to have done so is also not explained.

16] In the result the magistrates' court before which the application for an order in terms of s 87(c) has been brought does not have the authority to grant relief in terms of s 86(11) because debt recovery proceedings had already competently been commenced by the credit provider in this court before the institution of proceedings in the magistrates' court.

17] Turning to consider s 130 of the Act. This section in the Act is intended to regulate legal proceedings for the enforcement of credit agreements. It seems to me that in the circumstances of the current matter only the following provisions of s 130(4) might be relevant if summary judgment were to be refused and the matter were to go to trial:

(4) In any proceedings contemplated in this section, if the court determines that-

a) the credit agreement was reckless as described in section 80, the court must make an order contemplated in section 83;

b) ..

(c) the credit agreement is subject to a pending debt review in terms of Part D of Chapter 4, the court may-

(i) adjourn the matter, pending a final determination of the debt review proceedings;

(ii) order the debt counsellor to report directly to the court, and thereafter make an order contemplated in section 85 *(b)* ; or

(iii) if the credit agreement is the only credit agreement to which the consumer is a party, order the debt counsellor to discontinue the debt review proceedings, and make an order contemplated in section 85 (b)

d) …

e) …

18] There is no suggestion in the affidavit opposing summary judgment that the credit agreement was reckless as described in s 80 of the Act. There is apparently in any event authority to the effect that it is not a defence to a claim for return of goods sold in terms of a credit agreement to allege that credit was recklessly extended.[11] It is, however, not necessary to make any finding in that connection in the absence of any allegation by the defendant in her opposing affidavit which could found a determination in terms of s 130(4)(a) that the credit agreement was reckless as described in s 80.

19] The provisions of s 130(4)(c) are curious. On the face of it the credit agreement in the current matter is not subject to a pending debt review because of the termination of the review in respect of this agreement in the circumstances discussed earlier in this judgment. The provisions of s 130(4)(c)(i) and (ii) can be given a sensible import only if construed to relate to a credit agreement that was subject to a debt review that is still pending, but which has been terminated insofar as the credit agreement which is before the court in the enforcement proceedings is concerned. The only credit agreement which was subject to pending debt review that can competently be enforced in court proceedings is one in respect of which the debt review has been terminated by notice in terms of s 86(10). What to make of s 130(4)(c)(iii) in the context of my construction of s 130(4)(c)(i) and (ii) defies my ingenuity. What can be discerned, however, is that all three sub-paragraphs appear to be directed at reiterating the court's power in the circumstances to make an order in terms of s 85(b) of the Act.[12]

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11 See para. [3] of the judgment in *SA Taxi Securitisation (Pty) Ltd v Nako and others* (supra), referring to an unreported judgment of Plasket J in *SA Taxi Securitisation (pty) Ltd v T Booi and three other similar matters* (20 May 2010) in ECG case no.s 4077,5065, 4021 and 5069/2009.

12 The apparent purpose of s 130(4)(c)(i) is to provide a procedure in terms of which the court seized with the enforcement proceedings might delay making an order in terms of s 85 of the Act until it was in a position to consider the contextual effect of such an order with regard to relief that may have been granted in the magistrates' court in respect of credit agreements in respect of which the debt review had not been terminated.

20] In my view the court determining competently instituted enforcement proceedings would have that power in any event by virtue of the provisions of s 85 itself. The enforcement proceedings are undoubtedly 'court proceedings in which a credit agreement is being considered' within the meaning of s 85. The effect of s 85 is that a court in which a credit agreement is being considered may, if it is alleged that the consumer under the credit agreement is over-indebted, after suitable enquiry and consideration, make an order in terms of s 86(7) or s 87 of the Act, as the case might be. Having regard, however, to the provisions of s 129(1)(b) of the Act, it should only be in an exceptional case that this course will be considered. There would, in my view, have to be an adequate explanation by the consumer defendant as to why s/he had not applied for debt review on receipt of a notice from the plaintiff in terms of s 129(1)(a), or, if such application for debt review had been instituted, as to why it had been allowed to be terminated. Any other approach would render nugatory the effect of the exercise by a credit provider of the right to terminate the debt review pursuant to notice in terms of s 86(10) and would give rise to an implementation of the statute in a manner biased unduly in favour of consumers to the prejudice of credit providers. As mentioned earlier in this judgment, such an approach would be at odds with the objects of the Act. There is no adumbration in the affidavit opposing summary judgment of any basis upon which any such explanation by the defendant might be founded.

21] In the circumstances, as there is no basis for defence disclosed in the opposing affidavit other than reliance on the debt review application instituted after the competent institution of these proceedings, the plaintiff is entitled to summary judgment in its favour.

22] Summary judgment is granted in favour of the plaintiff against the defendant in the following terms:

(a) The cancellation of the WheelSave Rental Agreement concluded between Rola Pre-Owned (Pty) Ltd t/a InspectaCar Helderberg and the defendant on 23 September 2005 in respect of 2003 model Mitsubishi Colt motor vehicle with engine no. 4M4OGH1230 is confirmed.

(b) The defendant is ordered to deliver the said motor vehicle up to the plaintiff.

(c) The defendant is ordered to pay the plaintiff's costs of suit.

It is further ordered that the relief sought by the plaintiff in terms of prayers (c) and (d) of the particulars of claim together with any attendant questions of costs shall stand over for later determination.

A.G. BINNS-WARD

Judge of the High Court