

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

17/9/2010

CASE NO. 14160/09

In the matter between:

SCHALK PELZER

Applicant

and

NEDBANK LIMITED

Respondent

DELETE WHICHEVER IS NOT APPLICABLE

(1)	REPORTABLE	YES/NO
(2)	OF INTEREST TO OTHER JUDGES	YES/NO
(3)	REVISED	✓

DATE 15/09/10

SIGNATURE

To be handed down
17/09/10

JUDGMENT

GOODEY AJ:

[1] INTRODUCTION:

- 1.1 This application deals with section 88(3) of the **NATIONAL CREDIT ACT, 34 OF 2005 ("NCA")**.

- 1.2 More specifically, since there is no provision in terms of the National Credit Regulations that states that a debt review procedure lapses because of non-compliance with the time periods, the question is whether a debt review procedure can carry on **indefinitely** or whether it should lapse once a reasonable time has expired.
- 1.3 *In casu*, the Applicant applies for the rescission of a judgment that was granted against him in favour of the Respondent on 21 April 2009.

[2] BACKGROUND:

- 2.1 The Applicant is indebted to the Respondent in terms of various credit agreements, which credit agreements are governed by the provisions of the National Credit Act, 34 of 2005 ("the Act").
- 2.2 On 12 July 2008, the Applicant applied for debt review, utilising Form 16 in terms of the Act.

- 2.3 On the same day, 12 July 2008, the Applicant's debt counsellor, one Weideman notified the Respondent by way of Form 17.1 that the Applicant had applied for debt review.
- 2.4 On 14 September 2008, Weideman found the Applicant to be over-indebted and informed all his creditors, among them the Respondent, of his finding.
- 2.5 On 13 March 2009, the Respondent issued summons against the Applicant and thereafter, in absence of the Applicant's intention to defend, proceeded to obtain default judgment against the Applicant.
- 2.6 The Applicant now applies for rescission of the aforesaid default judgment.

[3] THE GIST OF APPLICANT'S DEFENCE (DEFENDANT IN THE MAIN ACTION):

- 3.1 The Applicant's defence is that he had applied for debt review on 12 July 2008, being a date prior to the institution of action

by the Respondent, and had been found to be over-indebted, the Respondent was precluded in terms of Section 88(3) of the National Credit Act, 34 of 2005 from instituting action, as it did, in March 2009.

3.2 The Respondent's answer to the aforesaid is that the **debt review procedure that had been initiated, had lapsed**.

4) APPLICANT'S ARGUMENT:

4.1 The Applicant briefly submitted the following argument:

"It is the Applicant's contention that the Respondent was barred from issuing summons in terms of section 88(3) of the Act.

The Respondent's opposition to the Applicant's application is based on its contention that the Applicant's debt review procedure had lapsed.

The Respondent contends that the Applicant's debt review had lapsed because Weideman did not deliver a completed Form 17.1 to all credit providers within five days after receiving an application for debt review (12 July 2008).

On the Respondent's own version the creditors were informed of the Applicant's application for debt review by way of Form 17.1 not on 12 July 2008, as stated by the Applicant, but on 16 July 2008, still within five days of the Applicant's application for debt review.

There is a further document that was transmitted by Weideman to the Respondent, with the heading "URGENT REQUEST FOR COB's", which was transmitted to the Respondent on 15 August 2008, which also has 'Form 17.1' appearing on it."

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The Applicant further argues that the Respondent is mistakenly under the impression that the last mentioned document was

the form 17.1 notice, whilst it was merely a request for a certificate of balance.

- 4.3 The Applicant also argues that since no provision is made in the NCA Regulations (or the act) that a debt review procedure lapses because of non-compliance with the time limits, no such lapse *in casu* occurred.

[5] THE RESPONDENT'S ARGUMENT:

- 5.1 The Respondent on the other hand, argue as follows:

"In terms of Regulation 24(2), part D to the NCA, the debt counsellor for the Applicant was obliged to deliver a completed Form 17.1 to all credit providers that are listed in the application and every registered credit bureau within five business days after receiving an application for debt review in terms of Section 86(1) of the NCA.

The application was delivered outside the stipulated period of five business days, as the Applicant had made the application for review on 12 July 2008 but the application was only delivered to the Respondent on 17 September 2008.

The Respondent accordingly advised the Applicant's debt counsellor to withdraw the (late) application and to resubmit the Form 17.1 application within the prescribed time period. The Respondent also advised the debt counsellor that the notification was regarded as invalid and of no force and effect with regards to the credit agreements concluded with the Respondent.

The Respondent and/or his debt counsellor did not withdraw the application.

In addition, the debt counsellor failed to make a determination whether the Applicant is over-indebted within thirty days as prescribed by Regulation 24(6). According to the Applicant's founding affidavit, the determination was made on 14

September 2008 which is 45 days from the date of the
Applicant's application for debt review."

(My underlining)

- 5.2 The Respondent further argues that the debt counsellor only issued the application for the arrangement of the Applicant's debts, as contemplated in Section 86(7)(c) of the NCA in the Magistrate's Court, during March 2009. Under the circumstances the Respondent submits, the time taken, **does not constitute a reasonable time**.

[6] **THE NCA:**

- 6.1 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... (My underlining)

B.2 The purpose of the Act is to be found in Section 3 which, *inter alia*, reads 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 customers, 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;*

(b) ...

- (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) *...*
- (f) *..."*

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

(My underlining)

5.3

In my opinion it is clear from the purpose of the act that a consumer who is over-indebted is granted a “moratorium” and is assisted to get his “house in order”. **But his liability to repay does not disappear, neither is he entitled to hang on to the goods** which are the subject matter of the agreement, whilst not paying. On the contrary, the goods must be sold to reduce his debt. At the heart of it all lies that this has to be done (where no time limits are prescribed) **within a**

reasonable time. It could never have been the intention of the legislature that the process can drag on forever and thus be abused.

6.4 LEVENBERG AJ in:

6.4.1 CASE NO: 51330/09

In the matter between:

SA TAXI SECURITISATION (PTY) LTD Plaintiff

and

MBATHA, BHEKITHEMBA MISCHACK Defendant;

and

6.4.2 CASE NO: 52948/09

In the matter between:

SA TAXI SECURITASATION (PTY) LTD Plaintiff

and

MOLETE, CHRISTOPHER QENEHELO Defendant;

6.4.3 **CASE NO:53080/09**

In the matter between:

SA TAXI SECURITASATION (PTY) LTD Plaintiff

and

MAKHOBHA, AARON VELAPHI Defendant;

**(IN THE SOUTH GAUTENG HIGH COURT,
JOHANNESBURG)**

(as yet unreported) says the following (parr 32 – 35):

[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 indebtedness. 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 a 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."*

(My underlining)

8.5 The following statements of Masipa J in **Standard Bank of South Africa Limited v Panayotts 2009(3) SA 363 (W) 370** should also be referred to:

"[77] In any event, my view 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 of 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..."

(My underlining)

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

- 6.7 HCJ FLEMMING "FLEMMINGS NATIONAL CREDIT ACT" (2nd Edition) on pages 152 and 153 says the following:

"NOTE:

Firststrand Bank v Smith, case 24206/08 (WLD) (5.12.2008), decided that a notice to a credit provider informing him that an application for debt-arrangement has commenced, loses its value to prevent the credit provider from exercising (or enforcing) a right or his security (s88-3) if the s86 process is not followed through to a result at the s86-7 stage within a reasonable time. The basic correctness of the judgment is not doubted, but it shields only one corner from abuse by debtors. (The NCA does not act explicitly against inactivity by debt counsellors or delays caused by ineffective courts). The court held that because no time was prescribed, the lapsing takes place when a reasonable time has expired. In fact regulation 24-6 requires a decision under s86-6 within 30 business days after receiving the application. The 29 business days includes the period from 'receiving' the application to the decision to take the application on. S86-6 implies a choice to accept or not to accept the application. 'Accept' is different from 'receive'. That, read with r24-2, implies that

the debt counsellor must in effect expeditiously decide about accepting. That is in line with avoiding opportunity for debtors (and for cooperating debt counsellors) merely to cause delay for creditors. Cf. s86-2.

The Defendant also relied on s130-3-c-1 contending that the Plaintiff was prevented from approaching court because the application was before a debt counsellor. It was held that that specific section ceases to apply once a debt counsellor has given the notice to creditors that is required by s86-8 (perhaps s86-4-b was intended). From that time onwards it is s88-3 that governs the situation. #29 of the judgment."

(My underlining)

- 6.8 I respectfully agree with the aforesaid, namely that where no time / time limit is prescribed, the **reasonable time principle** should be applied. [The reasonable time principle is in any event well-established in our law].

[7] **SECTION 88(3) OF THE NCA:**

- 7.1 Section 88(3) of the act provides:

"Subject to Section 86(9) and (10) , a credit provider who receives notice of Court proceedings contemplated in section 83 or 85, or notice in terms of section 86(4)(b)(i), may not exercise or enforce by litigation or other judicial process any right or security under the credit agreement until:

*(a) the consumer is in default under the credit agreement;
and*

(b) one of the following has occurred:

*(i) An event contemplated in sub-section
88(1)(a) through (c); or*

*(ii) The consumer defaults on any obligation
in terms of a re-arrangement agreed
between the consumer and credit
providers, or ordered by court of the
Tribunal."*

7.2 In view of paragraph 6 above, I am of the opinion that although no provision in terms of the National Credit Regulations can be found that states that a debt review procedure lapses because of non-compliance with the time periods, it does however lapse when a **reasonable time** has expired. To my mind this approach is the only way to give effect to the intention of the legislature, despite the fact that a **lacuna** apparently exists in this regard.

[5] **CONCLUSION:**

8.1 I have come to the conclusion that a debt review procedure lapses when a **reasonable time** has expired if there was no compliance with the time periods.

8.2 *In casu* I have not been convinced by the Applicant that:

8.2.1 there was compliance within the prescribed time limits;

8.2.2 a reasonable time has not expired neither that good cause has been shown.

8.3 I have therefore come to the conclusion that the application for rescission should fail.

8.4 Consequently I make the following order:

"The application for rescission of the default judgment is dismissed with costs".



GOODEY AJ

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