

**FORM A**  
**FILING SHEET FOR EASTERN CAPE, PORT ELIZABETH**

PARTIES:                   **CHANGING TIDES 17 (PTY) LTD V D R SCHOLTZ +**  
**1**

Case Number:               **2975/09**

[1] High Court:             **PORT ELIZABETH**  
**[2]**

- DATE HEARD:              **19 JANUARY 2010**
- DATE DELIVERED:       **2 FEBRUARY 2010**
- JUDGE(S):               **EKSTEEN J**
- 

LEGAL REPRESENTATIVES -

*Appearances:*

- for the Plaintiff(s):   **ADV P SCOTT**
- for the Defendant(s): **MR CURTAIN**
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*Instructing attorneys:*

- Plaintiff(s):            **JACQUES DU PREEZ**
- Defendant(s):          **J R BESTER & ASSOCIATES**

CASE INFORMATION -

- [1] *Nature of proceedings:*
- [2] *Key Words:*
- [3] *Summary:*

IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE, PORT ELIZABETH

NOT REPORTABLE

Case No. 2975/09

Date delivered: 2 February 2010

In the matter between:

**CHANGING TIDES 17 (PROPRIETARY) LIMITED N.O.**

Plaintiff

and

**DEON RIAAN SCHOLTZ**

First Defendant

**MARIANA SCHOLTZ**

Second Defendant

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### **JUDGMENT**

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**EKSTEEN, J:**

[1] This is an application for summary judgment in which the plaintiff seeks judgment in the amount of R459 648.98, together with interest thereon, calculated at a rate of 9,8% from 1 September 2009 to the date of payment and an order declaring certain immovable property executable.

[2] The debt arises from a loan advanced to the defendants on 22 June 2007. A certain immovable property known as Erf 1438 Algoa Park in the Nelson Mandela Metropolitan Municipality was duly hypothecated as security for the loan. The defendants have failed to timeously and punctually perform their obligations in terms of the loan. It is not apparent from the papers to what extent the defendants have fallen into arrears.

[3] The defendants admit their liability to the plaintiff in the amount claimed but they allege that the sum is not yet due and payable. The defendants state that they applied for debt review in terms of the provisions of section 86 of the National Credit Act, 34 of 2005 (herein referred to as “the Act”) on 29 May 2009. On the same day, 29 May 2009, the debt counsellor gave notice to all credit providers as required in section 86(4)(b) of the Act. The defendants further allege that on the same day the debt counsellor found them to be over-indebted and notified all credit providers, including the plaintiff, of this fact. On 31 August 2009 the plaintiff gave notice in terms of section 86(10) of the Act terminating the debt review process. In its notice it confirmed that the defendants were in arrears with their loan repayments and recorded that no payments at all had been allocated to it via the public distribution agent in respect of the loan nor had the defendants maintained the loan repayments. On 20 October 2009 the plaintiff issued summons in this matter.

[4] The defendants admit receipt of the notice in terms of section 86(10) of the Act and the summons, however, they state that they are lay persons at law and did not understand the import thereof. In these circumstances they took these documents to their debt counsellor who advised that they should not be concerned as all was under control.

[5] On 23 September 2009, after receipt of the notice in terms of section 86(10) of the Act, the debt counsellor issued an application in the Magistrates' Court of Port Elizabeth proposing that the defendants be declared to be over-indebted and seeking an appropriate order in terms of section 87(7)(c) of the Act. It appears from the papers that the matter is currently pending before the Magistrates' Court and no order has been made in terms of the provisions of section 86(7).

[6] Against this background the defendants state that they are advised that they have at their disposal two remedies which constitute *bona fide* defences to the plaintiff's claim. These defences are set out in paragraph 14 of the opposing affidavit in the following terms:

“14.1 Section 86(11) of the NCA provides that ,should a credit provider give notice to terminate a review and proceed to enforce an agreement the Court hearing the matter may order that the debt review process resume. I submit that under the circumstances where our debt review application was brought before the Magistrate outside of the time limits due to no fault of our own the Honourable Court may order such debt review process to proceed;

14.2 Section 129(1)(b) of the NCA provides that the credit provider may commence legal proceedings to enforce a credit agreement only once a notice in terms of Section 129(1)(a) or Section 86(10) of the NCA was given. However, in subsection 129(2) of the NCA it is provided that subsection 129(1) is not applicable to a credit agreement when there are proceedings regarding that credit agreement in a Court that may result in a debt restructuring order. I submit that, when summons was issued herein and prior to the notice in terms of Section 86(1) being received by my husband and I there were proceedings in Court that may result in a debt restructuring order and which proceedings are still underway.”

[7] At the hearing of the application for summary judgment, Mr **Curtain**, who appears for the defendants, correctly in my view, acknowledged that the interpretation of section 129 relied upon in the latter defence raised is flawed. He abandoned any reliance on this defence.

[8] In respect of the former defence, it was not in dispute during argument before me that the debt review process was validly and effectively terminated by the plaintiff's notice in terms of section 86(10). It is argued, however, that

the High Court may, and should in the circumstances, order, in terms of section 86(11) that the debt review process should resume.

[9] In considering this argument it is necessary to have regard to the nature of the debt review process. A consumer who believes that he is over-indebted may apply to a debt counsellor to have himself declared to be over-indebted. Such an application is to be made in the prescribed manner and form. (Section 86(1))

[10] The manner is prescribed in Regulation 24 published in Government Notice 489 of 31 May 2006. The consumer is required in such an application to disclose to the debt counsellor all his income, whether from employment or other sources, all his monthly expenses, a list of all debts, disclosing the monthly commitment, the total balance outstanding, the original amount of the debt, and the amount in arrears and all his reasonable living expenses.

[11] The debt counsellor is then required to evaluate the consumer's state of indebtedness and the prospects for responsible debt rearrangement (section 86(5)(a)). Any credit provider referred to by such consumer in his application is required to participate, in good faith, in the debt review process and any negotiation designed to result in the responsible debt rearrangement (section 86(5)(b)).

[12] On the completion of this process the debt counsellor is required to reach a conclusion in terms of section 87(7)(a) or (b) or (c). If he concludes, as he did in this case, that the consumer is over-indebted, then, in terms of section 87(7)(c), he must formulate a proposal recommending that the Magistrates' Court make one or both of the orders contemplated in section 87(7)(c)(i) and (ii).

[13] It follows from the provisions of section 87(7) that the matter is referred by the debt counsellor to the Magistrates' Court to consider the evaluation and the proposal of the debt counsellor. To this end the Magistrates' Court must hold a hearing in the matter which comes before it in the form of an application brought by the debt counsellor in terms of the Rules of the Magistrates' Court. (See **National Credit Regulator v Nedbank Limited and Others** 2009 (6) 295 (NG) at 304I-305B and 310B-D.) The purpose of this entire process is for the Magistrates' Court to provide for judicial oversight of the debt review process (see **National Creditor v Nedcor Limited and Others** (*supra*) at 305A-B).

[14] Where a consumer is in default under a credit agreement which is being reviewed in terms of the aforesaid process, the credit provider is entitled to give notice in the prescribed manner to terminate the review process provided that at least sixty days have lapsed from the time that the consumer applied for his debt review. That has occurred in this case.

[15] Section 86(11) then provides as follows:

“(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 Magistrates’ Court hearing the matter may order that the debt review resume on any conditions that the court considers to be just in the circumstances.”

[16] The section appears to me to make it plain that it is only the Magistrates’ Court hearing the matter which may make such an order. The reference to the “Magistrates’ Court hearing the matter” is, in my view, reference to the Magistrates’ Court which provides the judicial oversight over the debt review process. Section 86(11) requires of the magistrate presiding to exercise a discretion both in respect of whether to order the resumption of the process and in respect of the conditions to be attached to such further process. In my view it is only the Magistrates’ Court providing the judicial oversight to the process that would have before it all the information which the consumer was required to provide in terms of Regulation 24 and which is required in order to exercise such discretion.

[17] In the circumstances I do not consider that the High Court hearing an action under the Credit Agreement is clothed with the authority conferred upon the Magistrates' Court by section 86(11). Section 86(11) does not provide a defence valid in law to the plaintiff's claim where the process has been validly terminated by a notice in terms of section 86(10). If relief were to be sought under section 86(11) the defendants' would have to apply to the Magistrates' Court hearing the debt review process for such an order. This is has not occurred.

[18] Notwithstanding my finding that the applicant has not shown a *bona fide* defence to the plaintiff's claim it is trite that the court retains a discretion in an appropriate case to refuse summary judgment even where no defence has been made out.

[19] It has been held that this discretion should be exercised, not capriciously or on the basis of mere conjecture or speculation so as to deprive the plaintiff of the remedy of summary judgment when entitled to it, but upon material before the court from which it appears that the reasonable possibly exists that an injustice may be done if judgment is so granted. See ***Breytenbach v Fiat SA (Edms) Bpk*** 1976 (2) SA 226 (T) at 229.

[20] It seems to me, therefore, that a defendant who wishes to ask the court to exercise its discretion in his or her favour, on the basis that the Magistrates'

Court hearing the debt review application may order that the debt review process resume, must at least place sufficient information before the Court to enable it to assess whether a reasonable prospect exists that the Magistrates' Court may make such a finding.

[21] In the present matter no such information has been placed before me. Information which would clearly be important to the exercise of my discretion would include information relating to the total liabilities of the defendants; the current monthly commitments of the defendants in respect of such liabilities; the defendants' income, if any; the required living expenses of the defendants; whether the property hypothecated is the primary residence of the defendants or an investment asset; what the extent of the arrears is; and the proposal which the debt counsellor has made in respect of the rearrangement of debts. None of this information has been placed before this court. In the circumstances there is nothing before the court which could lead me to conclude that there is any reasonable prospect that a Magistrates' Court may order the debt review to be resumed.

[22] In addition to the claim sounding in money the plaintiff seeks an order declaring the property hypothecated to secure the loan to be executable. In the matter of ***Jafta v Schoeman and Others; Van Rooyen v Stoltz and Others*** 2005 (2) SA 140 (CC), Mokgoro J concluded that in order to ensure the prevention of unjustified execution against immovable property, judicial

oversight prior to such execution was appropriate. I consider accordingly whether this is justified on the papers.

[23] I have already stated that in this matter there is no evidence to show whether the immovable property is a primary residence or an investment asset. The defendants', who are represented in this court, have not placed any information before me to indicate any other possible means whereby the debt may be paid. They have not placed before me the proposal recommended to the Magistrates' Court by the debt counsellor or put forward any other proposal which may result in the repayment of the loan. The debt which the plaintiff seeks to recover is not insignificant and it appears from the plaintiff's notice given in terms of section 86(10) of the Act that no payments have been received by the plaintiff in respect of this debt since the defendants made application for debt review in May 2009.

[24] In the defendants' favour there is the established fact that a debt counsellor did in fact consider that the defendants are over-indebted as envisaged in section 79 of the Act. Sadly, the unseemly haste with which he came to this conclusion serves to detract from the weight which one might otherwise have afforded this fact. As I have stated earlier the application was made on 29 May 2009. On the same day the debt counsellor concluded that the defendants were in fact over-indebted. In these circumstances I am driven to question whether the process set out in the Act was followed at all.

Section 86(5) requires that each credit provider which is listed in the application must participate, in good faith, in the review process. Regulation 24 requires a process of verification of the information provided prior to the conclusion being reached. For this process of assessment the regulations provide that a debt counsellor has thirty days to do his evaluation. In the present instance the conclusion was arrived at on the same day that the application was received. It is difficult to imagine how any creditor provider could have participated in this process. Added to this the alleged proposal made to the Magistrates' Court is not disclosed to this court. On a consideration of all the evidence placed before me I am of the view that this is a case where summary judgment is justified.

[25] In the result:

1. There will be summary judgment against the defendants jointly and severally, the one paying the other to be absolved, in the amount of R459 648.98.
2. The defendants are ordered to pay interest on the aforesaid amount at a rate of 9,8% per annum, compounded monthly in arrears from 1 September 2009 to date of payment.
3. Erf 1438 Algoa Park, in the Nelson Mandela Metropolitan Municipality, Division of Port Elizabeth, Eastern Cape Provision, in extent 49 square metres, held by deed of transfer no. T56453/2004 is declared to be specially executable.

4. Defendants are ordered to pay the plaintiff's costs on a scale as between attorney and client.

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**J W EKSTEEN**

**JUDGE OF THE HIGH COURT**