

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

NOT REPORTABLE

Case No.: 1693/10
Date Heard: 3 August 2010
Date delivered: 31 August 2010

In the matter between:

FIRSTRAND BANK LIMITED

Plaintiff

and

WAYNE THOMAS EVANS

Defendant

JUDGMENT

EKSTEEN J:

[1] This is an application for summary judgment. The plaintiff claims payment of the sum of R2 114 713,15 together with interest thereon. The debt arises from a loan being a credit agreement as contemplated in the National Credit Act 34 of 2005 ("the Act"), which was secured by a mortgage bond registered over certain immovable property. An order is accordingly sought to declare the property executable. The property in issue is the defendant's primary residence.

[2] The extent of the debt is not in dispute nor is it disputed that the defendant has defaulted on the credit agreement. The defendant states in his opposing affidavit that on 13 November 2009 he completed the necessary forms to commence a debt review process in terms of the provisions of section 86 of the Act. The loan agreement with the plaintiff was included in the debt review process. At the stage when the debt review process

commenced no legal proceedings had been instituted against him.

[3] Various steps thereafter followed in terms of the review process in accordance with section 86 of the Act leading up to the conclusion by the debt counsellor that the defendant was indeed over indebted as envisaged in section 79 of the Act. On 13 January 2010 the debt counsellor, acting in accordance with section 86(7)(c) of the Act referred the matter together with his proposal to the Magistrate's Court for Port Elizabeth seeking an order that the defendant's debt be rearranged in accordance with the proposal which he submitted.

[4] The referral, which was enrolled for hearing on 28 April 2010 before the Magistrate's Court was duly served on the plaintiff on 2 March 2010. From this time forth the defendant started to make payments in accordance with the proposal of the debt counsellor, thus remaining in default of the credit agreement. On 18 March 2010, however, the plaintiff gave notice in terms of the provisions of section 86(10) of the Act terminating the debt review process. The defendant took no further steps upon receipt of this notice. When the matter was called before the Magistrate's Court for a hearing pursuant to section 87 of the Act the matter was opposed by the plaintiff on the strength of the notice in terms of section 86(10), the plaintiff alleging that the debt review process had been terminated. The matter was accordingly postponed. The plaintiff, however, proceeded to issue summons in the High Court to enforce the credit agreement alleging that the debt review process had been terminated by the delivery of a notice in terms of the provisions of

section 86(10) and that it was accordingly entitled to enforce its rights and security under the credit agreement.

[5] The defendant, upon receipt of the summons, delivered a notice of intention to defend the action. This in turn prompted the application for summary judgment, which application is opposed.

[6] The only defence raised in opposition to the summary judgment application is set out as follows in the opposing affidavit:

“I am advised that the debt review which can be terminated in accordance with the provisions of Section 86 (10) is the debt review in terms of section 86 of the Act. As my debt review application was already before the Magistrate’s Court in terms of Section 87 of the Act when the Applicant served the Notice of Termination, I again respectfully submit that the Applicant was not entitled to terminate my debt review.”

[7] The narrow issue raised for consideration in this matter is whether the plaintiff could validly give notice to terminate the debt review process in terms of section 86(10) after the debt counsellor had lodged an application with the Magistrate’s Court, and whilst such application is pending, for an order as envisaged in section 86(7)(c). This involves an interpretation of the provisions of the Act and in particular of section 86 thereof.

[8] Regrettably the formulation of the Act is not a model of clarity and its provisions has given rise to conflicting interpretations. The issue raised in this matter too, has been the subject of differing views. In the matter of ***Standard Bank of South Africa Limited v Kruger; Standard Bank of South Africa***

Limited v Pretorius, 2010 (4) SA 635 (to which I shall refer as the Kruger: Pretorius case) Kathree-Setiloane AJ held that it was not competent for a credit provider to give notice in terms of section 86(10) of the Act where the debt counsellor has already referred the debt review to the Magistrate's Court. Kathree-Setiloane AJ states as follows at para [13] on p. 640:

'It is clear from a reading of section 86(10) that the termination of a debt review process, referred to in the sub-section, is expressly qualified by the words "that is being reviewed in terms of this section". A credit provider's right to terminate in terms of section 86(10) of the Act would, consequently, apply only to a debt review to which section 86 applies. Therefore, once a debt review has been referred to the Magistrate's Court in terms of section 86(8)(b) of the Act, then section 87 finds application.'

[9] She found further support for this interpretation of section 86 of the Act in the provisions of section 129 of the Act. Section 129(1)(a) requires of a credit provider to give notice to the consumer who is in default drawing his attention to his various rights before the credit provider may take steps to enforce the agreement. Section 129(1)(b) provides that a credit provider may not, "subject to section 130(2), ... commence any legal proceedings to enforce the agreement before – (i) first providing notice to the consumer, as contemplated in paragraph (a) or in section 86(10), as the case may be; and (ii) meeting any further requirements set out in section 130." Section 129(2) then provides as follows:

"Subsection (1) does not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order."

[10] Kathree-Setiloane AJ, in the **Kruger: Pretorius** case, concluded as

follows at para [26] on p. 644:

“It is clear from a reading of section 129(2) of the Act, that neither section 129(1)(a) nor 129(1)(b) of the Act applies to instances where a matter has been referred to a court for determination. The provisions of section 129(1) of the Act are, in this regard, expressly qualified by the provisions of section 129(2); the latter specifically excluding the application of section 129(1) of the Act to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order. A referral of a debt review by a debt counsellor, in terms of section 86(8) of the Act, to a Magistrate’s Court for determination, in terms of section 87 of the Act, may result in a restructuring or re-arranging order in terms of subsection (b)(i) or (ii) of the Act. It therefore follows that in terms of section 129(2) of the Act, notice to terminate a review, in terms of section 86(10) of the Act, would be incompetent, once the debt review is referred, by a debt counsellor, to a Magistrate’s Court for determination.”

[11] Subsequent to the delivery of the judgment in the ***Kruger: Pretorius*** case the same issue came before Kemp AJ for decision in the matter of ***SA Taxi Securitisation (Pty) Limited v Nako and Others*** (an unreported judgment in case no’s 19/10; 21/10; 22/10; 77/10; 89/10; 104/10 and 842/10 (ECB)) I shall refer to this matter as the ***SA Taxi*** case. Kemp AJ was referred to the judgment in the ***Kruger: Pretorius*** case and had the benefit of the reasoning of Kathree-Setiloane AJ in exercising his judgment. He found himself unable to agree with her interpretation and came to the opposite conclusion, namely, that the credit provider remained entitled to give notice in terms of section 86(10) even after the debt counsellor has referred the debt review, together with his/her proposal to the Magistrate’s Court. He found support for his view in the provisions of section 86(11) of the Act, which Kathree-Setiloane AJ did not consider. He responded to the reasoning of Kathree-Setiloane AJ in the ***Kruger: Pretorius*** case as follows at para [40]

and following of his judgment:

“[40] Once a debt review has been submitted to a Magistrate’s Court in terms of section 87 then the relief afforded under section 86(10), she held, is no longer available. The learned Judge found that any other interpretation would lead to an absurdity, as any delay occasioned at the instance of the court or even any delay due to unforeseen circumstances would deprive the consumer of the opportunity to have the matter properly determined by that court. Any other view, the learned Judge held, would not be consistent with the core objective of the Act, which as the learned Judge put it, is the promotion and protection of consumers.

[41] ...

[42] What the learned Judge appears, with respect, to have lost sight of, are the provisions of section 86(11) of the Act, which provides: ‘If a credit provider who has given notice to terminate the review as contemplated in subsection 86(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.

[43] Section 87 is itself dependant on a proposal made in terms of section 86. To argue that because section 86(10) is qualified by the words “that is being reviewed in terms of the section” that the review considered in the subsection is only the review of a debt counsellor, loses sight of the fact that section 87 procedure is based on the proposal made in terms of section 86 and also loses sight of the protection expressly afforded the credit receiver in terms of section 86(11). It would otherwise appear to have been unnecessary to use the words “hearing the matter”, which clearly appeared to apply to a matter pending before it. If the learned Judge’s interpretation is correct then there would have been no matter before the magistrate in terms of section 86(10) and no need to use the words “hearing that matter”.”

[12] Subsequently the matter of **SA Securitisation (Pty) Limited v Matlala, Gideon** (an unreported judgment in case no. 6359/10 (SGJ) dated 29 July 2010)(to which I shall refer as the **SA Securitisation** case) came, again, before Kathree-Setiloane AJ. The same issue arose again. Kathree-Setiloane AJ was referred to the judgment in the **SA Taxi** case. She remained unmoved by the reasoning of Kemp AJ and again came to the same

conclusion as she had previously done. In addressing the judgment in the **SA Taxi** case she held as follows at para [9]:

“According to Kemp AJ in *SA Taxi Securitisation v Nako*, the Magistrate’s Court referred to in section 86(11) is the Magistrate’s Court to whom the debt review has been referred in terms of section 86(7) or (8) of the Act, and the phrase “hearing the matter” refers to the review before it in terms of section 87 of the Act. With all due respect to Kemp AJ, I am of the view that his interpretation of section 86(11) is misconceived for the following reasons. It is clear from a proper reading of section 86(11) of the Act that the Magistrate’s Court referred to in that section is not the Magistrate’s Court to which the review has been referred in terms of section 86(7) or (8) of the Act, but rather the Magistrate’s Court before which the credit provider seeks to enforce the agreement in terms of Part C of Chapter 6. Hence, the phrase *‘the Magistrate’s Court hearing the matter’* refers to the Magistrate’s Court hearing the matter which concerns the enforcement of the agreement in terms of Part C, Chapter 6 of the Act, and not the debt review itself. ...”

[13] She proceeded at para [12] and [13] of her judgment as follows:

“[12] Kemp AJ clearly fails to give proper consideration to section 129 in *SA Taxi Securitisation v Nako*. In fact, in response to the submission by the fifth respondent that the (applicant) did not have the right to institute legal proceedings against him as the debt owed to the applicant was subject to proceedings in the East London Magistrate’s Court that could result in a restructuring order, Kemp AJ stated that he did not agree as:

‘All section 129(2) provides is that the credit provider does not have to give notice proposing that the credit receiver refers the credit agreement to a debt counsellor, etc. if the credit receiver has already done so. The contention that section 129(2) prohibits the credit provider from taking action appears to be clearly incorrect.’ ...

[13] Again with all due respect to Kemp (A)J, he appears to have misread section 129(1) of the Act, and in particular has failed to give proper consideration to s129(2) of the Act, which when read together with s29(1)(b)(i) of the Act, expressly provides that legal proceedings to enforce an agreement may not be commenced, by first providing notice to the consumer in terms of section 129(a) or section 86(10) of the Act, where the credit agreement is subject to

a debt restructuring order, or proceedings in a court that could result in such an order. ...”

[14] Thus the debate stood when this matter was called before me. The issue turns on the interpretation of section 86 of the Act. Given the sharply divergent and critical views previously expressed it is with some measure of trepidation that I venture to enter the fray.

[15] In seeking to interpret the provisions of section 86 it is, of course, trite that regard should be had to the context in which the words are used in the Act as a whole and the surrounding circumstances relating to the apparent scope, purpose and limits of the Act as well as its background. (Compare, for example, **Jaja v Dönges NO and Another** 1950 (4) SA 653 (A) 662H.) It is perhaps appropriate to take heed of the caveat expressed by Diemont JA in **List v Jungers** 1979 (3) SA 106 (A) where at p. 118D he said:

“It is, in my view, an unrewarding and misleading exercise to seize on one word in a document, determine its more usual or ordinary meaning, and then, having done so, to seek to interpret the document in the light of the meaning so ascribed to that word. Apart from the fact that to decide on the more usual or ordinary meaning of a word may be a delicate task ... it is clear that the context in which the word is used is of prime importance.”

(Compare also **Swart v Cape Fabrics (Pty) Limited** 1979 (1) SA 195 (A) 202C in respect of the interpretation of contracts.) I consider that the same caution should be exercised in respect of any phrase in a document.

[16] Part D of Chapter 4 of the Act deals with reckless credit and over indebtedness. It provides for the rearrangement of a consumer’s debts by an

order of court (a restructuring order) in section 83, section 85 and section 86, read in each case together with section 87. Both section 83 and section 85 provide that, despite any provisions of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, the court may, if it concludes that the consumers is over indebted, make a restructuring order in accordance with section 87. (See section 83(1) and (3)(b)(ii) and section 85.) Both these sections apply to “any court proceedings in which a credit agreement is being considered” in any court. In each case the credit agreement is the subject of the litigation.

[17] In contrast to the provisions of section 83 and 85 section 86 provides for a mechanism whereby particular debts of a consumer may be reviewed at the instance of the consumer, prior to the institution of any court proceedings, and under the exclusive judicial oversight of the Magistrate’s Court.

[18] Section 86 provides for a process whereby the consumer may apply in accordance with section 86(1) of the Act to be declared to be over indebted and to have his debts rearranged. The debt counsellor is then required to carry out a debt review in accordance with the provisions of section 86. The debt review process is subject, as I have said, to the judicial oversight of the Magistrate’s Court. When a debt counsellor makes a finding that a consumer is over indebted, as he did in the present matter, the debt counsellor is required “to refer the matter to the Magistrate’s Court”. (See section 86(8)(b) and section 86(7)(c) as read with ***National Credit Regulator v Nedbank Limited*** 2009 (6) SA 295 at 310G-H.) The “matter” which is referred to the

Magistrate's Court is the information gathered in the debt review which is provided for in section 86, the debt counsellor's proposal and the consumer's financial means and obligations (compare section 87(1)). The role of the debt counsellor conducting the debt review in terms of section 86 is, however, not completed by the mere reference of the matter to the Magistrate's Court. The reference referred to in section 86(8)(b) takes the form of an application governed by the ordinary rules of the Magistrate's Court in which the debt counsellor is a pro forma applicant. The procedure is however an extraordinary one which is created by the Act. (See **National Credit Regulator** case (*supra*) at 309 in respect of the procedure.) The Magistrate's Court is required to conduct a hearing and to make an appropriate order in terms of the Act. The debt counsellor conducting the debt review in terms of section 86 is required to be present at the hearing and to participate in the hearing assisting the Magistrate's Court by way of furnishing evidence or making submissions as to his/her proposal or answering queries which the Magistrate's Court may raise. (See **National Credit Regulator** (*supra*) at 313C.)

[19] The draftmanship of section 86, leaves much to be desired. This is clearly apparent from the difficulties raised in the National Credit Regulator case. What, however, emerges from the findings in the National Credit Regulator case, in my view, is that the credit review process which is regulated by section 86 of the Act continues until the Magistrate's Court makes an order in terms of section 87. There is no other section in the Act which places the aforesaid duties on the debt counsellor.

[20] I turn to consider the terminology of section 86 of the Act. In terms of section 86(10), where a consumer is in default of a credit agreement that is being reviewed “in terms of section 86(10)” the credit provider may, subject to the conditions set out in the subsection, give notice to terminate the review. I am not convinced that a simplistic linguistic approach to the words “... that is being reviewed in terms of this section ...” contained in section 86(10), in isolation, brings any clarity to the debate. I consider that the more plausible interpretation to be attached to these words, in the context of the Act, is that they are used to distinguish the process in section 86 from that in sections 83 and 85. I am unable to find anything in the structure of section 86 or of the Act in its entirety which is indicative of an intention on the part of the legislature to limit the right of a credit provider under section 86(10) to the process prior to the reference to the Magistrate’s Court. On the contrary for the reasons which follow I consider that the credit provider’s rights to give notice in terms of section 86(10) and to legitimately terminate the debt review process continues until the Magistrate’s Court has made an order as envisaged in section 87.

[21] The learned Judge in the *Kruger: Pretorius* case expressed the view that such an interpretation would lead to an absurdity in that any delay by any party to such an application, or any delay occasioned at the instance of the court, or even any delay due to unforeseen circumstances, would deprive the consumer of the opportunity to have the matter properly determined before that court.

[22] This brings me to section 86(11) which led the learned Judge in the **SA Taxi** case to a different conclusion. Section 86(10) of the Act provides as follows:

“(10) If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner at any time at least 60 business days after the date on which the consumer applied for the debt review.”

[23] Section 86(11) 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 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”.

[24] It has frequently being held that where the legislature uses the same word in the same enactment, it may reasonably be supposed that out of a proper concern for the intelligibility of its language, it would intend the word to be understood, where no clear indication to the contrary is given, in the same sense throughout the enactment. See **Minister of Interior v Mashadodorp Investments (Pty) Limited and Another** 1957 (2) SA 395 (A) 404; **Makoka v Germinston City Council** 1961 (3) SA 573 (A) at 580G-581A; **Kommisaris van Binnelandse Inkomste v Sive Se Boedel** 1963 (3) SA 847 (A) at 854; **Mphosi v Central Board for Co-operative Insurance Limited** 1974 (4) SA 633 (A) at 643. I have referred above to the provisions of section 86(8)(b) which requires of the debt counsellor to refer “the matter to the

Magistrate's Court". The matter which is referred to the Magistrate's Court is the recommendation of the debt counsellor and the consumer's financial means, prospects and obligations. Whilst the terminology does not appear in section 86(7)(c) it has been held that the proposal of the debt counsellor referred to in this subsection similarly requires a referral to the Magistrate's Court. (See ***National Credit Regulator*** (*supra*) at 310H and 313G-H.) It was further held in the ***National Credit Regulator*** case that where "the matter" is referred to the "Magistrate's Court" a hearing is to be held. (See ***National Credit Regulator*** (*supra*) p. 302D-E and section 87(1).)

[25] Where section 86(11) refers to the Magistrate's Court "hearing the matter" it appears to me to be a reference to the Magistrate's Court to which "the matter" referred to in section 86(8)(b) has been referred for hearing.

[26] The jurisdiction provided for in section 86(11) is specifically restricted to the Magistrate's Court. This is in stark contrast to the other portions of the Act, for example section 83, 85, 129(2) and 130, where reference is made to "the Court" or "a Court". I consider that this is so because section 86(11) forms part of the debt review proceedings provided for in section 86. The debt review process provided for in section 86 falls under the exclusive judicial oversight of the Magistrate's Court. (See ***National Credit Regulator*** case at p. 314D.)

[27] The process envisaged in the Act seems to me to be as follows. When an application is received by a debt counsellor in terms of section 86 he 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 in any negotiation designed to result in a responsible debt rearrangement (section 86(5)(b)).

[28] On the completion of this process the debt counsellor is required to reach a conclusion in terms of section 86(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 86(7)(c) he must formulate a proposal recommending that the Magistrate's Court make one or both of the orders contemplated in section 86(7)(c)(i) and (ii).

[29] It is only after this process that the matter is referred to the Magistrate's Court for a hearing. The purpose of the entire process is for the Magistrate's Court to provide judicial oversight of the debt review process. Where a notice in terms of section 86(10) terminating the process is then issued the consumer is afforded a remedy in section 86(11). The "Magistrate's Court hearing the matter" is required in terms of section 86(11) 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 Magistrate's 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 under the Act and which is required in order to exercise such discretion. In the circumstances I consider,

for this reason too, that it is only the Magistrate's Court exercising the judicial oversight over the debt review process that may order the process to resume as envisaged in section 86(11). This conclusion is supportive of the interpretation that the credit provider is entitled to terminate the debt review process after the matter has been referred to the Magistrate's Court. Section 86(11) is in my view designed to protect the interests of the consumer in such circumstances.

[30] It follows from the foregoing that the consumer is not prejudiced by the right of the credit provider to terminate the debt review process. The rights of the consumer are fully protected in section 86(11). The credit provider, in my view, does not have carte blanche to terminate the process without good reason. Where a referral to the Magistrate's Court is being prosecuted with due efficacy it would appear to me that, more often than not, it would be inappropriate for the credit provider to serve a notice in terms of section 86(11). There may however be circumstances where the debt counsellor and the consumer may intentionally delay the hearing in terms of section 87 to the prejudice of the credit provider whilst the consumer might cease all payments under the credit agreement. In such circumstances the credit provider might be justified in terminating the debt review process. Where, however, the credit provider attempts to enforce the credit agreement pursuant to such notice the consumer is entitled urgently to approach the magistrate hearing the matter to exercise his judicial oversight. Where justice requires the process will be ordered to resume.

[31] It follows that I am in respectful disagreement with the conclusion reached in the **SA Securitisation** matter that the phrase “the Magistrate’s Court hearing the matter” in section 86(11) refers to the Magistrate’s Court hearing the matter which concerns the enforcement of the agreement in terms of Part C of Chapter 6 of the Act. Such an interpretation leads to an absurdity which I do not consider that the legislature could have intended. The jurisdiction conferred in section 86(11) is very specifically limited to the Magistrate’s Court. Thus, adopting the interpretation in the **SA Securitisation** matter, if the credit provider chooses to enforce his agreement in the Magistrate’s Court the magistrate may order the process to resume, however, if he chooses to enforce his rights in the High Court the process cannot resume. In my view this would not be a feasible interpretation of the section.

[32] The conclusion to which I have come above appears to me to accord with the provisions of section 88 of the Act. Section 88(3) of the Act provides as follows:

“(3) 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 any other judicial process any right of security under the credit agreement until-

- (a) the consumer is in default under the agreement and
- (b) one of the following has occurred:
 - (i) an event contemplated in subsection (1)(a) through (c); or
 - (ii) the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and the credit providers or ordered by a court or tribunal.”

[33] Accordingly, where once a restructuring order has been issued a credit provider may not enforce his credit agreement until the consumer defaults on the order. If the consumer defaults on the order and he is simultaneously also in default under the credit agreement, which usually will be inevitable, the credit provider may then enforce his right by litigation or other judicial process, without any further notice.

[34] Where the credit provider has received notice of “court proceedings”, which are proceedings contemplated in section 83 or 85, and no restructuring order has been made, it is similarly restrained from enforcing its rights by litigation or other judicial means until one of the events set out in section 88(1) occurs and, he is simultaneously in default under the credit agreement.

[35] Section 88(1) postulates the occurrence of three categories of events as follows:

- “(a) The debt counsellor rejects the application and the prescribed time period for direct filing in terms of section 86(9) has expired without the consumer having so applied;
- (b) the court has determined that the consumer is not over indebted, or has rejected a debt counsellor’s proposal or the consumer’s application; or
- (c) a court having made an order or the consumer and credit provider having made an agreement rearranging the consumer’s obligations, or the consumer’s obligations under the credit agreements as rearranged are fulfilled, unless the consumer fulfils the obligations by way of a consolidation agreement.”

[36] Subsection (c) finds application where a rearrangement has occurred. In the case of proceedings under section 83 and 85 therefore, it seems to me, unless a restructuring order is made, that the moratorium exists until such

time as the court has determined that the consumer is not over indebted. If at that stage he remains in default under the credit agreement then the credit provider may proceed by litigation or other judicial process without any other notice.

[37] In the case of a debt review in terms of section 86 there is a moratorium on the enforcement by litigation or other judicial process of any rights or security under a credit agreement until one of the events contemplated in section 88(1) occurs and the consumer is also in default under the agreement. If that occurs the credit provider may proceed to enforce its rights by litigation or other judicial process.

[38] The entire moratorium imposed upon litigation or other judicial process in section 88(3) and which persists until one of the events in section 88(1) occurs, is however “subject to section ... 86(10)”. Section 86(10) can find no application after an order has been made. Similarly section 88(10) finds no application to the court proceedings contemplated in section 83 and 85. It applies only to a re-arrangement in terms of section 86, hence the words “... that is being reviewed in terms of this section ...” where they appear in section 86(10). The entire moratorium which occurs by virtue of a review pursuant to section 86, and which persists until one of the events in section 88(1) occurs is subjected to the credit providers rights in terms of section 86(10). By virtue of the provisions of section 88(3), therefore, I am of the view that the credit provider is entitled to give notice under section 86(10) at any time prior to a restructuring order in terms of section 87 being either granted or dismissed.

[39] I turn to consider the provisions of section 129 of the Act. Section 129 deals with certain procedures that are required before a credit provider may proceed to enforce a debt. Section 129(1)(a) requires of the credit provider, where the consumer is in default, to draw the default to the notice of the consumer in writing and to propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with intent that the parties resolving the dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date.

[40] Section 129(1)(b) provides as follows:

“If the consumer is in default under a credit agreement, the credit provider-

- | | | |
|---------|------|--|
| | (a) | ... |
| any | (b) | subject to section 130 (2), may not commence |
| before- | | legal proceedings to enforce the agreement |
| as | (i) | first providing notice to the consumer, |
| section | | contemplated in paragraph (a), or in |
| | | 86 (10), as the case may be; and |
| out in | (ii) | meeting any further requirements set |
| | | section 130.” |

[41] Section 129(2) upon which the judgments in the Kruger: Pretorius case and the SA Securitisation case rely heavily, provides as follows:

- (2) Subsection (1) does not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order.”

[42] The provisions of section 130(2) referred to in section 129(1)(b) find no application to the present issue. The reason for the exclusion contained in section 129(2) appear to me to be found in section 88. Section 88, to which I have referred above, provides for three scenarios. Firstly, it provides a moratorium where a Magistrate's Court has already made a restructuring order. The second situation for which it provides a moratorium is where notice is received of court proceedings. Those are proceedings in terms of the provisions of section 83 and 85. The terminology "court proceedings" are the identical words utilised in both section 83 and 85. The third and separate scenario provided for in section 88(3) is where a debt review in terms of section 86 is in progress.

[43] In contrast to section 83 and 85 section 86 makes no reference to any court proceedings. It requires of the debt counsellor to refer his proposal to a Magistrate's Court. The subject of the hearing before the magistrate is not the credit agreement, but the "proposal and information before it and the consumer's financial means, prospects and obligations" (see section 87(1)).

[44] In the circumstances I consider that the reference in section 129(2) to a credit agreement that is subject to proceedings in a court, constitutes a reference to sections 83 and 85 and does not include a reference to a Magistrate's Court as contemplated in section 86. To interpret section 129(2) as a reference to proceedings before a Magistrate's Court pursuant to section 86 would, in my view, conflict with the express provisions of section 88(3). I

have found above that in terms of that section the moratorium imposed upon litigation and judicial process by the proceedings under section 86 continues until the completion of the process as envisaged in section 88(1), subject to the credit provider's right at any time to give notice in terms of section 86(10).

[45] To summarise, I am of the view:

1. That the credit provider is entitled to give notice in terms of section 86(10) after the proposal of the debt counsellor in terms of section 86(7)(c) or 86(8)(b) has been referred to the Magistrate's Court;
2. If a credit provider has given notice in terms of section 86(10) of the Act and he proceeds to attempt to enforce his credit agreement the consumer is entitled to approach the Magistrate's Court to which the matter has been referred for hearing to seek an urgent order that the credit review process resume;
3. Section 129(2) does not have the effect of preventing the delivery of such a notice.
4. In terms of section 88(3) the moratorium placed upon the enforcement of a credit agreement by litigation or other judicial means, which persists until the debt review process has been completed as envisaged in section 88(1) or until the consumer defaults on the order, as the case may be, is in its entirety subject to the credit providers right

in terms of section 86(10) until a restructure order is made.

[46] In all the circumstances I am of the view that the defendant has not made out a defence to the plaintiff's claim. The matter, however, does not end there for the defendant urges upon me to grant him an indulgence so as to enable him to approach the Magistrate's Court for relief in terms of section 86(11) of the Act.

[47] I have stated above that in this matter the immovable property which it is sought to declare executable and which has been mortgaged in order to secure the loan constitutes the plaintiff's primary residence. In terms of the provisions of section 26 of the Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution") every person has the right to adequate housing. The Constitutional Court has had occasion to consider the effect of the sale and execution of a person's home on his right under section 26 of the Constitution in the matter of **Japhta v Schoeman; Van Rooyen v Stoltz** 2005 (2) SA 140 (CC). The judgment therein requires that a sale in execution of a person's home should only occur under effective judicial oversight.

[48] In this case it is argued on behalf of the plaintiff that in order to succeed in an application for postponement of the matter the defendant is required to demonstrate reasonable prospects of success in seeking relief under section 86(11). This, it is argued, has not been done and on the documents before me I should conclude that no such reasonable prospects exist.

[49] In the present matter a debt counsellor did conclude in January 2010 that the defendant was over indebted. He/she concluded that a proposal could be made which could result in an order in terms of section 87. He accordingly referred the matter to the Magistrate's Court. The defendant avers that since the proposal of the debt counsellor he has made payments in accordance with the proposal albeit that certain payments were erroneously made to the account of the debt counsellor as opposed to the payment distribution agent. The error he says was *bona fide* and falls to be rectified.

[50] In these circumstances, and having regard to the conflicting decisions which have existed in various Divisions in respect of this particular matter I consider that justice demands that in the exercise of my discretion, I afford the defendant the opportunity to apply to the Magistrate's Court for relief in terms of section 86(11).

[51] In the circumstances I consider that it would be fair to postpone the application for summary judgment for a period of thirty days from the date of this judgment so as to enable the defendant to approach the Magistrate's Court for urgent relief. It is only the Magistrate's Court hearing the matter that has before it all the information required to exercise this discretion. The plaintiff is given leave to re-enrol the matter on five days notice, after the lapse of thirty days. The defendant is granted leave to file a supplementary affidavit in respect of steps taken pursuant to section 86(11).

[52] In the result:

1. The application for summary judgment is postponed for thirty (30) days from the date of this judgment.
2. The defendant is ordered to pay the costs occasioned by the postponement.
3. The plaintiff is granted leave to re-enrol the matter for reconsideration on five (5) days notice after the lapse of thirty (30) days.
4. The defendant is granted leave to file a supplementary affidavit in respect of steps taken by him pursuant to the provisions of section 86(11).

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv P Scott instructed by Spilkins, Port Elizabeth

For Defendant: Adv T Zietsman instructed by Burmeister De Lange Soni Inc