

IN THE HIGH COURT OF SOUTH AFRICA, EAST LONDON

**Case no: EL1450/2011
ECD2485/2011**

In the matter between:

Wesbank A Division of Firststrand Bank Limited Plaintiff

and

Denzil Noel Schroder Defendant

and

In the Application of:

Gerard Stoltz (in his capacity as Debt Counsellor) Applicant

and

Wesbank A Division of Firststrand Bank Limited 1st Respondent

Denzil Noel Schroder 2nd Respondent

JUDGMENT

D. VAN ZYL J:

- 1] This matter concerns the provisions of section 86(11) of the National Credit Act 34 of 2005 (“the Act”). In March 2004 the defendant purchased a Opel Astra Classic motor vehicle from a dealership in East London and to that end entered into an instalment sale agreement (“the agreement”) with the seller. The plaintiff subsequently acquired

all right, title and interest in and to the agreement. On 30 August 2011 the plaintiff issued summons against the defendant wherein it claims that the defendant is in breach of the terms of the agreement and that it has cancelled the agreement as a result. It seeks to obtain possession of a motor vehicle (**“the vehicle”**) as envisaged in the agreement for the purpose of recovering the monies which it says the defendant owes it. When the action became opposed the plaintiff applied for summary judgment. Although the defendant filed a notice opposing the application for summary judgment he chose not to file an opposing affidavit as envisaged in Rule 32(3)(b) of Uniform Rules of this Court. Instead, at the hearing of the matter he elected to rely on an application which was filed by a debt counsellor, namely Gerhard Stoltz (**“the applicant”**) in his capacity as **“the debt counsellor of the defendant”** in terms of section 86(11) of the Act (**“the application”**). The plaintiff and the defendant are cited therein as the first and second respondents respectively.

- 2] In this application this court is asked to order, in the exercise of its discretion in terms of section 86(11) of the Act, that a review of the defendant’s indebtedness to the plaintiff which was pending in the

magistrates' court prior to the present proceedings, be resumed and that the summary judgment application either be dismissed, or be stayed pending a conclusion of the debt review process. Section 86(11) on which the application is based reads as follows:

'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.'

In *Collett v Firstrand Bank 2011(4) SA 508 (SCA) (the Collett case)* it was held that the words '**hearing the matter**' in this sub-section relate to the proceedings to enforce the agreement and consequently refer to the enforcing court, which may be either the High Court or the Magistrate's Court (at 518 D).

3] It is common cause that the agreement is a credit agreement as envisaged in section 8 of the Act. On 17 November 2007 the defendant applied for a debt review in terms of section 86(1) of the Act. The application was made to the respondent and the plaintiff was duly notified of the application two days later by way of the prescribed form as required in sub-section (4)(b) of section 86. On 16

December the applicant notified the plaintiff that the application was successful, meaning that the defendant is over-indebted as envisaged in section 79 of the Act (**‘the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all credit agreements to which the consumer is a party’**). The applicant thereafter on 10 March 2009 issued a proposal in terms of section 86(7)(c)(ii) of the Act recommending that the defendant’s obligations be re-arranged and that the magistrates’ court make an order accordingly. This **“proposal”** took the form of an application in terms of the rules of the magistrates’ court and it was set down for hearing on 23 April 2009.

- 4] The plaintiff instructed a firm of attorneys to represent it in the proceedings in the magistrates’ court. According to the applicant a postponement of the proceedings was requested by the attorney concerned in order to enable the plaintiff an opportunity to make a counter proposal with regard to the restructuring of the defendant’s indebtedness. The matter was thereafter for the same reason postponed on a further two occasions. When it became clear on 8 October 2009 that no settlement would be reached the application was postponed to 28 January of the following year in order to afford the

plaintiff an opportunity to file an opposing affidavit so as to have the matter enrolled for hearing on the opposed roll for argument. By 28 January the plaintiff had not filed an opposing affidavit and the matter was again remanded to enable the plaintiff to do so. This continued until the plaintiff eventually on 22 March 2011 by electronic mail provided the applicant with an opposing affidavit. The original signed affidavit was only delivered on 14 July 2011.

- 5] However, in the interim and prior to the filing of the opposing affidavit, the plaintiff on 25 November 2010, more than two years after the debt review process first commenced, terminated the debt review of the agreement by giving notice of its intentions in terms of section 86(10) of the Act. It is not in dispute that the defendant was in default of his obligations under the agreement and that the plaintiff was as a result entitled to cancel the debt review (the *Collett case* at 515 E–F). Relying on the plaintiff's conduct, or rather the lack thereof, the applicant's case is that the plaintiff failed to participate in good faith in the debt review process. The applicant contends that if it was serious in doing so the plaintiff would have provided him with a counter proposal upon receipt of the proposed re-structuring of the

defendant's obligations and timeously filed its opposing affidavit after the matter was referred to the magistrates' court for an order as contemplated in section 86(7)(c) of the Act. With reliance on the judgment in the *Collett* case at 517F wherein the Court per Malan JA stated that '**Should the credit provider fail or refuse to participate in the review, a resumption of the process may well be ordered**', it is contended that this court should, in the exercise of its discretion in terms of section 86(11), give consideration to the plaintiff's conduct during the debt review process and order a resumption thereof.

- 6] The plaintiff's answer to applicant's accusations of delay and a lack of participation in the debt review process is that there was an agreement between the applicant and the plaintiff's '**representative that the Respondent would not file Opposing Affidavits in debt review matters before the Magistrate's Court in East London, but would rather undertake *bona fide* negotiations with the Applicant and only once the Applicant advised that such negotiations were fruitless or that the 2nd respondent ("the defendant") could not accommodate the Respondent's ("the plaintiff") Counter Proposal that the Respondent would be required to file such Opposing Affidavit.**' It is further stated that the plaintiff *bona fide* participated in the debt review proceedings by providing the applicant with a certificate of

balance and a counter proposal with regard to the re-structuring of the defendant's obligation in terms of the agreement.

7] I may further add that the plaintiff at the hearing of the matter by way of a point *in limine* raised an objection to the applicant's *locus standi* to bring the application, the submission being that the defendant, as a party to the summary judgment proceedings, is the proper person to bring the application. The objection was foreshadowed in the plaintiff's answering affidavit although on a different basis. The argument that the mandate or statutory function of a debt counselor in respect of a particular credit agreement comes to an end when the credit provider terminates the debt review to that agreement is very seductive. I however do not intend to deal with this objection but would rather determine the application on its merits where the issues have been properly ventilated and addressed by the parties. For reasons which are to become clearer later in this judgment, I am of the view that the applicant cannot succeed with the application. It will accordingly be assumed for purposes of this judgment that the applicant does indeed possess the necessary *locus standi* to bring the application in terms of section 86(11).

8] The issue raised by the applicant must be decided on the three sets of affidavits filed in the application and the ordinary rules of procedure, as formulated in the well-known *dictum* of Corbett JA in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 H-C, must accordingly apply. An applicant who seeks final relief in motion proceedings must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are in the opinion of the court not such as to raise a real, genuine or *bona fide* dispute of fact, or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers. (See also *Ripoll-Dausa v Middleton NO and Others* 2005 (3) SA 141 (C) at 151A – 153C.) A real or genuine dispute of fact can only exist where the court is satisfied that the party who purports to raise the dispute in his affidavit seriously and unambiguously addressed the fact said to be disputed. Further, where the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer or countervailing evidence if they are not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial, the court will generally have difficulty in finding

that the test is satisfied.

- 9] Applied to the facts of the present matter, I am not satisfied that the plaintiff has dealt with the factual allegations of the applicant on which he relies for his contention that the plaintiff did not participate in good faith in the debt review process, in a manner so as to raise a real, genuine or *bona fide* dispute of fact. The plaintiff chose not to deal with the applicant's assertions concerning the events which followed upon the referral of his proposal to the magistrates' court in terms of section 86(7)(c) of the Act. The deponent to the plaintiff's answering affidavit, a certain Da Cruz employed as a manager at the plaintiff's Debt Review Centre in Johannesburg, sought in a rather opportunistic and disingenuous fashion to distance the plaintiff therefrom by stating that the applicant's allegations in the relevant paragraphs of his founding affidavit refer to *Firststrand Bank* and not the plaintiff and therefore does not concern the plaintiff. The plaintiff is a division of Firststrand Bank. No doubt this caused the applicant to refer to the Plaintiff as Firststrand Bank instead of Wesbank. It is quite evident from what the applicant says in his founding affidavit and the relevant correspondence and documentation referred to that there can

be no doubt that he was referring to the plaintiff. The only reasonable conclusion that I can come to is that this is simply an attempt not to deal with the applicant's version of the relevant events which preceded its cancellation of the debt review in November 2010 because the plaintiff is unable to do so.

10] That this is so is further evident from the plaintiff's contention as to the existence of an agreement between the applicant and a representative of the plaintiff with regard to the filing of an opposing affidavit in the debt review proceedings in the magistrates' court. This evidence poses a number of problems. Not only is it characterized by vagueness and a lack of detail, but the deponent has quite clearly no personal knowledge of what had transpired between the applicant and the unidentified representative. A confirmatory affidavit is annexed to the plaintiff's answering affidavit of an erstwhile candidate attorney in the office of the firm of attorneys who represented the plaintiff in East London, namely Don Maree Attorneys, who simply states that she confirms the affidavit of Da Cruz **"insofar as it relates to my involvement in the matter."** What her involvement in the matter was is not stated in either of the affidavits. The plaintiff's reliance on making a counter

proposal also does not assist the plaintiff in this enquiry. The proposal referred to was, as appears from the correspondence disclosed by the applicant, only made in May 2011, nearly 6 months after the plaintiff had already terminated the debt review. What purpose it was intended to serve at that stage is not known and any reliance thereon in these proceedings is not only misplaced but is also misleading. Of even more importance is the fact that the plaintiff made it clear on 24 April 2009 in a letter from its attorneys, rejecting the applicant's proposed restructuring of defendant's obligations after he had submitted it to the magistrates' court, that it was no longer willing to make any counter proposals. I accordingly conclude that the issue relating to the plaintiff's failure to actively and in a meaningful manner participate in the debt review process must be decided on the plaintiff's papers and in favour of the plaintiff.

11]Counsel for the plaintiff however sought to argue that even if the plaintiff's version is to be accepted, it does not mean that it can be concluded that the plaintiff did not participate in the debt review process. Her argument is that after the applicant referred his proposal to the magistrates' court recommending a restructuring of the

defendant's obligations, the matter had to be dealt with in terms of the rules of that court regulating application proceedings. Accordingly, so it was argued, the proceedings became adversarial in nature and there was consequently no longer any duty on the part of the plaintiff, as a party to those proceedings, to engage with the applicant and make any counter proposals. Further, and if the applicant was of the opinion that the plaintiff was delaying the finalisation of the proceedings, he should have invoked the rules of that court so as to enforce a response from the plaintiff.

12] I do not agree with this submission. Such an approach is contrary to the purpose of the Act and the nature of the debt review process as envisaged by section 86 and 87 of the Act. The purpose of the Act was dealt with in the *Collett (supra)* case (at 514 E-G). To the aims listed in that judgment may be added the aim of providing '**for a consistent and accessible system of consensual resolution of disputes arising from credit agreements.**' (Section 3(h)). That the aim is to provide for a consensual and by necessary implication, a participative process in the resolution of issues arising from credit agreements, is supported by section 86(5) of the Act. As stated by Malan JA in the *Collett (supra)*

case, where the consumer has applied for a debt review before the credit provider has proceeded to enforce the credit agreement, the credit provider is obliged, ‘...as section 86(5) requires, **not only to comply with any reasonable request by the debt counsellor to facilitate an evaluation of the consumer’s indebtedness and the prospects for responsible debt restructuring, but also to participate in good faith in the review and negotiations. This duty to negotiate does not terminate when the debt counsellor refers his proposal to the magistrates’ court, but continues, pending the hearing.**’ (at 516 F-G.)(My emphasis)

13]The reason why the duty to negotiate does not terminate upon a referral by the debt counsellor of his proposal to the magistrates’ court lies in the fact that, as found by Malan JA in the aforementioned judgment (at 515E), there is only one unified process under sections 86 and 87 of the Act, the purpose of which is the restructuring of the consumer debt by amending the terms of the credit transaction between the parties. The debt review is continuing process that only terminates when the debt counsellor’s proposal culminates in an order as envisaged in section 87 or, where the consumer is in default, the credit provider before the finalisation of the debt review process terminates the debt review relating to that specific credit agreement as

authorized by section 86(10). (*Collett (supra)* case at 515B and 516C-E.)

14]The Act and its regulations do not prescribe a procedure for the referral by the debt counsellor of his proposal to the magistrates' court as contemplated by sections 86(7)(c) and 87(1). In *National Credit Regulator v Nedbank Ltd and Others* 2009 (6) SA 295 (GNP) (the *NCR* case) at 313 C-E it was held that the proposal must take the form of an application as governed by the rules of the magistrates' court. This arrangement appears to have found the approval of the Supreme Court of Appeal in the *Collett(supra)* case (at 515 B-C). I do not believe, as was suggested by counsel for the plaintiff in argument that the use of application proceedings in terms of the rules of the magistrates' court as a vehicle to drive the debt review process envisaged in section 87(1), means that it must be conducted in an adversarial manner as that term is understood. In other words, that the applicant alone has the primary responsibility for defining the issues and for investigating and advancing the dispute. This not only runs counter to the aim of the Act to encourage the consensual resolution of disputes arising from credit agreements, but is also contrary to the

finding in the *Collett (supra)* case, namely that the duty of both the consumer and the credit provider to negotiate does not terminate when the debt counsellor refers his proposal to the magistrates' court, but continues pending the hearing (at 516 F-G). Further, the issues to be decided by that court are defined in the Act and not by the parties. Another aspect is that, as pointed out by du Plessis J in the *NCR(supra)* case, although the debt counsellor is the applicant in the proceedings envisaged in section 86 and 87 of the Act, he fulfills a statutory function and is not a litigant in the ordinary sense (at 311G).

- 15] Quite clearly the finding that the debt counsellor's proposal and the hearing relating thereto must be by way of application procedure, is to fill a *lacuna* in the Act. It is regrettable that the legislature has not seen it fit to put into place a more simplistic and less formal procedure for dealing with the referral of the proposal of the debt counsellor to the magistrates' court and the manner in which the hearing is to be conducted as envisaged in section 87(1) of the Act. The unfortunate result of this is that, as in the instant case, once the proposal is referred to the magistrates' court, the matter then lands up in the hands of lawyers at which time the spirit of cooperation more often than not

sadly disappears. The result is unnecessary delays in the finalization of the debt review process and the resultant incurring of further costs. This does nothing to promote a process of which the aim is the public good, namely to provide assistance to an over-indebted consumer while at the same time recognising the ‘**principle of satisfaction by the consumer of all responsible financial obligations**’ (Section 3(g)).

16]I accordingly conclude that the plaintiff’s attitude that once the applicant has referred his proposal for the restructuring of the defendant’s debt to the magistrates’ court it was no longer willing to make any further proposals, thereby effectively preventing an early consensual resolution of the matter, is in conflict with the aims of the Act and a factor which must be considered in the exercise of this court’s discretion in terms of section 86(11) of the Act. This is however not the only consideration. As stated by Malan J in the *Collett (supra)* case, where there are good grounds to conclude that the proposed restructuring will not lead to the ‘...**satisfaction by the consumer of all responsible financial obligations**’ (Section 3(g) and (i)) or a rearrangement as contemplated by section 86(7)(c), the court considering the resumption of the debt review may very well refuse to

order its resumption (at 517G). This consideration involves an assessment of the prospects of the proposed restructuring of the consumer's debts being made an order of court as envisaged in section 87(1). That section requires the relevant court to make its decision by having regard to inter alia '**...the consumer's financial means, prospects and obligations**'. The said court is in essence called upon to decide, on the information placed before it, whether the proposed restructuring of the consumer's debts is viable in that it would resolve the consumer's over-indebtedness while at the same time provide a balance between the respective rights and obligations of the credit provider and the consumer. (Section 3(d).)

17] As in every other case where the court is called upon to exercise a statutory direction, it is in my view incumbent upon a party who seeks to invoke the provisions of section 86(11), whether it be in proceedings such as the present or when raised as a request in summary judgment proceedings (*Collet (supra)* case at 518H – 519A), to place sufficient information before the court to show that it should exercise its discretion in his favour. This information is, on the strength of the *Collett (supra)* case, not to be limited to the conduct of

the credit provider during the debt review process but must also relate to the prospect that the court as envisaged in section 87(1) will sanction the recommendation of the debt counsellor and order a rearrangement of the consumer's obligations. To this extent information regarding the consumer's financial position as at the time of the application in terms of section 86(11) must for obvious reasons become relevant. Where, as in the present case, the court is called upon to exercise its discretion some two years after the debt counsellor's initial proposal, the consumer's current financial position is of particular importance. It may have improved or deteriorated to the extent that the proposed debt rearrangement may no longer be capable of implementation in its original form. I must however stress that an application in terms of section 86(11) should not turn into an enquiry as envisaged in section 87(1). That is the task of the court that would be asked to consider the debt counsellor's proposal after a resumption of the debt review. The need to disclose information to the court which is called upon to exercise its discretion in terms of section 86(11), is for the limited purpose of assessing the prospects of the restructuring proposal relied upon being made an order as contemplated in paragraph (ii) of section 87(1)(b).

18]The consideration relating to the prospect of the restructuring proposal leading to the satisfaction of the defendant's financial obligations or to an order as contemplated in section 87(1), was not addressed by the applicant in his papers. Save to state that the defendant has been making payments in terms of the proposed rearrangement of his obligations, there is no information relating to his financial position or prospects. I do not agree with counsel for the applicant that this, and considerations relating to whether the proposed rearrangement of the consumer's debt would strike a balance between the interests of the credit provider and that of the consumer, are matters which must be dealt with in the debt review process once it has been reinstated. The reason is simply that the court exercising its discretion in terms of section 86(11) must ensure that there are good grounds for doing so. It must be satisfied that a resumption of the debt review process is *bona fide*, that it is justified and not simply a delaying tactic, or as in the present case, will lead to an unnecessary delay in the finalisation of the proceedings instituted by the credit provider for the recovery of monies owing to it in terms of the agreement.

19]On the facts of the present matter I am not persuaded that the plaintiff did not have good grounds for rejecting the proposed rearrangement of the defendant's obligations when it terminated the debt review. The amendments which the applicant proposed should be made to the instalment sale agreement to achieve a restructuring of the defendant's obligations would mean that the latter would settle his indebtedness over two hundred and forty months (twenty years) as opposed to fifty two months. In terms of the agreement ownership of the vehicle vests in the plaintiff, and it has the right in the event of the defendant being in default of his obligations, to take possession of the vehicle. It is this right which the plaintiff now seeks to enforce in the summary judgment proceedings. I agree with counsel for the plaintiff that an implementation of the proposed rearrangement of the defendant's obligations would effectively result in the plaintiff losing its security due to a depreciation in the value of the vehicle over the proposed extended time period. Otherwise than an exotic sports vehicle, it is unlikely that the vehicle in the present matter would increase in value. This must be weighed against the fact that to sell the vehicle, as the plaintiff proposes to do, would serve to reduce the defendant's

indebtedness. I am accordingly not at all convinced that the proposed rearrangement of the defendant's obligations in terms of the agreement is viable and that there exists any reasonable prospect that it would in its present form be sanctioned by a court in a resumed debt review process.

20]In the result the application in terms of section 86(11) should be dismissed. Insofar as the costs of the application is concerned, I am of the view that an appropriate order would be one of no order as to costs. The reason therefore is twofold: Firstly, the plaintiff's conduct and lack of willingness to commit to a meaningful participation in the debt review process deserves censure. The manner in which the plaintiff dealt with this issue in these proceedings also leaves much to be desired. Secondly, the applicant acted in his statutory capacity as debt counsellor in bringing the proceedings in terms of section 86(11) of the Act. There is nothing to indicate that he was not *bona fide* in doing so or that the application was devoid of any merit.

21]Turning then to the application for summary judgment, the parties were *ad idem* that should the application in terms of section 86(11)

fail, it must follow that the plaintiff would be entitled to judgment. As stated earlier, the defendant acknowledges that he is in default of his obligations in terms of the agreement. Further, over indebtedness is not a defence on the merits (the *Collett (supra)* case at 518G). In terms of the agreement the plaintiff is entitled to costs on an attorney and client scale.

22]One other matter remains for the attention of the taxing master and in respect whereof I must express my displeasure. In its papers filed in the application the plaintiff's deponent unnecessarily dealt with matters of law and advanced, what amounts essentially to legal argument. In support of this he annexed a number of judgments including the judgment in the *Collett (supra)* case. In addition, all the documents which already form part of the record in the summary judgment application were unnecessarily annexed to the answering affidavit. Then there is for an inexplicable reason also annexed a second set of all the documents already filed in the application. The result of all of this is that the indexed papers came to 316 pages. Pages 132 to 166 and 171 to 286 served no purpose at all in deciding the issues in the application and counsel for the plaintiff could advance

none. These papers were filed in the section 86(11) application and not in the summary judgment application. The plaintiff would accordingly, by reason of the costs order which I intend making in the application, not be entitled to recover any of the costs of the aforementioned pages.

23]For these reasons I make the following order:

- (1) The application in terms of section 86(11) of the National Credit Act 34 of 2005 is dismissed.
- (2) There will be no order as to the costs of the aforementioned application.
- (3) Summary judgment is granted in favour of the plaintiff in the following terms:
 - (a) The plaintiff's cancellation of the installment sale agreement is confirmed.
 - (b) An attachment order is issued authorizing the plaintiff to take possession of the Opel Astra Classic Motor vehicle which forms the subject matter of the aforementioned agreement.
 - (c) The plaintiff is given leave to approach this court for an

order enforcing the remaining obligations of the defendant in terms of the said agreement.

- (d) The defendant pays the plaintiff's costs to date on an attorney and client scale, such costs to include collection charges.

D. VAN ZYL
JUDGE OF THE HIGH COURT

Matter heard on : 21 February 2012

Judgment delivered : 24 February 2012

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