

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

In the matters between:

Case no: 555/2010

SA TAXI SECURITISATION (PTY) LTD PLAINTIFF

and

JERMAN EPHRAIM MAZIBUKO DEFENDANT

Case no: 409/2010

SA TAXI SECURITISATION (PTY) LTD PLAINTIFF

and

LUCAS MAKHETE MPHATSOANYANE DEFENDANT

Case no: 556/2010

SA TAXI SECURITISATION (PTY) LTD PLAINTIFF

and

JOHANNES THABISO NAILE DEFENDANT

Case no: 708/2010

SA TAXI SECURITISATION (PTY) LTD PLAINTIFF

and

NTIKILE ABEL ABRAMS DEFENDANT

Case no: 709/2010

SA TAXI SECURITISATION (PTY) LTD

PLAINTIFF

and

TLALE ALEXIS MPHALE

DEFENDANT

Case no: 779/2010

SA TAXI SECURITISATION (PTY) LTD

PLAINTIFF

and

ITSHOKOLELE PIET LEBAKA

DEFENDANT

Case no: 845/2010

SA TAXI SECURITISATION (PTY) LTD

PLAINTIFF

and

THABO RAPONTO JANUARY

DEFENDANT

Case no: 846/2010

SA TAXI SECURITISATION (PTY) LTD

PLAINTIFF

and

FUSI PETRUS MIFI

DEFENDANT

Case no: 982/2010

SA TAXI SECURITISATION (PTY) LTD

PLAINTIFF

and

MOSES BENJAMIN NHLABATHI

DEFENDANT

Case no: 983/2010

SA TAXI SECURITISATION (PTY) LTD

PLAINTIFF

and

PINKI CAIN MOKHELE

DEFENDANT

Case no: 1189/2010

SA TAXI SECURITISATION (PTY) LTD

PLAINTIFF

and

MAMPE SIMON TLADI

DEFENDANT

Case no: 1190/2010

SA TAXI SECURITISATION (PTY) LTD

PLAINTIFF

and

LETSIE ZACHARIA MPONYA

DEFENDANT

Case no: 1191/2010

SA TAXI SECURITISATION (PTY) LTD

PLAINTIFF

and

MOSELANTJA EMILY DUIKER

DEFENDANT

Case no: 1252/2010

SA TAXI SECURITISATION (PTY) LTD

PLAINTIFF

and

PADI DAVID MOTSATSE

DEFENDANT

Case no: 1282/2010

SA TAXI SECURITISATION (PTY) LTD

PLAINTIFF

and

MOHAPI BENNET LEKEKA

DEFENDANT

Case no: 1385/2010

SA TAXI SECURITISATION (PTY) LTD

PLAINTIFF

and

BONGANI WILLIAM MAY

DEFENDANT

Case no: 1412/2010

SA TAXI SECURITISATION (PTY) LTD

PLAINTIFF

and

MAMPAI LYDIA MOKEKI

DEFENDANT

Case no: 1494/2010

SA TAXI SECURITISATION (PTY) LTD

PLAINTIFF

and

MALECHESA MARIA PEDI

DEFENDANT

Case no: 1495/2010

SA TAXI SECURITISATION (PTY) LTD

PLAINTIFF

and

MOJALEFA SAMUEL SEKHALOA

DEFENDANT

Case no: 1548/2010

SA TAXI SECURITISATION (PTY) LTD

PLAINTIFF

and

BIZUYISE GOODWILL SITHOLE

DEFENDANT

Case no: 1549/2010

SA TAXI SECURITISATION (PTY) LTD

PLAINTIFF

and

MASHAODISE JONAS RANTSOARENG

DEFENDANT

Case no: 1550/2010

SA TAXI SECURITISATION (PTY) LTD

PLAINTIFF

and

NOMATHEMBA EMILY MODJIDJI

DEFENDANT

Case no: 1609/2010

SA TAXI SECURITISATION (PTY) LTD

PLAINTIFF

and

PITSO JOHANNES MOLAHLEHI

DEFENDANT

Case no: 2761/2010

SA TAXI SECURITISATION (PTY) LTD

PLAINTIFF

and

MOTLATSI MICHAEL MPHANE

DEFENDANT

Case no: 3326/2010

SA TAXI SECURITISATION (PTY) LTD

PLAINTIFF

and

THALABA WILLIAM MASIU

DEFENDANT

JUDGMENT BY: CJ MUSI, J

HEARD ON: 21 October 2010

DELIVERED ON: 23 November 2010

[1] This judgment concerns 25(twenty five) separate applications for summary judgment that were brought before me. The defences of all the respondents (defendants) – subject to slight differences – are the same. All the defendants are represented by the same counsel. The applicant (plaintiff) is also represented by the same counsel. The matters were therefore argued simultaneously. Mr Snellenburg, on behalf of the defendants, however reserved the right to refer to the specific facts and circumstances of particular defendants should the need arise.

[2] The defendant (Ephraim Jansen Mazibuko, case no: 555/2010) applied for leave to file a supplementary affidavit.

This application was unopposed. The supplementary affidavit raises an additional defence: “reckless credit” and also sets out other factual averments to which I shall return later. By agreement the defence of “reckless credit” was argued in respect of all the defendants.

[3] The National Credit Regulator (NCR) established in terms of section 12(1) of the National Credit Act, 34 of 2005 (the Act) brought an urgent application (under case number 4360/2010) wherein it sought an order to be joined in all these matters as *amicus curiae*.¹ It further sought an order that all twenty five matters be postponed sine die pending a decision by the South Gauteng High Court (Johannesburg) under case number: 20491/2010.

[4] The parties agreed that the NCR may participate as *amicus curiae* in the summary judgment applications and that it may

¹ Section 12 (1) of the Act reads as follows: “**Establishment of National Credit Regulator.** – There is hereby established a body to be known as the National Credit Regulator, which –

- (a) has jurisdiction throughout the Republic;
- (b) is a juristic person;
- (c) is an independent and subject only to the Constitution and the law;
- (d) must exercise its functions in accordance with the Act;
- (e) must be impartial; and
- (f) must perform its functions –
 - (i) in as transparent a manner as is appropriate having regard to the nature of the specific function; and
 - (ii) without fear, favour, or prejudice.”

make whatever submissions it wishes in relation to these applications. It was also agreed that I may, if needs be, make any costs order against the NCR. The application for postponement was argued whereafter I dismissed it with no order as to costs. I revert to the summary judgment applications.

- [5] These matters were argued on the basis of the Mazibuko matter (case no: 555/2010) because his opposing and supplementary affidavits contain the defences raised by all the defendants. The understanding – although disavowed to some extent by Mr Snellenburg – was that the outcome of the application against Mazibuko will determine the fate of the other applications. I will deal with these matters based on the Mazibuko matter without disregarding the peculiar facts of the other matters.

- [6] The plaintiff is an authorised credit provider and is registered as such in terms of the Act.² All the defendants are taxi

² The plaintiff is registered in terms of section 40 of the Act, which reads as follows: “40 **Registration of credit providers.** – (1) A person must apply to be registered as a credit provider if –

(a) that person, alone or in conjunction with any associated person, is the credit provider under at least 100 credit agreements, other than incidental credit agreements; or

operators. The plaintiff entered into a separate lease agreement with each defendant.

- [7] In terms of the respective agreements the plaintiff leased a motor vehicle to the defendant, which vehicle was delivered to the defendant. Despite the delivery of the vehicle ownership of it remain vested in the plaintiff.
- [8] Each defendant was liable to pay an initial deposit plus a first rental amount and thereafter to make approximately 59 monthly rental payments.
- [9] The agreement furthermore provides that should the defendant fail to pay the rental on due date or fail to satisfy any of his/her other obligations in terms of the agreement the plaintiff shall, without prejudicing any of its other rights in law be entitled to cancel the agreement and inter alia claim return and possession of the vehicle and claim costs on the attorney and client scale.

(b) the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42 (1)”

[10] The plaintiff alleged that each of the defendants breached the agreement by failing to pay the rentals due in terms of the agreement.

[11] It is common cause that all the defendants consulted a debt counsellor and applied to be declared over-indebted.³ The debt counsellor notified the plaintiff of the defendants' applications in terms of section 86 (4) (b) (i) of the Act.⁴

[12] The plaintiff contends that neither the debt counsellor nor any of the defendants took any further steps as contemplated in section 86 (5) to (8) of the Act.⁵

³ See section 86 (1) which reads as follows:

"A consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over indebted."

⁴ Which reads: "On receipt of an application in terms of subsection (1), a debt counsellor must –
(b) notify, in the prescribed manner and form –

(i) all credit providers that are listed in the application; and
(ii) every registered credit bureau"

⁵ Section 86 (5) to (8) reads as follows:

"A consumer who applies to a debt counsellor, and each credit provider contemplated in subsection (4) (b), must –

(a) comply with any reasonable request by the debt counsellor to facilitate the evaluation of the consumer's state of indebtedness and the prospects for responsible debt re-arrangement ; and
(b) participate in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement.

6 A debt counsellor who has accepted an application in terms of this section must determine, in the prescribed manner and within the prescribed time –

(a) whether the consumer appears to be over-indebted; and
(b) If the consumer seeks a declaration of reckless credit, whether any of the consumer' credit agreements appear to be reckless.

7 If, as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably concluded that –

(a) the consumer is not over-indebted, the debt counsellor must reject the application, even if the debt counsellor has concluded that a particular credit agreement was reckless at the time it was entered into;

[13] The defendants state that they were found to be over-indebted by the debt counsellor and that the latter suggested a reduced payment plan which they (defendants) accepted and adhered to.

[14] It is common cause that the plaintiff did not consent to any proposal for a reduced payment plan. It is further common cause that the debt counsellor did not refer any of the matters to the Magistrate's Court with his recommendation. It

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- (b) the consumer is not over-indebted, but is nevertheless experiencing, or likely to experience, difficulty satisfying all the consumer's obligations under credit agreements in a timely manner, the debt counsellor may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement; or
 - (c) the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or both of the following orders
 - (i) that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless; and
 - (ii) that one or more of the consumer's obligations be re-arranged by –
 - (aa) extending the period of the agreement and reducing the amount of each payment due accordingly;
 - (bb) postponing during a specified period the dates on which payments are due under the agreement;
 - (cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or
 - (dd) recalculating the consumer's obligations because of contraventions of part A or B of Chapter 5, or Part A of Chapter 6.

8 If a debt counsellor makes a recommendation in terms of subsection (7) (b) and –

- (a) the consumer and each credit provider concerned accept that proposal, the debt counsellor must record the proposal in the form of an order, and if it is consented to by the consumer and each credit provider concerned, file it as a consent order in terms of section 138; or
- (b) if paragraph (a) does not apply, the debt counsellor must refer the matter to the Magistrate's Court with the recommendation.

follows therefore that the Magistrate's Court did not make an order as contemplated in section 87 of the Act.⁶

[15] Having heard nothing further about the review process the plaintiff gave notice, in terms of section 86 (10) of the Act, to terminate the review to the defendants, the debt counsellor and the NCR. The notice was given at least 60 (sixty) business days after the date on which the respective defendants applied for debt review.⁷ The plaintiff subsequently issued summons and applied for summary judgment after the defendants filed their respective notices of opposition. Although the plaintiff prayed for other relief in its summary judgment applications, during argument it only

⁶ Section 87 reads as follows: "**Magistrate's Court may re-arrange consumer's obligations.** – (1) If a debt counsellor makes a proposal to the Magistrate's Court in terms of section 86 (8) (b) or a consumer applies to the Magistrate's Court in terms of section 86 (9), the Magistrate's Court must conduct a hearing and, having regard to the proposal and information before it and the customer's financial means, prospect and obligations, may –

- (a) reject the recommendation or application as the case may be; or
- (b) make –
 - (i) an order declaring any credit agreement to be reckless, and an order contemplated in section 83 (2) or (3), if the Magistrate's Court concludes that the agreement is reckless;
 - (ii) an order re – arranging the consumer's obligations in any manner contemplated in section 86 (7) (c) (ii); or
 - (iii) Both orders contemplated in subparagraph (i) and (ii).

⁷ Section 86 reads as follows: "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 to –

- (a) the consumer;
- (b) the debt counsellor; and
- (c) the National Credit Regulator, at any time at least 60 business days after the date on which the consumer applied for the debt review.

asked for the return of the vehicles with costs on the attorney client scale.

[16] The defendant (Mazibuko) denied that the plaintiff was entitled to terminate the debt review. He contended that 60 (sixty) business days had not elapsed since the date on which the payment plan was deemed to have been accepted. It is the defendant's contention that as a result of the premature termination of the review the plaintiff was not entitled to issue summons against him.

[17] The defendants' defences are as follows:

17.1 That the review was prematurely terminated.

17.2 The defendant denied being in breach of the agreement because they made regular payments in terms of the debt counsellor's proposal to the plaintiff.

17.3 That the Magistrate's Court or this Court might revive the debt review process as contemplated in section 86 (11).⁸

17.4 That there was no lawful cancellation of the agreement.

17.5 That the plaintiff advanced "reckless credit" and is at this stage not entitled to have possession of the vehicles.

⁸ Section 86 (11) reads as follows: "If a credit provider who was 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."

[18] The NCR argued that the termination of the review is invalid because section 88(3) is the starting point. It argued that the applications fell foul of the provisions of section 88(3) and therefore the plaintiff may not exercise or enforce by litigation any right or security under the agreements.⁹

[19] Before I deal with the defences, I pause to deal with the point *in limine* raised by the defendants relating to the “personal knowledge” of the deponent in support of the applications for summary judgment.

[20] The defendants point out that a certain Mr Sachin Maharaj, a manager at the plaintiff, supplied the debt counsellor with information pertaining to all the defendants in terms of section 86(5) (a).¹⁰ In the summary judgment applications Andre Erasmus deposed to the supporting affidavit. They

⁹ Section 88 (3) reads as follows: “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 that 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 subsection (1) (a) through (c); or
 - (ii) The consumer default on any obligation in terms of a re – arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal.

¹⁰ See footnote 5.

argued that because Maharaj stated that the affairs of the defendants resort under him the “personal knowledge” of Erasmus must be subject to doubt.

[21] Uniform rule 32(2) reads as follows:

“The plaintiff shall within 15 days after the date of delivery of notice of intention to defend, deliver notice of application for summary judgment, together with an affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount, if any, claimed and stating that in his opinion there is no *bona fide* defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay. If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit and the notice of application for summary judgment shall state that the application will be set down for hearing on a stated day not being less than 10 days from the date of the delivery thereof.”

[22] In Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A-D) it was said with reference to the aforesaid subrule:

“Generally speaking, before a person can swear positively to acts in legal proceedings they must be within his personal knowledge ... The grant of the remedy is based upon the supposition that the plaintiff’s

claim is unimpeachable and that the defendant's defence is bogus or bad in law. One of the aids to ensuring that this is the position is the affidavit filed in support of the applicant, and to achieve this end it is important that the affidavit should be deposed to either the plaintiff himself or by someone who has personal knowledge of the facts..."¹¹

[23] I find the defendants' argument strange. In their opposing affidavits they all state that: "Annexure B was compiled by a certain Sachin Rajendra Maharaj, a manager of plaintiff, who I presume has the same powers as the deponent given their employment as managers of plaintiff." Annexure B refers to the information supplied to the debt counsellor. The defendants seem to accept that Erasmus has the necessary "personal knowledge".

[24] Erasmus' affidavit in any event deals sufficiently with this issue and it eradicates all doubt. The relevant part of his affidavit reads as follows:

"1. I am the general manager of the abovementioned plaintiff
in this matter and is duly authorised to depose to the
affidavit on behalf of the plaintiff.

2. The facts herein set out fall within my personal knowledge
and are true and correct

¹¹ See page 42 3 A-B and G-H

3. In consequence of such position held by me with the plaintiff, I have in my possession and under my control the files and records of the plaintiff pertaining to this matter, the contents of which I have familiarised myself with during the course of the plaintiff's dealings with the defendant and for purposes of this matter. By virtue of the foregoing I have personal knowledge of the facts deposed to by me herein..."

[25] I am satisfied that Erasmus has "personal knowledge" of the facts he deposed to. The point *in limine* is dismissed. I now turn to the defences.

[26] Mr Snellenburg argued that a credit agreement that is subject to the Act may not be cancelled extra judicially. According to him the right to cancel such a contract is subject to judicial oversight by a court considering the credit agreement. Therefore, so the argument went, any extra judicial cancellation of such a contract is only a purported cancellation until the court considering the matter concludes that the party desiring to cancel the agreement (the credit provider) is entitled to do so.

[27] Mr Snellenburg pointed out that his argument is fortified by the fact that section 83 (1) of the Act permits a court considering a credit agreement to declare such an agreement as being reckless.¹² According to Mr Snellenburg a finding that the credit agreement is reckless taints the whole agreement and not a part thereof.

According to him the contract may not be cancelled and the security returned because that would impede the court's power to make orders in terms of section 83(2) and (3) of the Act.¹³ He referred to an unreported judgment by Willis J wherein he said:

"It seems clear enough that a credit provider is prevented from enforcing a credit agreement where:-

¹² Section 83 (1) of the Act reads as follows: **Court may suspend reckless credit agreement.** – (1) Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is to be considered, the court may declare that the credit agreement is reckless, as determined in accordance with this Part.

¹³ Section 83(2) and (3) of the Act reads as follows:

- (2) if a court declares that a credit agreement is reckless in terms of section 80 (1) (a) or 80 (1) (b) (i), the court may make an order-
 - (a) setting aside all or part of the consumer's rights and obligations under that agreement, as that court determines just and reasonable in the circumstances; or
 - (b) Suspending the force and effect of that credit agreement in accordance with subsection (3) (b) (i).
- (3) If a court declares that a credit agreement is reckless in terms of section 80 (1) (b) (ii), the Court –
 - (a) must further consider whether the consumer is over –indebted, at the time of those court proceedings; and
 - (b) if the court concludes that the consumer is over – indebted, the court may make an order –
 - (i) suspending the force and effect of that credit agreement until a date determined by the court when the order of suspension; and
 - (ii) restructuring the consumer's obligations under any other credit agreements, in accordance with section 87.

- (i) there has not been compliance with certain procedural formalities (section 130(1))
- (ii) a court has determined that the credit agreement was reckless (section 130(4) (a));
- (iii) a court has declared a consumer to be over – indebted in terms of the Act (section 140 (c) (iii))
- (iv) the credit agreement has been suspended or is subject to an order re-arranging the debt or an agreement to that effect has been entered into (section 130 (4) (e) and section 130(3) (c) (ii)).¹⁴

[28] The Act does not expressly state that all credit agreements falling within its purview may only be cancelled by an order of court. The provisions of the Act have certainly limited the right of a credit provider to cancel a credit agreement.¹⁵

[29] Extra-judicial cancellation of contracts has always been recognised in our law. In Lebedina v Schechter and Haskell¹⁶ Greenberg J said the following:

“Mr Brink’s contention on behalf of the plaintiff is that in case of contract induced by fraud, when the defrauded party repudiates

¹⁴ First Rand Bank Ltd t/a First National Bank v JGS Seyffert & Another & 3 Other similar cases under case number 212862/2010; 23132/2010; 23380/2010 and 9987/2010 SGHC judgment delivered on 11 October 2010 at paragraph 15

¹⁵ See section 123(1) which reads “A credit provider may terminate a credit agreement before the time provided in that agreement only in accordance with section...” See also First Rand Bank Ltd t/a First National Bank v JGS Seyffert supra.

¹⁶ 1931 WLD 247 at 251-252.

and the Court upholds his repudiation and decrees a rescission, the contract is extinguished *ex post facto* as from the date of the contract. The first difficulty that I have with this contention is a doubt whether the Court's intervention is necessary at all. It seems to me that it is the defrauded party's repudiation which puts an end to the contract and the Court merely decides that this party was entitled to put it to an end. In practice this appears to be recognised, because it is quite common in our Courts that where a party is suing on a cause of action which arises out of his having entered into a contract which is induced by fraud, he does not ask formally for rescission of a contract, but merely asks for such remedies as follow from a rescission of a contract. And this is even clearer in the case of defence to a claim on a contract which is said to have been induced by fraud. It is very unusual for a defendant in such a case to ask that the contract should be set aside: he merely states that he has put an end to the contract, sets out his reason, and claims that he is free from the consequences of the contract."

[30] This applies with equal force to cancellation of a contract based on a serious breach such as non payment of monthly rentals.¹⁷ In Sonia (Pty) Ltd v Wheeler¹⁸ the right of a party to rely on an extra judicial cancellation was recognised but it

¹⁷ See *Trust Bank van Suid Afrika Bpk v Eales en Ander* 1989 (4) SA 509 (TPD) at 514 B-F.

¹⁸ 1958 (1) SA 555 (AD) at 561 A-E

was emphasised that it is desirable to have a judgment of cancellation.

[31] In Swart v Vosloo¹⁹ it was stated that in the absence of an agreement to the contrary, a party who exercises his right to cancel must convey his decision to the other party and that cancellation does not take place until that happens.

[32] It is clear from the authorities cited above that the right of a party to extra-judicially cancel a contract on breach thereof is deeply rooted in our legal system. If the legislator wanted to change this by taking away the right of two or more contracting parties to cancel their mutual agreement it should have done so in express terms. In my view the legislator did not take away that right. First Rand Bank v JGS Seyfferet supra is not authority for Mr Snellenburg's argument. Thus if a contract that is governed by the Act states under what circumstances a party may extra judicially cancel it and such cancellation is done subject to and in accordance with the Act then the cancellation will be valid.

¹⁹ 1965 (1) SA 100 (AD) at 105 A-G

[33] In fact section 129(3) puts this issue beyond doubt. Section 129(3) expressly grants a consumer who is in default the right to re-instate a credit agreement, before it has been cancelled by the credit provider, and thereby preventing a credit provider from exercising his right of cancellation.²⁰ The Act therefore expressly or at the very least by default recognises the credit provider's right to extra judicially cancel a credit agreement. If the intention was that credit agreements may only be cancelled by an order of court then the section would have read "at any time before the court has cancelled the agreement..."

[33.1] The plaintiff states, in its particulars of claim, that due to the defendants' breach of the agreement it terminated it alternatively it is terminated by the summons. The summons is sufficient notification of cancellation.²¹

[34] The defendants denied that they breached the agreement and pointed out that they paid the monthly rental in terms of

²⁰ Section 129(3) reads as follows " Subject to subsection (4), a consumer may

(a) at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement; and

(b) after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order"(My underlining)

²¹ See Noble v Laubscher, 1905 T.S. 125

the debt counsellor's proposal to the plaintiff. It is common cause that all the defendants failed to pay the rentals due in terms of the lease agreements. It is further common cause that the proposal of the debt counsellor was either not accepted by the plaintiff or the counter proposal made by the plaintiff was not accepted by the defendants.

[35] The payment plan devised by the debt counsellor was a unilateral act which is not sanctioned by the Act. If the debt counsellor reasonably concluded – as he did – that the defendants were over-indebted he was supposed to make a proposal recommending that the Magistrate's Court make an order in terms of section 86(7)(c) of the Act. None of these matters were referred to the Magistrate's Court.

[36] In the National Credit Regulator v Nedbank Limited & Others²² Du Plessis J said the following in relation to section 86(7)(c):

“In my view section 86(7)(c) requires cases of over-indebtedness to be referred to the magistrate's court so as to ensure judicial oversight of the entire process. A magistrate's

²² unreported case number 19638/2008 North Gauteng High Court

court can only provide such oversight if it conducts a hearing and has regard to at least the matters referred to in section 87(1). It follows that by necessary implication the procedure set out in section 87(1) applies also to cases coming before the magistrate's court under section 86(7)(c)."

[37] Du Plessis J also correctly concluded that a referral to a Magistrate's Court in terms of section 86(7)(c) of the Act is an application as contemplated in the Magistrate's Court Act 32 of 1944 and should be treated as such in terms of Rule 55 of the Magistrate's Court Rules.²³ The recommendation in terms of 86(7)(c) must be served in terms of Rule 9 of the Magistrates' Court's Rules, but service thereof may, with the agreement of the affected parties be by way of fax or e-mail.²⁴

[38] The debt counsellor, in this matter, did not refer any of these matters to the Magistrates' Court with a recommendation. It follows that there was no order by the Magistrate's Court that any of the agreements were reckless (section 87(1)(b)(i)) or

²³ Rule 55 (1) provide that:

"Except where otherwise provided, an application to the court for an order affecting any other person shall be on notice, in which shall be stated shortly the terms of the order applied for and the time when the application will be made to the court..."

²⁴ See National Credit Regulator v Nedbank (Pty) Ltd and Others *supra*.

an order re-arranging any of the defendant's obligations (section 87(1)(b)(ii). The defendants could not legally pay a lesser amount. It is therefore clear that the defendants breached the agreement by not paying the monthly rental in terms of the agreement.

[39] The defendants argued that the review was not validly terminated and in respect of Mazibuko, as stated above, it was argued that it was terminated prematurely because the 60 business days prescribed in section 86(10) had not elapsed when summons was issued. I propose to deal with the Mazibuko matter before considering the general complaint of invalid termination.

[40] Mazibuko states in his opposing affidavit that during or about October 2009 he consulted the debt counsellor who found him to be over-indebted and that his debt review was accepted in terms of section 86 of the Act. He attached a notice dated 14 October 2009 from the debt counsellor to the plaintiff which *inter alia* reads:

"This letter serves to advise you that the under mentioned consumer has applied for debt review and has been found over

– indebted and accepted (original emphasis) in terms of section 86 of the National Credit Act 34 of 2005... Kindly provide us with:

- (1) An account breakdown of the above consumer
- (2) The date of conception of this account
- (3) Your banking details..."

[41] The plaintiff responded on 20 October 2009 with a letter which reads:

"We refer to your request for a Certificate of Balance regarding the above mentioned consumer and attach hereto and "information supplied" to Debt counsellor for your records (sic)."

[42] The debt counsellor wrote another letter to the plaintiff dated 9 November 2009 which reads as follows:

"This is a follow up on the form 17(1) notification in terms of the new Credit Act 34 of 2005 you received recently regarding this consumer.

Kindly note, apart from performing the debt counselling package we also have been mandated to apply our rehabilitating services, thus taking control of all his/her financial matters and ensure credit providers receive their fair share. For that purpose a precise and appropriate self explanatory income and expenses account (Form D), a payment plan (Form E) and if

mortgage and/ or assets finance agreements are applicable (Form E**) attached hereto, has been constructed.

Electronic payments in accordance to the payment plan which will commence immediately. Payment dates are between the 15th and end of each month. Kindly note the first monthly payment might be less than indicated due to unforeseen additional costs.

We trust you find this informal payment in order and will consider that you accepted it if we have not receive any response from you by the 23rd November 2009. In the event of the majority of creditors rejecting the proposal, we will have to approach Court for intervention to enforce it. Although legal cost involved in such action may culminate in a lesser monthly amount being available for distributing amongst creditors, we would nevertheless proceed with this proposed payment plan."

- [43] There was no further correspondence between the parties in relations to the review process. On 15 January 2010 the plaintiff sent its 86(10) notice to the defendant, the debt counsellor and the NCR informing them that it terminates the debt review requested by Mazibuko. Mazibuko does not deny receiving the section 86(10) notice. Summons was issued on 3 February 2010.

[44] Mr Snellenburg argued that the 60 days period should be calculated from 23 November 2009. I disagree. Section 86 (10) is clear. The notice must be given "at any time at least 60 business days after the date on which the consumer applied for debt review." (My underlining). Mazibuko was "found" to be over-indebted by the debt counsellor on 14 October 2009. Although it is not clear on which date he applied, it is certain that it was on or before 14 October 2009. The 60 days period should therefore be calculated from 14 October 2009. That being the case, the plaintiff's contention that he had been in default for at least twenty (20) business days, that at least sixty (60) business days had elapsed since the date on which the defendant applied for debt review and that at least ten (10) business days had elapsed since the plaintiff delivered its notice in terms of section 86 (10) of the Act cannot be faulted. The debt review was therefore terminated in accordance with the prescripts of the Act and not prematurely as the defendant, Mazibuko, alleged.

[45] The defendants' further contention was that the reviews were invalidly terminated because the plaintiff acted in bad faith. Support for the defendants' proposition that a credit provider who terminates a review in terms of section 86(10) must do so in good faith is found in the judgment of Blignault J in **Mercedes Benz Financial Services South Africa (Pty) Limited v Papana Gideon Dunga**.²⁵ The implication of the criterion of good faith in section 86(10) fits comfortably with the general purpose of the Act and the duty of the credit provider to act in good faith.²⁶ I therefore agree with Blignault J that a section 86(10) termination must be done in good faith.

[46] Whether a credit provider acted in good faith or not is a factual inquiry. It will depend on the facts and circumstances of each case. The determination whether the credit provider acted in bad faith being a factual inquiry the defendant ought to lay a factual foundation for his assertion that the plaintiff acted in bad faith. Some of the defendants knew or ought to have known that the (irregular) payment plan was not accepted by the plaintiff and the others did not accept the

²⁵ Unreported judgment in case number 9222/2010 delivered on 20 September 2010 at paragraph 52.

²⁶ See section 86(5)(b) of the Act.

plaintiff's counter proposal. The debt review process was initiated by the defendants. As much as there was a duty on the debt counsellor to refer the matters to the Magistrate's Court, there was an equal if not higher duty on the defendants to ascertain from the debt counsellor what the status of their respective applications were. Nothing was done by all the defendants to prosecute the review process further. In my view it is not reasonable to initiate a process and thereafter ignore it under circumstances where you know or ought reasonably to have known that the process is not yet complete. Even after all the defendants received the section 86(10) notices, before they were informed about the cancellation of the agreements, they did nothing to prevent the cancellation.

- [47] The plaintiff waited, as it was enjoined to do, for the prescribed periods to elapse before giving notice in terms of section 86(10) of the Act. There is no express indication in the opposing affidavit that the plaintiff acted insincerely or maliciously; neither can such conduct be inferred from the facts and circumstances of these matters. The fact of the matter is that the defendants acted unreasonably by not

prosecuting the matters in terms of the Act. Absent any steps by the defendants to take the review to its conclusion the plaintiff was entitled to unilaterally terminate the review process. In my view the debt review was terminated *bona fide* and validly.

[48] Having terminated the review the plaintiff cancelled the contracts. Mr Snellenburg, as pointed out above, argued that the cancellation is not valid because it impedes the court's power to order that the review resume in terms of section 80 (11) or to refer the matter to a debt counsellor in terms of section 85(a) after a finding that the consumer is over-indebted. He argued that it would be unfair to grant an order at this stage that the vehicles be returned in the light of the orders (section 85(a) and 86(11)) that the court may make in relation to the credit agreements.

[49] The short answer to this submission is that the agreements have been cancelled. The defendants' right to possess the vehicles is acquired by virtue of the terms of the lease agreements. Those agreements being cancelled the defendants don't have any right to possess the vehicles

anymore after cancellation. The court cannot revive a lawfully cancelled agreement. In BMW Financial Services (SA) (Pty) Ltd v C J Donkin²⁷ Wallis J correctly concluded as follows:

“It follows that the defendant’s contention that a cancelled instalment sale agreement, such as her agreement with the plaintiff can be reinstated as a result of a re-arrangement flowing from a court’s under section 85 of the NCA cannot be sustained. The NCA does not itself expressly provide for such reinstatement and all the textual and contextual indications point in the opposite direction. Accordingly the defendant’s invocation of section 85 in this case can only operate in respect of her obligations to the plaintiff arising from the cancellation of the instalment sale agreement and cannot serve to reinstate that agreement. That being so her right to retain possession of the motor vehicle was terminated by the plaintiff’s cancellation of the instalment sale agreement. That right cannot be restored through the mechanisms of the NCA.”

[50] After the lawful cancellation of the agreements the rights and obligations of the parties as they exist after the cancellation

²⁷ Kwazulu-Natal High Court case number 15548/08 judgment delivered on 4 June 2009 at paragraph 33.

will then be considered and not the rights and obligations whilst the agreements were still extant.²⁸

[51] Mr Snellenburg also argued that the defendants have a valid defence because the credit agreements were concluded recklessly. According to Mazibuko the agreement between him and the plaintiff is reckless because the plaintiff failed to conduct an assessment in terms of section 81(2) of the Act or because the agreement with him despite the fact that the preponderance of information available to the plaintiff indicated that he did not understand the risks, costs or obligations under the credit agreement or that by entering into the agreement he would become over-indebted. He then proceeds to state that the plaintiff did not enquire what his monthly income and expenses were.

[52] Mr Snellenburg argued that the vehicles should not be returned because, if the court declares that the agreement is reckless because the plaintiff failed to conduct an assessment or the preponderance of information available indicated to the plaintiff that the defendant did not generally

²⁸ See BMW Financial Services v C J Donkin *supra* at paragraph 31.

understand the risks, costs and obligations under the proposed credit agreement, the court may set aside all or part of the defendant's rights and obligations under the agreement (section 83(2)(a)) or suspend the force and effect of the agreement (section 83(2)(b)).

[53] He also pointed out that if the court finds that the agreement is reckless because the preponderance of the available information indicated that entering into the agreement would make the defendant over-indebted the court must consider whether the consumer is over-indebted at the time of the court proceedings and if the court concludes that the defendant is over-indebted the court may suspend the force and affect of the agreement until a specific date and restructure the consumer's obligations under any other credit agreements, in accordance with section 87.

[54] I do not agree with Mr Snellenburg that the possibility or probability of a finding that the agreement is reckless means that the motor vehicle may not be returned to the plaintiff pending such determination. Mr Snellenburg's argument is that all or part of the rights and obligations of the consumer

may be set aside. He argues that if the vehicles are handed back at this stage then the court would not, at a later stage, be able to make an order that governs all the rights and obligations of the consumer. This argument is untenable. It in effect means that the defendants may be in possession of and use the vehicles without paying therefor pending a determination, one day, during the trial, that the agreements were reckless. If the court ultimately determines that the agreements were reckless and set them aside, the defendants would walk away from the agreements after having enjoyed the use of the car without paying therefor. On the other hand if the court ultimately determines that the agreements were not reckless the defendants would have enjoyed the use of the vehicle, pending the determination, without paying therefor.

[55] I agree with Mr Mundell's submission that the Act does not contemplate such a situation. The defendants can not have "the money and the box". It has been pointed out that the "purpose of the NCA is to provide a more efficient and equitable credit system by balancing the right of credit providers and consumers. The intention of the legislature was no to shift the balance of power so

much that all power in the credit relationship would amass into the hands of consumers. 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 the lenders depreciating security while at the same time not making debt payments, the NCA would make it significantly more unlikely that over-indebted consumer 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.”²⁹

[56] I agree. The Act did not usher in an era of bread and circuses for over-indebted consumers but it is rather an attempt to curb and ultimately stop reckless credit granting and to provide for an efficient discharge of consumer debt.

[57] Even on the assumption that the defendants have prima facie shown that the agreements were reckless or that they are over-indebted; there exists no basis for them to remain in possession of the vehicles after cancellation of the agreements.

²⁹ Per Levenberg, AJ in SA Taxing Securitisation (Pty) Ltd v Mbatha unreported judgement in case no 51330/09; 52948/09 and 53080/09 South Gauteng High Court, Johannesburg at paragraph 32 and 33.

[58] In the matter of SA Taxi Securitisation (Pty) Ltd v Booie & 4 other similar matters³⁰ Placket J correctly came to the following conclusion in respect of a reckless credit defence in a summary judgment application for the return of a vehicle:

“I am in respectful agreement with both Wallis J and Levenberg AJ and thus conclude that even if the credit extended to the defendants was recklessly extended, that is no defence to the claims of the plaintiffs for the return of the vehicles... I have, however, assumed in their favour, without deciding, that they have raised their defence adequately for purposes of addressing the central issue that I have identified.”

[59] After the vehicles have been returned the remaining rights and obligations will be subjected to orders in terms of section 83(2) and (3) of the Act.

[60] Mr Zietsman on behalf of the NCR conceded that a lawfully cancelled contract can not be reinstated by a court. He however argued that these matters should be decided with reference to section 88(3) of the Act. According to Mr Zietsman the plaintiff may in terms of section 88(3) not

³⁰ Eastern Cape High Court case number 4077/2009 judgement delivered on 20 May 2010

exercise or enforce by litigation or other judicial process any right or security under the credit agreement until the consumer is in default. This argument neglects the fact that section 88(3) is subjected to section 86(9) and (10).

[61] In *S v Marwane*³¹ Miller AJ said the following in relation to the phrase “subject to”:

“The purpose of the phrase “subject to” in such a context is to establish what is dominant and what subordinate or subservient; that to which a provision is “subject to”, is dominant – in case of conflict it prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation. When the legislator wishes to convey that (that) which is now being enacted is not to prevail in circumstances where it conflicts, or inconsistent or incompatible, with a specified other enactment, it very frequently, if not almost invariably, qualifies such enactment by the method of declaring it to be “subjected to” the other specified one.”³²

[62] The plaintiff in this matter validly and lawfully invoked the provisions of section 86(10) of the Act to terminate the

³¹ 1982 (3) SA 717 (AD) at 747 H to 748 A

³² See also *Ynuico Ltd v Minister of Trade and Industry* 1996 (3) SA 989 (cc) at paragraph 8

review. That being the case, section 88(3) of the Act is rendered irrelevant because it is subject to section 86(10).

[63] I am not satisfied that the defendants raised a defence that is good in law to the plaintiff's claim for the return of the vehicles. There is no lawful reason why I should exercise my discretion against the plaintiff by refusing the applications.

[64] Mr Snellenburg did not make any submission in relation to costs. It should follow the success. I do not propose to make any costs order against the NCR. Costs should be granted on the agreed scale.

[65] I accordingly make the following orders.

- a) The defendant (MAZIBUKO) in case no: 555/2010 is ordered to return to the plaintiff forthwith the 2009 TOYOTA QUANTUM SES'FIKILE with engine number 2TR8193708 and chassis number JTFSX22P706061621. The defendant is ordered to pay the plaintiff's costs on the attorney client scale.

- b) The defendant (MPHATSOANYANE) in case no: 409/2010 is ordered to return to the plaintiff forthwith the 2008 FOTON 2.2 PETROL with engine number BJ491EQ1712148 and chassis number LVCB1DWA47B017667. The defendant is ordered to pay the plaintiff's costs on the attorney client scale.
- c) The defendant (NAILE) in case no: 556/2010 is ordered to return to the plaintiff forthwith the 2008 TOYOTA QUANTUM SES'FIKILE with engine number 2TR8159551 and chassis number JTFSX22P906050068. The defendant is ordered to pay the plaintiff's costs on the attorney client scale.
- d) The defendant (ABRAMS) in case no: 708/2020 is ordered to return to the plaintiff forthwith the 2007 TOYOTA SIYAYA with engine number 4Y9195097 and chassis number AHT41YH630987162. The defendant is ordered to pay the plaintiff's costs on the attorney client scale.
- e) The defendant (MPHALE) in case no: 709/2010 is ordered to return to the plaintiff forthwith the 2008 POLAR SUN with engine number 952661 and chassis number

LL2TD32R38J000544. The defendant is ordered to pay the plaintiff's costs on the attorney client scale.

f) The defendant (LEBAKA) in case no: 779/2010 is ordered to return to the plaintiff forthwith the 2007 C.A.M INYATHI with engine number SF491QE070652069A and chassis number LFZBBAGC77A006009. The defendant is ordered to pay the plaintiff's costs on the attorney client scale.

g) The defendant (JANUARY) in case no: 845/2010 is ordered to return to the plaintiff forthwith the 2009 TOYOTA QUANTUM SES'FIKILE with engine number 2TR8203915 and chassis number JTFSX22P306065522. The defendant is ordered to pay the plaintiff's costs on the attorney client scale.

h) The defendant (MIFI) in case no: 846/2010 is ordered to return to the plaintiff forthwith the 2009 TOYOTA QUANTUM SES'FIKILE with engine number 2TR8193351 and chassis number JTFSX22P106061548. The defendant is ordered to pay the plaintiff's costs on the attorney client scale.

- i) The defendant (NHLABATHI) in case no: 982/2010 is ordered to return to the plaintiff forthwith the 2007 C.A.M INYATHI with engine number SF491QE070651895A and chassis number LFZBBAGC47A006047. The defendant is ordered to pay the plaintiff's costs on the attorney client scale.

- j) The defendant (MOKHELE) in case no: 983/2010 is ordered to return to the plaintiff forthwith the 2007 C.A.M INYATHI with engine number SF491QE070551069A and chassis number LFXBBAGC77A005362. The defendant is ordered to pay the plaintiff's costs on the attorney client scale.

- k) The defendant (TLADI) in case no: 1189/2010 is ordered to return to the plaintiff forthwith the 2009 TOYOTA QUANTUM SES'FIKILE with engine number 2TR8175870 and chassis number JTFSX22P606058306. The defendant is ordered to pay the plaintiff's costs on the attorney client scale.

- l) The defendant (MPONYA) in case no: 1190/2010 is ordered to return to the plaintiff forthwith the 2008 C.A.M INYATHI XGD 2.2i HIGH ROOF with engine number SF491QE071160777A and chassis number LFZBBAGC7H012298. The defendant

is ordered to pay the plaintiff's costs on the attorney client scale.

m) The defendant (DUIKER) in case no: 1191/2010 is ordered to return to the plaintiff forthwith the 2007 C.A.M INYATHI with engine number SF491QE070450451A and chassis number LFZBBAGC87A004334. The defendant is ordered to pay the plaintiff's costs on the attorney client scale.

n) The defendant (MOTSATSE) in case no: 1252/2010 is ordered to return to the plaintiff forthwith the 2008 C.A.M INYATHI XGD 2.2 HIGH ROOF with engine number SF491QE071161362A and chassis number LFZBBAGC57A012486. The defendant is ordered to pay the plaintiff's costs on the attorney client scale.

o) The defendant (LEKEKA) in case no: 1282/2010 is ordered to return to the plaintiff forthwith the 2008 TOYOTA QUANTUM SES'FIKILE with engine number 2TR8122152 and chassis number JTFSX22P906036168. The defendant is ordered to pay the plaintiff's costs on the attorney client scale.

- p) The defendant (MAY) in case no: 1385/2010 is ordered to return to the plaintiff forthwith the 2009 TOYOTA QUANTUM SES'FIKILE with engine number 2TR8227490 and chassis number JTFSX22P8068071378. The defendant is ordered to pay the plaintiff's costs on the attorney client scale.
- q) The defendant (MOKEKI) in case no: 1412/2010 is ordered to return to the plaintiff forthwith the 2007 TOYOTA SIYAYA with engine number 4Y9195596 and chassis number AHT41YH6309087868. The defendant is ordered to pay the plaintiff's costs on the attorney client scale.
- r) The defendant (PEDI) in case no: 1494/2010 is ordered to return to the plaintiff forthwith the 2009 TOYOTA QUANTUM SES'FIKILE with engine number 2TR8195337 and chassis number JTFSX22P806062082. The defendant is ordered to pay the plaintiff's costs on the attorney client scale.
- s) The defendant (SEKHALO) in case no: 1495/2010 is ordered to return to the plaintiff forthwith the 2008 TOYOTA QUANTUM 2.7 with engine number 2TR8096015 and chassis number

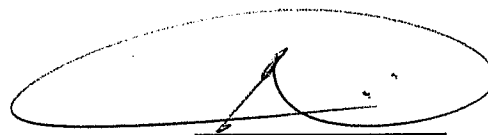
JFTSX22PX00010977. The defendant is ordered to pay the plaintiff's costs on the attorney client scale.

t) The defendant (SITHOLE) in case no: 1548/2010 is ordered to return to the plaintiff forthwith the 2007 TOYOTA SIYAYA with engine number 4Y9191490 and chassis number AHT41YH6309083026. The defendant is ordered to pay the plaintiff's costs on the attorney client scale.

u) The defendant (RANTSOARENG) in case no: 1549/2010 is ordered to return to the plaintiff forthwith the 2007 C.A.M INYATHI with engine number SF491QE070653076A and chassis number LFZBBAGC57A007479. The defendant is ordered to pay the plaintiff's costs on the attorney client scale.

v) The defendant (MODJIDJI) in case no: 1550/2010 is ordered to return to the plaintiff forthwith the 2007 C.A.M INYATHI with engine number SF491QE07085561A and chassis number LFZBBAGC47A008185. The defendant is ordered to pay the plaintiff's costs on the attorney client scale.

- w) The defendant (MOLAHLEHI) in case no: 1609/2010 is ordered to return to the plaintiff forthwith the 2007 C.A.M INYATHI with engine number SF491QE070653124A and chassis number LFZBBAGC27A007066. The defendant is ordered to pay the plaintiff's costs on the attorney client scale.
- x) The defendant (MPHANE) in case no: 2761/2010 is ordered to return to the plaintiff forthwith the 2009 TOYOTA QUANTUM SES'FIKILE with engine number 2TR8171677 and chassis number JTFSX22P106053983. The defendant is ordered to pay the plaintiff's costs on the attorney client scale.
- y) The defendant (MASIU) in case no: 3326/2010 is ordered to return to the plaintiff forthwith the 2007 TOYOTA SIYAYA with engine number 4Y9191394 and chassis number AHT41YH630908. The defendant is ordered to pay the plaintiff's costs on the attorney client scale.


C.J. MUSI, J

On behalf of the Plaintiff:

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Adv. ARG MUNDELL

Instructed by:

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JOHANNESBURG

On behalf of the Defendant:

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On behalf of the NCR:

Adv. P ZIETSMAN SC
Adv PJJ ZIETSMAN

Instructed by:

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/ar