



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case number: 2169/2024

In the matter between:

ABSA BANK LIMITED

Plaintiff

and

WILMAR CLAUDIO FRANS

Defendant

JUDGMENT DELIVERED ON 28 MARCH 2025

VAN ZYL AJ:

Introduction

1. This is an opposed application for summary judgment. The underlying action arises from the defendant's breach of a vehicle financing agreement concluded between the parties under the National Credit Act 34 of 2005 ("the NCA"). The plaintiff seeks confirmation of termination of the credit agreement, return of the

motor vehicle, and costs pertaining to this portion of the claim.

2. The credit agreement was concluded on 2 July 2021. The terms thereof are not in dispute, and it is common cause that the defendant breached his obligations thereunder. Monthly instalments were to be paid by the defendant to the plaintiff over a period of 72 months, commencing on 26 August 2021, with the last instalment being due on 26 July 2027. The monthly repayment, inclusive of the finance instalment and cost of insurance, amounted to R3 679.67. Failure to make any payment under the agreement on due date thereof would amount to an event of default, which would entitle the plaintiff to terminate the agreement, provided it did so in compliance with the provisions of the NCA.
3. It is common cause that on 25 May 2023 a debt review order¹ was granted in which the defendant's contractual obligations towards (amongst other creditors) the plaintiff were rearranged. The plaintiff instituted action on 31 January 2024 after the defendant had breached the terms of the debt review order.
4. The defendant raises two defences to the plaintiff's claim by way of a special plea and a plea on the merits:
 - 4.1. First, the defendant argues that, at the time of service of the summons, which occurred on 7 February 2024, he was no longer in default of the debt review order, and for this reason the plaintiff did not comply with the provisions of section 88(3) of the NCA. In other words, the plaintiff was not entitled to institute action against the defendant.
 - 4.2. Second, the defendant contends that the plaintiff is in any event prohibited by section 86(10)(b) of the NCA from terminating the debt review process, as the debt review application had already been determined by the debt review court.

¹ In the Mossel Bay Magistrate's Court under case number 2479/2022.

5. The plaintiff submits that it was entitled to proceed in terms of section 88(3) of the NCA, because the defendant had admittedly been in breach of the debt review order prior to the institution of the action. The defences accordingly raise no issue for trial. The defendant does not have a *bona fide* defence and has opposed the summary judgment application solely for the purposes of delay.
6. These aspects are discussed below.

The principles applicable to applications for summary judgment

7. The object of Rule 32 is to prevent a plaintiff's claim, when based upon certain causes of action, from being delayed by what amounts to an abuse of the process of the court. The plaintiff is allowed to apply for judgment to be entered summarily against the defendant, thus disposing of the matter without putting the plaintiff to the expense of a trial. The procedure is not intended to shut out a defendant who can show that there is a triable issue applicable to the claim as a whole from placing his or her defence before the court.²
8. Rule 32(3)(b) provides that a defendant in summary judgment proceedings may "*satisfy the court by affidavit ..., or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor*".
9. In *Breitenbach v Fiat SA (Edms) Bpk*³ the Court held as follows in relation to the defendant's affidavit:

² *Majola v Nitro Securitisation 1 (Pty) Ltd* 2012 (1) SA 226 (SCA) at 232F–G.
³ 1976 (2) SA 226 (T) at 228D–E. Emphasis added.

“... no more is called for than this: that the statement of material facts be sufficiently full to persuade the Court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. What I would add, however, is that if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the Court to consider in relation to the requirement of bona fides”.

10. The defendant who elects to deliver an affidavit in opposition to a summary judgment application must thus show that they have a *bona fide* defence to the action. They must fully disclose the nature and grounds of the defence, and the material facts relied upon and which they genuinely desire and intend to adduce at trial. The facts should not be inherently and seriously unconvincing and should, if true, constitute a valid defence.⁴ A *bona fide* defence is accordingly one that is good in law, and that is pleaded with sufficient particularity.⁵
11. In considering the amended Rule 32, the Court in *Tumileng Trading CC v National Security and Fire (Pty) Ltd*⁶ held that:

“... Rule 32(3), which regulates what is required from a defendant in its opposing affidavit, has been left substantively unamended in the overhauled procedure. That means that the test remains what it always was: has the defendant disclosed a bona fide (ie an apparently genuinely advanced, as distinct from sham) defence? There is no indication in the amended rule that the method of determining that has changed. The classical formulations in Maharaj and Breitenbach v Fiat SA as to what is expected of a defendant seeking to successfully oppose an application for summary judgment, therefore remain of application. A defendant is not required to show that its defence is likely to prevail. If a defendant can show that it has a legally cognisable defence on the face of it, and that the defence is genuine or bona fide, summary

⁴ See *Breitenbach supra* at 227G-228B; *Standard Bank of South Africa v Friedman* 1999 (2) SA 456 (C) at 461I-462G.

⁵ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426C-D.

⁶ 2020 (6) SA 624 (WCC) at para [13]. Emphasis added.

judgment must be refused. The defendant's prospects of success are irrelevant".

12. The word "may" in Rule 32(5) confers a discretion on the Court, so that even if the defendant's affidavit does not measure up fully to the requirements of subrule (3)(b), the Court may nevertheless refuse to grant summary judgment if it thinks fit.⁷ The discretion is not to be exercised capriciously, so as to deprive a plaintiff of summary judgment when he or she ought to have such relief.⁸
13. If it is reasonably possible that the plaintiff's application is defective or that the defendant has a good defence, the issue must be decided in favour of the defendant.⁹ If, on the material before it, the Court sees a reasonable possibility that an injustice may be done if summary judgment is granted, that is a sufficient basis on which to exercise its discretion in favour of the defendant.¹⁰
14. In the present matter there is no problem with the manner in which the defendant's defences have been pleaded. The issue is whether the defences are good in law.

The debt review order

15. The defendant's compliance with (or breach of) the debt review order takes centre stage in this application. It is common cause that the history of the defendant's debt review process is as follows.
16. The defendant applied to a debt counsellor for debt review in terms of section 86(1) of the NCA.¹¹ On 1 May 2022, the debt counsellor delivered to the plaintiff the required notice as contemplated in section 86(4)(b)(ii)¹² of the NCA. At the

⁷ *First National Bank of South Africa Ltd v Myburgh* 2002 (4) SA 176 (C) at 180D–E.

⁸ *Jili v Firststrand Bank Ltd* 2015 (3) SA 586 (SCA) at para [13].

⁹ *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 305C–F.

¹⁰ *First National Bank of South Africa Ltd v Myburgh supra* at 184H.

¹¹ "86(1) A consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted."

¹² "86(4) On receipt of an application in terms of subsection (1), a debt counsellor must-

time, the defendant was in arrears with his payments under the credit agreement in the amount of R11 283,39.

17. On 6 February 2023 the plaintiff accepted a debt rearrangement proposal which had been submitted by the debt counsellor on 31 January 2023. It was accepted and agreed that the monthly instalment due to the plaintiff under the credit agreement would be reduced to R2 892,00 per month over a period of 100 months, payable on the 25th day of each month.
18. On 25 May 2023 the debt review court granted a debt review order declaring the defendant over-indebted, rearranging the defendant's obligations to the plaintiff in accordance with the accepted proposal, and ordering the defendant to pay a total monthly amount of R3 343,93 directly to the so-called Payment Distribution Agency for distribution to the relevant creditors, including the plaintiff. The defendant was ordered to make his first payment under the debt review order on 7 June 2023.
19. The defendant breached the terms of the debt review order in relation to the plaintiff by failing to pay the full monthly instalment due to the plaintiff in terms thereof. Counsel for the defendant conceded that the defendant made "*sporadic and sometimes short payments*" of the instalments required by the debt review order. No payments were made for the months of June 2023 and October 2023. The defendant admits this. It appears from the Payment Distribution Agency's statement of account that the defendant consistently underpaid the agency over the period May 2023 to January 2024 although, as shall be set out below, he made two payments per month in July 2023 and in December 2023 respectively.

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- (a) provide the consumer with proof of receipt of the application;
 - (b) notify, in the prescribed manner and form-
 - (i) all credit providers that are listed in the application; and
 - (ii) every registered credit bureau."

20. In terms of the debt review order, as read with the plaintiff's letter of acceptance of the rearrangement proposal, the defendant had to pay a monthly instalment of R2 892,00 to the plaintiff. From when the debt review order was granted until 31 January 2024, when summons was issued, 8 instalments had been due and payable, namely:

	7 June 2023	R 2 892,00
	7 July 2023	R 2 892,00
.	7 August 2023	R 2 892,00
.	7 September 2023	R 2 892,00
	7 October 2023	R 2 892,00
.	7 November 2023	R 2 892,00
.	7 December 2023	R 2 892,00
.	7 January 2024	<u>R 2 892,00</u>
		<u>R23 136,00</u>

21. In the same period, the defendant made payments as follows:

.	26 May 2023	R 2 338,92
.	12 July 2023	R 2 164,79
.	1 August 2023	R 2 373,20
.	29 August 2023	R 2 342,30
.	27 September 2023	R 2 897,24
.	6 November 2023	R 2 897,24'
.	5 December 2023	R 2 897,24
	28 December 2023	R 2 897,24
	31 January 2024	<u>R 2 811,07</u>

R23 619.23

22. By 29 January 2024, the arrears on the defendant's account with the plaintiff had escalated to R47 083,89, and the full outstanding balance amounted to R188 798,67.¹³
23. Summons was issued on 31 January 2024. On that day, the defendant (via the Payment Distribution Agency) paid a sum of R2 881,07 to the plaintiff, which resulted in the paying up of the arrears under the debt review order.¹⁴
24. In calculating (on the papers) the amounts that have been paid to the plaintiff since the grant of the debt review order, the defendant erroneously included a payment allegedly made on 5 September 2023 in the amount of R2 348.79. No such payment was in fact made to the plaintiff - this much is clear from the statement of account. The total amount paid to the plaintiff under the debt review order is thus R23 619,24 (not R25 968,53 as set out in the papers), as opposed to the R23 136,00 that was due. Be that as it may, the defendant's contention still holds true, namely that he was not in arrears under the debt review order at the time when the summons was served on him on 7 February 2024. Whether this assists him in resisting summary judgment is dealt with below.

Default under the debt review order: was the plaintiff entitled to institute action?

25. It is convenient to deal with the defendant's defences together, as they are interlinked. As indicated, the defendant admits that he breached the terms of the debt review order over the months preceding the institution of the action.

¹³ The plaintiff's counsel handed up an updated certificate of balance, dated 19 March 2025. The arrears are currently R96 162,78, with a total outstanding balance of R195 033,46. The last payment that had been made was R592,00 on 28 February 2025.

¹⁴ Prior to the payment on 31 January 2024 the defendant had paid R20 738,17 in total over the preceding months. He was thus still in arrears on the day that summons was issued, but settled the arrears on that day.

He claims, however, that upon service of the summons in February 2024 he was no longer in default, because he had in fact paid more than what was required under the debt rearrangement up to that date. As a result, so the defendant argues, the plaintiff was not entitled to enforce the credit agreement under section 88(3) of the NCA by instituting action.

26. The defendant contends, in addition, that the plaintiff is prohibited by section 86(10)(b) of the NCA from terminating the debt review process in relation to the credit agreement, as his debt review application had already been filed in (and determined by) the debt review court. Counsel for the defendant did not press this contention during argument, but I shall nevertheless deal with it briefly, as it was pertinently raised on the pleadings in the action.

Termination of the debt rearrangement under section 88(3) of the NCA

27. Section 88(3) of the NCA reads as follows:¹⁵

“(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 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);¹⁶ or

¹⁵ Emphasis supplied.

¹⁶ “88(1) A consumer who has filed an application in terms of section 86(1), or who has alleged in court that the consumer is over-indebted, must not incur any further charges under a credit facility or enter into any further credit agreement, other than a consolidation agreement, with any credit provider until one of the following events has occurred:
 (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) the court having made an order or the consumer and credit providers having made an agreement re-arranging the consumer's obligations, all the consumer's obligations under the credit agreements as re-arranged are fulfilled, unless the consumer fulfilled the obligations by way of a consolidation agreement.”

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

28. The interpretation and implications of section 88(3) have been discussed in various cases over the years. I refer to the pertinent ones below. These include two cases in this Division, with different outcomes – an aspect upon which the defendant relies in support of his contention that he has a *bona fide* defence.
29. In *FirstRand Bank Limited v Fillis and another*,¹⁷ a decision of the Eastern Cape Division, Port Elizabeth (as it then was) delivered on 17 August 2010, the Court held that once the jurisdictional requirement set out in section 88(3)(a) co-exists with any one of the jurisdictional requirements set out in section 88(3)(b), it follows as a matter of interpretation that the credit provider is entitled to proceed with the enforcement of its rights under the credit agreement. This may be done without further notice to the defendant. The restraint placed upon a credit provider as a result of a credit review process and a rearrangement order in terms of section 86(7) of the NCA falls away on the express authority of section 88(3).¹⁸ The Court remarked that this interpretation accorded, too, with the provisions of section 129(2)¹⁹ of the NCA. As observed in *Fillis*:²⁰

"The Act provides very extensive protection to a consumer who has become over-indebted, whether it be of his or her own making or through circumstances beyond his or her control. Not only does a re-arrangement afford him or her alleviation from the onerous monthly obligations that he or she has in all seriousness undertaken to his or her credit providers, but he or she also enjoys the protection of section 103(5) against

¹⁷ 2010 (6) SA 565 (ECP) at paras [15], [16], and [18].

¹⁸ See also *FirstRand Bank Ltd v Kona and another* 2015 (5) SA 237 (SCA), in which *Fillis* was cited with approval: "[18] The moratorium is lifted by operation of law — and accordingly without the need to have the debt re-arrangement order set aside — once the consumer is in default of the relevant credit agreement and is in default of the debt re-arrangement order."

¹⁹ "129(2) Subsection (1) [the required notice of default] 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."

²⁰ *Fillis supra* at para [14]. Emphasis supplied.

the ravaging effect of escalating interest whilst he or she remains in default under the credit arrangement. If, however, he or she fails to embrace this opportunity, or he or she is, notwithstanding this very considerable assistance, unable to comply with his or her restructured debt commitment, the Act permits the common law to run its course."

30. In *Fillis*, the existence of the debt under the relevant credit agreement and the breach of the defendants' obligation thereunder were undisputed. Over the period from the date of the grant of the rearrangement order to the issue of summons, the defendants had paid R3 550,00 less, in total, than the amount stipulated in the rearrangement order.²¹ Summary judgment was accordingly granted against them, as well as an order declaring their immovable property specially executable.
31. In *Firststrand Bank Ltd v Fester*,²² a judgment delivered in this Division on 15 September 2011, the question arose whether a debt review terminated automatically by virtue of the consumer defaulting on his obligations under the debt review order, or whether the debt review is automatically reinstated in the event of the consumer remedying the default in respect of the debt review order. The defendants had defaulted on their payments under a debt arrangement order, but had remedied their breach and paid up the arrears during August 2011. At the time that the summary judgment application was heard they were therefore no longer in arrears under the debt review order, and they argued that the debt rearrangement had therefore not been terminated.²³
32. The Court held,²⁴ with reference to *Fillis*, that once the jurisdictional requirement set out in section 88(3)(a) co-exists with any of the jurisdictional requirements set out in section 88(3)(b), the rearrangement order automatically falls away and the relevant credit provider is at liberty to enforce, by litigation, any right

²¹ *Fillis supra* at paras [2] and [4].

²² [2011] ZAWCHC 363 (15 September 2011).

²³ *Fester supra* at para [2].

²⁴ *Fester supra* at para [4].

under the credit agreement, without further notice. It was held²⁵ that section 88(3) does not provide for an automatic reinstatement of the debt rearrangement upon a consumer remedying his default.

33. The Court held further²⁶ that the NCA does not give a court a discretion as to whether the statutory bar to enforcement is uplifted. Whether the jurisdictional requirements specified in section 88(3)(a) and (b) have been met is a purely factual enquiry.
34. In *Fester*, as in *Fillis*, there was no dispute about the existence of the original debt under the relevant credit agreement and the breach of the defendants' obligations thereunder.²⁷ Summary judgment was granted against the defendants, together with an order declaring their immovable property specially executable.
35. I pause at this juncture to point out that, in the present matter, the defendant admits defaulting on his obligations under the debt review order over the months preceding the institution of the plaintiff's action. It is, of course, not in dispute that he had previously defaulted on his obligations under the credit agreement. It is therefore common cause that the jurisdictional requirements set out in section 88(3)(a), read with section 88(3)(b)(ii), have been met. On the authority of *Fillis*²⁸ and *Fester*, the defendant's debt rearrangement in relation to the credit agreement was thus automatically terminated upon the first breach of the debt review order in relation to the plaintiff's claim.
36. *Fester* further confirms²⁹ that the debt rearrangement was not automatically reinstated by the defendant's subsequent "making up" of what he owed the plaintiff under the debt review order. It follows that, on the authority of *Fester*,

²⁵ *Ibid.*

²⁶ *Fester supra* at para [5].

²⁷ *Fester supra* at para [1].

²⁸ And the Supreme Court of Appeal in *Kona* (see fn 8 above).

²⁹ At para [6].

the defendant was in default and the plaintiff was entitled to enforce the credit agreement in terms of section 88(3).

37. The defendant refers, however, to *Absa Bank Limited v McEpieuw*,³⁰ an unreported decision delivered in this Division on 1 August 2013,³¹ in which the Court refused to grant summary judgment against a defendant who had twice over a 12-month period made short payments of what was due under a debt review order.
38. The facts underlying the decision in *McEpieuw* are not set out in the decision. What does appear from the judgment – which was given *ex tempore* – is that the Court was swayed by the fact that the defendant was no longer in arrears with his payments under the debt review order at the time when summons was issued, having remedied the situation prior to the institution of action. It is useful to set out the Court’s reasoning in this regard:³²

“While the defendant may have defaulted on one of more occasion, the defendant is not in arrears and was not in default of his obligation in terms of the debt restructuring order when summons was issued ... during the relevant period he paid to the plaintiff an amount of R42 082,86 whereas an amount of R33 001,15 was in fact payable in terms of the debt restructuring order...”

Over a period of 12 months two payments were not timeously made but the default was addressed shortly thereafter...

...Section 88(3)(b)(ii) of the Act is not severable from the act as a whole. The Act contains an interpretation section which expressly states that it is to be interpreted in such manner as to give effect to its purposes which are clearly set out in Section 3 of the Act, The purpose of the Act is set out in somewhat broad terms but in essence seeks to promote the social and economic benefit of all South Africans underpinned by a fair and transparent credit market.

³⁰ I requested the court file from Room 1 to consider the contents. It appears that the defendant’s surname was McEpieuw, and not McEpieow as indicated on the judgment.

³¹ Under case number 19252/2012.

³² At pp 2-4 of the judgment.

It seeks to address over-indebtedness, provides mechanisms for recording such problems and asserts as a principle the satisfaction by the consumer of all responsible financial obligations (See Section 3(g) of the Act.) In this instance, the debtor defendant appears to have been entirely responsible and it would hardly be consistent with the provisions of the Act or rather its socially salutary purposes to punish such a debtor in instances where the default is of no real value or, at least, has insignificant financial consequences”.

39. The Court in *McEpieuw* did not refer to *Ferris* or *Fillis*, and did not consider the effect of the automatic termination of the debt review arrangement that had occurred as a result the defendant’s default prior to the institution of the action. The Court also does not appear to have considered the fact that the debt rearrangement had not automatically been reinstated upon the defendant’s payment of the arrears under the debt review order.
40. The Court, whilst accepting the plaintiff’s submission that the plaintiff had been entitled to institute action under section 88(3)(b)(ii), clearly refused the application for summary judgment on an equitable basis in the exercise of its discretion, because it was of the view that the defendant was a responsible consumer and his default under the debt review order was “*of no real value or, at least, [had] insignificant consequences*”.³³
41. *McEpieuw* was relied on in another matter in the Eastern Cape Division, namely *Absa Bank Ltd v Jacobs*.³⁴ This was an application for default judgment, which was refused on 6 November 2014. In *Jacobs*, the defendant had also paid more in total than what was due under the debt review order, although the plaintiff argued that she had breached the order over various months preceding the institution of the action.³⁵

³³ At p. 4 of the judgment.

³⁴ 2015 JDR 0927 (ECP).

³⁵ At para [19].

42. The Court held that the plaintiff had not established that the defendant was in fact in default of the debt review order. This was because the Court found that there was no indication that the defendant had not timeously made the required payments to the relevant payment distribution agency. The debt review order did not stipulate when the defendant was to make payment to the agency. If there were delays in the making of payments to the plaintiff, then those delays were to be laid at the agency's door, not the defendant's.³⁶

43. The Court referred to the remarks in *McEpieuw* regarding the social and economic purposes of the NCA.³⁷ It remarked,³⁸ in relation to the plaintiff, that:

" ... it is reasonably expected that an established creditor will demonstrate understanding, maturity and fairness in its dealings with struggling, but honest and responsible debtors. In casu the plaintiff, by pursuing the action and this application for default judgment, despite having received payments in excess of that required by the order, seems to me to be lacking in "understanding, maturity and fairness" in its dealings with the defendant. This is clearly not a matter where the defendant is seeking to frustrate the enforcement of the plaintiff's debt."

44. The Court in *Jacobs* was also dissuaded from granting default judgment because of the circumstances surrounding the defendant's failure to appear:³⁹

"The defendant's failure to defend the plaintiff's action, when she has paid an amount in excess of that required by the order, is surprising. She may well consider that there is no need to defend the action as the plaintiff is prohibited from litigating against her, it having failed during the course of the past four years to indicate that it was dissatisfied with the manner in which it was receiving payment. Furthermore, it may well be that the defendant is not aware of the pending litigation, as the only document provided to her was the summons, which was served (in compliance with the uniform

³⁶ See *Jacobs supra* at paras [20]-[24].

³⁷ At para [8].

³⁸ At para [28].

³⁹ *Jacobs supra* at para [30].

rules) by the sheriff affixing it to the front door of her chosen domicilium. The plaintiff has been unable to indicate whether or not the domicilium address is the defendant's home address. In these circumstances it seems to me appropriate to direct that personal service on the defendant is required before any further proceedings are prosecuted against her to enforce the provisions of the loan agreement and the mortgage bond."

45. The defendant in the present matter argues that, as he had remedied his default under the debt review order prior to service of the summons, the approach taken in *McEpieuw* and *Jacobs* is to be preferred over that taken in *Fillis* and *Fester*.
46. I think, however, that the defendant's case is distinguishable from *McEpieuw* as well as from *Jacobs* on the facts. The defendant short-paid the plaintiff 5 times over a 12-month period in comparison to the 2 instances of default in *McEpieuw* over the same period. In the present matter the defendant paid up the arrears on the very day that the summons was issued (31 January 2024), while in *McEpieuw* the arrears had been paid about a month before the institution of the plaintiff's action. In the present matter the asset purchased on credit is a motor vehicle, whilst in *McEpieuw* the defendant's immovable property was at stake.
47. *Jacobs* concerned an application for default judgment as opposed to summary judgment, and various additional factors were at play. In *Jacobs* there was not only a monetary judgment at stake, but also the question whether the defendant's immovable property should be declared specially executable. The Court found, on a consideration of the available evidence, that the plaintiff had not proven the defendant's breach of the debt review order. In the present matter such breach is common cause on the papers.
48. All of this may perhaps amount to splitting hairs. What is more important is the fact that whatever uncertainties there could have been as to the proper

approach in matters such as these were removed by subsequent decisions from the Constitutional Court as well as the Supreme Court of Appeal.

49. Shortly after *McEpieuw*, on 12 December 2013,⁴⁰ the Constitutional Court clarified the level of compliance required from a consumer under debt review under section 88(3). In *Ferris and another v Firstrand Bank Ltd*⁴¹ it was held that actual – as opposed to substantial - compliance with a debt review order is required:

“[20] ... Mr and Mrs Ferris submit that they 'substantially' complied with the debt-restructuring order. They urge us to hold that because they substantially complied, they cannot be said to have breached the order, and so FirstRand may not enforce the loan. This contention is not convincing.

[21] While our law recognises that substantial compliance with statutory requirements may be sufficient in certain circumstances, Mr and Mrs Ferris have not given compelling reasons why a substantial-compliance standard would be useful or appropriate in determining compliance with a debt-restructuring order. On the contrary, there is no indication in the wording of the Act or the debt-restructuring order that anything less than actual compliance is required. ...”

50. In the present matter is it common cause that the defendant in fact did not comply with the debt review order. He was in breach of the order, whether or not he subsequently paid up the arrears.
51. The Constitutional Court in *Ferris* expressly endorsed⁴² the approach in *Fillis* (followed in *Fester*) that once the jurisdictional requirement set out in section 88(3)(a) co-exists with any of the jurisdictional requirements set out in section 88(3)(b), the rearrangement order automatically falls away and the relevant

⁴⁰ *Jacobs* was determined after *Ferris*, but given the Court's finding on the evidence as to the defendant's (lack of) default, it was not necessary for the Court in *Jacobs* to consider the implications of section 88(3) of the NCA in the specific circumstances of the case.

⁴¹ 2014 (3) SA 39 (CC) at paras [20]-[21]. Emphasis supplied.

⁴² *Ferris supra* at paras [14]-[16].

credit provider is at liberty to enforce, by litigation, any right under the credit agreement:

“[14] ... Mr and Mrs Ferris breached the debt-restructuring order. Once the restructuring order had been breached, FirstRand was entitled to enforce the loan without further notice. This is clear from the wording of the relevant sections of the Act. Section 88(3)(b)(ii) does not require further notice — it merely precludes a credit provider from enforcing a debt under debt review unless, among other things, the debtor defaults on a debt-restructuring order. Moreover, s 129(2) expressly stipulates that the requirement to send a notice under s 129(1) is not applicable to debts subject to debt-restructuring orders.

[15] ...

[16] It seems to me that an original credit agreement is enforceable without further notice if the relevant debt-restructuring order is breached....”

52. In *Jili v FirstRand Bank Ltd t/a Wesbank*⁴³ the Supreme Court of Appeal dealt with a consumer who was in breach of a debt review order. She was admittedly still in arrears when summons was issued:⁴⁴

“[6] In March and April 2012, the appellant fell into arrears in respect of her rescheduled repayments to the bank but made this default good in July 2012. In the meantime, on 25 May 2012, the bank instituted an action against the appellant for the return of the vehicle and recovery of the debt. The action was defended. On 24 August 2012 the bank applied for summary judgment. The application was opposed. It was common cause that the appellant had not purged her default by the time the application for summary judgment was heard.

[7] In her affidavit resisting summary judgment, the appellant said the following:

‘. . . On 11 June 2012 my attorney confirmed in writing a proposal that I would bring the arrears up to date by paying the arrears of R3428.86, and requested the plaintiff’s attorneys to take instructions in this regard... This proposal –

⁴³ 2015 (3) SA 586 (SCA). Two judgments were delivered, both coming to the same conclusion, albeit for slightly different reasons.

⁴⁴ See *Jili supra* at paras [6]-[8] (per Willis JA). Emphasis supplied.

which I respectfully submit was a most reasonable proposal – was made in the spirit of keeping alive the rearrangement order that had been made and enabling me ultimately thereby to satisfy in due course all my financial obligations to all of the credit providers concerned, including the plaintiff. However, it was summarily rejected by the plaintiff’

The appellant’s defence is, in effect, a plea ad misericordiam.

[8] The bank succeeded. Referring to the provisions of s 88(3) of the NCA, the high court relied strongly on the judgment of Eksteen J in FirstRand Bank Ltd v Fillis & another to hold that, once a debtor has defaulted in terms of an order by a magistrate for the re-arrangement of debt, the order is automatically terminated. Correspondingly and simultaneously, in the view of the court, the termination of the order gave rise to the requisite jurisdictional facts that enable a creditor to proceed to obtain judgment against the debtor. The high court found that the appellant had no bona fide defence to the application for summary judgment and, in the result, granted the relief sought by the bank.”

53. The Supreme Court of Appeal did not accept the appellant’s argument that *Fillis*, upon which the High Court had relied in granting summary judgment, had been wrongly decided. On the contrary, the Supreme Court of Appeal pointed out⁴⁵ that *Fillis* had been approved by the Constitutional Court in *Ferris*.

“[23] It was argued on behalf of the appellant that Fillis had been wrongly decided, but the insurmountable problem facing the appellant in this regard is the fact that the Constitutional Court has already reached the contrary conclusion in Ferris v FirstRand Bank Ltd ...

[24] Counsel for the appellant argued that the conclusion of the Constitutional Court in regard to s 88 was both obiter and clearly wrong, and that this court was entitled to reach a contrary conclusion. I do not agree. In the first instance, such conclusion is in my view clearly right. But in any event, the contention that it was obiter is unsustainable. The appellants in Ferris had sought to rescind a default judgment on the basis that it had been erroneously sought or granted against them as there was a debt re-arrangement order in place. Although that order recorded that the rights and

⁴⁵ *Jili supra* at para [23] (per Leach JA).

obligations amended by the order would be 'fully enforceable' in the event of the order being breached, this did no more than spell out the effect of s 88(3). The clear ratio decidendi of the case was that the breach of the debt re-arrangement order entitled the bank to enforce the loan without further notice."

54. The Supreme Court of Appeal expressly dealt with the exercise of the Court's discretion in summary judgment applications where the underlying debt was undisputed:⁴⁶

*"[10] ... the appellant also submitted that an important purpose of the NCA is to promote non-litigious methods of resolving consumer defaults and that 'weight must be given to constitutional considerations in assigning meaning to the statute's provisions. 'The appellant furthermore contended that a court always had a discretion to refuse to grant summary judgment and that in this particular case the discretion should so be exercised. ... The respondent supported the Constitutional Court's reasoning in *Ferris v FirstRand Bank* and submitted that the discretion to refuse summary judgment was confined to situations where there was doubt about the indebtedness of the defendant, which obviously was not the position in the present case.*

...

*[13] ... Insofar as the question of the high court's discretion to grant or refuse the application for summary judgment is concerned, the critically relevant fact is that it is common cause that the appellant had no defence, recognised in law, to the fact that she was indebted to the bank. It is indeed trite that a court has a discretion as to whether to grant or refuse an application for summary judgment. Although *Breitenbach v Fiat SA (Edms) Bpk* has made it plain that a court should exercise a discretion against granting such an order where it appears that there exists 'a reasonable possibility that an injustice may be done if summary judgment is granted' the context in which that was said indicates that this precaution applies in situations where the court is not persuaded that the plaintiff has an unanswerable case.*

[14] It is a different matter where the liability of the defendant is undisputed: the discretion should not be exercised against a plaintiff so as to deprive it of the relief to

⁴⁶ See paras [10]-[14] (per Willis JA). Emphasis supplied.

which it is entitled. Where it is clear from the defendant's affidavit resisting summary judgment that the defence which has been advanced carries no reasonable possibility of succeeding in the trial action, a discretion should not be exercised against granting summary judgment...."

55. Leach JA , in turn, discussed⁴⁷ the exercise of the Court's discretion as follows:

"[26] I turn to the appellant's submission that even if she has no defence, the court a quo should have exercised its discretion to refuse summary judgment and thereby afforded her the opportunity of fulfilling her obligations under the debt re-arrangement order. In advancing this argument, counsel for the appellant emphasised that the NCA was intended to protect consumers and to promote social and economic welfare and a fair, transparent, competitive, effective and accessible credit market."⁴⁸

[27] The simple answer to this argument is, of course, that a court's discretion to refuse summary judgment is limited to those cases where there may be some doubt as to the defendant's liability. There is no such doubt in this case. It is not disputed that the respondent is entitled to the order that it seeks if the debt re-arrangement order earlier granted by the magistrate does not bar the respondent's claim which, for the reasons already given, it does not.

[28] Moreover, ... notwithstanding the objective of the NCA to protect consumers, there has to be a careful balancing of the competing interests sought to be protected and further that the interests of creditors should 'also be safeguarded and should not be overlooked'."⁴⁹

[29] The appellant has already enjoyed the considerable benefit afforded by a debt re-arrangement order that substantially reduced her monthly instalments and at the same time increased the period available to her to effect repayment. ...

[30] To allow the appellant, who has spurned the advantages flowing from the magistrate's order of 4 November 2011 by defaulting in her payments, a yet further opportunity to attempt to get her affairs in order at the expense of the respondent who is entitled to the relief it seeks, would not be in the interests of justice. To refuse summary judgment would be to afford the appellant a further advantage not envisaged

⁴⁷ See *Jili supra* at paras [26]-[30]. Emphasis supplied.

⁴⁸ See *McEpieww supra*.

⁴⁹ Ibid.

by the NCA — and a second bite at the cherry, so to speak — to the detriment of the clear rights of the respondent.”

56. I am of the view that the approach taken in *Jili* (and the underlying case law, including *Fillis* and *Ferris*) is squarely applicable to the present matter. Although the Supreme Court of Appeal remarked⁵⁰ that it was common cause that the appellant had not purged her default by the time the application for summary judgment was heard, I do not think that the fact that the defendant in the present case subsequently paid up his arrears under the debt review order makes any difference.
57. The result of the common cause default was that the debt rearrangement in relation to the plaintiff’s credit agreement terminated automatically. Payment of the arrears (on the day that the summons was issued) did not reinstate the rearrangement. I do not agree with counsel for the defendant’s submission that *McEpieuw* “confirmed that, even if a consumer has been in default with a debt review order at some stage, he or she can expunge such default by future payments, which in effect means that the interpretation [in *Fester*] that non-payment ‘automatically’ terminates a Debt Review Order cannot be correct.” *McEpieuw* confirmed nothing of the sort, and the subsequent authorities made the position crystal clear.
58. Section 88(3) does not make provision for a see-saw situation in which debt rearrangements are terminated and reinstated upon every breach and paying-up, time after time. The rearrangement was no longer in place when the summons was served, and it was not in place when the application for summary judgment was argued. There was accordingly nothing barring the plaintiff from instituting action and from persisting with the relief sought.
59. It is common cause that the defendant is indebted to the plaintiff under the credit

⁵⁰ *Jili supra* at paras [6] and [25].

agreement, and that he is in default of his obligations under that agreement. He has no defence. In these circumstances, I am not inclined to exercise my discretion in favour of the defendant.

Termination of the debt review process under section 86(10)(b) of the NCA

60. What role does section 86(10)(b) of the NCA play? The section reads as follows:

*"No credit provider may terminate an application for debt review lodged in terms of this Act, if such application for review has already been filed in court or in the Tribunal."*⁵¹

61. As indicated earlier, a creditor's entitlement to proceed with the enforcement of the original obligations under the credit agreement in the event of the consumer defaulting on the terms of a debt rearrangement order was confirmed by the Constitutional Court in *Ferris*.⁵² In a case such as the present, there was no need for the plaintiff to terminate the debt rearrangement, because termination occurred automatically under section 88(3) of the NCA once the defendant had defaulted on his obligations under such rearrangement.⁵³ Section 86(1)(b) therefore does not come into play, and the defendant's reliance thereon is misplaced.

Conclusion

62. I find, on the basis of the discussion above, that the defendant has no *bona fide* defence to the summary judgment application. The plaintiff is entitled to the relief sought.

Costs

⁵¹ Emphasis supplied.

⁵² *Ferris supra* at para [16].

⁵³ See *Fester supra* at para [6].

63. There is no reason why costs should not follow the event.
64. The credit agreement concluded in relation to the vehicle provides that the plaintiff will be entitled to costs on the scale as between attorney and client if litigation is required to enforce the plaintiff's rights under the agreement.

Order

65. In the circumstances, I grant the following relief:

1. **Summary judgment is granted against the defendant for:**
 - 1.1 **confirmation of termination of the credit agreement concluded between the parties under account number 9[...] on 2 July 2021; and**
 - 1.2 **the return of the motor vehicle described as a 2016 Volkswagen Polo Vivo GP 1.4 Street 5Dr with engine number CLP[...] and chassis number AAV[...] , from wherever it may be found.**
2. **The defendant shall pay the plaintiff's costs of suit on the scale as between attorney and client.**
3. **The plaintiff's claim for damages is postponed *sine die*.**

P. S. VAN ZYL

Acting judge of the High Court

Appearances:

For the plaintiff:

Ms S. Sundelson, instructed by Strauss Daly
Incorporated

For the defendant:

Mr J-H Gous, instructed by E. Rowan
Incorporated