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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, PRETORIA**

CASE NUMBER: 1208/2024

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED: YES/NO

DATE 06/03/2026

SIGNATURE

In the matter between:

CHANGING TIDES (PTY) LTD N.O.

APPLICANT

and

NOLEEN MOSES

RESPONDENT

(IDENTITY NUMBER : 6[...])

JUDGMENT

[1] There are two applications which serve before this Court, namely; an application for summary judgment and an application in terms of Rule 46A to have the Respondent's immovable property be declared specially executable

and the latter will be entertained if the summary judgment application is successful.

[2] Initially, the Respondent raised three special pleas in her affidavit resisting summary judgment but decided to persist with the third special plea and abandoned the remainder of the special pleas.

[3] The Applicant seeks summary judgment against the Respondent for payment in the amount of R 561 734.127 together with interest.

[4] The Respondent's defence in essence is premised on:

4.1 the fact that the Respondent has applied for debt review on 22 March 2023 after a section 129 notice was served on her;

4.2 the Applicant's account was included in the form 17.1 during the debt review process and is in fact still under debt review;

4.3 the Applicant's letter of termination did not comply with the provisions of National Credit Act, 34 of 2005 ("the Act").

[5] The Applicant's claim is based on two loan agreements which is secured by mortgage bond in favour of the Applicant, the Respondent applied for debt review in the Magistrate's Court and the Applicant alleges that it terminated the debt review by giving notice under section 86(10).

[6] It is the Respondent's case that the section 86(10) notice did not comply with the Act and accordingly, the Applicant could not have proceeded with the institution of legal proceedings against the Respondent.

[7] Section 86(10) of the Act provides:

"(10)(a) 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, at any time at least 60 business days after the date on which the consumer applied for the debt review, give notice to terminate the review in the prescribed manner to-

i. the consumer;

ii. the debt counsellor; and

iii. the National Credit Regulator; and

(b) 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 a court or in the Tribunal."

- [8] Whilst section 86(10) entails that the Applicant has the right to terminate the debt review the Applicant had to follow the notice process as set out above, which the Applicant failed to do.
- [9] The Respondent's defence is not mere a technical defence as alleged by the Applicant as a section 86(10) notice is a statutory pre-enforcement notice that must be delivered by the credit provider before he can proceed with enforcement in respect of a credit agreement which is being reviewed in terms of section 86.
- [10] In *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors 2009 (2) SA 512 (D)* it was held that the notice of termination of debt review in terms of section 86(10) is a necessary first step before the credit provider proceeds to commence litigation.
- [11] In *SA Taxi Securitisation (Pty) Ltd v Booï (unreported ECG case no: 4077/2009)* the Court held that if a credit provider issues summons in circumstances in which a debt review has not been properly terminated, the issuing of summons would have been premature.
- [12] The method of delivery of the section 86(10) notice is not prescribed. However, it is a pre-enforcement notice like the section 129(1)(a) notice, the same considerations ought to apply to "delivery" of a section 86(10) notice.

[13] In *Standard Bank of South Africa v Wessels and Others* [2012] ZAGPPHC 166 (20 April 2012) the Court held that:

"[28] It is clear from a reading of the Act that a debt counsellor is a very important cog in the debt review machinery and clearly a very important person in the life of a consumer who has applied for debt review. One can say this without even listing the functions and duties of a debt counsellor. The importance of the debt counsellor and the fact that he should be notified with regards to anything that pertains to consumers for whom he acts as debt counsellor, in particular when the debt review process which he manages or participates in is sought to be terminated is readily understandable. It is quite easy to envisage that the legislature would have envisaged and intended that documents of this nature be "served" on a debt counsellor. In the absence of any other provision in the Act or as prescribed in the regulations, I find that Section 168 is applicable to notices sent in terms of Section 86(10) to debt counsellors, i.e., they must be delivered or sent by registered mail. The practice of plaintiffs by unilaterally choosing to send these notices by e-mail or, as in the case in case 68363/2011 by fax, does not comply with the Act."

[14] Section 168 of the Act provides:

"Unless otherwise provided in this Act, a notice, order or other document that, in terms of this Act, must be served on a person will have been properly served when it has been either-

- a. *delivered to that person; or*
- b. *sent by registered mail to that person's last known address."*

[15] In *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1 the Court held:

'139] In sum, the Act does not require a credit provider to bring the contents of a section 129 notice to the subjective attention of a consumer. Rather, delivery consists of taking certain steps, prescribed by the Act, to apprise a reasonable consumer of the notice. Thus, a credit provider's obligation may be to make the section 129 notice available to the consumer by having it delivered to a designated address. When the consumer has elected to receive notices by way of the postal service, the credit provider's obligation to deliver generally consists of dispatching the notice by registered mail, ensuring that the notice reaches the correct branch of the Post Office for collection and ensuring that the Post Office notifies the consumer (at her designated address) that a registered item is awaiting her collection. This is subject to the narrow qualification that, if these steps would not have drawn a reasonable consumer's attention to the section 129 notice, delivery will not have been effected. The ultimate question is whether delivery as envisaged in the Act has been effected. In each case, this must be determined by evidence.

[40] The interpretation of "delivery" set out in the preceding paragraph is consonant with the statutory objectives of consumer protection and consensual dispute resolution in that it imposes obligations on the credit

provider to ensure that the consumer is adequately informed of her statutory rights to seek extra-curial assistance. It also reflects an appropriate balancing of interests: while the obligation to deliver the section 129 notice rests on the credit provider, if the consumer acts unreasonably the credit provider may go ahead and seek enforcement of the credit agreement notwithstanding the consumer's failure to engage with the contents of the notice."

[16] The Court went further in the *Kubyana* judgment and held that in order to proof delivery the credit provider need to proof the following:

"[154] The Act prescribes obligations that credit providers must discharge in order to bring section 129 notices to the attention of consumers. When delivery occurs through the postal service, proof that these obligations have been discharged entails proof that-

- (a) the section 129 notice was sent via registered mail and was sent to the correct branch of the Post Office, in accordance with the postal address nominated by the consumer. This may be deduced from a track and trace report and the terms of the relevant credit agreement;*
- (b) the Post Office issued a notification to the consumer that a registered item was available for her collection;*

- (c) *the Post Office's notification reached the consumer. This may be inferred from the fact that the Post Office sent the notification to the consumer's correct postal address, which inference may be rebutted by an indication to the contrary as set out in [52] above; and*
- (d) *a reasonable consumer would have collected the section 129 notice and engaged with its contents. This may be inferred if the credit provider has proven (a)-(c), which inference may, again, be rebutted by a contrary indication: an explanation of why, in the circumstances, the notice would not have come to the attention of a reasonable consumer."*

[17] The Applicant should accordingly proof that the section 86(10) notice was delivered as set out in the *Kubyana* judgment on both the Respondent and the debt counsellor. It has become standard practice over the years that notice to the National Credit Regulator of the termination is given to the designated email address being: t[...].

[18] From the loan agreement, the Applicant has elected a chosen *domicilium citandi et executandi* as 2[...] Z[...] G[...] Avenue, Eersterus, Pretoria, Gauteng, South Africa, 0[...] and no mention was made of any email address.

[19] From the track and trace report of the Applicant it is noteworthy that the notice never reached the Eersterus postal office and accordingly, it is submitted that the notice was never delivered to the Applicant.

[20] When one has regard to the delivery of the notice to the debt counsellor, the then debt counsellor's address indicated on the form 17.7 notice was 4[...] D[...] H[...] Crescent, Presequor Close, 0020.

[21] It should be noted that in the proof of dispatch by pre-paid registered post annexed to the Applicant's particulars of claim the notice was posted to the incorrect postal code being: 0[...] and from the track and trace report it is apparent that the notice was never delivered to the Persequor postal office nor would it have reached the Persequor office as the incorrect postal code was used.

[22] The Applicant failed to comply with the requirements set out in section 86(10) and in terms of section 130(4)(b) if a credit provider has not complied with the relevant provisions of the Act the Court must adjourn the matter before it and make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed.

[23] Although section 130(3)(a) does not expressly refer to compliance with section 86(10), it does refer to compliance with section 129. When one has regard to section 129 it becomes apparent that section 129(1)(b) requires compliance with either section 129(1)(a) or section 86(10) before legal proceedings to enforce a credit agreement may be commenced.

[24] In *Mnguni and Another v Absa Bank Ltd and Others* [2013] ZAGPPHC 81 the Court held that the fact that a track and trace report in this instance showed that

the section 86(10) notice, which although sent by registered post and delivered to the correct post office, however indicated that the notice was not collected and this constituted sufficient proof of non-compliance with section 86(10). The Court also indicated that in such non-compliance with the provisions of section 86(10) leads to a pause and not a nullity and that a section 130(4) order was appropriate to address such non-compliance.

[25] Considering the Applicant's non-compliance with section 86(10) the Applicant could not commence with any legal proceedings before there was full compliance with section 86(10).

[26] The section 86(10) procedure appears to be a unilateral procedure available to a credit provider. However, a consumer against whom a pending debt review was terminated is not without redress as section 86(11) provides that if a credit provider who has in terms of section 86(10) given notice to terminate a debt review as contemplated in section 86 proceeds to enforce the 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 that the court considers to be just in the circumstances. A notice of termination in accordance with section 86(10) is thus a prerequisite for the operation of section 86(11). The wording of section 86(11) indicates that this section may be invoked only once the credit provider has proceeded to enforce the credit agreement and that the appropriate Court to approach in this regard is the Court in which the credit agreement is being enforced.

[27] It is clear that the credit agreement was not properly enforced and the legal proceedings were instituted prematurely and therefore the argument by the Applicant regarding the application of section 86(11) should not be entertained.

[28] In my view, the Respondent demonstrated that she has a *bona fide* defence and summary judgment ought to be dismissed.

[29] In the circumstances, I will not entertain the application in terms of Rule 46A.

[30] In the circumstances then following order is made:

1. The summary judgment application is dismissed.
2. Leave to defend is granted
3. Costs to be costs in the cause.

MODISA AJ
JUDGE OF THE HIGH COURT
PRETORIA

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