

**IN THE KWAZULU NATAL HIGH COURT, PIETERMARITZBURG  
REPUBLIC OF SOUTH AFRICA**

**CASE NO.: 4096/10**

Reportable

In the matter between:

**FIRSTRAND BANK LTD**

**PLAINTIFF**

and

**VUSI EMMANUEL MVELASE**

**DEFENDANT**

**JUDGMENT**

**D PILLAY J**

1. In this application for summary judgment the Court has to decide whether a credit provider may enforce a credit agreement after terminating debt review proceedings in the Magistrates' Court in terms of s 87 (10) of the National Credit Act No 34 of 2005 (the NCA). Can a notice in terms of s 86 (10) lawfully terminate the debt review pending before a Magistrates' Court? Which Court has jurisdiction to hear a debt review when it resumes in terms of s 86 (11)?
2. The ambiguity in the text of the NCA leads to three possible models for processing credit agreements through debt review and enforcement by litigation. I discuss the three models and decide which one best achieves the purposes of the NCA.

## The Facts

3. The plaintiff is a registered credit provider in terms of s 40.
4. The defendant is indebted in terms of a mortgage bond registered for R1 280 00.00 plus R256 000.00. The balance outstanding on the mortgage bond as at 2 June 2010 is R1 368 972.84 plus interest at the rate of 8.2% per annum from 1 June 2010 to date of payment.
5. As at 2 June 2010 the defendant's arrears in terms of the mortgage bond amounted to R209 214.88. His monthly instalment is R12 416.16.
6. On 13 November 2009 the debt counsellor referred the matter to the Magistrate's Court for debt review in terms of s 86 (8) (b) for an order in terms of s 86 and 87 of the NCA.
7. On 30 April 2010 the plaintiff notified the defendant that:
  - a) its account was in arrears;
  - b) sixty (60) business days had lapsed since the defendant applied for debt review and; and
  - c) the plaintiff was terminating the review with immediate effect in terms of s 86 (10).
8. The defendant remained in default of the mortgage bond for more than twenty (20) business days after receiving the s 86 (10) notice.
9. On 14 May 2010 the plaintiff notified the defendant at its *domicilium citandi et executandi* in terms of s 129 (1) that:
  - a) its loan account was in arrears in the amount of R196 798.72 for at least twenty (20) business days; and
  - b) unless the defendant exercised certain options within ten (10)

business days to repay the debt, the plaintiff would have the right to institute legal proceedings for the recovery of the entire balance owing by the defendant.

10. One of the options was for the defendant to approach a debt counsellor for advice on his financial position. However, the defendant had already applied for debt review which was terminated by the 86 (10) notice whilst the review was pending in the Magistrates' Court.
11. The defendant failed to respond to the notice in terms of s 129 (1) within ten (10) business days.
12. On 3 June 2010 the plaintiff's attorneys certified that the plaintiff complied with s 129 (1) (a).
13. On 8 June 2010, more than six months after the defendant applied for debt review, the plaintiff issued summons for the full balance due by the defendant.

### **Defendant's grounds for resisting summary judgment**

14. The defendant pleads that its opposition is *bona fide* and not proffered for the purposes of delay. It alleges that it is over indebted in terms of s 79 of the NCA. As his application for debt review in terms of s 87 preceded the plaintiff's summons, the plaintiff's notice in terms of s 86 (10) did not entitle it to issue summons against him. He accordingly denies that the plaintiff terminated his debt review lawfully.
15. Furthermore, the defendant acts in good faith; he continues to pay the debt voluntarily in terms of s 126 in substantial instalments even though the debt review order has not been granted and he is not obliged to pay. The plaintiff is only entitled to payment when the Magistrates' Court determines the s 87 application. Whilst that application is

pending he cannot be “in arrears” in terms of the debt review proposal.

16. He contends that his ss 86 and 87 applications for debt review give him *bona fide* defences to the summary judgment application.

17. A defence not raised in his opposing affidavit but in his heads of argument is that the deponent of the affidavit in support of the summary judgment is “not evidentially qualified”.<sup>1</sup>

18. Another defence not raised in his pleading but in his heads of argument is that the plaintiff has not produced proof of delivery of its s 86 (10) notice on the debt counsellor and the National Credit Regulator.

## **Analysis**

19. The starting point of my analysis is the purpose of the NCA.<sup>2</sup> Under the common law and the freedom of contract, consumers are particularly vulnerable at the hands of credit providers. Consumers as a group have some members who are more vulnerable than others because of their poverty, race, gender, social standing, lack of education, amongst other disadvantages. The overriding purpose of the NCA is to protect consumers from a relatively unbridled freedom of contract, to improve their bargaining position through better access to information and to enhance their economic position through fair access to credit. In this way the NCA strives to strike a fairer balance between the rights of consumers and credit providers than that which prevails under the common law. An important concern therefore is about elevating vulnerable consumers in relation to credit providers to balance their rights.

20. The NCA strikes this balance<sup>3</sup> through a push-pull tension which

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1 Paragraph 3 of the Defendant’s Heads of Argument

2 S 3

3 *Rossouw and Other v First National Bank Ltd t/a FNB Home Loans* Case No 640/2009 [2010] ZASCA 130 (30 September 2010) at para 17, 32; *BMW Financial Services (South*

ensures that whenever sections of the NCA tip the scales in favour of the consumer, countervailing rights of the credit provider in other sections sway the balance in favour of the latter, and *vice versa*. Ultimately the NCA aims to “provid(e) for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.”<sup>4</sup>

21. Not only are the interests of consumers and credit providers at stake when determining where the balance should be struck but also the national economic interest is affected by consumer borrowing and over or under spending and credit providers’ ability to recover debts. Over or under protecting either the consumer<sup>5</sup> or the credit provider runs the risk of distorting the balance.<sup>6</sup>

### **The Scheme of the NCA**

22. In proceedings to enforce a credit agreement through litigation that balance is struck in four ways: first, s 130 sets certain pre-requisites for litigation; second, the consumer has prescribed time limits to react to notices from the credit provider;<sup>7</sup> third, the credit provider is delayed from approaching the court in certain circumstances;<sup>8</sup> last, the powers of the court hearing the enforcement claim are limited.<sup>9</sup>

23. From analysing how these four mechanisms fit together at least three models are discernable: Model One permits litigation early in the debt recovery process whilst the debt review is underway before a debt

*Africa) (Pty Ltd v Mudaly* 2010 (5) SA 618 (KZD) para 16 per Wallis J;

4 S 3 (i); *SA Taxi Securitisation (Pty) Ltd v Mbatha and Similar Cases* 2010 JDR 0473 (GSJ) para 30-38 per PN Levenberg AJ

5 *Standard Bank of SA Ltd v Kruger; Standard Bank of SA v Pretorius* 2010 (4) SA 635 (GSJ) para 11 Kathree-Setiloane AJ. Contrast with *SA Taxi Securitisation (Pty) Ltd v Nako and Others* (19/2010, 21/2010, 22/2010, 77/2010, 89/2010, 104/2010, 842/2010 [2010] ZAECBHC 4 (8 June 2010) at para 38, 44 Kemp AJ

6 *Firststrand Bank Ltd t/a First National Bank v Seyffert and Another* 212862/2010; [2010] ZAGPJHC 88 (11 October 2010) paras 10; 14 per Willis J

7 S 130 (1)

8 S 130 (3)

9 S 130 (4)

counsellor or Magistrates' Court. At the other extreme Model Two permits litigation only after debt review is completed. Between these extremes Model Three permits litigation to interrupt debt review but also recognises that the court enforcing the credit agreement can conduct the debt review itself in certain limited circumstances, refer it back to the Magistrates' Court or grant an order that also complies with the NCA and its purposes.

24. Three models emerge because the NCA is ambiguous in parts. That judicial opinion varies between the first two models with signs of a move towards Model Three evidences the ambiguity.<sup>10</sup>

25. In this judgment I outline the scheme of the NCA to show how the four mechanisms identified above interface to achieve the purposes of the NCA. I identify some of the arguments for Model One and Model Two and explain my preference for Model Three.

*Prerequisites, timeframes and hurdles*

26. The scheme of the NCA coalesces in s 130; subsection (1) sets the following prerequisites for litigation:<sup>11</sup>

- a) The consumer must be in default under the credit agreement;
- b) Such default must persist for at least 20 business days;
- c) The credit provider must deliver a notice to the consumer as contemplated in s 86 (10)<sup>12</sup> or s 129 (1);
- d) Ten days must have elapsed after delivery of the s 86 (10) or s 129 (1) notice as the case may be; and
- e) The consumer either does not respond to the s 129 (1) notice or rejects the credit provider's proposals.

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<sup>10</sup> *Firststrand Bank Ltd v Evans* (1693/2010) [2010] ZAECPEHC 55 (31 August 2010) paras 30, 50-52 per Eksteen J; *First Rand Bank Ltd v Moodaley and Other*(2502/10) [2010] ZAECPEHC 63 (26 October 2010)

<sup>11</sup> *BMW Financial Services (South Africa) (Pty Ltd v Mudaly* Case No 16975/09 dated 20 August 2010 KZD (unreported) para 14-15 per Wallis J;

<sup>12</sup> The reference to subsection 9 appears to be a mistake.

27. Additional requirements set for instalment agreements, secured loans or leases which by definition<sup>13</sup> relate to movable property,<sup>14</sup> are not relevant for enforcement of mortgage bonds and their underlying immovable properties,<sup>15</sup> which this case involves.

28. Section 130 (1) (a) mistakenly refers to s 86 (9), instead of to subsection (10). Manifestly, subsection (9) which relates to the consumer applying to the Magistrates' Court when a debt counsellor rejects his debt review application, is not a notice of any kind whereas, s 86 (10) is.<sup>16</sup>

29. A s 86 (10) notice terminating a debt review sets the following additional prerequisites for litigation when a credit agreement is being reviewed:

- a) The credit provider must give notice to terminate the review in the prescribed manner<sup>17</sup> to-
  - i. the consumer;
  - ii. the debt counsellor; and
  - iii. the National Credit Regulator,
- b) At least 60 business days must have elapsed after the consumer applied for the debt review before the creditor provider gives a s 86 (10) notice.

30. When s 86 (10) is not the hurdle, s 129 (1) and (2) are.<sup>18</sup> If the consumer is in default of a particular credit agreement, the credit provider must notify the consumer and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, to resolve any

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13 S 1

14 *Rossouw and Other v First National Bank Ltd t/a FNB Home Loans* Case No 640/2009 [2010] ZASCA 130 (30 September 2010) at para 16

15 Section 130 (1) (c) and (2)

16 *Coetzee and Other v Nedbank* Case No 2793/10 ZAKZDHC 46 (12 October 2010 (DBN)) (unreported) para 5 fn5 per Gorven J

17 Although s 86 (10) of the Act states that the notice is prescribed, I have not found any regulation dealing with s 86 (10) notices.

18 S 129 (1) (b) (i) read with s 130 (1)

dispute under the agreement or agree on a payment plan.<sup>19</sup>

31. Subsection 129 (2) provides that subsection (1) does not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order. It does not bar notice in terms of s 86 (10) terminating the debt review or litigation but merely exempts a credit provider from having to notify a consumer of his s 129 (1) (a) rights.<sup>20</sup>

32. Whether sections 86 (10) and 129 (1) notices are mutually exclusive is not a question I have to decide since the credit provider gave both notices. Facially, the word “or” in s 129 (1) (b) (i) and 130 (1) (a) suggests that one notice is dispensable if the other is given.

33. However, the purpose and content of these notices differ. A s 86 (10) notice serves to terminate a debt review; if read with s 130 (1) (a) it may imply that litigation is to follow. The review is of the consumer’s indebtedness generally. A s 129 (1) serves to firstly use various ways of securing payment of a particular debt. Secondly, it unequivocally informs the consumer of the credit provider’s intention to litigate.<sup>21</sup> Both notices inform consumers of different processes. Giving both notices does no harm, in fact in strengthens the credit providers case for enforcement. However, serving a s 129 (1) notice instead of s 86 (10) notice when a debt review is pending is fatal.

34. Litigating without regard to a debt review already underway results in parallel processes. Accordingly, I agree with my brother Gorven J that a s 86 (10) notice is indispensable when a debt review is underway, even if the credit provider delivers a s 129 (1) notice.<sup>22</sup>

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19 S 129 (1) (a)

20 *Firststrand Bank Ltd t/a First National Bank v Seyffert and Another* 212862/2010; [2010] ZAGPJHC 88 (11 October 2010) paras 14-15 per Willis J

21 *BMW Financial Services (South Africa) (Pty Ltd v Mudaly* Case No 16975/09 dated 20 August 2010 KZD (unreported) para 12 per Wallis J; *BMW Financial Services (South Africa) (Pty Ltd v Donkin* 2009 (6) 63 KZD para 10 per Wallis J

22 *Coetzee and Other v Nedbank* Case No 2793/10 ZAKZDHC 46 (12 October 2010 (DBN)) para 13



35. Section 88 (3) constrains credit providers further. A credit provider who receives notice that the consumer is applying to court to suspend a reckless credit agreement,<sup>23</sup> to be declared over-debted<sup>24</sup> or for debt review,<sup>25</sup> may not litigate under that credit agreement until the consumer defaults under the credit agreement or any repayment agreement. Other obstacles to litigation are summarised in *Coetzee and Other v Nedbank*.<sup>26</sup>

36. The above procedural requirements operate against the credit provider and in favour of the consumer.

37. Constraints on the consumer are in the form of tight time frames and pressure to pay his debts. A consumer has to apply for debt review before a credit provider delivers a s 129 (1) to stave off litigation and take refuge in the debt review.<sup>27</sup> This refuge is temporary. Either the consumer and credit provider agree to a payment plan<sup>28</sup> and consent to an order<sup>29</sup> or a Magistrates' Court must determine the debt review application.<sup>30</sup>

38. A debt counsellor must determine the debt review within 30 business days.<sup>31</sup> The consumer has 20 business days after a debt counsellor gives him a letter of rejection to submit his application in terms of subsection 86 (9) to the Magistrates' Court.<sup>32</sup> The time limit of 20 business days may be extended by the Magistrates' Court only on application by the consumer and on good cause.<sup>33</sup> As the entire review process must be completed within 60 business days, the Magistrates'

<sup>23</sup> S 88 (3) read with 83

<sup>24</sup> S 88 (3) read with 85

<sup>25</sup> S 88 (3) read with 86 (4) (b) (i)

<sup>26</sup> *Coetzee and Other v Nedbank* Case No 2793/10 ZAKZDHC 46 (12 October 2010 (DBN)) para 8.

<sup>27</sup> S 86 (2)

<sup>28</sup> S 86 (8)(a)

<sup>29</sup> S 86 (8) (a) read s 87 and 138

<sup>30</sup> S 87

<sup>31</sup> Regulation 24 (6) Chapter 3 Part D (GN R489 of 31 May 2006)

<sup>32</sup> Regulation 26 (1) Chapter 3 Part D (GN R489 of 31 May 2006)

<sup>33</sup> Regulation 26 (2) Chapter 3 Part D (GN R489 of 31 May 2006)

Court has considerably less than 60 business days to determine the review.

39. What should happen if the debt counsellor does nothing within 30 business days or determines the debt review after 30 business days is not prescribed in either the NCA or its regulations. The consumer should be free to apply in terms of s 86 (9) to the Magistrates' Court as soon as possible after the 30 business days and before the 60 business days expire.
40. However, the consumer has to get from the debt counsellor a rejection letter before applying in terms of s 86 (9).<sup>34</sup> A debt review in the Magistrates' Court must therefore be preceded by a review before a debt counsellor.<sup>35</sup> A consumer cannot bypass the debt counsellor to access the Magistrates' Court.
41. Subsection 86 (11) permits the consumer to apply for a resumption of a review when a credit provider terminates it in terms of subsection (10).

### *Powers of the courts*

42. For debt review and enforcement courts play a role in two respects in resolving non payment under credit agreements: debt review in the Magistrates' Court (s 87) and enforcement by litigation in the Magistrates' Court and High Court (s 130 (4)).
43. A Magistrates' Court conducts a debt review hearing when either a debt counsellor recommends a proposal to that Court if a consumer and credit provider do not consent to an order,<sup>36</sup> or when a consumer applies to the Magistrate's Court to be declared over-indebted.<sup>37</sup> The

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34 Regulation 26 (1) Chapter 3 Part D (GN R489 of 31 May 2006)

35 S 86 (8) (b) and (9) read with s 87 (1)

36 S 87 (1) read with 86 (8) (b)

37 S 87 (1) read with 86 (9) and (7) (c)

reviewing Court considers the proposal, the information before it and the consumer's financial means, prospects and obligations. It may then reject the debt counsellor's recommendation or the consumer's application,<sup>38</sup> declare any credit agreement to be reckless,<sup>39</sup> rearrange the consumer's obligations<sup>40</sup> or grant both the declarator and rearrangement orders.<sup>41</sup>

44. Magistrates' Courts and High Courts enforce credit agreements only after the credit provider has met the prerequisites, overcome the hurdles and complied with the time limits discussed above. The enforcement court may determine that the credit agreement was reckless,<sup>42</sup> order the credit provider to comply with the relevant provisions of the NCA, and, if the credit provider has not complied, adjourn the matter and set out the steps the credit provider must complete before the litigation resumes.<sup>43</sup>

45. If the credit agreement is subject to a pending debt review in terms of Part D of Chapter 4, the enforcement court may first, adjourn the matter, pending a final determination of the debt review proceedings.<sup>44</sup> Second, only after the debt counsellor reports directly to the court, may the enforcement court grant an order declaring the consumer to be over-indebted<sup>45</sup> and an order to relieve the consumer's over-indebtedness.<sup>46</sup> Third, if the credit agreement is the only credit agreement to which the consumer is a party, the enforcement court may order the debt counsellor to discontinue the debt review proceedings, and determine the over-indebtedness of the consumer in terms of s 85 (b).

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38 S 87 (1) ((a)

39 S 87 (1) ((b) (i) read with 83 (2) or (3)

40 S 87 (1) ((b) (i) read with 86 (7) (c) (ii);

41 S 87 (1) ((b) (iii)

42 S 130 (4) (a) read with 80 and 83

43 S 130 (4) (b)

44 S 130 (4) (c) (i)

45 S 130 (4) (ii) read with 85 (b)

46 S 130 (4) (c) (i) read with 87

## Analysis of Scheme

46. The inference to be drawn from the scheme outlined above is that the Legislature intended most reviews to be determined by debt counsellors with only a few filtering through to the reviewing Magistrates' Court and even fewer proceeding to the enforcement court. The policy consideration underpinning this model is to prevent the Magistrates' Court from being overburdened with the additional case load emanating from the NCA.<sup>47</sup>
47. Another consideration is that in the Magistrates' Court the debt review is an application subject to the formalities and rules of court including the risk of paying legal costs.<sup>48</sup> Hence the process before the debt counsellor is both adjudicative resulting in determinations<sup>49</sup> and mediated resulting in the parties consenting to a recommendation of the counsellor.<sup>50</sup>
48. The scheme and time frames for debt review in terms of s 86 and 87 links back to the purpose of the NCA to promote and advance a "sustainable, responsible, efficient, effective ..... credit market and industry".<sup>51</sup> If the scheme or the institutions underpinning it delay or impede debt recovery these objectives of the NCA become unattainable.
49. The difference in the powers and functions of the review and enforcement courts confirms that a Magistrates' Court sitting as a debt review court is a specialist court with specific jurisdiction and powers. The enforcement courts conduct debt review in limited circumstances.
50. Another contrast is with the tight time limits prescribed for the debt review before the counsellor and the absence in the NCA of any time limits for Magistrates' Courts to complete the debt review. In *National*

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47 *Firststrand Bank Ltd v Olivier* 2009 (3) SA 353 para 18 per Erasmus J

48 In *National Credit Regulator v Nedbank Ltd* 2009 (6) SA 295 (GNP) at 311D-E per Du Plessis J

49 S 87 (1)

50 S 86 (8) (a)

51 S 3;

*Credit Regulator v Nedbank Ltd* 2009 (6) SA 295 (GNP) Du Plessis J held that the power of a Magistrates' Court to conduct a hearing and grant orders in terms of s 87 derives from s 87 read with s 86, the Magistrates' Court Act, 1944 (Act 32 of 1944) and Rule 55 of Magistrates' Court which governs applications.<sup>52</sup> In short, the usual time limits for filing, opposing and hearing an application in the Magistrates' Court apply. Whereas the 60 business days before the debt counsellor is fixed the continuation of the debt review before the Magistrates' Court is highly variable. Furthermore, the variability arises from factors within the control of the parties and from beyond their control from the administration of the Court. The stark contrast between the two phases of debt review is an invitation to the courts to set parameters so that the purpose of the NCA is not lost.

## The Controversy

51. The controversy underpinning the three models arises from interpretations of subsections 86 (10) and (11). Can a credit provider use a s 86 (10) notice to terminate a debt review that is referred to the Magistrates' Court? This question arises because s 86 (10) applies "(i) if a consumer is in default under a credit agreement that is being reviewed in terms of *this section*". Does "this section" refer to s 86 only or does it incorporate s 87? If it includes s 87 then a s 86 (10) can terminate debt reviews pending in the Magistrates' Court.

52. The related question is the meaning of "*the Magistrate's Court hearing the matter*" in subsection (11). Is the Magistrates' Court referred to in subsection (11) the Magistrates' Court hearing the debt review in terms of s 87 or, the Magistrates' Court or High Court hearing the enforcement claim in terms of s 130 (4)?

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<sup>52</sup> *National Credit Regulator v Nedbank Ltd* 2009 (6) SA 295 (GNP) at 320 para 3 and 4 of Order

53. Model One interprets “this section” to include s 87 and the reference to “the Magistrates’ Court” in subsection (11) to be the s 87 debt review court. Model Two interprets “this section” to exclude s 87 and the reference to “the Magistrates’ Court” in subsection (11) to be the s 130 (4) enforcement court. Model Three interprets “this section” to include s 87 and the reference to “the Magistrates’ Court” in subsection (11) to be the s 87 debt review court; in addition, it accepts that the s 130 (4) enforcement court may also conduct debt review in limited circumstances prescribed by that section.

### **The Case for Model One**

54. The arguments supporting the interpretation that s 86 (10) permits termination of the review when it is in the Magistrates’ Court include:

- a) The legislature intends the same words in an enactment to be understood in the same sense throughout the enactment. Hence the words “the matter” and “the Magistrates’ Court” should bear the same meaning, unless the context indicates otherwise.<sup>53</sup> The words “*the matter*” in subsection (11) must mean the same matter in subsection (8) (b). Likewise, “*the Magistrates’ Court*” in subsection (11) must be the same Magistrates’ Court referred to in subsections (8) (b) and (9), namely the Court hearing the debt review in terms of s 87.<sup>54</sup>
  
- b) The words “in this section” must be given a contextual and not a simplistic linguistic interpretation. In the context, the words are used to distinguish the s 86 process from processes in s 83 and 85. Sections 83 and 85 refer to “any court proceedings in which a credit agreement is being considered” when the credit agreement is already the subject of the litigation. Section 86 provides for debt review prior to litigation.<sup>55</sup>

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53 *Firstrand Bank Ltd v Evans* (1693/2010) [2010] ZAECPEHC 55 (31 August 2010) paras 24-25 per Eksteen J

54 *Firstrand Bank Ltd v Evans* (1693/2010) [2010] ZAECPEHC 55 (31 August 2010) para 26 and cases cited there.

55 *Firstrand Bank Ltd v Evans* (1693/2010) [2010] ZAECPEHC 55 (31 August 2010) paras 16-20 per Eksteen J

- c) Nothing in the structure of s 86 or the NCA suggests that subsection 86 (10) limits the credit providers right to terminate the process to the time before it is referred to the Magistrates' Court. The right to terminate the review continues until the Magistrates' Court grants a s 87 order.<sup>56</sup>
- d) Inactivity by the debt counsellor or consumer would create a "permanent moratorium" against debt repayment.<sup>57</sup> Simultaneously, the credit provider has to act in good faith when it gives notice to terminate the review.<sup>58</sup>
- e) The purpose of the NCA is not only about protecting consumers.<sup>59</sup> Another purpose is to prioritise the eventual satisfaction of consumer obligations under credit agreements.<sup>60</sup>
- f) If the credit provider cannot terminate a debt review in the Magistrates' Court before litigating against the consumer, two parallel processes will be underway possibly in conflict with each other: a debt review in the Magistrates' Court and litigation in either a Magistrates' Court or a High Court. Section 86 (2) also discourages parallel processes which prevents a consumer from applying for debt review in respect of a particular credit agreement if the credit provider has delivered a s 129 notice in respect of that agreement.<sup>61</sup>

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56 *Firstrand Bank Ltd v Evans* (1693/2010) [2010] ZAECPEHC 55 (31 August 2010) para 20 per Eksteen J

57 *Firstrand Bank v B L Smith* Case no 24205/08 31 October 2008 per Lamont J (unreported) cited in *Standard Bank of SA Ltd v Kruger; Standard Bank of SA v Pretorius* 2010 (4) SA 635 (GSJ) para 13-16 per Kathree-Setiloane AJ

58 *Mercedes Benz Financial Servcies South Africa (Pty) Ltd v Papana Gideon Dunga* (9222/2010) [2010] ZAWCHC 208 (20 September 2010) paras 48, 50-52 per Blignault J

59 *SA Taxi Securitisation (Pty) Ltd v Nako and Others* (19/2010, 21/2010, 22/2010, 77/2010, 89/2010, 104/2010, 842/2010 [2010] ZAECBHC 4 (8 June 2010) at para 38 per Kemp AJ

60 *SA Taxi Securitisation (Pty) Ltd v Nako and Others* (19/2010, 21/2010, 22/2010, 77/2010, 89/2010, 104/2010, 842/2010 [2010] ZAECBHC 4 (8 June 2010) at para 44 per Kemp AJ

61 Another purpose of s 86 (2) is to prevent a consumer from frustrating a credit provider who has already started to enforce a particular credit agreement by delivering a s 129 notice in respect of that agreement. (*National Credit Regulator v Nedbank Limited and Others* 2009 (6) SA 295 (GNP) at 318E-319B per Du Plessis J cited in *BMW Financial Services (South Africa)*

For these reasons no litigation is permissible to enforce a debt that is being reviewed. Hence a s 86 (10) notice terminates a review.

- g) Section 130 (3) imposes additional hurdles to litigation. Subsection (c) prohibits litigation if the credit agreement is before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud; the Magistrates' Court reviewing the credit agreement is not included. By definition a consumer court is not the Magistrates' Court. Consequently, a credit provider is not precluded from litigating when the debt review is before a Magistrates' Court.

55. Arguments favouring the view that subsection (11) refers to the Magistrates' Court hearing the review in terms of s 87 include the following:

- a) The Magistrates' Court exercises exclusive judicial oversight over the debt review. It is an extraordinary procedure with the debt counsellor being the pro forma applicant and assisting the Magistrates' Court. Therefore that Magistrates' Court exclusively may order the process to resume.<sup>62</sup>
- b) The consumer is not prejudiced by the credit provider terminating the debt review.<sup>63</sup> He can invoke subsection (11) to resume the debt review.
- c) If subsection (11) refers to the enforcement court then the consumer will have to wait for the credit provider to institute enforcement proceedings before invoking the resumption of the debt review under s 86 (11).<sup>64</sup>

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*(Pty Ltd v Mudaly* Case No 16975/09 dated 20 August 2010 KZD (unreported) para 9 per Wallis J, see also para 12 and 19; also see para 11 prevention of parallel processes in respect of the same debt.

62 *Firststrand Bank Ltd v Evans* (1693/2010) [2010] ZAECPEHC 55 (31 August 2010) paras 16-19, 26, 29 per Eksteen J

63 *Firststrand Bank Ltd v Evans* (1693/2010) [2010] ZAECPEHC 55 (31 August 2010) para 29 per Eksteen J

64 *Mercedes Benz Financial Services South Africa (Pty) Ltd v Papana Gideon Dunga* (9222/2010) [2010] ZAWCHC 208 (20 September 2010) para 46 per Blignault J



- d) Motivating a s 86 (11) resumption of a debt review in the enforcement court is fraught with difficulties for the consumer who, in a litigation environment has to show prospects of success if the debt review resumes and he risks paying costs.<sup>65</sup>

### The Case for Model Two

56. The arguments supporting the interpretation that s 86 (10) does not permit termination of the review when it is in the Magistrates' Court include:

- a) Having regard to the sections on the interpretation<sup>66</sup> and the purpose,<sup>67</sup> the purpose of the NCA is clearly to promote and protect consumers; the NCA must therefore be interpreted to give effect to this core purpose.<sup>68</sup>
- b) It is "clear" from s 86 (10) that the words "that is being reviewed in terms of this section" applies only to a debt review in terms of s 86, not 87.<sup>69</sup>
- c) Debt review in s 86 (10) refers to a review before a debt counsellor in terms of s 86 and not a review before a Magistrates' Court.<sup>70</sup>
- d) An interpretation which allows the debt review to be terminated after 60 days despite the matter being referred to a Magistrates' Court will lead to absurdity in that any delay, even for unforeseen circumstances, would deny the consumer of the opportunity of

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65 *Mercedes Benz Financial Services South Africa (Pty) Ltd v Papan Gideon Dunga* (9222/2010) [2010] ZAWCHC 208 (20 September 2010) para 46, 47 per Blignault J

66 S 2 (1)

67 S 3 (d) (g) (h) and (i)

68 *Standard Bank of SA Ltd v Kruger; Standard Bank of SA v Pretorius* 2010 (4) SA 635 (GSJ) para 11 per Kathree-Setiloane AJ

69 *Standard Bank of SA Ltd v Kruger; Standard Bank of SA v Pretorius* 2010 (4) SA 635 (GSJ) para 13-16 per Kathree-Setiloane AJ; *BMW Financial Services (South Africa) (Pty) Ltd v Mudaly* Case No 16975/09 dated 20 August 2010 KZD (unreported) para 24 per Wallis J;

70 *SA Securitisation (Pty) Ltd v Matlala* (6359/1010) [2010] ZAGPJHC 70 (29 July 2010) para 10 per Kathree-Setiloane AJ

having the debt reviewed properly.<sup>71</sup>

- e) Delays in the Magistrates' Court are likely when trying to secure hearing dates and when accommodating multiple credit providers. An "unqualified entitlement to terminate proceedings" in the Magistrates' Court without reference to that Court is "clearly" not consistent with the core objective of the NCA.<sup>72</sup>
- f) An interpretation which allows the debt review to be terminated after it is referred to the Magistrates' Court would render the debt review ineffectual as all credit providers will wait for 60 business days to elapse, knowing that the Magistrates' Court will not complete the review within that time, before enforcing the debt. This would circumvent the protection the NCA affords to consumers.<sup>73</sup>
- g) Section 129 (2) bars litigation when a credit agreement is subject to debt restructuring in a court; consequently s 86 (10) cannot terminate s 87 proceedings.<sup>74</sup>
- h) Subsection 130 (3) (c) prohibits litigation if the credit agreement is before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud. Because the Magistrates' Court reviewing the credit agreement is excluded the debt review is a different process and cannot be terminated by a s 86 (10) notice.

57. Arguments favouring the view are that subsection (11) refers to the Magistrates' Court hearing the enforcement proceedings in terms of s 130 (4) include the following:

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71 *Standard Bank of SA Ltd v Kruger; Standard Bank of SA v Pretorius* 2010 (4) SA 635 (GSJ) para 16 per Kathree-Setiloane AJ

72 *Standard Bank of SA Ltd v Kruger; Standard Bank of SA v Pretorius* 2010 (4) SA 635 (GSJ) para 17, 21 per Kathree-Setiloane AJ

73 *Standard Bank of SA Ltd v Kruger; Standard Bank of SA v Pretorius* 2010 (4) SA 635 (GSJ) para 24 per Kathree-Setiloane AJ

74 *Standard Bank of SA Ltd v Kruger; Standard Bank of SA v Pretorius* 2010 (4) SA 635 (GSJ) para 26 per Kathree-Setiloane AJ; *SA Securitisation (Pty) Ltd v Matlala* (6359/1010) [2010] ZAGPJHC 70 (29 July 2010) para 10-13 per Kathree-Setiloane AJ

- a) Section 86 (11) is “clear”.<sup>75</sup>
- b) Section 86 (10) is “clear”.<sup>76</sup>
- c) Even though a literal interpretation of subsection (11) is untenable,<sup>77</sup> the “clear” intention of the legislature is that the review should resume in the enforcement court, which could be the Magistrates’ Court or the High Court.<sup>78</sup>
- d) Because the legislation is so clear, it is possible to read in the words “or High Court” after “the Magistrates’ Court” in subsection 11 to provide for a *casus omissus*.<sup>79</sup>
- e) A literal interpretation gives rise to four problems:
  - i. “(I)nconsistent parallel proceedings”.<sup>80</sup> When the court hearing the enforcement application orders the debt review to resume it will also stay the enforcement proceedings. Otherwise, the debt review will be futile and lead to absurdity.<sup>81</sup>
  - ii. Proceedings may “resume” if the debt review was previously referred to the Magistrates’ Court in terms of s 86 (8) (b). The Magistrates’ Court sitting in terms of s 87 cannot conceivably

<sup>75</sup> *SA Securitisation (Pty) Ltd v Matlala* (6359/1010) [2010] ZAGPJHC 70 (29 July 2010) para 9 per Kathree-Setiloane AJ

<sup>76</sup> *Standard Bank of SA Ltd v Kruger; Standard Bank of SA v Pretorius* 2010 (4) SA 635 (GSJ) para 13 per Kathree-Setiloane AJ

<sup>77</sup> *Mercedes Benz Financial Servcies South Africa (Pty) Ltd v Papana Gideon Dunga* (9222/2010) [2010] ZAWCHC 208 (20 September 2010) para 34 per Blignault J

<sup>78</sup> *Mercedes Benz Financial Servcies South Africa (Pty) Ltd v Papana Gideon Dunga* (9222/2010) [2010] ZAWCHC 208 (20 September 2010) para 16s – 22 per Blignault J

<sup>79</sup> *Mercedes Benz Financial Servcies South Africa (Pty) Ltd v Papana Gideon Dunga* (9222/2010) [2010] ZAWCHC 208 (20 September 2010) paras 16 – 22 per Blignault J

<sup>80</sup> *Mercedes Benz Financial Servcies South Africa (Pty) Ltd v Papana Gideon Dunga* (9222/2010) [2010] ZAWCHC 208 (20 September 2010) paras 35, 37 per Blignault J

<sup>81</sup> *Mercedes Benz Financial Servcies South Africa (Pty) Ltd v Papana Gideon Dunga* (9222/2010) [2010] ZAWCHC 208 (20 September 2010) paras 36, 37, 38 per Blignault J; *Standard Bank of SA Ltd v Panayiotts* 2009 (3) SA 363 (W) para 18 per Masipa J.\*

order that the provisions of 86 (7) for example be bypassed.<sup>82</sup>

iii. “Resume” implies that immediately before resumption, the court will not be hearing the debt review; hence “hearing the matter” cannot refer to the debt review court but to the enforcement court.<sup>83</sup> The debt review court will only hear the matter when it resumes. In summary judgment proceedings therefore the consumer may raise the defence that at the trial he intends to ask for the resumption of the debt review.<sup>84</sup>

iv. Section 86 (11) will be unworkable.<sup>85</sup>

### Model Three

58. I opt for Model Three for the reasons supporting Model One, save that I do not agree that the reviewing Magistrates’ Court has exclusive jurisdiction; the enforcement courts also have debt review jurisdiction albeit limited. To the case for Model One I add the following reasons:

a) Judicial opinion on both sides of the debate raises valid concerns. Deciding whether the NCA permits terminating a debt review before the reviewing Magistrates’ Court is critical to determining the balance between the rights, protections and obligations of the consumer and the credit provider in ways that achieve the objectives of the NCA. Permitting a s 86 (10) notice to terminate a review in the Magistrates’ Court swings the balance entirely in favour of the credit provider; the opposite view swings the balance entirely in favour of the consumer. Somewhere between these extremes lies the balance that meets the

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82 *Mercedes Benz Financial Servcies South Africa (Pty) Ltd v Papana Gideon Dunga* (9222/2010) [2010] ZAWCHC 208 (20 September 2010) para 39 per Blignault J

83 *Mercedes Benz Financial Servcies South Africa (Pty) Ltd v Papana Gideon Dunga* (9222/2010) [2010] ZAWCHC 208 (20 September 2010) para 41 per Blignault J

84 *Mercedes Benz Financial Servcies South Africa (Pty) Ltd v Papana Gideon Dunga* (9222/2010) [2010] ZAWCHC 208 (20 September 2010) para 58 per Blignault J

85 *Mercedes Benz Financial Servcies South Africa (Pty) Ltd v Papana Gideon Dunga* (9222/2010) [2010] ZAWCHC 208 (20 September 2010) para 40 per Blignault J

purpose of the NCA.

- b) The conflicting judicial opinions on subsections (10) and (11) summarised above suggest anything but clarity. The controversy shows that the two phrases open to interpretation, namely, “this section” and “the Magistrate's Court hearing the matter” are manifestly ambiguous. Until the legislature clarifies its intention in respect of these expressions, the courts have to do their best to bring coherence to the interpretation and application of the NCA.
- c) A s 86 (10) notice terminates a debt review in the Magistrates' Court because the ambiguity of subsections 86 (10) and (11) permits this interpretation.
- d) The structure of sections 86 and 87 are interconnected. Section 86 enables the referral of the review to the Magistrates' Court; s 87 prescribes the powers of the Magistrates' Court after it hears such a referral. The debt review is a continuous process that starts in s 86 and ends in s 87. Section 86 (8) (b) and (9) incorporate s 87; in turn the preamble to s 87 and subsections (b) (ii) and (iii) incorporate sections 86 (8) (b), (9) and (7) (c) (ii).
- e) This inter-connectedness between sections 86 and 87 is reinforced by the subject matter that these sections cover as distinct from the subject matter of s 130. Debt review is regulated under Part D of Chapter 4 concerning over indebtedness and reckless credit. Litigation and enforcement is found in Part C of Chapter 6 titled “Collection Repayment Surrender and Debt Enforcement”. The debt review is therefore more closely connected to the Magistrates' Court performing functions in terms of s 87.
- f) Furthermore, courts hearing the enforcement proceedings are not only the Magistrates' Courts but also the High Courts, hence s 130 (4) refers to “the court”. Elsewhere the NCA refers to “a court”, “the

court” and “any court”.<sup>86</sup> By expressly identifying the Magistrates’ Court in subsection (11) the Legislature must have intended to confine the debt review and any resumption of it to the Magistrates’ Court to which the debt review application is referred.<sup>87</sup>

- g) The powers of the court hearing the enforcement proceedings enumerated in s 130 (4) (c) do not link back to s 86 (11). For reasons discussed above in the analysis of the scheme, subsection (4) (c) discourages an enforcement court from assuming the debt review function.
- h) The power of the enforcement court to adjourn the matter and prescribe steps that the credit provider must complete before the enforcement proceedings resume is vital to counteract any inequity or imbalance that arises if the debt review is terminated. Consequently, if the enforcement court finds that a debt review would better achieve the purposes of the NCA, it could adjourn the enforcement proceedings until a debt review is conducted either before the debt counsellor or the Magistrates’ Court.
- i) Similarly to a Magistrates’ Court exercising its discretion in a debt review, in exercising its discretion in terms of s 130 (4) court may consider the amount of the debt, the nature of the security, the extent of the default, the prospects of payment, the prospects of settlement, the relative prejudice to the parties, the purposes of the NCA, the conduct of the parties during the debt review, the good faith of the parties and the interests of justice.<sup>88</sup>
- j) Section 130 (4) is the security net for both consumer and credit provider to invoke the protection of the enforcement court to reset the balance when either party claims an unfair advantage. It

<sup>86</sup> E.g. s 83 and 85

<sup>87</sup> *Standard Bank of South Africa Ltd v Panayiotts* 2009 (3) SA 363 2009 (3) SA 363 para 15-19 per Masipa J

<sup>88</sup> E.g. *Standard Bank of South Africa Ltd v Panayiotts* 2009 (3) SA 363 2009 (3) SA 363 para 47-80 per Masipa J

remedies any inequity, unfairness or imbalance that arises from the tight time frames that the NCA and its regulations prescribe for completing a debt review. Any party claiming relief under the NCA must plead its case fully to enable the court to exercise its discretion appropriately.<sup>89</sup>

- k. The entire debt review process which starts with the debt counsellor and ends in the Magistrates' Court must be completed within 60 business days. A s 86 (10) notice is available to terminate debt reviews when the 60 business days or a reasonable period beyond 60 business days expire, even when the review is pending in the Magistrates' Courts.
- l. Of the 60 business days, up to 50 business days<sup>90</sup> may expire before the review reaches the Magistrates' Court. That would leave only 10 business days for the Magistrates' Court to determine the review. Applying Rule 55 of the Magistrates Court Rules the consumer would have to give 10 court days notice before the debt review is heard. The reviewing court could have more than 10 days if the debt counsellor acts swiftly, the Magistrates' Court has the capacity and the parties adhere to the time limits in Rule 55. Whilst it is theoretically possible to complete the entire debt review within 60 business days, and whilst this may actually occur occasionally, practically the debt reviews are completed after 60 business days expire.
- m. Then there is the prospect of the Magistrates' Court extending the time limit for referring a debt review. Granting any extension of the 20 business day time limit although constrained by the risk the credit provider bears and its right to terminate the review within 60

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89 *Standard Bank of South Africa Ltd v Panayiotts* 2009 (3) SA 363 2009 (3) SA 363 para 8 per Masipa J. Although this was an application in terms of s 85, the reasoning is valid for enforcement proceedings.

90 30 + 20 business days referred to in Regulation 24 (60 and 26 (1) of Chapter 3 Part D ( GN R489 of 31 May 2006)

business days, also implies that the 60 business days for completing the entire review will not be met.

- n. Inefficiency and incapacity at the level of debt counsellors and the Magistrates' Courts compound the delay. Meeting the 60 business days limit means eliminating the flaws in debt review institutions. It also means eliminating flaws in the NCA so that clarity of the legislation minimises litigation such as this to discern what the Legislature intended.
- o. Even if the institutions are efficient and meet the deadlines, the fact is that the Legislature envisaged the entire debt review procedure to be completed within 60 business days (approximately 3 months). If it intended to give consumers a longer respite from enforcement, it would have increased the 60 business day limit for debt review. It follows that the Legislature intended to set the debt review period at 60 business days or as a standard for assessing what might be a reasonable period for debt review.
- p. However efficient and capacitated the debt review institutions may be, entrusting to the consumer the power to protract a debt review in the Magistrates' Court without conferring a countervailing right on the credit provider to expedite the review runs the risk of the review being delayed for an unreasonable time. Unlike the time limits imposed on the debt counsellor by the regulations,<sup>91</sup> the NCA and the regulations impose no time limits on the proceedings in the Magistrates' Court other than the 60 business days imposed by a s 86 (10 ) notice. Although the time limits in the Rules of the Magistrates' Court give the credit provider a means to press for finality, once a Magistrates' Court is seized with the matter, both parties are subject to the administration of the Court and the inevitable delays of litigation, which both sides of the debate acknowledge.

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<sup>91</sup> Regulation 24 (6), 26 (1) Chapter 3 Part D (GN R489 of 31 May 2006)



- q. If “in this section” does not incorporate terminating a review in the Magistrates’ Court then the credit provider would be at a disadvantage because it would have no means of enforcing the payment of the debt until the Magistrates’ Court finalises the application for debt review. An interpretation that yields this result is inconsistent with the purpose of the NCA evidenced by the tight timeframes it prescribes for various steps for recovering debt. Besides distorting the balance between the interests of the consumer and the credit provider, such interpretation undermines the purpose of the NCA to promote and advance a “sustainable, responsible, efficient, effective ..... credit market and industry”.<sup>92</sup>
- r. If the review by a debt counsellor is so limited by time, the review in a Magistrates’ Court cannot be timeless. At least, a reasonable period for determining or terminating the review in the Magistrates’ Court must be imputed to s 87. What is a reasonable period depends on the circumstances of each case taking into account the amount of the debt, the nature of the security, the extent of the default, the prospects of payment, the prospects of settlement, the relative prejudice to the parties, the purposes of the NCA and the interest of justice. If the debt review is proceeding in good faith and at a reasonable pace,<sup>93</sup> a credit provider who commences litigation runs the risk of the enforcement court ordering a resumption of the review before the debt counsellor or the Magistrates’ Court and suspending the litigation with an appropriate order for costs until the review is determined.<sup>94</sup>
- s. Another protection against unfair litigation is the resumption of the review permitted by subsection (11); it is a shield in the hands of the

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92 S 3;

93 *Firststrand Bank Ltd v Evans* (1693/2010) [2010] ZAECPHC 55 (31 August 2010) para 30 per Eksteen J; *Changing Tides (Pty) Ltd v Erasmus and Others* [2009] ZAWHCH 175 (12 November 2009) para 30

94 *Firststrand Bank Ltd v Evans* (1693/2010) [2010] ZAECPHC 55 (31 August 2010) para 30 per Eksteen J

consumer to use to restore the balance in his favour,<sup>95</sup> even when litigation is underway and especially when the credit provider seizes the sword in subsection (10) to terminate the review.

- t. In the circumstances, Model Three is most capable of balancing the interests of the consumer and credit provider to achieve all the purposes of the NCA, especially that of “promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers”.

### Summary Judgment requirements

59. Turning to whether the plaintiff complied with Rule 32 (2) which requires a “person who can swear positively to the facts verifying the cause of action and the amount...claimed” to depose to the affidavit in a summary judgment application, Wallis J summarises this requirement in *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another* 2010 (5) SA 112 (KZP) 4 May 2010 at para 5-16 which I intend to follow. Citing Theron J, the learned judge agreed that the deponent must have personal or direct knowledge of the facts in the particulars of claim; anything less than that is hearsay.

60. A defendant who opposes an application for summary judgment must show on the merits that he has a *bona fide* defence.<sup>96</sup> When the defence is that the credit agreement on which the summary judgment is based is subject to debt review either before a debt counsellor or a Magistrate, the defendant must allege sufficient facts in its opposing affidavit to satisfy the court that the debt review itself is *bona fide*<sup>97</sup> and

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<sup>95</sup> *SA Taxi Securitisation (Pty) Ltd v Nako and Others* (19/2010, 21/2010, 22/2010, 77/2010, 89/2010, 104/2010, 842/2010 [2010] ZAECBHC 4 (8 June 2010) at para 43 per Kemp AJ

<sup>96</sup> *Standard Bank of South Africa Ltd v Panayiotts* 2009 (3) SA 363 2009 (3) SA 363 para 52-55 per Masipa J

<sup>97</sup> Section 86 (5) (b); *Firststrand Bank Ltd t/a First National Bank v Seyffert and Another* 212862/2010; [2010] ZAGPJHC 88 (11 October 2010) para 10 per Willis J; *SA Taxi Securitisation (Pty) Ltd v Mbatha and Similar Cases* 2010 JDR 0473 (GSJ) para 69 per PN Levenberg AJ

not a tactic to delay final judgment for payment of the debt. Undue and unexplained delay in finalising a debt review indicates bad faith. Failure to disclose sufficient information to persuade the Court that a proposed scheme for repayment of the debts is reasonable and capable of meeting the purpose of the NCA to prioritise consumers satisfying their obligations<sup>98</sup> also falls short of the requirement of good faith.

61. Depending on the seriousness of the defendant's bad faith the Court may decide to grant or refuse summary judgment. In cases of extreme bad faith, the court may also declare property executable.<sup>99</sup> On the other hand, however well intentioned a defendant might be to repaying the debt, if he cannot do so without liquidating his assets, summary judgment which includes an order declaring property executable would be appropriate.<sup>100</sup> Declaring residential property executable is a harsh remedy; hence the constitutional protection against eviction.<sup>101</sup> It is therefore not a remedy that is resorted to lightly.

62. Giving notice in terms of s 86 (10) and 129 (1) arises from the consumer's right to receive documents<sup>102</sup> at the address it stipulates for receiving notices.<sup>103</sup> A notice is served if it is delivered in one of six ways, including by email, or if it is sent by registered mail to the consumer.<sup>104</sup> Section 65 and 96 safeguard the interests of the consumer. When the NCA requires the credit provider to "give" the s 86 (10) notice to the debt counsellor and the National Credit Regulator neither the NCA nor its regulations prescribe the method by which

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98 S 3 (h) and (g)

99 *Firststrand Bank Ltd t/a First National Bank v Seyffert and Another* 212862/2010; [2010] ZAGPJHC 88 (11 October 2010) para 16 per Willis J

100 *Firststrand Bank Ltd v Olivier* 2009 (3) SA 353 para 23 per Erasmus J

101 Section 26 (3) of the Constitution of the Republic of SA Act, 1996; *SA Taxi Securitisation (Pty) Ltd v Nako and Others* (19/2010, 21/2010, 22/2010, 77/2010, 89/2010, 104/2010, 842/2010 [2010] ZAECBHC 4 (8 June 2010) at para 35, per Kemp AJ; *Changing Tides 17 (Pty) Ltd NO v Erasmus and Another; Changing Tides 17 (Pty) Ltd NO v Cleophas and Another; Changing Tides 17 (Pty) Ltd No v Frederick and Another* (WCC) Unreported Case No 18153/09 12 November 2009 per Binns-Ward AJ para 10

102 S 65

103 S 96; *Rossouw and Other v First National Bank Ltd t/a FNB Home Loans* Case No 640/2009 [2010] ZASCA 130 (30 September 2010) at para 29

104 S168; *Rossouw and Other v First National Bank Ltd t/a FNB Home Loans* Case No 640/2009 [2010] ZASCA 130 (30 September 2010) at para 30

notice should be given. One of the seven methods used to give notice to the consumer should suffice.

63. Following the judgment in *Rossouw and Other v First National Bank Ltd t/a FNB Home Loans* (640/2009) [2010] ZASCA 130 (30 September 2010) at para 36 a plaintiff seeking summary judgment should disclose fully in its founding affidavit proof of delivery or service of documents. A plaintiff who is challenged about delivery and service of a notice is not allowed to hand in proof of delivery, even if the defendant consents because all of the plaintiff's evidence in the summary judgment must be in the founding affidavit.<sup>105</sup> Furthermore, the plaintiff must not only aver that the notice was served or delivered but also specify which of the seven possible ways permitted in s 65 (2) and by the SCA it used to deliver the notice.<sup>106</sup> The SCA drew a distinction between handing in proof of delivery of a s 129 (1) notice and handing in documents that do not constitute new evidence, such as a certificate of balance.<sup>107</sup>

### **Application of law to facts**

64. I deal with the procedural requirements for summary judgment first before considering the substantive merits. The deponent to the affidavit in support of the summary judgment application in this case is the Senior Manager – Foreclosures. In that capacity the deponent has access to the plaintiff's loan account. The deponent has personal knowledge of the status of the loan account and is able to verify the cause of action and the amount claimed. The deponent to the summary judgment application in *Shackleton* was the attorney for the applicant who had taken cession of credit agreements from ABSA Bank. Wallis J found that the deponent in that matter had no direct and

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<sup>105</sup> Uniform rule 32 (4); *Rossouw and Other v First National Bank Ltd t/a FNB Home Loans* Case No 640/2009 [2010] ZASCA 130 (30 September 2010) at para 35, 46

<sup>106</sup> *Rossouw and Other v First National Bank Ltd t/a FNB Home Loans* Case No 640/2009 [2010] ZASCA 130 (30 September 2010) at para 53

<sup>107</sup> *Rossouw and Other v First National Bank Ltd t/a FNB Home Loans* Case No 640/2009 [2010] ZASCA 130 (30 September 2010) at para 47

personal knowledge of those claims. All he had done was to inspect the documents obtained from ABSA Bank. He could not have had personal knowledge as he claimed. The court found that his affidavit was entirely hearsay and he could not verify the facts giving rise to the claims and the amount of that claim.

65. In this case the deponent is an employee of the plaintiff and has first hand knowledge of the plaintiff's record. As such, I am satisfied he has personal knowledge of the cause of action and the amount claimed.

66. As regards giving the s 86 (10) notice to the debt counsellor and the National Credit Regulator, the plaintiff satisfied this requirement by emailing it to them at their correct addresses. That the plaintiff has not adduced proof that they received the notice is not fatal to this application because notice to them is for their information. If they were to intervene in the proceedings it would be at the instance of the defendant whose interest is at stake. Notice to the defendant is not in dispute. More importantly, however, even if the debt counsellor and National Credit Regulator did intervene, the common cause facts remain decisive.

67. I am satisfied that the plaintiff has complied with all the prerequisites in s 130 (1) and overcome all the hurdles delaying litigation in s 88(3).

68. Turning to the merits, the distinguishing features of the facts in this case are that the application for debt review has been pending since 13 November 2009 with no end insight. Furthermore, the balance owing on the credit agreement exceeds the initial amount of the loan. Besides the plaintiff, the defendant is indebted to Standard Bank Master Card, Standard Bank Classic Card, FNB Current Account, Wesbank , ABSA Vehicle Finance, Virgin Money Credit Card, FNB Garage Card, Vodacom Credit Card, ABSA Bank and Diner's Club.

69. The portions of the debt review application attached to the summary

judgment application do not disclose the total amount of the defendant's indebtedness to various creditors nor does it disclose his income. A consumer wishing to stay enforcement proceedings should disclose fully his indebtedness and his ability to comply with a debt re-arrangement that might ensue from either a debt review court or the enforcement court. Disclosure also indicates the good faith element required for summary judgment.

70. It is common cause there is no debt restructuring order in place yet. That the proceedings in the Magistrates' Court could result in such an order is doubtful. Despite notice to terminate the debt review, the defendant did not approach the Magistrates' Court hearing the matter for an order resuming the debt review in terms of s 86 (11). Furthermore, the defendant has been trying to resolve his indebtedness since 2008 when he first approached a debt counsellor.
71. Most importantly, the balance now owing on the mortgage bond exceeds the amount of the initial loan. From the instalment payment schedule (annexure B to the Opposing Affidavit) it appears that he has been repaying about 10 credit cards or financial institutions. Since 2008 the balance has not decreased below the amount of the capital owing on the bond. He cannot service the bond on the repayment scheme he proposes. His best option is to liquidate some of his assets to reduce his indebtedness. He had the opportunity from at least August 2008 when he appears to have applied for debt review to 7 June 2010 the day before summons was issued in this matter to liquidate some of his assets. If he has liquidated any of his other assets they were clearly inadequate to stave off this litigation. Granting this application is therefore unavoidable.
72. The only reasonable conclusion that the court can come to is that the defendant has entered an appearance to defend for the purpose of delay.

73. In the circumstances, I granted an order in the following terms on 26 October 2010:-

- a) Summary Judgment granted against the Defendant for:
  - i. Payment of the sum of R1 368 972.84;
  - ii. Interest thereon at the rate of 8.20% per annum calculated daily on the amount outstanding at the commencement of each day and compounded at the end of each month, as from 1<sup>st</sup> June 2010 to date of payment, both dates inclusive.
  - iii. An Order declaring executable the property described as  
Portion 13 of Erf 3050 Westville,  
Registration Division FT, Province of  
KwaZulu-Natal, in extent 1506 (ONE  
THOUSAND FIVE HUNDRED AND SIX)  
square metres  
Held by Deed of Transfer No. T56448/04
  
- b) An Order directing Defendant to pay Plaintiff's costs on the scale as between Attorney and Client.

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D PILLAY J

**COUNSEL**

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Counsel for the Respondent: **Mr. C.W. Haveman**

Instructing Attorneys : C W Havemann & Associates

Locally represented by  
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271 Prince Alfred Street  
Pietermaritzburg

Ref: Mr Dawson/ Charles Havemann

Date of hearing : 13 October 2010

Date of Judgment : 26 October 2010

Date of Reasons for Judgment: 11 November 2010