REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2009/45438

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED Applicant

and

KRUGER, WERNER HUGO Respondent

AND

CASE NO: 2009/39057

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED Applicant

and

PRETORIUS, THERESA LYNN Respondent

J U D G M E N T

KATHREE-SETILOANE, AJ:

[1] This judgment concerns two applications for summary judgment by Standard Bank of South Africa Limited ("*the applicant*") against:

1.1 Werner Hugo Kruger ("Kruger"), for the outstanding amount of a loan granted by the applicant in favour of Kruger and secured by a mortgage bond registered over immovable property, Erf 1700, Rynfield Township, Registration Division IQ, Province of Gauteng, and held by Deed of Transfer 049672/07; and

1.2 Theresa Lyn Pretorius ("Pretorius"), for the outstanding amount of a loan granted by the applicant in favour of Pretorius and secured by a mortgage bond registered over immovable property, Erf 2395, North Riding Extension 38 Township, Registration Division IQ, Province of Gauteng, and held by Deed of Transfer 155307/07 ("*the properties*").

[2] The applications were heard together for the sake of convenience. The two applications turn upon the proper interpretation of section 86(10) of the National Credit Act, No. 34 of 2005 ("*the Act*"), and in particular, whether it

empowers a credit provider, as defined in the Act, to terminate a debt review process once it has been referred, by a debt counsellor with recommendations, to a Magistrate's Court for consideration.

[3] The two the applications for summary judgment were brought by the applicant on the basis that it had terminated the debt reviews of Kruger and Pretorius ("the respondents") respectively, in terms of section 86(10) of the Act, due to their default in terms of the respective mortgage bonds.

[4] The respondents admit their indebtedness to the applicant as claimed in the respective summons issued against each of them, and raise similar defences, namely that they are each over-indebted as envisaged in the Act, and had approached a debt counsellor prior the institution of the respective actions by the applicant. It is common cause that each of the respondents applied for a debt review, in terms of section 86 of the Act, prior to the institution of the respective actions, against them, by the applicant.

[5] The applicant terminated the respondents' respective debt reviews in accordance with section 86(10) of the Act due to their default in terms of the respective mortgage bonds. The applicant gave notice of termination to each of the respondents and their debt counsellors respectively, and to the National Credit Regulator, in accordance with the provisions of section 86(10) of the Act, more than 60 days after the date on which each of the respondents applied for debt review.

[6] It is not in dispute that the Act applies to each of respondents' loan agreements in question, or that they are consumers as defined in the Act, or that the applicant is a credit provider as defined therein.

[7] The respondents, however, deny that their respective debt reviews were terminated lawfully. Mr Kruger alleges, in his affidavit resisting summary judgment, that the termination of his debt review was prematurely executed as his debt review application was brought within the 60 business days of the time period contemplated in section 86(10) of the Act, and that the matter is *sub-judice* as the debt review proceedings before the Benoni Magistrate's Court have not been finalised. He, therefore, contends that the summary judgment application against him should be dismissed.

[8] Ms Pretorius likewise alleges, in her affidavit resisting summary judgment, that the applicant's summons in respect of the action against her is premature, in violation of section 130 of the Act; and should for this reason be dismissed. In addition, she alleges that the applicant has not complied with section 129 of the Act, and that the credit agreement constitutes reckless credit.

[9] This Court is therefore called upon to determine:

9.1 Whether section 86(10) of the Act empowers a credit provider to terminate the debt review process where a debt counsellor has referred the review, with recommendations, to a Magistrate's Court for consideration;

9.2 Whether section 130(4)(b) of the Act is applicable where the applicant has failed to comply with section 86(10) of the Act.

[10] The interpretation of section 86(10) of the Act must be viewed against the purpose and objectives of section 86 of the Act, and the Act as a whole. Section 2(1) of the Act provides:

"*2(1) This Act must be interpreted in a manner that gives effect to the purpose set out in section 3.*"

[11] Section 3 of the NCA provides:

"***3. Purpose of Act –*** *The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by –*

(a) …

(d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;

…

> *(g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;*
>
> *(h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and*
>
> *(i) providing 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.*"

The purpose of the Act is clearly to promote and protect consumers. The Act must accordingly be interpreted to give effect to this core purpose.

[12] Section 86 describes the process that a consumer is required to follow when applying for a debt review. The section provides as follows:

> "***86. Application for debt review. –*** *(1) A consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted.*
>
> *(2) An application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement.*
>
> *(3) A debt counsellor -*
>
> *(a) may require the consumer to pay an application fee, not exceeding the prescribed amount, before accepting an application in terms of subsection (1); and*
>
> *(b) may not require or accept a fee from a credit provider in respect of an application in terms of this section.*
>
> *(4) On receipt of an application in terms of subsection (1), a debt counsellor must -*

(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.

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

(a) comply with any reasonable requests by the debt counsellor to facilitate the evaluation of the consumer's state of indebtedness and the prospects for responsible debt re-arrangement; and

(b) participate in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement.

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

(a) whether the consumer appears to be over-indebted; and

(b) if the consumer seeks a declaration of reckless credit, whether any of the consumer's credit agreements appear to be reckless.

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

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

(b) the consumer is not over-indebted, but is nevertheless experiencing, or likely to experience, difficulty satisfying all the consumer's obligations under credit agreements in a timely manner, the debt counsellor may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt-arrangement; or

(c) the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or both of the following orders –

(i) that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless; and

(ii) that one or more of the consumer's obligations be re-arranged by –

(aa) extending the period of the agreement and reducing the amount of each payment due accordingly;

(bb) postponing during a specified period the dates on which payments are due under the agreement;

(cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or

(dd) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6.

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

(a) ***the consumer and each credit provider concerned accept that proposal, the debt counsellor must record the proposal in the form of an order, and if it is consented to by the consumer and each credit provider concerned, file it as a consent order in terms of section 138; or***

(b) if paragraph (a) does not apply, the debt counsellor must refer the matter to the Magistrate's Court with the recommendation.

(9) If a debt counsellor rejects an application as contemplated in subsection (7)(a), the consumer, with leave of the Magistrate's Court, may apply directly to the Magistrate's Court, in the prescribed manner and form, for an order contemplated in subsection (7)(c).

(10) If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to -

(a) the consumer;

(b) the debt counsellor; and

(c) ***the National Credit Regulator, at any time at least 60 business days after the date on which the consumer applied for the debt review.***

(11) If a credit provider who has given notice to terminate a review as contemplated in subsection (10) proceeds to enforce that agreement in terms of Part C of Chapter 6, the Magistrate's Court hearing that matter may order that the debt review resumes on any conditions the court considers to be just in the circumstances."
(own emphasis)

[13] It is clear from a reading of section 86(10) that the termination of a debt review process, referred to in the sub-section, is expressly qualified by the words "*that is being reviewed in terms of this section*". A credit provider's right to terminate in terms of section 86(10) of the Act would, consequently, apply only to a debt review to which section 86 applies. Therefore, once a debt review has been referred to the Magistrate's Court in terms of section 86(8)(b) of the Act, then section 87 finds application. It reads as follows:

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

(a) reject the recommendation or application as the case may be; or

(b) make –

> *(i) an order declaring any credit agreement to be reckless, and an order contemplated in section 83(2) or (3), if the Magistrate's Court concludes that the agreement is reckless;*
>
> *(ii) an order re-arranging the consumer's obligations in any manner contemplated in section 86(7)(c)(ii); or*
>
> *(iii) both orders contemplated in subparagraph (i) and (ii).*
>
> *(2) The National Credit Regulator may not intervene before the Magistrate's Court in a matter referred to it in terms of this section.*"

[14] I accordingly agree with the respondents that once a debt review is referred, by a debt counsellor with recommendations, to the Magistrate's Court for consideration, in terms of section 86(8)(b) of the Act, it falls within the ambit of section 87 of the Act and not section 86 of the Act. Accordingly, any termination of the debt review, in terms of 86(10), would be unlawful.

[15] I therefore agree with Mr Feldgate, who appeared on behalf of Ms Pretorius, that once a debt review has been referred to the Magistrate's Court for consideration, the "*debt review*" process, as conducted in terms of section 86 of the Act ends, and the matter becomes, simply put, a review before the Magistrate's Court. The Magistrate's Court is empowered, in a review before it, in terms of section 87 of the Act, to *inter alia* re-arrange a consumer's obligations or take similar steps to relieve a consumer of his or her over-indebtedness.

[16] It is clear from a proper reading of section 86 of the Act, that the only review process that may be terminated, in terms of section 86(10) of the Act, is the one which is undertaken by a debt counsellor. In other words, any of the review steps taken by the debt counsellor, in terms of sections 86(6) to 86(8)(a) of the Act, prior to a referral to the Magistrate's Court. I am of the view that any contrary interpretation in terms of which a credit provider would be entitled to terminate the debt review process after a period of 60 days, despite it having been referred to a Magistrate's Court, would lead to an absurdity in that any delay by any party to such application, any delay occasioned at the instance of the court or even any delay due to unforeseen circumstances would deprive the consumer of the opportunity to have the matter properly determined by that court.

[17] Furthermore, section 86(10) clearly contemplates that the debt review process before a debt counsellor will be completed at least 60 business days after the date on which the consumer applied for the debt review, failing which the credit provider may terminate the review in the prescribed manner. Therefore, having regard to lengthy delays when attempting to obtain a date for a hearing in the Magistrate's Court, the likelihood of multiple postponements in a review, which has a multitude of credit providers and other similar factors, I am of the view that an unqualified entitlement to terminate proceedings, where a court has been seized with the review therein, without reference to that court is clearly not consistent with a core objective of the Act, which is the promotion and protection of consumers.

[18] In the recent unreported judgment of *Firstrand Bank v B L Smith* Case No. 24205/08, 31 October 2008, Witwatersrand Local Division, Lamont J had occasion to deal with the issue of the consequences that may arise from the failure of a debt counsellor to refer a debt review to a magistrate in terms of section 86(8)(b) of the Act. He held as follows at page 10, paragraph 13:

> "*It is immediately apparent that the debt counsellor not having taken the next step as provided for in Section 86 that the Defendants are able to frustrate and have frustrated the fulfilment of the events set out in Section 88(3) which otherwise would occur. This has resulted in the credit provider being unable to take steps to institute proceedings to recover the debt. The inactivity of the counsellor and/or consumer resulted in the creation of a moratorium.*
>
> *…*
>
> *If the notice is seen in isolation there appears to be a lacuna in the Act, in that the consumer is able to prevent the credit provider from ever instituting action against it. A dishonest debtor could frustrate the rights of legitimate creditors by starting the process and then stopping at mid-stride as happened in this matter. There would then be a permanent moratorium. The credit provider would never be able to obtain relief and is forever unable to exercise or enforce by litigation his rights to payment.*"

[19] Although I share Lamont J's concerns that there appears to be a *lacuna* in the Act, in that the consumer is able to prevent the credit provider from ever instituting action against it and could accordingly frustrate the rights of legitimate creditors, it is important to distinguish the facts in that case from the two applications before this Court. The facts in the *Firstrand Bank v B L Smith* related to an instance where the debt review process commenced, in terms of section 86(1) read with section 86(4) of the Act, after which no further steps were taken, i.e. the debt review was not referred to the Magistrate's

Court in terms of section 86(8)(b) of the Act. Lamont J's concerns accordingly have no application in the two matters at hand, as the debt counsellor, in each of these matters, has in fact referred the debt review with his recommendations to the Magistrate's Court for consideration.

[20] Accordingly I am of the view that once the debt review process has been initiated, which thereafter results in the referral of the debt review to the Magistrate's Court, the credit provider is not entitled to institute court proceedings to enforce its claim, until the Magistrate's Court has made a determination in terms of section 87 of the Act.

[21] In contending for an interpretation of section 86(10) of the Act that would allow a creditor to terminate a debt review process once a debt counsellor has referred it to a Magistrate's Court for consideration, the applicant relies on the procedural inability of the Magistrate's Court, to deal with section 87 proceedings within 60 days from the date on which it was referred to it. I am of the view that that such an interpretation will lead to an absurdity, in that the whole purpose of the Act would be circumvented, due to the Magistrate's Court's inability to process section 87 applications within 60 business days from the referral date, being the referral to the credit provider, and not the referral to the Magistrate's Court. Such an interpretation would be contrary to the intention of the legislature as set out in section 2(1) read with section 3 of the National Credit Act. In *S v Tom* and *S v Bruce* 1990 (2) SA 802 (A), the Appellate Division held as follows at page 807-809:

> "*The primary rule in construction of statutory provisions is to ascertain the intention of the legislature. One does so by attributing to the words of a statute their ordinary, literal, grammatical meaning. Where the language of a statute so viewed, is clear and unambiguous, effect must be given thereto, unless to do so 'would lead to absurdity to glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the Court is justified in taking into account … (Per Innes CJ in R v Venter 1907 TS 910 at 915.) See also* ***Shenker v The Master and Another 1936 (AD) 136 at 142***."

[22] It is clear from a reading of section 86(10) of the Act, that only debt reviews conducted by debt counsellors, in terms of sections 86(6) to 86(8)(a) of the Act, maybe terminated in terms of that sub-section, at any time at least 60 business after which the consumer applied, to the debt counsellor, for a debt review in terms of section 86(1) of the Act. Section 86(10) clearly contemplates that the sixty days referred to therein, will run at least 60 days from the date on which the consumer first applied, to a debt counsellor, for a debt review, and not that it will run at least 60 days from the date of referral, by the debt counsellor, to a Magistrate's Court.

[23] It is furthermore clear from a proper reading of section 86(10) that it is not the magistrate that is required to make a determination at least 60 days from the date on which the consumer applied for the debt review, in terms of section 86(1) of the Act, but rather the debt counsellor. In other words, should he fail to conclude the review process, within 60 days from the date on which the consumer applied for the debt review, in terms of section 86(1) of the Act, then a credit provider would be entitled, in terms of section 86(10) of the Act, to give notice to terminate the review, in the prescribed manner, to the

consumer, the debt counsellor, and the National Credit Regulator. Any contrary interpretation would not have been contemplated by the legislature, as it would be to the detriment of the consumer.

[24] In summary, I am of the view that notice in terms of section 86(10) of the Act is not competent where a debt counsellor has already referred the debt review to the Magistrate's Court. Any contrary interpretation would render the entire debt review process ineffectual, as all credit providers will simply wait for 60 working days, knowing that no Magistrate's Court will be able to adjudicate the debt review, in terms of section 87 of the Act, to finality within 60 business days from referral to it. Such an interpretation would circumvent the protection afforded by the Act, and would be in conflict with the intention of the legislature. It is vital, in this regard, that the provisions of the Act and, in particular, the provisions of section 86(10) be viewed in their proper context and not to the detriment of the consumer, which the Act so clearly seeks to protect.

[25] Mr Van der Merwe, appearing on behalf of Mr Kruger, submitted that section 129 of the Act also supports an interpretation that once a debt review process has been referred to the Magistrate's Court, termination thereof in terms of section 86(10) is incompetent. Section 129 provides:

> "***129. Required procedures before debt enforcement.*** *– (1) If the consumer is in default under a credit agreement, the credit provider –*
>
> *(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute*

resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and

(b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before –

(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and

(ii) meeting any further requirements set out in section 130.

(2) 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."

[26] It is clear from a reading of section 129(2) of the Act, that neither section 129(1)(a) nor 129(1)(b) of the Act applies to instances where a matter has been referred to a court for determination. The provisions of section 129(1) of the Act are, in this regard, expressly qualified by the provisions of section 129(2); the latter specifically excluding the application of section 29(1) of the Act 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. A referral of a debt review by a debt counsellor, in terms of section 86(8) of the Act, to a Magistrate's Court for determination, in terms of 87 of the Act, may result in a restructuring or re-arranging order in terms of sub-sections (b)(i) or (ii) Act. It therefore follows that in terms of section 129(2) Act, notice to terminate a review, in terms of section 86(10) of the Act, would be incompetent, once the debt review is referred, by a debt counsellor, to a Magistrate's Court for determination.

[27] In the premises, I am of the view that section 86(10) of the Act does not empower the applicant to terminate the debt reviews of Kruger and Pretorius as their respective debt counsellors have already referred their respective reviews, with recommendations, to the Magistrate's Court for consideration. The applicant's termination of the debt reviews in the two applications before this Court is, therefore, invalid and of no force or effect.

[28] Ms Pretorius raised an additional point *in limine* that the applicant has not complied with section 86(10) of the Act, as it has failed to provide proof that the termination notice was transmitted to the National Credit Regulator. The Court in *ABSA B*ank *Limited v Prochaka t/a Bianca Cara Interiors* 2009 (2) SA 512 D at paragraphs 28 to 31 held as follows in respect of the provision of notice as contemplated in section 86(10) of the Act:

> "*I am fortified in this conclusion by having regard to the scheme of the Act, particularly pertaining to the provisions of s 86. The credit provider is also precluded, by the provisions of s 129(1)(b), from commencing any legal proceedings before first providing notice to the consumer, as contemplated by s 86(10), to terminate the review that has been commenced by the debt counsellor pursuant to the provisions of s 86.*
>
> *...*
>
> *The notice to the consumer to terminate the review, as envisaged in s 86(10), may only be given at least 60 days after the application made by the consumer to apply for review.*
> *The wording of s 86(11), in my view, renders it beyond any argument that the notice contemplated in s 86(10) is a necessary first step before the credit provider proceeds to commence litigation."*

[29] Ms Bezuidenhout, appearing on behalf of the applicant, submitted that in the event that this Court finds that the applicant has not complied with the notice requirements contemplated in Section 86(10) of the Act, then it must make an order in terms of s 130(4)(b) of the Act which provides:

> "(*4) In any proceedings contemplated in this section, if the court determines that –*
>
> *(a) ...*
>
> *(b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3)(a), or has approached the court in circumstances contemplated in subsection (3)(c) the court must –*
>
> *(i) adjourn the matter before it; and*
>
> *(ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed;*
>
> ..."

[30] However, in view of my conclusion that section 86(10) of the Act does not empower the applicant to terminate the respective debt reviews of the respondents, as their respective debt counsellors have already referred their reviews, with recommendations, to the Magistrate's Court for consideration, there is no need for me to make a decision on whether section 130(4)(b) of the Act finds application where the requisite notices contemplated in section 186(10) of the Act are not provided. There is likewise no need for me to decide on Ms Pretorius's further point that the notice which applicant had sent to her was not in compliance with section 96 of the Act, which requires the party giving legal notice to deliver that notice to the other party at the address

of the other party as set out in the agreement, or the address most recently provided by the recipient.

[31] In the result, I am satisfied that the respondents, in each of the applications, have a bona fide defence that is good in law, and accordingly grant them:

31.1 leave to defend the respective actions against them and,

31.2. the costs in the two summary judgment applications are to be costs in the cause of the two main actions, respectively.

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F KATHREE-SETILOANE
ACTING JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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DATE OF HEARING	11 FEBRUARY 2010
DATE OF JUDGMENT	23 APRIL 2010