IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NO: 36490/2009

In the matter between:

MATIMBA MANAGEMENT AND LABOUR CC AND
MONGANE BEN HLABJAGO AND
15 OTHER APPLICANTS Applicant

and

SA TAXI SECURITISATION (PTY) LIMITED First Respondent
SA TAXI FINANCE (PTY) LIMITED Second Respondent

J U D G M E N T

BLIEDEN, J:

Introduction and background history:

[1] By notice of motion dated 25 August 2009 Matimba Management and Labour CC, a debt counsellor registered in terms of the provisions of the

National Credit Act, 34 of 2005 (the NCA) and 25 other applicants launched urgent proceedings to be heard on Friday 28 August 2009.

[2] Relief sought in that urgent application was, *inter alia*, for an order staying all actions instituted by and execution of all warrants obtained by the first respondent against the second to twenty sixth applicants (hereinafter referred to as the 25 applicants) pending the finalisation of the debt review process which it was alleged that the 25 applicants had launched in terms of the NCA. (Matimba Management is not a party to the rescission applications)

[3] On 28 August 2009 Lamont J granted an order by agreement between the parties to the effect that, pending the rescission applications to be launched by the 25 applicants (which included the application referred to in the heading to this judgment, Hlabjago as the 19th applicant) no further writs of attachment would be executed on behalf of the first respondent and none of the vehicles already attached by the first respondent would be sold. Paragraph 5 of that order made provision for the setting down of the matter for hearing in the week of 15 September 2009.

[4] The first respondent is registered in terms of the NCA as a credit provider and had concluded agreements of lease with each of the 25 applicants. In terms of these agreements the first respondent leased a vehicle or vehicles to each of the 25 applicants who, it is common cause, intended to use those vehicles as taxis in the conduct of their businesses as taxi operators. The second respondent is the financial arm of the first

respondent and, it is common cause, plays no part in these proceedings. In his heads of argument in support of the applicant's application counsel stated that his clients would not proceed for any costs against the second respondent. In the circumstances nothing further need be said about the second respondent. In this judgment the first respondent will be referred to as the respondent.

[5] The respondent delivered its answering affidavit in five of the rescission applications and delivered notices in terms of rule 6(5)(d)(iii) in a further eight applications to the effect that it raised questions of law only in response to such applications.

[6] The respondent set down for hearing in the motion court for 22 September 2009 the matters in respect of which either answering affidavits had been delivered or rule 6(5)(d)(iii) notices had been given, together with a notice in the case of one of the applicants, Jika (the 20th applicant) in which it consented to the rescission of judgment.

[7] When those matters were called before Jajhbay J on Tuesday 22 September 2009 he directed that the matters be referred to the Deputy Judge President for the purposes of a special allocation on the motion court roll owing to the volume and expected duration of the hearing of the applications.

[8] The matters were allocated by the Deputy Judge President to Moshidi J, to be heard on 8 February 2010. On that day the following transpired:

1. The eight applicants in respect of whom the jurisdictional point had been taken withdrew their applications for rescission of judgment and tendered costs. These were applicants numbers 3, 5, 12, 13, 14, 17 and 24.
2. The default judgment which was granted against the 20th applicant, Jika, was rescinded and set aside.
3. At the request of the remaining 15 applicants, those applications were postponed sine die by agreement, the applicants being directed to pay the wasted costs occasioned thereby jointly and severally, on the scale as between attorney and client such costs to include the costs of two counsel.
4. The postponement was sought to enable those remaining 15 applicants to supplement their founding affidavits in support of the relief sought.
5. Owing to the fact that the affidavits filed in the five applications which were ripe for hearing (as well as the founding and answering affidavits in the remaining ten applications) are in virtually identical terms the parties agreed that Moshidi J would be called upon to decide only the application of Mongane Ben Hlabjago (the 19th applicant) and that the relief sought in the remaining 14 applications would follow the outcome of the Hlabjago application.

6. It was agreed between the parties that in the event of Hlabjago being successful in obtaining a rescission of Judgment, the applicants in the remaining 14 applications would be entitled to the same relief. On the other hand in the event of Hlabjago being unsuccessful and his application being dismissed, the remaining 14 applicantions for recission of judgment would similarly be dismissed and those applicants refused relief.

7. Following on the application for postponement, Moshidi J also directed that the supplementary affidavits (which, in reality, would only apply to Hlabjago, as his application is determinative of the others) were to be delivered by no later than 15:00 on 19 February 2010. No such affidavits were filed. However at the hearing of the application I accepted a supplementary affidavit from Hlabjago, to which reference will later be made.

The application of Hlabjago:

[9] The relevant portion of the notice of motion filed on his behalf prays for the following relief:

"*1. Rescinding the judgment taken against the Applicant;*
2. Rescinding the Warrant of Execution obtained by the Respondents against the Applicant pursuant to the default judgment referred to in prayer 1, above;
3. Directing that the debt-review process initiated by the Applicant to resume and be finalised before the Respondents may enforce their rights by litigation or any other judicial process;
4. *Directing that the Respondents forthwith restore the vehicle repossessed by them from the Applicant (2008 TOYOTA HIACE SUPER 16, Engine Number: 4Y9167301; Chassis Number: AGT41YH6309060821)*

5. Directing that the action initiated by the Respondents against the Applicant in this honourable Court be stayed pending the finalisation of the debt-review process and the outcome of the pending debt-review process currently in the Magistrate's Court under case number 0053434.

6. *In the event that the debt-review process is finalised and the Respondents persist with their action initiated against the Applicant in the High Court, the Applicant to be permitted to file a Plea within 15 days of the rescission of the judgment."*

[10] Default judgment had been granted against the applicant by the registrar of this court on 17 June 2009, the applicant having failed to enter an appearance to defend the respondent's summons.

[11] Although there is a factual dispute as to whether the applicant's vehicle was attached following upon the grant of default judgment, it is common cause that the applicant is currently in possession of the vehicle referred to in the Notice of Motion. As a result the relief sought in paragraph four of the notice of motion is not relevant.

The law:

[12] The applicant bears the onus of establishing *sufficient cause* for the rescission of the default judgment. The existence or not of sufficient cause depends upon whether:

1. The applicant has presented a reasonable and acceptable explanation of his default; and
2. The applicant has shown the existence of a bona fide defence, that is, one that has some prospect or probability of success.

[13] An acceptable explanation of the default must co-exist with the evidence of reasonable prospect of success on the merits. **Harris v ABSA Bank Limited t/a Volkskas 2006 (4) SA 527 (T)** at paragraphs 4 – 6.

The applicant's defence:

[14] The respondent's cause of action is founded on the unchallenged allegation that the applicant defaulted in the payments due in terms of an agreement of lease. Consequent upon this default the respondent has cancelled the agreement and claimed the return of the vehicle forming the subject matter thereof. It is not disputed that the applicant's arrears were R31 833.10 on 5 February 2009.

[15] It is also not in dispute that prior to the institution of its action the respondent complied with the provisions of section 119 and 130 of the National Credit Act, No. 34 of 2005 (the NCA), in that, as contemplated in section 119 (1) (b)(i) thereof the respondent had furnished notice to the applicant. In terms of section 86(10) the respondent terminated the debt review process which had by then been put in motion.

[16] The applicant does not dispute his failure to pay the agreed rentals due in terms of the lease agreement, but challenges the respondent's entitlement to have instituted action or applied for default judgment "*while the matter was pending before a debt counsellor and the magistrate's court".*

[17] In his founding affidavit the applicant does not challenge the averment in the respondent's particulars of claim to the effect that its notice of termination of the debt review in terms of section 86(10) of the NCA was furnished in the prescribed manner to the applicant, his debt counsellor and the national credit regulator.

[18] In his replying affidavit the applicant admits that the section 86(10) notice was received by him and his debt counsellor but pleads no knowledge of whether or not the respondent furnished that notice to the national credit regulator. The respondent did not annexe proof of service of that notice to his answering affidavit, given that the allegations of notice in the prescribed manner were not challenged in the founding affidavit. On the papers before the court, the respondent's furnishing of the notice in terms of the NCA is therefore not in issue.

[19] In order to place the applicant's contentions into perspective, the relevant time line of the debt review process in this case is as follows:

1. On 18 July 2008 the applicant approached Matimba Management in terms of section 86(1) of the NCA to have himself declared over indebted.
2. On 22 July 2008 the respondent was notified by Matimba Management of the applicant's debt review application.

3. On 29 July 2008 the respondent was advised by Matimba Management that the applicant's application for debt review had been successful.

4. On 11 September 2008 Matimba Management furnished the respondent with what is described as a "*restructuring proposal*" in terms of which it was suggested that the lease instalment payable by the applicant to the respondent be reduced from R3881.41 per month to R1470.00 per month.

5. The proposal was not accepted by the respondent.

6. No further steps were taken by Matimba Management or the applicant in the debt review process.

7. On 5 February 2009 the respondent delivered its notice in terms of Section 86(10) terminating the debt review.

8. The respondents' summons was issued on 23 February 2009 and served in terms of the rules of court on 24 February 2009.

9. By notice of application dated 11 March 2009 the applicant made application in the Magistrate's court for the district of Johannesburg for an order contemplated in section 87 of the NCA. That application was issued by the relevant Magistrate's court on 20 March 2009. This section of the NCA reads:

"***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).”*

10. The application was not served on the respondent in terms of the Magistrate's court rules but was sent by registered post to the Respondent, who admits receipt thereof. However the respondent avers that by the date on which the application was launched, it had already cancelled the debt review process in terms of section 86(10) which reads:

“*(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.”

[20] It is the respondents' case therefore, that at the time of the institution by the respondent of his action there was not in existence an application in terms of section 86(7)(c) of the NCA which precluded the action. That subsection reads:

“(7) If, as a result of an assessment conducted in terms of subsection (6) a debt counsellor reasonably concludes that -
a…
b….
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."

It now seems that the applicant seeks the revival of the debt review process as contemplated in section 86 (11). This section reads:

> *"(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 the matter may order that debt review resume on any conditions the court considers to be just in the circumstances."*

On behalf of the respondent counsel submitted that no case had been made justifying such a revival, or the terms on which it is to take place. He further made the point that the applicant's reliance on this provision ignores the significant fact that the agreement of lease had been validly terminated by the respondent.

It was further submitted that there is no provision in the NCA which entitles a magistrate's court (or, indeed, any court) to reinstate an agreement that has been validly terminated. The only remedy available to the applicant in those

circumstances is to invoke the provisions of section of sections 86 (11) in order to obtain a revival of the debt review process in relation to whatever amounts may remain outstanding by him after return of the vehicle to the respondent and after the respondent has utilised the provisions of section 127 of the NCA which deals with the surrender of goods by the consumer, being the present applicant. In such case the applicant would be entitled to be credited with the price received on the sale of the goods by the respondent which is in excess of the debt at that time outstanding.

In my view the submissions of the respondent's counsel as stated above have substance in the circumstances.

The termination of the debt review process and its effect:

[21] The termination of the debt review process initiated in terms of section 86(1) of the NCA through the utilisation of section 86(10) requires the existence of the following jurisdictional factors:

1. The consumer (applicant) must be in default under the credit agreement;
2. At least sixty business days must have elapsed after the date on which the consumer applied for debt review;
3. action can only be instituted after at least ten business days have elapsed since the credit provider delivered the notice contemplated in section 86(10) of the NCA.

[22] In the instant case these factors were all present as the unchallenged evidence shows:

1. It is not in dispute that the applicant was in default under the lease agreement (the allegations in the particulars of claim had not been challenged);
2. The notice in terms of section 86(10) delivered on 5 February 2009 was delivered more than 60 business days after the applicant approached Matimba Management to have himself declared over indebted. The application was made on 18 July 2008.

[23] Ten business days elapsed between 5 February 2009 (the date of the section 86(10) notice) and 24 February 2009 (the date of the service of the summons on the applicant).

[24] In my view counsel for the respondent is correct in his submission that once the debt review process has terminated in the circumstances already referred to, the only remedy remaining available to a consumer such as the applicant is that contemplated in section 86(11) of the NCA which allows for the resumption of the debt review process by the magistrate's court hearing the matter on such terms and conditions as that court considers to be just in the circumstances. It is plain that the section contemplates an application for that relief. See **Standard Bank SA Ltd v Panayiotts 2009 (3) SA 366 W**.

[25] Despite the fact that paragraph 3 of the Notice of Motion seeks a directive that a debt review process initiated by the applicant resume, no case is made out by the applicant for the relief claimed in terms of section 86(11). The applicant relies in his founding papers on two contentions:

1. Firstly the allegation that action should not have been instituted by the first respondent and default judgment not applied for in the circumstances in which the debt review process remained pending before a magistrate's court.
2. Secondly the applicant contends that that the respondent acted in bad faith by failing to properly co-operate in the debt review process and, it is suggested circumvented that process by the institution of action and the application for default judgment. In my view there is no substance in this contention as it is the applicant and the debt counsellor who are responsible for not having proceeded in terms of the provisions of the NCA.

[26] An additional ground raised in the applicant's supplementary affidavit is that the respondent had granted him credit recklessly within the meaning of section 80 of the NCA. In my view there is no substance in this contention in the present case as a debt counsellor had been appointed by the applicant, and part of the relief claimed by him was a declaration that the respondent had granted credit recklessly.

[27] The propositions in 25.1, 25.2 and 26 above lose sight of the possible outcomes of a debt review application as legislated for in the NCA. Section 86(7) makes provision for only three possible outcomes:

1. The debt counsellor may find that the consumer is not over indebted;
2. The debt counsellor may find that although the consumer is not over indebted, he / she is experiencing, or is likely to experience difficulties in satisfying his / her obligations;
3. The debt counsellor may find that the consumer is over indebted. **National Credit Regulator v Nedbank Limited 2009(6) SA 295 (GNP)** at 303 a – b.

[28] There is no provision in the NCA which allows for a finding of over indebtedness on the part of the debt counsellor for the restructuring of a consumer's debt without such debt counsellor being obliged to refer that proposal to the magistrate's court in terms of section 86(7)(c) for a determination as contemplated in that subsection and in section 87 of the NCA. See **National Credit Regulator v Nedbank Ltd (supra)** at 317 A -B

[29] In the present matter the approach adopted by the debt counsellor and the applicant is contrary to the provisions of the NCA. Once the finding of over indebtedness had been made by the debt counsellor as contemplated in section 86(7)(c) of the NCA, rather than make a proposal or recommendation to a magistrate's court, the debt counsellor unilaterally determined through the form of his proposal (Annexure K5 to the applicant's founding papers) that the

applicant's monthly lease instalment should be reduced from R3881.41 to R1470.00.

[30] Despite the fact that no judicial approval for the reduction was furnished (notwithstanding the requirement for judicial oversight of the entire process: National Credit Regulator v Nedbank *supra* at 304I – 305D) the applicant terminated his agreed monthly lease instalments and (partly) paid what had been determined (albeit irregularly) by the debt counsellor.

[31] It is claimed by the respondent that since November 2008 to the date of the default judgment, the applicant paid the respondent the sum of R8 811.57 in reduction of his lease instalments. However in terms of his own restructuring proposal, the amount that should have been paid over that period was R14 700.00. In the circumstances at the time of the granting of default judgment the applicant had not even complied with his own version of reduced payments.

[32] Sec 88(3)(b)(ii) allows for the enforcement by litigation by a credit provider, such as the respondent, of its rights in terms of a credit agreement in the event that the consumer (applicant) defaults on any obligation in terms of the rearrangement agreed to between the consumer and credit provider or ordered by a court. Although in this instance there was no such agreement or court order, the continued non-payment by the applicant of what had been proposed through his debt counsellor, demonstrates that the applicant has no clear intention of servicing his debts.

[33] In reply to the allegations of non payment made in the respondents' answering affidavit, the applicant says no more than he has made payments and denies that he is in arrears in terms of that proposal. No proof of payment is furnished and this contention must be rejected as being "*needlessly bald, vague and sketchy*". See **Breytenbach v Fiat 1976 (2) SA 226 T.**

[34] Neither the applicant nor the debt counsellor have furnished any explanation for the delay between the application in terms of section 86(1) which was made on the 18th of July 2008 and the issue of the Magistrate's court application on 11 March 2009 - a delay of almost eight months. As submitted on behalf of the respondent the inference is inescapable that the applicant utilised the provisions of section 86(1) of the NCA for the purposes of seeking to delay the enforcement of the provisions of the lease agreement despite his breach thereof and by failing to pay any reasonable instalments in terms of such agreement.

[35] In the circumstances the relief sought in the rescission application for a reinstatement of the debt review process in terms of section 86(11) of the NCA cannot succeed.

[36] In all the circumstances I find that there is no basis for relief in terms of section 86(11) of the NCA and consequently the applicant has not presented

facts which furnish him with a defence which has any prospect of success at the trial.

The applicant's explanation for his default:

[37] In explaining his failure to enter into an appearance to defend in his founding affidavit, the applicant states that he was told by his debt counsellor that as the debt review process had not been finalised, he was not required to enter an appearance to defend the respondents' action. He says he was told the debt counsellor would inform the registrar of the pending application at the Johannesburg magistrate's court. No mention is made of the name of the debt counsellor involved nor was there any affidavit from such counsellor confirming this.

[38] What is significant is that in these founding papers the applicant did not dispute receiving the summons. By implication he must have received it in order to have obtained the advice he relied upon.

[39] The respondent's summons had been served on the principle door of the applicant's chosen domicilium citandi et exucutandi which was an address in Pimville Soweto and was the applicant's residential premises.

[40] In his replying affidavit the applicant denies having received a copy of the summons. He states that had he received such a copy he would have entered into an appearance to defend. This is in direct contradiction to what

he said in his founding papers. This in itself is a cause for concern as to the applicant's bona fides in the present application.

[41] However, counsel for the respondent submitted that even if I found that an acceptable explanation had been furnished by the applicant for his failure to defend the matter timeously, this was not sufficient to justify a rescission of the judgment either in common law or in terms of the rules of the court. As is plain from what is stated in **Harris v ABSA Bank Ltd t/a Volkskas** supra at paragraph 5, the test to be applied in this application is that an acceptable explanation of the default must co-exist with evidence of a reasonable prospect of success on the merits. The test in conjunctive not disjunctive.

[42] There is also no room for the application of rule 42(1)(a) in the present matter as service of the summons had been properly effected and there was no question of the default judgment being erroneously sought or granted as claimed by the applicant as I already found the debt review process had been lawfully terminated by the respondent by the time the summons was served.

Conclusion:

[43] In all the circumstances, and for the reasons stated above, the application for rescission of judgment fails and is dismissed with costs.

[44] Counsel for the respondents submitted that this was a matter which justified the employment of two counsel. I am of the view that this is correct

as it involved no less than 15 applications and was a matter of importance both to the applicant and the respondent.

[45] In the circumstances the application for rescission of judgment brought by the following applicants is dismissed with costs, such costs including the costs of two counsel, for which all 15 applicants are liable jointly and severally:

1. Mongane Ben Hlabjago;
2. Zakheleni Andries Khanile;
3. Vusumzi Mtabane;
4. Cardinal Moloi;
5. Bennet Jeleni;
6. Sibongile Ndlela;
7. Nkosinathi Valentine Khumalo;
8. Vhunyani Simon Muridili;
9. Mulalo Norman Mulaudzi;
10. Sefoloko David Ratau;
11. Daniel Thabo Habanyane;
12. Joseph Tsotetsi;
13. Francina Lineo Mokhethi;
14. Lesetja Norman Mojapelo;
15. Welcome Monwabisi Mnotoza.

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P BLIEDEN
JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPLICANT	Adv. C. Georgiades
INSTRUCTED BY	Nzoku Nxusani Inc.
COUNSEL FOR THE RESPONDENTS	Adv. A. Subel (SC)
	Adv. A.R.G. Mundell
INSTRUCTED BY	Marie-Lou Bester Inc.
DATE OF HEARING	03 March 2010