IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 64923/2011

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA Plaintiff

and

FRANCOIS JACOBUS WESSELS Defendant

CASE NO: 68363/2011

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA Plaintiff

and

CARL NIENABER t/a MONTANA AGENCIES Defendant

CASE NO: 70014/2011

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA Plaintiff

and

P J KOEKEMOER Defendant

JUDGMENT

DAVIS, AJ

[1] The abovementioned three matters came before me in the unopposed motion court on the 11th of April (in respect of case numbers 68363/2011 and 64923/2011) and 13 April 2012 (in respect of case number 70014/2011) respectively. The Plaintiff in all three matters is the Standard Bank of South Africa Ltd and the various Defendants were all represented by the same set of attorneys, who also used the same counsel to argue all three matters. All three matters were opposed applications for summary judgment and in all three matters the answering affidavits followed the same pattern to the extent of even listing the defences in the same wording, font and sequence. Of course different defendants might have the same defence but the manner in which these were presented to the court gave the definite impression of a standard so-called "*cut-and-paste*" affidavit. I will deal with the detail of the affidavits more fully hereunder. As will also appear, there is sufficient overlapping of issues in all three matters to render it appropriate to deal with them in one judgment.

[2] In case number 68363/2011 the claim was for cancellation of a written instalment sale agreement regarding a Tata motor vehicle and for return thereof. The agreement provided for monthly instalments in the amount of R7 648,90 and the agreement would have expired on 6 March 2011, that is more than a year prior to the hearing of the application.

[3] In case number 64923/2011, the Plaintiff claimed confirmation of the cancellation of a written lease agreement in respect of a certain Nissan Hardbody motor vehicle and the return thereof. The lease

agreement provided for monthly instalments in the amount of R2 820,28 and the agreement would have expired on 1 August 2011.

[4] In case number 70014/2011, the Plaintiff claimed confirmation of cancellation of a written instalment sale agreement in respect of a Toyota Corolla motor vehicle and the return thereof. The monthly instalments were R3 985,35 and the agreement would have expired on 1 December 2013.

[5] As aforestated, in all three matters summary judgment was applied for after the respective Defendants have delivered notices of intention to defend. In all three matters the Defendants were in arrears in respect of the respective credit agreements. In all three matters the various Defendants had applied for debt review and had made offers to the Plaintiff as credit provider. In case number 68363/2011 the Defendant therein proposed a debt restructuring proposal on 1 February 2011 in which he proposed monthly repayments in respect of the Plaintiff's credit agreement in the amount of R4 715,93 which amount would increase over time and with a proposed final termination date of 7 April 2019. In case number 64923/2011 the Defendant therein proposed a debt restructuring proposal (on a date not indicated) in which he proposed monthly repayments in respect of the Plaintiff's credit agreement in the amount of R4 500,00 which amount would increase over time and with a proposed final termination date of 24 March 2013. In case number 70014/2011 the Defendant therein proposed a debt restructuring proposal on 24 November 2011 in which he proposed monthly repayments in respect of the Plaintiff's credit agreement in the amount of R2 881,98 which amount would increase over time

and with a proposed final termination date of 1 August 2017. None of these proposals were accepted.

[6] In all three matters the Plaintiff sent notices in terms of Section 86(10) of the National Credit Act, No. 34 of 2005 terminating the respective debt reviews.

[7] Save for a single sentence wherein it is denied that appearance had been entered for purposes of delay (in case no. 70014/2011), the first seven paragraphs of the opposing affidavits in all three matters are virtually identical, to the extent that the debt counsellor's name in case no. 64923/2011 (in which case a different debt counsellor is involved than the one in the other two matters) has initially been copied from the other affidavits and later been amended in pen and initialled by the deponent therein (only). The defences raised by the Defendants in all three matters are identically worded and described as follows:

"• *TECHNICAL SHORTCOMINGS IN THE PAPERS*

- *ALLEGED TERMINATION AND PROOF THEREOF*
- *APPLICATION IN TERMS OF SECTION 86(11) OF THE NCA*
- *RE-ARRANGEMENT IN TERMS OF SECTION 85 OF THE NCA*
- *PERSONAL CIRCUMSTANCES*
- *COSTS*" (I quote these defences in the same fashion as they identically appear in all three opposing affidavits.)

[8] These defences are then dealt with in subsequent paragraphs in similar fashion in all three matters. I shall similarly deal with them hereunder. I interpose at this stage to state that the three Defendants also each quoted identical paragraphs from the judgment in **Rossouw and Another v Firstrand Bank Ltd** 2010(6) SA 439 (SCA) in their affidavits to which I will also make reference hereunder.

[9] Before dealing with the aforementioned defences raised, I lastly point to the following distinguishing features in the matters:

9.1 In case number 64923/2011 the answering affidavit was late and on 7 March 2011 Mngqibisa-Thusi, J, in postponing the matter, ordered the Respondent to file an application for condonation within 5 days from that date. The condonation application was served late on 23 March 2012 and although the telefaxed copy handed up to me in court bear the court's date stamp of 27 March 2012, this application was not initially on the court file. Neither the application nor the supporting affidavit explained why the application was late and why the Defendant should still be heard although before caught with dirty hands.

9.2 In matter number 70014/2011 Molopa-Sethosa, J previously postponed the matter and ordered the Defendant to pay the wasted costs, presumably also due to a late delivery of the opposing affidavit.

9.3 In matters number 68363/2011 and 70014/2011 the affidavits in support of the applications for summary judgment were deposed to by Ms Lynn Liesel Lawrence-Hall and in matter number 64923/2011 by Mr Jonas Malosa Reginald Sema. Both these deponents are managers in the Legal Department of the Plaintiff's Vehicle and Asset Finance Divisions.

[10] **AFFIDAVITS IN SUPPORT OF THE APPLICATIONS FOR SUMMARY JUDGMENT**:

In matters number 68363/2011 and 64923/2011 the aforementioned affidavits are *in pari materia* with each other and the relevant portions thereof read as follows:

"3. *I verify and confirm that I have through my position access to all records and information in the possession of the Applicant pertaining to this matter before this Honourable Court and am as such competent to depose to this affidavit.*

4. *I have perused the records in my possession and acquainted myself with the contents thereof and therefore the facts herein contained herein (sic) fall within my direct knowledge unless the contrary is indicated.*

5. *I swear positively to the facts verifying the cause of action and the amount claimed.*

6. *I state that in my opinion there is no bona fide defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay."*

[11] In matter number 70014/2011 the relevant portion of the affidavit in support of the application for summary judgment reads as follows:

"2. *I confirm that all files, documents and records pertaining to this matter are in my possession and under my control.*

3. *I can swear positively to the facts herein and state that the Respondent/Defendant is indebted to the Applicant/ Plaintiff on the grounds stated in the summons and particulars of claim and I confirm the content and correctness of the averments contained in the summons and particulars of claim and hereby verify the facts, cause of action and the amount claimed.*

4. *In my opinion the Respondent/Defendant does not have a bona fide defence to the action and a notice of intention to defend has been delivered solely for the purpose of delay."*

[12] During argument of one of the matters I was referred to two as yet unreported judgments in this division regarding the sufficiency of affidavits in support of applications for summary judgment. The first is case number 32371/2010 in the matter between Standard Bank of South Africa (Plaintiff) vs Han-Rit Boerdery CC (First Defendant), Bernardus Johannes Bezuidenhout (Second Defendant) and Susanna Maria Bezuidenhout (Third Defendant) by Southwood J (judgment date 22 July 2011) (the "*Han-Rit Boerdery case*"). The second is in case number 23054/2011 in the matter between Standard Bank of South Africa Ltd (Applicant) vs Kroonhoek Boerdery CC (First Defendant), André Nortjé (Second Defendant) and Andries Johannes Burger (Third Defendant) by Tuchten, J (judgment date 1 August 2011) ("*the "Kroonhoek Boerdery case*"). Southwood J upheld the Defendants' point *in limine* in the matter before him and refused summary judgment whilst Tuchten J differed from Southwood J and granted summary judgment. The **Kroonhoek Boerdery** judgment has been marked reportable but I understand is also being taken on appeal.

[13] The crucial portion of the judgment in the **Han-Rit Boerdery** case reads as follows:

> *"In the present case it is clear that Ms Govender's knowledge is derived entirely from the Applicant's ledgers, books of account and files pertaining to the Defendants' accounts. She does not allege that she had any discussions or dealings with the Defendants in connection with their accounts and the amounts claimed."*

The learned judge agreed with the decisions in **Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another** 2010(5) SA 112 (KZP) and **Firstrand Bank Ltd v Beyer** 2011(1) SA 196 (GNP) wherein it was found that a deponent who acquires his knowledge from documents to which he has access cannot positively swear to the facts. With reference to **Maharaj v Barclays National Bank** 1976(1) SA 418 (A) at 423A-424 and **Barclays National Bank Ltd v Love** 1975(2) SA 514 (D), Tuchten J differed from the approach in the **Han-Rit Boerdery** judgment and its reliance on the position taken in **Firstrand Bank Ltd v Beyer** as follows:

> *"In my respectful view, this proposition may be too widely stated. The question, I suggest, is not the general one whether the deponent can competently testify to all the documents with her employer bank but whether she can competently testify to those relevant to the case in question. In the present case Ms Harripersad* [the deponent] *is the official within the Applicant at the head of the department responsible for the recovery of amounts which the Applicant regards as being in arrears. She had the means to acquire personal knowledge of the contents of the documents attached to the statement of claim and she says, in effect that she did so."*

[14] I am furthermore in respectful support of the approach taken in the **Kroonhoek Boerdery** case in which reference was made to **Maharaj v Barclays National Bank** *supra* which made *"...it quite plain (at 423H) that the principle is that in deciding whether or not to grant summary judgment, the court looks at the matter 'at the end of the day', on all the documents that are properly before it"*.

[15] The existence of the agreements, the terms thereof, the monthly payments and at least the issue of arrears (if not the full extent thereof) have not been placed in dispute in the three matters under consideration. In fact, the proposals made to the credit providers confirm that the initial payments had not been made or were not capable of being made, hence the offer of paying some other amount. These common cause facts appear to distinguish these cases from that in the **Han-Rit Boerdery** case. I am, in these circumstances, satisfied that the requirements of Rule 32 have sufficiently been complied with and that the following finding in the **Kroonhoek Boerdery** case, is equally apposite to all three matters before me:

> *"In these circumstances, in my judgment, it would in the present case be entirely artificial and in conflict of the principle in **Maharaj** to which I have referred to to non-suite the Applicant on any supposed defect in its affidavit in support of the summary judgment application."*

[16] As a last resort, all three Defendants take issue with the fact that the deponents to the affidavits in support of summary judgment verified "*... the amount claimed ...*" in each instance whilst, as indicated earlier no specific amount was claimed as a prayer. Whilst this may be so, in each instance indebtedness, arrears payments and damages, being the difference between the full outstanding amounts on the various agreements (in each instance confirmed by an agreed to certificate of balance) minus the value of the goods as at the date on which the Plaintiff obtains possession of same were pleaded. Clearly this calculation and particularly the certificates of balance

constitute the "*amounts claimed*" which had been confirmed on oath. In my view, nothing turns on these objections.

[17] **TERMINATION OF DEBT REVIEW**:

As stated above, in all three matters the Defendants have applied for debt review and the Plaintiff has alleged termination thereof. All three Defendants dispute that the termination was properly executed.

[18] Regarding termination of debt review, Section 86(10) of the National Credit Act, No. 34 of 2005, states as follows:

> "*(10) If a consumer is in default under a credit agreement that is being reviewed in terms of the 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 day on which the consumer applied for debt review.*"

[19] In each instance the agreements concerned were included in the respective Defendants' debt reviews and the 60 day time periods have elapsed. Issue has only been taken with the notices.

[20] The first of the notices must be to the Defendants as consumers. A notice constitutes a "*document*" and, in respect of consumers, Section 65 provides as follows:

> "***65 Right to receive documents***
>
> *(1) Every document that is required to be delivered to a consumer in terms of this Act must be delivered in the prescribed manner, if any.*
>
> *(2) If no method has been prescribed for the delivery of a particular document to a consumer, the person required to deliver that document must ....*
>
> *(b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a).*"

Section 65(2)(a)(i) makes provision for notice by ordinary mail.

[21] It has already been held in **Rossouw v Firstrand Bank** *supra* at paragraph [30] that the option to choose receipt by registered mail fall within the statutorily sanctioned postal delivery provided for in Section 65(2)(a).

[22] The Defendants also do not object to the fact that the notices have been sent by registered mail, they simply (in respect of case number 68363/2011 and 64923/2011) allege that they have not received them while in case number 70014/2011 it was alleged that the debtor "*simply cannot remember*" if the notice was received or not.

[23] In case number 70014/2011 and 64923/2011 the notices provided by the Plaintiff were each accompanied by an individual slip from the post office. These slips were date-stamped and provided for "*full tracking and tracing*". For this purpose a track and tracing sticker with a unique tracing number is affixed to the slip indicating mail by registered post. In case number 68363/2011, the letter is indicated on a "*registered mail control sheet*". The control sheet has a specific track and trace sticker with a unique tracing number in respect of the letter sent to the Defendant therein and the control sheet also bears a date stamp from the relevant post office. Although the initials of the post office accepting officers are absent (or unclear in one instance) the date-stamping and the tracing stickers in my view, sufficiently distinguish these three matters from the position in **Rossouw v Firstrand Bank** *supra*.

[24] I therefore find that the notices to the Defendants as consumers terminating their individual debt reviews were sufficient dispatched by the Plaintiff. The aside comment by the Defendant in case number 68363/2011 that the indication was that his letter was sent to No. 5 Noas Apache Avenue, Cynthiavale 0182 whilst he lives at No 5 Apache Avenue, Cynthiavale do not in my view take the matter much further. The probabilities are overwhelming that despite the insertion of the letters "*Noas*" where it has been in the letter all indications are

that it would have reached No. 5 Apache Avenue where the relevant Defendant lives once it had got to Cynthiavale with the correct postal code, lastmentioned which are not disputed.

[25] The Defendants' objections to the notices having been e-mailed to the debt counsellors in matters number 64923/2011 and 40014/2011 have a bit more substance: There is no corresponding provision regarding debt counsellors as there is for consumers in Section 65 of the National Credit Act. Insofar as Section 86(10) makes provision for the giving of notices "*... in the prescribed manner*" the "*manner*" could only be prescribed by regulation. None of the regulations promulgated in terms of the National Credit Act, being GNR 489 of May 2006, GNR 1209 of November 2006 and GN 789 of 28 August 2007 make provision for the notices contemplated in Section 86(10). Insofar as Regulation 1 of GNR 489 of 31 May 2006 in its definition of "*deliver*" makes provision for "*sending a document*" by e-mail, that definition only applies for those notices which are provided for in the regulations (and not the Act). See also **Rossouw v Firstrand Bank** *supra*, paragraphs [24] to [27].

[26] My attention has, as in the **Rossouw v Firstrand Bank** matter, repeatedly been drawn to the contents of Section 168 of the National Credit Act which provides as follows:

> "*Unless otherwise provided in this Act, a notice, order or other document that, in terms of this Act, must be served on a person would have been properly served when it has been either –*
>
> *(a) delivered to that person or*

(b) sent by registered mail to that person's lastknown address."

[27] It has already been found (in **Rossouw v Firstrand Bank** *supra* at paragraph [31]) that the "*... catch-all provisions of Section 168 of the Act, dealing with service of documents, which in the legal context is synonymous with 'delivery of documents' ... deems sending a document by registered mail to a person's lastknown address proper service ...*".

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

[29] I interpose to state that in case number 68363/2011 the notice was faxed to the debt counsellor with a fax number in which the last digit differed by one from the correct fax number. During argument, counsel for the Plaintiff conceded this but argued that the point was not taken in a *bona fide* manner as the alleged incorrect fax number was indeed that of the CEO of the debt counselling firm. Counsel sought to convince me of this fact by way of the handing up of a letter in response by the said CEO. Although the point does appear to be somewhat spurious, I cannot of course accept documents from the Plaintiff outside that which was provided for in Rule 32 and which should have formed part of the annexures to its particulars of claim. I must therefore disregard this fact and find that the notice was sent to the incorrect fax number. Having regard to the conclusion reached above, this is of course of no consequence and merely pointed out for the sake of completeness.

[30] The Defendants also object to the fact that the termination notices were sent in each instance to the National Credit Regulator by e-mail. The e-mail address was to *terminations@ncr.org.za*. Counsel for the Defendants conceded in argument that this was a standard practice.

[31] The e-mailing of letters to the National Credit Regulator is on a different footing than that of debt counsellors. The National Credit Regulator is not, in the instance of termination of the debt review, individually involved and, upon a reading of the Act, need to receive notice of such terminations for reporting and statistical purposes.

[32] Upon a re-reading of the regulations, the "*definitions*" contained in Regulation 1 of the regulations referred to above, contained under the definition of the term "*deliver*" two further sentences. These sentences appear not to be definitions but rather substantive regulations and provide as follows:

> "*Where notices or applications are required to be delivered to the National Consumer Tribunal, such delivery shall be done in terms of the Tribunal's rules. Where notices or applications are required to be delivered to the National Credit Regulator, such delivery shall be done by way of hand, fax, e-mail or registered mail to the registered address of the National Credit Regulator.*"

[33] One can easily imagine a number of reasons why the various options are given. Vast amounts of notices and documents must as a matter of course be received by the National Credit Regulator. Electronic mail will facilitate this. The volume of documents received by the National Credit Regulator (i.e. in respect of each and every consumer under debt review) must, by its very nature, be much more than that received by individual debt counsellors who only have to deal with their "*own*" consumers under debt review. Apart from the fact that the above quoted portions from the regulations appear to be substantive prescriptions (and not only defining what the term "*deliver*" means), I have been informed from the Bar that the e-mail address referred to above was a specific "*portal*" created and chosen by the National Credit Regulator for the specific purpose of receiving notices of terminations of debt review. It is therefore clearly a publicly announced address of choice by the statutory body. This creation of the portal and express choice of address by the National

Credit Regulator corresponds with my reading of the substantive nature of the above quoted portion of the regulations. I therefore find that notice of termination of a debt review by e-mail to the National Credit Regulator at its chosen e-mail address (and proof of the sending thereof) constitute sufficient compliance with the regulations and the National Credit Act.

[34] In terms of Section 130(4)(b)(ii), a court is entitled to adjourn any matter before it to enable compliance with such outstanding provisions of the National Credit Act as the court may deem appropriate. I intend exercising this right and, having regard to the novel influence the provisions of the National Credit Act has on pending legal proceedings as illustrated in the **Collett** judgment, I do not believe that such orders would undermine summary judgment procedures. I am fortified in this view by the judgment in **Standard Bank of South Africa Ltd v Rockhill & Another** 2010(5) SA 252 (GSJ).

[35] **APPLICATIONS IN TERMS OF SECTION 86(11) OF THE NATIONAL CREDIT ACT**:

In each of the three applications under consideration, the Defendants stated that, should I find that the debt review was in fact terminated, they will launch an application for resumption thereof in terms of Section 86(11) of the Act. They attempted to indicate that they have reasonable prospects of success regarding such resumption applications and requested adjournments of the summary judgment applications for purpose of filing such applications.

[36] The finding to which I came in paragraph [28] supra, strictly renders these requests inapplicable but, having regard to the orders which I intend making, the issue of the requests may still be relevant. Before considering the Defendants' requests, it is apposite to be mindful of what the Supreme Court of Appeal has found in **Collett v Firstrand Bank Ltd** 2011(4) SA 508 (SCA). Therein it was found that:

> *"Section 86(10) entitles a credit provider to terminate the debt review relating to a specific credit agreement ('if a consumer is in default under a credit agreement that is being reviewed'), not the 'hearing'. The hearing continues and, if several credit agreements are being reviewed, continues in respect of the others.... The right of the credit provider to terminate the review is balanced by Section 86(11) which provides that, if the credit provider has given notice to terminate and proceeds to enforce the agreement, the Magistrate's Court may order that the debt review resumes on any conditions the court considers to be just in the circumstances."*

See paragraphs [17] and [18].

[37] It is clear that this is also what has happened in all three of the abovementioned instances before me.

[38] It is also clear that the three Defendants in the applications before me each have no defence on the merits of the Plaintiff's claims against them. They in fact rely on their inability to comply with their contractual obligations and the debt review processes which resulted therefrom. Despite the absence of a defence on the merits, the

following has also been found in **Collett v Firstrand Bank** *supra* at 518G-519A:

> *"Over-indebtedness is not a defence on the merits. However, because of its extraordinary and stringent nature, a court has an overriding discretion to refuse an application for summary judgment. It would be proper for a defendant to raise termination of the debt review by reason of the credit provider's failure to participate or its bad faith in participating when application for summary judgment is made. These issues may be raised, not as a defence to the claim, but as a request to the court not to grant summary judgment in the exercise of its overriding discretion."*

[39] In similar fashion as in the **Collett**-matter, no request for a resumption of the debt review was made to this court but merely a request for a postponement so as to enable the Defendants to make it in the Magistrate's Court.

[40] I can find no indication of bias or *mala fides* on the part of the Plaintiff in seeking to enforce its contractual rights and in not accepting the Defendants' proposals. In each instance, the amount and/or time of arrears are substantial. The acceptance of the proposals would also mean that the time for termination of the initial agreements is extended in each instance, allowing the Defendants to ride around with and/or make use of the Plaintiff's vehicles without making payment in the terms as initially contracted between the parties and for an even longer period than initially envisaged. One can well understand a plaintiff's frustration and motivation in

enforcing its contract which included the finance charges from which the Plaintiff makes its living as it were and/or from which it complies with its obligations to its shareholders.

[41] On the other hand, one has both the indication of dire circumstances of the Defendants and their stated intention to comply with the proposals prepared by their debt counsellors.

[42] From the facts originally stated by me above, there is, to my mind, a very important distinguishing feature in this regard between the three Defendants: Whilst the proposals by the Defendants in case number 68363/2011 and 70014/2011 contain proposed instalments amounting to somewhere between 60% and 70% of the original instalments, the Defendant in case number 64923/2011 proposes making instalments to settle the outstanding balance due on his contract in the amount of R4 500,00 per month, whilst the original instalments amounted to only R2 820,28 per month. When I posed the question as to why the Plaintiff as credit provider was not prepared to accept a higher instalment than initially agreed to, the answer was that the credit provider had now "*waited long enough*", was not satisfied with the delay already caused by arrears payments and has no faith in the Defendant making good his promise contained in his proposal. Whilst these may be valid considerations, the refusal of the Defendant's proposal do not sound consonant with the tenor of the **Collett v Firstrand Bank** judgment and is surely a factor which a court must take into account in exercising its discretion.

[43] Save for the issues raised above and, in view of the orders which I propose to make, I am not inclined to otherwise accede to the requests for postponement.

[44] **REARRANGEMENT IN TERMS OF SECTION 85 OF THE NATIONAL CREDIT ACT**:

In the last instance, the Defendants state that this court may rearrange their payment obligations in terms of the agreement in the event of them being over-indebted. There is no need for such a finding in respect of the Defendants in case number 68363/2011 and 70014/2011 as their debt counsellors have already made such findings and their payment obligations will presumably then be rearranged at the resumption of their debt review processes (in respect of their other obligations than those presently under consideration). In respect of the Defendant in case number 64923/2011, in view of the order which I propose to make, I find no need to make a further finding in terms of Section 85 of the National Credit Act.

[45] **SUMMARY OF FINDINGS**:

In summary then, I find as follows:

45.1 The Defendants have disclosed no defences on the merits of the Plaintiff's claims against them.

45.2 But for the provisions of the National Credit Act and the fact that the Defendants have initiated debt review processes, the Plaintiff would be entitled to summary judgment in the terms as claimed as against each of the three Defendants.

45.3 The notices terminating debt review processes sent by e-mail or by fax to debt counsellors do not comply with the National Credit Act. Such notices must be served according to the provisions of Section 168 of the National Credit Act.

45.4 The terminations of the debt review processes in respect of the agreements under consideration would not prevent the Defendants from applying to the Magistrate's Court for the resumption of their debt review processes and the hearings in respect of their other obligations can, in accordance with the **Rossouw**-judgment, proceed.

45.5 I do not intend making findings or orders in terms of Section 85 of the National Credit Act.

45.6 I intend exercising my discretion in case number 64923/2011 only in favour of the Defendant.

45.7 Although the Plaintiffs in case numbers 68363/2011 and 70014/2011 have not complied with the provisions of the National Credit Act in respect of service of their termination of debt review notices on the debt counsellors, this appears from the number of similar conduct in various applications in this

court, to have constituted a practice. I therefore do not intend punishing the Plaintiff in these cases with costs.

45.8 The Defendant in case number 64923/2011 was, as already aforestated, in default with the delivery of his opposing affidavit. He also has not fully nor timeously complied with his condonation application requirements. He should bear the wasted costs occasioned by his dilatoriness but, as is apparent from this judgment and, in the interests of justice, I still allowed and considered his opposing affidavit rather than close the doors of this court on him in respect of a summary judgment procedure.

[46] **ORDERS**:

I make the following orders:

46.1 In case number 64923/2011: Leave is granted to the Defendant, costs to be costs in the cause.

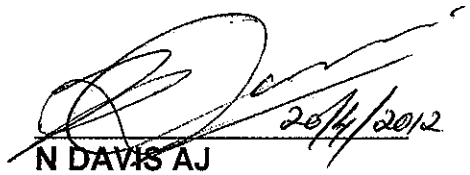
46.2 In case numbers 68363/2011 and 70014/2011:

46.2.1 The summary judgment applications are postponed *sine die*.

46.2.2 Should the Plaintiffs wish to continue with the summary judgment applications, they must, in terms of Section 130(4)(b)(ii) comply with Section 168 of

the National Credit Act in respect of the serving of their notices of termination of the respective Defendants' debt review processes as provided for in Section 86(10)(b).

46.2.3 Save for ordering the Defendant in case number 64923/2011 to pay the wasted costs occasioned by the postponement of the application on 7 March 2012, I make no further order as to costs.



N DAVIS AJ
ACTING JUDGE OF THE HIGH COURT