SECTION 86(10) OF THE NATIONAL CREDIT ACT 34 OF 2005

Firstrand Bank v Raheman (5345/2010) [2012] ZAKZDHC 3 (10 February 2012)

1 Introduction

The purpose of the National Credit Act 34 of 2005 (hereinafter “the Act”) is not only to protect the interests of consumers but to regulate the interests of credit providers as well. There have been a number of views expressed by our courts in dealing with the debt-review process. The debt-review process is found in Part D of Chapter 4 of the Act. The Act makes provision for a consumer who is over-indebted or where he or she is experiencing financial strain to have his or her affairs rearranged by a debt counsellor. The question as to when a creditor may interrupt these affairs is discussed in the case of *Firstrand Bank v Raheman* (*supra*).

2 The facts in *Firstrand Bank v Raheman*

The plaintiff instituted action against the defendants for an overdue debt in the amount of R220 858.82 together with interest calculated daily on such amount at the rate of 8.65% per annum and compounded monthly from 29 April 2010 to date of final payment. The plaintiff also sought an order that mortgaged property of the defendant, more fully described as Erf 361, Trenance Manor, Registration Division FU, Ethekwini Municipality, Province of KwaZulu-Natal, in extent 458 (Four and Fifty Eight) square metres, held by Deed of Transfer No.T42039/2008 be declared executable (par 1).

The defendants admitted that they failed to pay the necessary instalments in terms of the bond agreement. The defendants raised a special plea that they were placed under debt review on 8 January 2010 in terms of the provisions of the National Credit Act 34 of 2005 (par 2.1).

On 15 February 2010 the debt counsellor representing the defendants forwarded a proposal to the plaintiff in regard to the repayments of monies owed under the mortgage bond. On 4 March 2010 the defendants forwarded a revised proposal increasing the contribution to be made by the defendants in respect of monies owed to the plaintiff. The plaintiff did not object to the revised proposal nor did the plaintiff make a counter-proposal to the suggestions of the debt counsellor. The defendants proceeded to make monthly payments to the debt counsellor in terms of the revised proposal (par 2.2–2.5). An application to make the proposal an Order of Court was

instituted in the Durban Magistrates' Court. On 10 May 2010 the court made the following order:

> "1 that the joint estate of the first and second respondents be declared to be over-indebted in terms of section 79 of the Act;
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> 2 that the first and second respondents' obligation to the third and seventh respondents is to arrange in terms of section 86 and 87;
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> 3 the payment to the credit providers is made through a credit payments division agent; and
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> 4 that all parties bear their own costs to the application."

The plaintiff submitted that it terminated the debt review in terms of section 86(10) of the Act, and a notice to that effect was posted by pre-paid registered post to the defendants on 13 April 2010 (par 3).

The issue to be determined by the High Court was whether the credit provider was entitled to terminate a debt review in terms of section 86(10) after the debt counsellor had referred the matter to the Magistrates' Court.

3 The judgment in *Firstrand Bank v Raheman*

Mokgohloa J held that this matter was not only pending before the magistrate, but furthermore an order had been made in terms of sections 86 and 87 of the Act to re-arrange the debt. The plaintiff had not alleged that the defendant had defaulted the terms of the court order granted on 10 May 2010. This being the case, the court held that the plaintiff was not entitled to exercise or enforce by litigation any right under the credit agreement (par 9).

The court had to also consider whether the plaintiff had been reckless in failing to participate in the proposals made by the debt counsellor in re-structuring the debt in terms of section 86(5). The court was of the view that section 86(5) obliged both the consumer and credit provider to participate in good faith in the review and any negotiations designed to result in responsible debt rearrangement. If a court found that the credit provider failed to participate in the review process, a court could, on request of the consumer, order that the debt review be resumed. In this case however, no such request was made by the defendants because the court had already made an order in terms of section 86 and 87 (par 10–11).

The court concluded that the plaintiff's failure to participate in the review proceedings was reckless but not to an extent of attracting punitive costs against it. The court dismissed the plaintiff's action with costs (par 12).

4 Discussion and analysis

A pending debt review has serious consequences. It bars a consumer from entering into further credit agreements (s 88(1) of the Act) and prohibits an action on debt enforcement by the credit provider (s 88(3)). However, a debt review in terms of section 86 of the Act does not end or elapse automatically on the non-happening of a specific event or the expiry of a specific time period.

Before a credit provider can enforce a credit agreement that is the subject of a pending debt review, the debt review must be terminated in accordance

with section 86(10) and certain other requirements must be met, *inter alia* that ten business days should have elapsed since delivery of the notice of termination.

Section 86(10) does not set out specific grounds for the termination of debt review and merely provides that a credit provider may terminate a debt review in the prescribed manner where the consumer is in default with a credit agreement "that is being reviewed in terms of this section". Such termination may take place only after at least sixty business days have elapsed after the date on which the consumer applied for debt review in terms of section 86(1). Therefore, section 86(10), read together with section 86(6) and regulation 24(6), has the effect that a debt counsellor has *at least* sixty *business* days to fulfil his duties in terms of section 86 and not thirty business days as might appear at first glance (s 86(6), read together with reg 24(6) of the Act). In light of the case of *Changing Tides 17 (Pty) Ltd v Erasmus; Changing Tides 17 (Pty) Ltd v Cleophas; Changing Tides 17 (Pty) Ltd v Frederick* (18153/09, 14229/09 11973/09) 2009 ZAWCHC 175 par 30) it may appear that the intention of the legislature is that the debt counsellor has thirty business days to make the determination as provided for in section 86(6) and that the recommendation to court must then be made within thirty business days thereafter.

Section 86(10) of the Act provides that notice of the termination has to be given to the consumer, the debt counsellor and the National Credit Regulator. It should be noted that there is no prescribed form for termination of a debt review in the regulations. The section 86(10) procedure appears to be a unilateral procedure available to a credit provider. However, in terms of section 86(11) a consumer against whom a pending debt review was terminated is not without redress. The section provides that, if a credit provider who has in terms of section 86(10) given notice to terminate a debt review as contemplated in section 86, proceeds to enforce the agreement in terms of Part C of Chapter 6, the Magistrates' Court hearing the matter may order that the debt review resume on any conditions that the court considers to be just in the circumstances. A notice of termination in accordance with section 86(10) is thus a prerequisite for the operation of section 86(11). The wording of section 86(11) may lead to the conclusion that this section may be invoked only once the credit provider has proceeded to enforce the credit agreement and that the appropriate court to approach in this regard is the court in which the credit agreement is being enforced. If a debt review is incorrectly terminated in accordance with section 86(10), the enforcement proceedings instituted thereafter will be unlawful and premature (Van Heerden and Coetzee "Perspectives on the Termination of Debt Review in Terms of Section 86(10) of The National Credit Act 34 of 2005" 2011 14 *PER/PELJ* 2 40).

There has been great uncertainty with regard to the debt-review process more specifically as to when the process may terminate. A major reason for this is due to the provisions of section 86(10) and the determination as to when a debt review can be terminated. As will be seen below the courts have often reached different views on this specific issue.

In *SA Taxi Securitisation (Pty) Ltd (Pty) Ltd v Nako* (19/2010, 21/2010, 77/2010, 89/2010, 104/2010 and 842/2010) [2010] ZAECBHC 4), the court

held that section 129(2) does not prevent a credit provider from instituting legal proceedings where a debt counsellor has referred a matter to the Magistrates' Court, which proceedings could result in a debt-restructuring order. The court held that section 129(2) has the effect of making redundant the provision of a notice recommending a consumer to refer a matter to a debt counsellor, as the matter has already been referred to a debt counsellor (see par 10 of the judgment).

A different view was expressed in *Standard Bank of South Africa Ltd v Kruger* (2010 (4) SA 635 (GSJ)). The court held that in those instances where a debt counsellor lodged an application to a magistrate's court for purposes of debt-restructuring within sixty days from the date on which the consumer had applied for debt review, the credit provider could not terminate the debt review in terms of section 86(10) despite the fact that the application for restructuring had not been heard by the court within the aforesaid sixty days. The court based its judgment on the view that termination in terms of section 86 was competent only in respect of the actual debt-review process that was conducted by the debt counsellor and that the referral to court in terms of section 86(8)(b) for a hearing fell outside the ambit of such termination as it should have been done in accordance with section 87 of the Act (par 13 and 14 of the judgment). The court also made reference to section 129(2) of the Act, which provides that section 129(1), which *inter alia* requires a section 86(10) notice to be delivered prior to enforcement, did not apply to a credit agreement that was subject to a debt-restructuring order or to proceedings in a court that could result in such an order, and indicated that a referral by a debt counsellor fell in the latter category, thus indicating that a notice to terminate in terms of section 86(10) would be incompetent once a debt counsellor had made such a referral (par 29 of the judgment).

In *South African Taxi Securitisation (Pty) Ltd v Matlala* ((6359/2010) 2010 ZAGPJHC 70), the court considered the issue of termination of debt review in terms of section 86(10). The judge referred to *National Credit Regulator v Nedbank* (2009 (6) SA 295 (GNP) 305), where it was stated that a debt-restructuring referral by a debt counsellor had to be made by means of an application in terms of Magistrate's Court Rule 55 and that service of such referral had to be done in accordance with Magistrate's Court Rule 9. The court then concluded that the service and not merely the issuing of a referral on the credit provider would constitute a referral to the Magistrates' Court in terms of section 86(8)(b) or 86(7)(c) (see par 14 of the judgment). The court in *South African Taxi Securitisation (Pty) Ltd v Matlala* (*supra*) stated that it was of the opinion that the phrase "hearing the matter" as mentioned in section 86(11) referred to the court in which the credit agreement was being enforced and not the court to which the debt review had been referred in terms of section 87 of the Act (par 9 of the judgment). The court also indicated that it disagreed with the court in *SA Taxi Securitisation (Pty) Ltd (Pty) Ltd v Nako* (*supra*). According to the judge the court in that case had misunderstood and misinterpreted section 129 and had also failed to take into account the provisions of section 129(2) of the Act (par 13 of the judgment).

In *Firstrand Bank Ltd v Evans* ((1693/2010) 2010 ZAECPEHC 55), the court indicated that the role of the debt counsellor conducting a debt review in terms of section 86 was not completed by mere reference of his or her debt-restructuring recommendation to the Magistrates' Court, but that the debt-review process that is regulated by section 86 continued until the Magistrates' Court made an order in terms of section 87 (par 18 and 19 of the judgment). The court in this case was of the view that the words "that is being reviewed in terms of this section" should be construed to distinguish the process in section 86 from that in sections 83 and 85 (see par 20 of the judgment). The court held that there was no provision in the Act that indicated that there should be a limit imposed on a creditor under section 86 (10) to the process prior to the reference to the Magistrates' Court (par 20 of the judgment). The judge (Eksteen J) in this case was of the opinion that the credit provider's right to terminate a debt review in terms of section 86(10) continued until the Magistrates' Court made an order in terms of section 87 (par 20 of the judgment). The judge made reference to section 86(11) and the words "the Magistrates' Court hearing the matter" and interpreted it, based on similar terminology employed in section 86(8)(b), to be a reference to the Magistrates' Court to which the matter had been referred for a hearing in terms of section 86(8)(b) (par 25 of the judgment). Eksteen J stated that the jurisdiction provided for in section 86(11) was specifically restricted to a Magistrates' Court and that it was only the Magistrates' Court which conducted a hearing and provided judicial overview over the debt-review process that would have before it all of the information the consumer was required to provide in terms of regulation 24 and which was required in order to exercise a discretion as to whether or not the debt review should resume (par 26–29 of the judgment). In this situation the consumer was not prejudiced by the right of the credit provider to terminate a debt review in terms of section 86(10) as the consumer's rights were fully protected by section 86(11). Eksteen J did point out that a credit provider did not have an unfettered discretion to terminate a debt review in terms of section 86(10) and that such termination would be inappropriate where the referral to the magistrate's court had followed due process (par 30 of the judgment).

In *Firstrand Bank Ltd v Seyffert* ((212862/2010) 2010 ZAGPJHC 88), the court indicated that the court's approach and judgment in the cases of *South African Taxi Securitisation (Pty) Ltd v Matlala* (*supra*) and *Standard Bank of South Africa Ltd v Kruger* (*supra*) were incorrect (par 14). Willis J in *Firstrand Bank Ltd v Seyffert* (*supra*) stated that section 129(2) relieved a credit provider from having to notify a consumer that he or she had a right to approach a debt counsellor, alternatively dispute-resolution agent, consumer court or ombud with jurisdiction where the consumer had already taken such steps (par 14). Willis J opined that the plain reading of section 86(10), especially when read together with section 86(11), makes it clear that the giving of notice by the credit provider to a consumer to terminate a process of debt review does not necessarily terminate that process of debt review but *may* have this consequence (par 13 of the judgment). To this end, the judge remarked that it all depends on the extent to which the parties show good faith to each other, have sensible, fair and reasonable proposals and actively engage with each other to find realistic solutions to a particular consumer's problems (par 13 of the judgment). In an appeal, (under the neutral citation

Seyffert & Seyffert v Firstrand Bank Ltd (577/2011) [2012] ZASCA 81 (30 May 2012)), the appellants argued that the High Court should have exercised its discretion in their favour by acting in terms of either section 85 or section 87 of the Act and referring the matter to a debt counsellor, or declaring them over-indebted and rearranging their repay-ments. It was submitted that the respondents had not acted in good faith by terminating the debt review after requesting a postponement to file papers opposing it (par 8 of the judgment).

The court pointed out that a "review" as contemplated by section 85 is not necessarily initiated by the consumer as in the case of a debt review under section 86. Nor can the credit provider terminate the "review" under section 85 (*The Standard Bank of South Africa Limited v Panayiotis Kallides* [2012] ZAWCHC 38 (2 May 2012) par 8; and see *Matimba Management and Labour CC v SA Taxi Securitization (Pty) Ltd* [2010] ZAPJHC 32 (14 April 2010) par 24). It has been suggested that, despite the wide introductory words of section 85 –

> "reference to the broader context of the statute impels the conclusion that the section was not intended to provide a basis for a repetition of the process already provided for in terms of s 86, or to draw back within the ambit of debt review debts already excluded therefrom by the operation of other provisions of the Act, such as s 86(2), s 86(10) or s 88(3). To construe s 85 otherwise would be conducive to the most unwholesome circularity, at odds with the basic principle – interest *rei publicae ut sit finis litium*."

The court held that a discretion is given to a court by the word "may" in section 85 to make either of the two orders envisaged by it, and also due to the commencing words of the section "Despite any provision of law or agreement to the contrary" (*FirstRand v Olivier* 2009 (3) SA 353 (SE) par 14; *Standard Bank of South Africa Ltd v Hales* 2009 (3) SA 315 (D) par 12–13; and *BMW Financial Services (SA) (Pty) Ltd v Mudaly* 2010 (5) SA 618 (KZD) par 36–37). However, before the court can exercise the discretion, the material facts relied upon must be placed before it (*Standard Bank of South Africa Ltd v Hales supra* par 12–13). It may well be pointless in most cases, where the matter has already been referred to a debt counsellor, to do so again (*BMW Financial Services (SA) (Pty) Ltd v Mudaly supra* par 37). The court stated that a court should be slow to exercise its discretion to make either of the orders envisaged in section 85, where the matter has been dealt with by a debt counsellor, or a debt review has justifiably been terminated, and where no material change in circumstances has been demonstrated (par 15 of the judgment).

The court stated that, where debtors have applied for debt review, they and the credit provider were obliged not only to comply with any reasonable request by the debt counsellor to facilitate an evaluation of the debtors' indebtedness and the prospects for responsible debt-re-structuring, but also to participate in good faith in the review and negotiations. The duty to negotiate in good faith does not terminate on the debt counsellor's proposal being referred to the Magistrates' Court, nor when it is postponed. The right to terminate the debt review in respect of a particular credit agreement is balanced by section 86(11) which gives the "enforcing court" the power to order the resumption of the debt review. It is at this stage that the participation of the credit provider in the debt-review process becomes

relevant and at which the conduct of both parties will be assessed (par 14 of the judgment). The appeal was accordingly dismissed.

There is authority for the view that once a debt review has been referred to the Magistrates' Court, any litigation proceeding for the recovery of the debt should be stayed (*Wesbank, a Division of FirstRand Ltd v Papier (National Credit Regulator as Amicus Curiae)* 2011 (2) SA 395 (WCC); and *First Bank Limited*, *trading as Wesbank v Kishore Sewsunker* 22 February 2011).

In *FirstRand Bank Ltd v Collett* (2010 (6) SA 351 (ECG)), the court held that a credit provider is entitled to terminate a debt review in terms of section 86(10) even after the debt counsellor has referred the matter to the Magistrates' Court. The Supreme Court of Appeal confirmed this decision in *Collett v First Rand Bank Ltd* (2011 (4) SA 508 (SCA)). In *Collett v Firstrand Bank* (*supra*), the appellant was in default with her repayments on a mortgage bond granted by the respondent, and in accordance with the credit agreement, the whole amount became due and payable (see par 2 of the judgment). The appellant applied for a debt review in terms of section 86(1) of the NCA with a debt counsellor (Gerhard Stoltz Debt Counsellors), on 4 January 2010, and the respondent was notified on the same day. On 15 February 2010 the respondent was informed that the application was successful and that the financial affairs of the respondent were in the process of being re-structured (par 2 of the judgment). A debt-re-structuring proposal was sent to the appellant's credit providers, including the respondent. All of the appellant's creditors rejected the proposal. The debt counsellor referred the matter to the, in this case, East London Magistrates' Court in terms of section 86(8) of the Act for an "order declaring that the debtor is over-indebted; that her debt commitments be re-arranged; that the credit agreements of those credit providers who had terminated their reviews in terms of section 86(10) be included in the debt review; and for costs" on 29 March 2010 (par 2 of the judgment). In *Collett v Firstrand Bank* (*supra*) the respondent terminated the debt review in "so far as it related to the mortgage bond" on 7 April 2010, more than 60 days after the initial application, in terms of section 68(10). In the Magistrates' Court set the matter, in terms of section 87, down for 10 June 2010, this was then postponed to 12 August 2010 (see par 3). The respondent issued summons on 21 June 2010 and this was served on the appellant on 1 July 2010 (par 3).

In *Collett v Firstrand Bank* (*supra* 515) the court held:

> "The role of the debt counsellor does not end with his referral of the matter to the magistrates' court. His 'proposal' takes the form of an application governed by the rules of the magistrates' court and he is required to be present in court, participate in the hearing and assist the court by way of furnishing evidence, making submissions or answering questions. It is no answer to contend that contextually s 86(10) forms part of s 86 and thus part of the 'debt review', as opposed to the 'hearing' before the magistrates' court in terms of s 87. The words in s 86(10), 'that is being reviewed in terms of this section', rather emphasise that it is not a debt review pursuant to s 83(3)(*b*) or 85(*a*) and (*b*). Entirely different considerations apply to the review under these sections: they are not necessarily initiated by the consumer and the court has a discretion whether to proceed under those provisions. The credit provider is not entitled to terminate either of them. Under ss 86 and 87 there is only one unified process, the purpose of which is the restructuring of the consumer's

> debts by amending the terms of credit transaction between the parties. If the parties agree, they may amend the agreement in terms of s 116 or file a consent order as envisaged by s 86(8)(*a*). If they do not, the hearing envisaged by s 87 takes place. It follows that I am in agreement with the conclusion reached in the court below:
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> 'I am unable to find anything in the structure of s86, or of the Act in its entirety, which is indicative of an intention on the part of the legislature to limit the right of a credit provider under s86(10) to the process prior to the reference to the Magistrates' Court. On the contrary ... I consider that the credit provider's rights to give notice in terms of s86 (10) and to legitimately terminate the debt review process continue until the magistrates' court has made an order as envisaged in s 87.'"

In *Collett v First Rand Bank Ltd (National Credit Regulator as Amicus Curiae)* (CCT 58/11), the appellant's appeal to the Constitutional Court concerned the interpretation of section 86(10) of the Act. The application for leave to appeal was directed at the contextual analysis of section 86(10) with regard to section 39(2) of the Constitution. The appellant argued that section 86(10) should be interpreted in a manner that supports and promotes the objects of the Bill of Rights. Furthermore, that section 86(10) should be interpreted having regard to democratic values, social justice and fundamental human rights (Notice of Motion 7.1–7.3).

The Constitutional Court refused to grant the appellant leave to appeal against the decision of the SCA. The effect of the Constitutional Court decision is that the SCA judgment in *Collett v Firstrand Bank* (*supra*) matter will not be tested.

5 Concluding remarks

The differing views of the reported cases on the termination and certain aspects of the debt-review process in terms of section 86(10) is a clear indication of the difficulties that exist in interpreting this section.

In *Firstrand Bank v Raheman* (*supra*) the court made it clear that, if a matter is currently before a magistrate, and an order is made in terms of section 86 and 87 of the Act, the creditor cannot take steps to commence proceedings against the debtor. This is especially the case if the debtor has not defaulted in terms of the agreement.

The court in *Collett v Firstrand Bank* (*supra*) held that the credit provider is able to terminate the debt-review process in respect of the specific agreements it has with the consumer, where the credit provider has waited for a period of 60 days from the date of application and if (and only if) the debtor is in default. Merely because the matter has been referred to the Magistrates' Court in terms of the relevant provisions does not bar the creditor from terminating the debt-review process. The effect of the court's decision in the SCA and Constitutional Court could prove detrimental for consumers currently under debt review and may place the debt-review process under severe pressure. The effect of these judgments is that once a credit provider has terminated the debt review, that credit provider can enforce the consumer's obligations in terms of that credit agreement. Defaulting consumers might be at risk of losing their assets such as their cars or houses in the event of the 60 days having elapsed since they applied for debt review and their debt counsellors have not yet obtained an order for

the re-arrangement of their obligations. The Constitutional Court's decision and the SCA's judgment mean debt counsellors and consumers must ensure compliance with the relevant time frames as prescribed by the National Credit Act. It is also clear that only once a magistrate's order for the re-arrangement of a consumer's obligations has been obtained, will that consumer be protected against the termination of the debt review by the credit providers. During such an application the courts will consider at whether the credit provider participated in good faith in the debt-review proceedings and if not, the resumption of the debt review may well be ordered.

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