IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

In the matter between:

Case No. 637/2009

FIRSTRAND BANK LIMITED **Plaintiff**

and

MALEKE: R.L. **Defendant**

Case No. 638/09

FIRSTRAND BANK LIMITED **Plaintiff**

and

MOTINGOE : S.K. **First Defendant**

MOTINGOE: L. J. **Second Defendant**

Case No. 09/8830

PEOPLES MORTGAGE LTD **Plaintiff**

and

MOFOKENG M.M. **First Defendant**

ZULU P.J.T. **Second Defendant**

Case No 09/8941

FIRSTRAND BANK LTD. **Plaintiff**

and

MUDLAUDZI P.W. **Defendant**

JUDGMENT

C.J. CLAASSEN J

[1] On Tuesday 26 May 2009, there came before me four applications in the unopposed Motion Court 2. The applications were of similar nature making it convenient to deal with them simultaneously in one judgment.

[2] The similarity of these applications is indicated by the following characteristics:

1. The applicants were banking institutions and registered credit providers pursuant to the provisions of the National Credit Act No. 34 of 2005 ("The Act").
2. The defendants were all private individuals and historically disadvantaged persons[1].
3. In each case, application for default judgment pursuant to the provisions of Rule 31(5) of the Uniform Rules of Court, was placed before the Registrar of this court.
4. The Registrar referred each application to open court, as the amount claimed fell within the jurisdiction of the Magistrates' Court.
5. Each claim was based on a loan agreement of money secured by a mortgage bond registered over immovable property. Thus the underlying agreements constituted credit agreements as defined in section 8 of the Act.[2]

[1] See Section 2(6) of the Act which provides: "For all purposes of this Act, a person is a historically disadvantaged person if that person –

(a) Is one of a category of natural persons who, before the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), came into operation, were disadvantaged by unfair discrimination on the basis of race; ….."

[2] See in particular section 8(4) which states:

"An agreement, irrespective of its form but not including an agreement contemplated in sub section (2), constitutes a credit transaction if it is –

……

(d) a mortgage agreement or secured loan; …"

6. In each case, the plaintiffs applied for payment of the accelerated outstanding balance due on the loan agreement together with an order declaring the immovable property executable and costs on an attorney and client scale.
7. In each case, the plaintiffs averred that they had complied with the provisions of sections 129 and 130 of the Act.
8. In each case, service of the summons was affected at the chosen *domicilium* address being the property which had been hypothecated as security for the loan.
9. In each instance the property was used as the defendants' residence.
10. The actual arrears of instalments triggering the entitlement to claim the accelerated outstanding balance were relatively small amounts varying between R2000 and R5000 except in the Peoples Mortgage Ltd. case where an amount of R76 036.91[3] was alleged to be in arrear.
11. In each instance the summons advised the defendants that section 26(1) of the Constitution of Republic of South Africa accorded everyone the right to have access to adequate housing and should the defendant's claim that the order for execution will infringe that right, they are to place information supporting such claim before the court. In none of the cases did any of the defendants place any such information before the court.

[3] The National Credit Act has been the subject of a series of recently reported cases[4] The common denominator expressed in these cases is that the Act is a piece of consumer legislation which introduces new forms of protection for debtors in South Africa, both rich and poor. It seeks to balance the inequalities arising from unequal bargaining power between the large credit providers on one hand and the credit seekers on the other. This much is

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[3] This amount is clearly incorrect. The total bond amounts to R33 500.00 but the certificate of balance indicates "arrears/advance" of R113 041.75. The same certificate of balance indicates also that the outstanding balance is R76 036.91. Neither of these amounts can be correct as they are both beyond the total amount of the bond for no apparent reason.

[4] See *Nedbank Ltd v Mateman and Another* 2008 4 SA 276 TPD; *Absa Bank Limited v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 D&CLD; *Standard Bank of South Africa Ltd v Hales and Another* 2009 3 SA 315 D and CLD; *Absa Bank Limited v Myburgh* 2009 3 SA 340 TPD; *BMW Financial Services (SA) (Pty) v Dr. M.B. Mulaudzi Inc.* 2009 3 SA 348 BPD; *Firstrand Bank Limited v Olivier* 2009 3 SA 353 SECLD; *Standard Bank of South Africa Limited v Panayiotts* 2009 3 SA 363 WLD*; ex Parte Ford and two similar cases* 2009 3 SA 376 WCC; *Firstrand Bank Limited v Carl Beck Estates (Pty) Ltd. and Another* 2009 3 SA 384 TPD.

evident from the preamble[5] to the Act and its purposes as set out in section 3 thereof.[6] The Act is further designed to render assistance and protection to the previously disadvantaged section of our population who may wish to enter the property market.[7] The Act levels the playing field between a relatively indigent and unsophisticated consumer and a moneyed and well-advised credit provider, and to limit the financial harm that the consumer may suffer if he/she is unable to perform in terms of the credit agreement.[8] I also, respectfully, agree with

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[5] "To promote a fair and non-discriminatory marketplace for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information;…. to prohibit certain unfair credit and credit-marketing practices; …to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting; to provide for debt-reorganisation in cases of over-indebtedness; …… to provide for registration of credit bureaux, credit providers and debt counselling services; to establish national norms and standards relating to the consumer credit; to promote a consistent enforcement framework relating to consumer credit; ……."

[6] "3. 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) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;

……

(c) Promoting responsibility in the credit market by –

(i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and

(ii) discouraging reckless credit granting by credit providers and contractual default by consumers;

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

(e) addressing and correcting imbalances in negotiating power between consumers and credit providers by -

(i) providing consumers with education about credit and consumer rights;

(ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; and

(iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;

……

(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." (Emphasis added)

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[7] See s 3(a) of the Act *supra* as well as s 13(a) of the Act which provides: "The National Credit Regulator is responsible to – (a) promote and support the development, where the need exits, of a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible **credit market and industry** to serve the needs of – (i) **historically disadvantaged persons**; (ii) **low income persons and communities**; and (iii) remote, isolated or low density populations and communities, ..." (Emphasis added)

[8] See *Absa Bank Ltd v Myburgh supra* at paragraph [41].

the succinct and insightful overview of the Act as set out by Bertelsmann J in *Absa Bank Limited v Myburgh supra*.[9]

[4] In the applications before me, the Registrar referred the matters to open court in terms of Rule 31(5)(b)(vi) [10] of the Uniform Rules of Court. This is in line with a rule of practice laid down by the full court of this Division in the case of *Nedbank Limited v Mortinson* 2005 6 SA 462 WLD at 473, paragraph [33.2] where the following was stated:

> "All applications for default judgment where the creditor seeks an order declaring specially hypothecated immovable property executable, where the amount claimed falls within the jurisdiction of the magistrate's court, shall be referred by the Registrar for consideration by the Court in terms of Rule 31(5)(b)(vi)."

The need for the aforesaid rule of practice arose from the judicial concern that execution orders, where small amounts are claimed, require judicial oversight and scrutiny, prior to such orders being granted.

APPLICANTS' PAPERS

[5] The reason for reserving my judgment in these four similar unopposed applications, arises from my concern that an injustice may be done to the absent defendants, if the orders declaring their immovable properties executable, are granted. This concern arises from the following facts and circumstances which appear from the Applicants' own papers:

1. All the defendants are historically disadvantaged individuals falling within the definition of the Act. The dates of birth gathered from the mortgage bonds are as follows: Maleke 1939; Motingoe 1966 and 1967; Mofokeng 1943 and 1961; Mulaudzi 1962. All of them were born substantially before 1993 and therefore, laboured under the disadvantages of the previous dispensation. It is quite evident that the Act extends particular protection to individuals such as the defendants.
2. The defendants had been paying instalments in reduction of the bonds, respectively, for periods of 17 years, 14 years, 19 years and 13 years, prior to falling into arrears. The significance of these facts is that the defendants have of necessity acquired a

[9] See *Absa bank Ltd v Myburgh supra* paragraphs [28] to [39]

[10] Rule 31(5)(b)(vi) states: The Registrar may - (vi) require that the matter be set down for hearing in open court."

valuable equity in the increased market value of the properties. The court must be astute to take cognisance of this fact and the consequence of granting default judgment: the loss of such equity to the defendants!

3. The relatively small loans required to purchase the immovable properties as stated in the bond documents, indicate that the capital growth accumulated over the years since the loans had been granted, must have made the properties significantly more valuable than the outstanding balances: Maleka loan R38510.00 – o/b R16 948.89: Motingoe loan R72000.00 – o/b R81 642.52: Mofokeng loan R33500.00 – o/b R76 036.91: Mudlaudzi loan R72000-00 – o/b R44 403.20.
4. The applicants' papers disclose that the arrears were relatively minor. Agreement after negotiation between the parties (eg extending the remaining period of the bond and reducing the monthly instalment), alternatively reliance on the protection afforded the defendants in ss 85 and 86, could easily have resulted in a satisfactory solution whereby the applicants ultimately receive full payment of the bonds and the defendants retain their homes. This would have been possible due to the minor arrears, which are: Maleka R4189.62; Motingoe R4969.37; Mofokeng Arrears inconclusively proved; Mudlaudzi R2358.93. These arrears are trifling in their amounts and significance to the applicants. The prejudice which would be suffered by the defendants in potentially losing their properties would be disproportionately large compared to the minor prejudice to the applicants in being denied immediate payment of the outstanding balances on the bonds. A delay in the payment of the full outstanding balances due to a refusal to grant the execution orders, would not harm them in any way, whereas such execution would constitute a permanent setback to the relatively indigent and historically disadvantaged defendants.
5. The monthly instalments due on the respective bonds were R245.00, R876.00 and 937.80, except in the Peoples Mortgage case where the monthly instalment is unknown. These relatively small monthly instalments are indicative that the defendants all fall within the category of "low income persons" as contemplated in s 13(a)(ii) of the Act. Although this section imposes a duty upon the National Credit Regulator to promote a fair credit market, the courts are to reflect in their judgments the pursuit of the same ideal.
6. The letters of demand sent to the defendants in terms of s 129 of the Act do not expressly warn the defendants that their homes will be sold in execution, potentially leading to the loss thereof due to their eviction, should they fail to respond to such

letters. This is so, presumably, because the Act does not require such letters to contain a warning of this nature. The absence of such a warning does, however, place an additional burden of careful oversight on the court, before granting judgment. A relevant consideration in this regard is that historically disadvantaged persons who are unsophisticated may not sufficiently appreciate this danger upon receipt of the letters of demand. Their failure to refer their matters to a debt counsellor, may, therefore, be the result of this lack of understanding. Because of this potential threat, the courts are to be particularly vigilant in avoiding injustices which may be perpetrated in the application of the provisions of the Act in order to prevent, as far as is possible, "unfair …. conduct by credit providers"[11]. The absence of the defendants before court does not diminish but rather increases this duty resting upon the courts.

OTHER CONSIDERATIONS

[6] There are further general considerations which are relevant to a proper adjudication of the applications for default judgments, which do not necessarily appear from the applicants' papers. These are:

1 The protection afforded consumers in the Act who are faced with letters of demand addressed to them in terms of section 129, are not generally known to a large portion of the public, in particular historically disadvantaged persons. Such ignorance may often be the cause of their failure to respond to such letters and utilise these protective measures.

2 Nor would they appreciate the fact that once the credit provider has taken steps to enforce the agreement, their right to respond to the invitation to approach an alternative dispute resolution agent, the consumer court, the ombud with jurisdiction or a debt counsellor, lapses.[12] Had the defendants been made aware of this fact, they may very well have applied to a debt counsellor to assist them in order to restructure the debt and thus prevent the loss of their homes.

3 Another reason for not responding to the letters and/or the summons, may also be the lack of funds to seek legal advice. It is, however, a well known fact that historically

[11] See s 3(e)(iii) of the Act, supra.

[12] See section 86(2) of the Act which provides as follows:

"(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."

disadvantaged persons are not always aware of the fact that free legal advice is available to them to assist in their defence. The institutions concerned are the Legal Aid Board, the Legal Resources Centre, and the law clinics at local universities.

4 Even if the historically disadvantaged defendants were aware of the availability of free legal advice, the "means" test applied by these institutions may disenfranchise them from obtaining free legal advice. Once it is known that the defendants own immovable property, they may be denied free legal advice. Thus, despite any attempts on their part to defend their rights with the assistance of legal representation, such attempts may come to nought.

5 The prospect of litigating in the High Court may have deterred them from opposing the plaintiffs' claims. It is a well known fact that litigation in the High Court is more expensive than litigation in the Magistrates' Court.[13] The fear of being mulcted in legal costs may deter them from reacting to the letters of demand.

6 Where, as in these four cases, attorney and client costs are claimed, one would expect a normal defendant to attempt to limit the cost implications by defending the claims, even if they had to appear in person, and place before the court facts and circumstances which would assist the court to adjudicate the cases in a fair and equitable manner, before granting default judgment. However, it is unlikely that previously disadvantaged defendants would appreciate the significance of claims for attorney and client costs. They cannot be expected to know that they can ask the court to reduce the costs because the amount claimed falls within the jurisdiction of the Magistrates' Courts, nor is it likely that they would be aware of the remedy to reduce the costs provided for in Rule 69(3)[14] of the Uniform Rules of Court. It would place a too high standard of sophistication on the historically disadvantaged to expect them to "know the law" and appreciate all these legal niceties.

7 The fact that the courts *mero motu* protect the interests of defendants in default by reducing the costs where the claim falls within the Magistrates' Court jurisdiction[15], is indicative of the courts' acceptance of a duty to apply a standard of fairness without

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[13] See *Absa Bank Limited v Myburgh supra* at page 345 F paragraph [43].

[14] This sub-rule provides: "Save where the defendant or respondent is awarded costs, the tariff of maximum fees for advocates between party and party referred to in Part IV of Table A of Annexure 2 to the Rules for the Magistrates' Court (hereunder referred to as 'the tariff') shall apply where the amount or value of the claim falls within the jurisdiction of the magistrates' court, unless the court, on request made before or immediately after the giving of judgment, otherwise directs".

[15] This established practice may have been influenced by the prescriptions in this regard imposed upon the Registrar in terms of Rule 31(5)(e) when granting default judgment in cases where the claimed amount is within the Magistrates' Court jurisdiction.

being prompted to do so. This duty is all the more applicable when cases falling under the Act, are adjudicated in view of the purposes of the Act set out in s 3 supra. Granting the execution orders in such cases would, in effect, bedevil or terminate the defendants' "access to credit[16] placing them in a position where they are in future denied adequate housing.

[7] In my view, it is incumbent on the courts to determine whether or not one or more of the considerations mentioned in the previous paragraph, are relevant to any applications for default judgment in addition to such facts appearing from the plaintiffs' own papers. Should one or more of these circumstances apply, a grave injustice could be perpetrated by disregarding these considerations. They flow from a consideration and application of the purposes and spirit of the Act.

EVALUATION

[8] In the present cases, all the defendants fell into arrears only recently. It must, therefore, be accepted that they dutifully paid the monthly instalments for many years. In my view it is an inescapable inference that the market value of their homes would have increased during the interim periods since they first applied for the bonds. Although there is no evidence before me of the current market value of the properties encumbered to the plaintiffs, common sense would dictate that the inherent value of these homes must have increased substantially over the thirteen to nineteen years since the defendants bought their homes. In these circumstances it seems to me blatantly unfair and unjust that a credit provider should be afforded the benefit of this capital growth in an immovable property in circumstances where the arrears were relatively minor. Upon execution, the execution creditor gains a manifest advantage in that a home with a value substantially in excess of the outstanding balances owed, will more readily be sold and thus ensure the recovery of such outstanding amounts. The court should take into account that the defendants made an investment in their respective immovable properties many years ago expecting to benefit from the capital growth. If they now have to lose the properties due to a sale in execution resulting from relatively minor arrears, whatever capital growth they may have earned, would be lost. I accept the principle that a sale price achieved at a sale in execution which is in excess of the outstanding balance

[16] See s 3(a) of the Act, supra.

owed on the bond, should normally revert to the debtor. This principle, however, does not fully protect the interests of the execution debtor. There is no incentive for the credit provider to obtain a bid in excess of the outstanding balance. In these circumstances, the defendants' only hope would be that the excess over the debt due to the creditor, realised upon execution would be sufficient to substitute the lost home with another. This hope must, as of necessity, be a faint one. It is common knowledge that the value of immovable property tends to increase over the years. It is not realistic to argue that a substitute home of equal size and value as the one purchased many years ago, would be found. In addition, any excess which may revert to the execution debtor would be less than the current price of a home of equal size and value. It therefore, goes without saying that the sale in execution of the defendants' homes in these cases before me, would harm the defendants in a very material and substantial way. In cases such as these where the bond instalments had been paid over a long period of time and the arrears are relatively minor, the advantage to the credit provider is therefore substantial whereas the disadvantage to the consumer is disproportionately large.

[9] It would seem to me that the circumstances in each of the applications before me call for some form of intervention to protect the interests of the historically disadvantaged defendants. The papers indicate that they obviously fall into the category of "low income communities", judged by the small monthly instalments payable to the credit providers. This is further confirmed by the small sizes of the properties as reflected in the descriptions thereof contained in the mortgage bonds.[17] The courts should, in such circumstances, be particularly astute to protect the rights of historically disadvantaged persons when it comes to the application of the provisions of the Act.

[10] The courts are also duty bound to consider the constitutional implications of s 26 of the Constitution when applying the provisions of the Act. Section 26 of the Constitution reads as follows:

> "26(1) Everyone has the right to have access to adequate housing.
> (2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.

[17] In the Maleke and Motingoe matters the property sizes are a mere 389 square metres each; in the Mudlaudzi matter the property is a mere 170 square metres in size; and in the Mofokeng matter the property size is 242 square metres.

> (3) No-one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

[11] It was held by Mokgoro J in *Jaftah v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 CC at page 155 as follows:

> "[29] Section 26 must be seen as making that decisive break from the past. It emphasizes the importance of adequate housing and in particular security of tenure in our new constitutional democracy. The indignity suffered as a result of evictions from homes, forced removals and the relocation to land often wholly inadequate for housing needs has to be replaced with a system in which the State must strive to provide access to adequate housing for all and, where that exists, refrain from committing people to be removed unless it can be justified".

[12] Mokgoro J stated further, in paragraph [34] that, at the very least, any measure which permits a person to be deprived of existing access to adequate housing, limits the rights protected in s 26(1). If execution is ordered in the present applications, the defendants may very likely be deprived of obtaining other adequate housing if they were subsequently evicted. Even if the sale in execution realizes an amount in excess of the debt owed, such amount would not in these cases assist the defendants to buy immovable property of equal size and value. They will not only be put "at the back of the queue"[18] but also rendered homeless. In this regard Mokgoro J stated in [43]:

> "[43] However, it is clear that there will be circumstances in which it will be unjustifiable to allow execution. The severe impact that the execution process can have on indigent debtors has already been described. <u>There will be many instances where execution will be unjustifiable because the advantage that attaches to a creditor who seeks executions will be far outweighed by the immense prejudice and hardship caused to the debtor</u>….

[13] Mokgoro J came to the conclusion that the appropriate remedy to ensure the prevention of unjustified execution against immovable property is appropriate judicial oversight prior to such execution being levied. In this regard she held as follows at page 162 A:

> "[56] …If there are <u>other reasonable ways in which the debt can be paid</u> an order permitting a sale in execution will ordinarily be undesirable. If the requirements of the Rules have been complied with and if there is no other reasonable way by which the debt may be satisfied, an order authorizing a sale in execution may ordinarily be appropriate <u>unless the ordering of that sale in the circumstances of the case would be grossly disproportionate</u>. This would be so if the interests of the judgment creditor in obtaining payment are significantly less than the interests of the judgment debtor in security of tenure in his or her home, <u>particularly if the</u>

[18] See *Japhta* supra at page 158 B.

> sale of the home is likely to render the judgment debtor and his or her family completely homeless.
> [57] It is for this reason that the size of the debt will be a relevant factor for the court to consider. It might be quite unjustifiable for a person to lose his or her access to housing where the debt involved is trifling in amount and significance to the judgment creditor. However, this will depend on the circumstances of the case. As has been pointed out above, it may often be difficult to conclude that a debt is insignificant. In this regard, it is important too to bear in mind that there is a widely recognized legal and social value that must be acknowledged in debtors meeting the debts that they incur.
> [58] Another factor of great importance will be the circumstances in which the debt arose. If the judgment debtor willingly put his or her house up in some or other manner as security for the debt, a sale in execution should ordinarily be permitted where there has not been an abuse of court procedure. The need to ensure that homes may be used by people to raise capital is an important aspect of the value of a home which courts must be careful to acknowledge.
> [59] A final consideration will be the availability of alternatives which might allow for the recovery of debt but do not require the sale in execution of the debtor's home. At present, s73 of the Act provides for a judgment debtor to approach a court with an offer to pay off a debt in instalments. As pointed out above, this section does not constitute sufficient protection for indigent debtors because they are generally unaware of its potential to protect them and their inability (sic "ability?") to invoke it. However, the concept of paying off the debt in instalments is important and the practicability of making such an order must be ever present in the minds of the judicial officer when determining whether there is good cause to order the execution. The balancing should not be seen as all or nothing process. It should not be that the execution is either granted or the creditor does not recover the money owed. Every effort should be made to find creative alternatives which allow for debt recovery but which use execution only as a last resort.
> [60] In summing up, factors that a court might consider, but to which a court is not limited, are: The circumstances in which the debt was incurred; any attempts made by the debtor to pay off the debt; the financial situation of the parties; the amount of the debt; whether the debtor is employed or has a source of income to pay off the debt and any other factor relevant to the particular facts of the case before the court." (Emphasis added)

[14] In *Standard Bank of South Africa Limited v Hales and Another supra* at 326 D – 327 G, Gorven J also considered the implications of s 26 of the Constitution and the judgment by Mokgoro J in the *Jaftah* case, in relation to the question whether he should exercise his discretion in the debtor's favour not to order execution but rather take the conciliatory step contemplated in s 85(a) of the Act. Similar to the applications before me, the debtors in the case before Gorven J also failed to respond to the invitation contained in the summons to put facts before the court which would indicate infringement of their constitutional rights enshrined in s 26. Gorven J exercised his discretion in favour of the credit providers and against the debtors, largely due to the fact that the debt in that case was not trifling at all. The amount claimed was R790 000.00 plus an additional sum of R197 500.00.[19] That, of course, is a substantial distinguishing feature between the case before Gorven J and the applications before me.

[19] See **Hales**'s case *supra* at 317 E.

[15] There is also a final consideration which militates against the exercise of my judicial discretion in favour of the plaintiffs, and that is the current economic climate. The court is entitled to take judicial cognizance of the international melt-down and the effect that it has had on the debtors at the lower end of the market. The present economic climate must have been a contributing factor to the defendants falling into arrears, something which may very well have been beyond their control.

[16] For the reasons set out above, I am of the view that the peculiar circumstances of these four cases require me to exercise my discretion against the plaintiffs by disallowing the orders declaring the encumbered properties executable. That does not mean that the plaintiffs are precluded from seeking redress in another court. The refusal to grant the execution order is in the nature of an order absolving the defendants from the instances.

OTHER ALTERNATIVES WHICH WOULD ALLOW THE RECOVERY OF THE DEBT WITHOUT LEVYING EXECUTION

[17] The facts in these matters before me would have been ideally suited for the defendants to have been referred to a debt counsellor as contemplated in s 85(a) of the Act.[20] Such procedure would have constituted "other alternatives" as contemplated by Mokgoro J supra. Why the defendants failed to utilise the remedies provided therein may be ascribed to any of the considerations mentioned earlier in paragraph [6].

[18] The difficulty which arises in the case of applications for default judgment, is that no allegations of over-indebtedness are before the court. In this regard, I respectfully agree with Masipa J in the matter of *Standard Bank of South Africa Limited v Panayiotts supra* where the following is stated in paragraph [24]:

> "The powers given to the court under s 85 arise 'if it is alleged that the consumer under a credit agreement is over-indebted'. Clearly, the mere allegation of over-indebtedness can never be sufficient. The test would be that such over-indebtedness should be established on a

[20] Section 85 states as follows:

> "Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may –
>
> (a) Refer the matter directly to a debt counselor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of s 86(7);….. "

> balance of probability. This is supported by s 79(1) which refers to 'the preponderance of available information at the time a determination is made."

[19] Where the court is considering credit agreements in the context of Rule 31(5) in the absence of the debtors, it would seem manifestly incorrect for a court to apply the remedies provided in s 85. In any event, s 86(2)[21] precludes any referral to a debt counsellor once the credit provider had instituted steps to enforce the debt as contemplated in s 129 of the Act as was done in the present applications. Utilising the procedures provided for in s 85 is therefore not an option at this stage.

[20] Since the possibility of debt review and a restructuring of the debts are not available in the High Court, there is no basis to assist the defendants to protect their homes by such a process. This court is powerless to initiate a process whereby the defendants can be afforded the opportunity to restructure their debts and thus prevent an execution order being issued. There is, however, a protective measure which can be initiated by another court to see to the restructuring of the debts.

[21] Where the execution orders and other relief sought by the applicants are refused in this Court, plaintiffs can still recover the debts and obtain execution orders, by instituting proceedings in the Magistrate's Court of applicable jurisdiction. In such court the possibility of paying the outstanding amounts in instalments may present itself as a feasible solution. As stated by MokgoroJ in *Japhta*, such relief is expressly provided in s 73[22] of the Magistrates' Courts Act. Invoking this provision could very well lead to the stated purpose of the Act to ensure the "satisfaction by the consumer of all responsible financial obligations",[23] provided the defendants participate in such process. Hopefully this will result in a win/win situation where the plaintiffs will ultimately receive payment of the outstanding balances and the defendants will retain their homes. The implication of dismissing the applications is that the

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[21] Section 86(2) provides: "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 the agreement."

[22] Section 73(1) provides: "The court may, upon application of any judgment debtor or under section 65E(1)(a)(ii) or 65E(1)(c) and if it appears to the court that the judgment debtor is unable to satisfy the judgment debt in full at once, but is able to pay reasonable periodical instalments towards the satisfaction thereof or if the judgment debtor consents to an emolument attachment order or a garnishee order being made against him, suspend execut5ion against the debtor either wholly or in part on such conditions as to security or otherwise as the court may determine." (Emphasis added)

[23] See s 3 (g) and (i), supra.

plaintiffs will have to start again with the process of complying with the provisions of the Act with the intention of enforcing the agreements in the magistrates' court.

PROCEEDINGS IN THE HIGH COURT

[22] It was held by Bertelsmann J in *Absa Bank Limited v Myburgh supra* at page 345 paragraph [41], that issuing summons in the High Court for a debt that could be recovered in the magistrates' court runs counter to the express purposes of the Act. It was further held that any consent by the debtor to the jurisdiction of the High Court in instances where the amount claimed fell within the jurisdiction of the magistrates' court, was illegal and contrary to the provisions of s 90(2)(k)(vi) of the Act. This conclusion has, however been overruled by the full bench in *Nedbank Ltd v Mateman and Another* supra.[24] In that case it was held that a clause in a bond wherein the mortgagor consents to the jurisdiction of the High Court, does not conflict with the provisions of s 90(2)(k)(vi). The court further held that the jurisdiction of the High Court is not excluded by the provisions of the Act. It is therefore not illegal to issue a summons out of the High Court in cases under the Act. However, I do not read this case as holding that a High Court is in all circumstances obliged to hear a case under the Act, once proceedings in such court had been commenced at the election of the credit provider. The magistrates' court has concurrent jurisdiction with the High Court to hear cases under the Act. Also, the magistrates' court's jurisdiction to hear cases under the Act is unlimited.[25]

[23] In my view, the High Court's discretion to decline the hearing of a case under the Act is still unfettered and not curtailed by the decision in *Nedbank v Mateman*. The High Court does have a discretion to terminate the proceedings and refer the matter to the magistrates' court with jurisdiction. In certain circumstance it may be very appropriate to refer a matter to the magistrates' court. This is particularly so where the amount claimed is within the jurisdiction of the magistrates' court, unless difficult principles of law and/or fact require decision, in which case a hearing in the High Court will be more appropriate. It would appear that the Act contemplates the debt review process to be controlled and concluded in the magistrates' court.[26] It would therefore not be foreign or contrary to the provisions or purpose of the Act if a High Court terminates the proceedings and refer a matter to a magistrates' court in appropriate cases.

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[24] See also Roestoff and Coetzee, "Consent to Jurisdiction" 2008 (71)THRHR p 678.

[25] See s 29(1)(e) of the Magistrates' Court Act 32 of 1944; CM van Heerden, "Perspectives on Jurisdiction in Terms of the National Credit Act 34 of 2005" TSAR 2008. 4 p840.

[26] See s 86(7)(c), (8)(b), (9) and (11).

[24] A referral of the cases before me to the appropriate magistrates' court, will not secure the participation of the defendants so that they may benefit from the protective measures in the Act. It seems to me that a special order is required to apprise them of their rights in this regard. Of course, this court cannot force them to participate in a process which, ultimately, will redound to their benefit. The decision to participate in order to bring relief to the defendants will remain with them. Some encouragement for their participation may be secured by making a special order to serve copies of this judgment on the defendants as a prerequisite for the plaintiffs to recommence proceedings in terms of the Act for the recovery of the debts due. In terms of Rule 4(10)[27] a court is at liberty to order further steps to be taken in securing adequate service of process upon defendants. I will, therefore, include an appropriate order in this regard.

CONCLUSION

[25] In conclusion the order which is made in each of the four applications is as follows:

1. The defendant is absolved from the instance and the application is dismissed.
2. The plaintiff is interdicted from instituting action against the defendant arising out of the mortgage bond for the recovery of the debt and obtaining an execution order, in the High Court.
3. In the event of the plaintiff recommencing proceedings against the defendant for the recovery of the outstanding balance, **personal** service of a copy of this judgment upon the defendant is ordered simultaneously with the issue of a letter of demand contemplated in s 129 of the National Credit Act 34 of 2005.
4. No costs are allowed.

THUS DATED AND SIGNED AT JOHANNESBURG ON THIS …… DAY OF AUGUST 2009

C.J. CLAASSEN
JUDGE OF THE HIGH COURT

[27] Rule 4(10) provides: "Whenever the court is not satisfied as to the effectiveness of the service, it may order such further steps to be taken as to it seems meet."

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Argument in the above matters was heard on 26 May 2009
Date of Judgment: 20 August 2009