SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO 212862/2010

DATE: 11 OCTOBER 2010

FIRSTRAND BANK LTD T/A FIRST NATIONAL BANK

V

SEYFFERT AND ANOTHER AND SIMILAR CASES

WILLIS J

2010 SEPTEMBER 21; OCTOBER 11

***Credit agreement**—Consumer credit agreement—Debt review—Notice to terminate review is competent, once review referred by debt counsellor to magistrates' court—National Credit Act 34 of 2005, s 86(10).*

A notice to terminate a debt review in terms of s 86(10) of the National Credit Act 34 of 2005 is competent, once a debt review has been referred by a debt counsellor to a magistrates' court for determination. (Paragraph [14] at #.)

Annotations:

Reported cases

Southern Africa

;ansa*ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D){ref}: referred to

;ansa*Aktiebolaget Hässle and Another v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA) ([2002] 4 All SA 138) {ref}: referred to

;ansa*BMW Financial Services (SA) (Pty) Ltd v Donkin* 2009 (6) SA 63 (KZD){ref}: referred to

;ansa*BMW Financial Services (SA) (Pty) Ltd v Mudaly* 2010 (5) SA 618 (KZD){ref}: referred to

;ansa*Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T){ref}: referred to

;ansa*eTV (Pty) Ltd and Others v Judicial Service Commission and Others* 2010 (1) SA 537 (GSJ){ref}: referred to

;ansa*FirstRand Bank Ltd v Dhlamini* 2010 (4) SA 531 (GNP){ref}: referred to

;ansa*FirstRand Bank Ltd v Maleke and Three Similar Cases* 2010 (1) SA 143 (GSJ){ref}: referred to

;ansa*Gruhn v M Pupkewitz & Sons (Pty) Ltd* 1973 (3) SA 49 (A){ref}: referred to

;ansa*Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) (2005 (1) BCLR 78){cons}: considered

;ansa*Munien v BMW Financial Services (SA) (Pty) Ltd and Another* 2010 (1) SA 549 (KZD){ref}: referred to

;ansa*National Credit Regulator v Nedbank Ltd and Others* 2009 (6) SA 295 (GNP){ref}: referred to

;ansa*Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W) ([2006] 2 All SA 506){ref}: referred to

;ansa*Noah v Union National South British Insurance Co Ltd* 1979 (1) SA 330 (T){ref}: referred to

;ansa*Standard Bank of South Africa Ltd v Hales and Another* 2009 (3) SA 315 (D) ([2009] 2 All SA 416) {ref}: referred to

;ansa*Standard Bank of South Africa Ltd v Kruger; Standard Bank of South Africa Ltd v Pretorius* 2010 (4) SA 635 (GSJ){crit and not foll}: criticised and not followed

;ansa*Standard Bank of South Africa Ltd v Panayiotts* 2009 (3) SA 363 (W){ref}: referred to

;ansa*Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA) (2006 (9) BCLR 1022; [2006] 2 All SA 382){cons}: considered.

England

;anen*R v Secretary for the Home Department, Ex parte Daly* [2001] 3 All ER 433 (HL){ref}: referred to.

Unreported cases

Changing Tides 17 (Pty) Ltd NO v Erasmus (WCC case No 18153/09, 12 November 2009){appr}: approved

Firstrand Bank Ltd v Evans (ECP case No 1693/10, 31 August 2010){ref}: referred to

Firstrand Bank Ltd v Fillis and Another (ECP case No 1796/2010, 17 August 2010){ref}: referred to

Firstrand Bank Ltd v Mbele (GSJ case No 20839/2009, 28 June 2010){ref}: referred to

FirstRand Bank v BL Smith (SGJ case No 24205/08, 5 December 2008){ref}: referred to

SA Securitisation (Pty) Ltd v G Matlala (GSJ case No 6359/2010, 29 July 2010){crit and not foll}: criticised and not followed

SA Taxi Securitisation (Pty) Ltd v Nako and Others (ECB case No 19/2010, 8 June 2010){ref}: referred to
Wesbank, a Division of Firstrand Bank Ltd v Martin (WCC case No 13564/09, 13 August 2010){ref}: referred to.

Statutes

The National Credit Act 34 of 2005, s 86(10): see *Juta's Statutes of South Africa 2009/10* vol 2 at 1-586.

Four similar applications for summary judgment. The facts appear from the judgment of Willis J.

HM Viljoen for the applicant in case Nos 21862/2010; 23132/2010; 23380/2010.

JH de V Botha for the applicant in case No 009987/2010.

CG Grové (attorney) for the respondents in case No 21862/2010.

SS Cohen for the respondents in case Nos 23132/2010; 23380/2010; 009987/2010.

Cur adv vult.

Postea (October 11).

WILLIS J:

[1] These are four similar applications for summary judgment. During the course of the first week of September, while I was sitting in motion court, I became more acutely aware than ever before of a problem that has vexed various judges sitting in different divisions around the country concerning the interpretation of the provisions of s 86 (10) of the National Credit Act 34 of 2005 (the NCA). I therefore invited counsel appearing in these matters to prepare full heads of argument and to argue these matters before me on 21 September 2010. I am much indebted to counsel for their well-presented arguments.

[3] In each instance:

(i) the applicant is a registered credit provider in terms of the NCA;

(ii) the applicant seeks recovery of a debt secured by a mortgage bond registered over immovable property;

(iii) the respondents are spouses;

(iv) the respondents are in occupation of the property;

(v) the property is situated in a comfortably affluent or 'middle-class' area;

(vi) the respondents have raised no substantive defence other than to invoke the requirements of the NCA;
(vii) the respondents claim that the matter is subject to debt review in terms of Ch 4 of the NCA;
(viii) the applicant claims to have given notice of termination of that review in terms of s 86(10) of the NCA;
(ix) the agreement upon which the applicant relies is a credit agreement in terms of the NCA;
(x) there is no indication that the applicant provided credit recklessly;
(xi) there is no indication that the applicant imposed exploitative burdens on the respondents.

[3] In respect of the affidavits resisting summary judgment filed by each of the respondents, counsel for the applicants levelled a number of criticisms. With varying degrees of intensity, these criticisms are justified. The affidavits of the respondents have been cryptic to the extent of coyness. These affidavits are laconic, if not supine, with regard to the real possibility of extrication from financial difficulties which the respondents face. Even where the respondents presented some acceptable evidence as to the fact that they had referred the matter to a debt counsellor, and in some instances annexed that person's recommendations, in no such instance does the proposal make any economic sense at all. Indeed, the proposals are devoid of economic rationality. In making this observation as to economic rationality I have in mind no ideological commitment but consistency with mathematical laws. Ordinarily, 'bond repayments' constitute the largest single item in any salaried household's monthly budget. It is all very well, for example, to propose that the monthly repayments be halved for a few years and then massively increased thereafter, but where a family is salaried, or even deriving income from a small business, in the absence of further explanation, this does not make sense. Assume, notionally, that a family, earning a salary, is currently unable to make a monthly bond repayment of R5000 per month. A proposal to reduce that repayment to R2500 per month for four or five years and then increase it to R10 000 per month thereafter (to take into account, inter alia, interest accruals) has no apparent logic to it. Without some indication of where the extra R7500 is to come from in a few years' time, the proposal is bereft not only of reasonableness but also economic

feasibility. Furthermore, in non-Islamic systems of money-lending, the inability even to service interest while it is ticking away, will normally indicate a fatal flaw in the proposal.[1] Of course, there will be exceptions but it is the exceptions that need explanation.

[4] The conundrum that arises from s 86(10) is this: may a debtor, who has made an application for debt review in terms of s 86(1) of the NCA, by the simple expedient of making such an application, indefinitely frustrate the enforcement of a debt to which he or she has no real defence and where no serious effort is being made to enter into some sensible arrangement for the rescheduling or re-arrangement of his or her debt (as is provided for in the NCA)?

[5] Section 130(3) of the Act prevents a court from determining a matter in respect of a credit agreement to which the NCA applies if it is 'pending before' the National Consumer Tribunal or 'during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction'. The most common defence in otherwise hopeless cases for respondents attempting to resist summary judgment in this division is that the matter is 'before' a debt counsellor and awaiting debt review in terms of the provisions of the NCA.

[6] Section 86(10) of the Act provides that a credit provider:

> 'may give notice to terminate the review in the prescribed manner to—
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> *(a)* the consumer;
>
> *(b)* the debt counsellor; and
>
> *(c)* the National Credit Regulator,
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> at any time at least 60 business days after the date on which the consumer applied for the debt review'.

[7] Section 88(3) of the NCA prevents a credit provider from enforcing 'by litigation or other judicial process any right or security' under the credit

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1 In Islam, lending at interest is 'haraam' (forbidden). Other than acts of charity or works of mercy, Islamic systems of money-lending are rendered economically functional by, for example, the charging of fees, leasing, joint venture or profit-shares.

agreement in question until debt review has been completed but this subsection is, in express terms, rendered subject to the provisions of s 86(10) of the NCA. Each of the cases therefore turns on what one is to make of the provisions of s 86(10) of the NCA.

[8] I was referred, by counsel, to the following cases in particular which have dealt with the interpretation of this subsection:

ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors;[2]

Changing Tides 17 (Pty) Ltd NO v Erasmus;[3]
Standard Bank of South Africa Ltd v Kruger; Standard Bank of South Africa Ltd v Pretorius;[4]
SA Taxi Securitisation (Pty) Ltd v Nako and Others;[5]
SA Securitisation (Pty) Ltd v G Matlala;[6]
Wesbank, a Division of Firstrand Bank Ltd v Martin;[7]
FirstRand Bank v BL Smith;[8]
BMW Financial Services (SA) (Pty) Ltd v Mudaly;[9]
Firstrand Bank Ltd v Evans.[10]

[9] Although I was referred to a number of other cases, the following were the object of special focus:

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2 2009 (2) SA 512 (D).

3 WCC case No 18153/09, 12 November 2009.

4 2010 (4) SA 635 (GSJ).

5 ECB case No 19/2010, 8 June 2010.

6 GSJ case No 6359/2010, 29 July 2010.

7 WCC case No 13564/09, 13 August 2010.

8 SGJ case No 24205/08, 5 December 2008.

9 2010 (5) SA 618 (KZD).

10 ECP case No 1693/10, 31 August 2010.

Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others;[11]
Nedbank Ltd v Mortinson;[12]
Standard Bank of South Africa Ltd v Saunderson and Others;[13]
Standard Bank of South Africa Ltd v Hales and Another;[14]
Standard Bank of South Africa Ltd v Panayiotts;[15]
BMW Financial Services (SA) (Pty) Ltd v Donkin;[16]
National Credit Regulator v Nedbank Ltd and Others;[17]
FirstRand Bank Ltd v Maleke and Three Similar Cases;[18]
Munien v BMW Financial Services (SA) (Pty) Ltd and Another;[19]
Firstrand Bank Ltd v Mbele;[20]
Firstrand Bank Ltd v Fillis and Another;[21]
FirstRand Bank Ltd v Dhlamini.[22]

[10] I have benefited much from reading these judgments as well as the learned academic articles to which some of these judgments refer. I share the general frustration of my judicial colleagues around the country at the lack of clarity that

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11 2005 (2) SA 140 (CC) (2005 (1) BCLR 78).

12 2005 (6) SA 462 (W) ([2006] 2 All SA 506).

13 2006 (2) SA 264 (SCA) (2006 (9) BCLR 1022; [2006] 2 All SA 382).

14 2009 (3) SA 315 (D) ([2009] 2 All SA 416).

15 2009 (3) SA 363 (W).

16 2009 (6) SA 63 (KZD).

17 2009 (6) SA 295 (GNP).

18 2010 (1) SA 143 (GSJ).

19 2010 (1) SA 549 (KZD).

20 GSJ case No 20839/2009, 28 June 2010.

21 ECP case No 1796/2010, 17 August 2010.

22 2010 (4) SA 531 (GNP).

features at least in the parts of the NCA with which one is concerned in cases of the kind now before me. A court is forced to go round and round in loops from subsection to subsection, much like a dog chasing its tail. Indeed, the language used in the Act from time to time suggests that foreign draftspersons rather than South African lawyers had a strong hand in preparing the text.[23] Nevertheless, it is clear from reading s 3 of the NCA, which sets out the purposes of the Act, that it pursues varied objectives which must be held in balance. Certainly, the NCA is designed to protect consumers but it was not intended to make of South Africa a 'debtors' paradise'. Indeed a 'debtors' paradise' will not last for long. Very soon, credit would not be available to ordinary people. Sight must not be lost of the fact that among the purposes of the Act is the 'development of a credit market that is accessible to all South Africans'. It should be remembered that access to responsibly granted credit, on fair and reasonable terms, is an important means of social upliftment for ordinary citizens. It also needs to be borne in mind that responsibly granted credit has a 'multiplier effect' in an economy. For example, money lent to build a house is used not only to pay the wages of the builders but also to buy materials (and, in so doing, pays the wages of those who produced the materials). These payments by the borrower who is building a house find their way back into the banking system as deposits and are lent out again. Thus the system multiplies, depending on the reserve ratios that the banks, either voluntarily or by regulation, maintain. In other words, money-lending not only creates wealth but jobs as well. It is inconceivable that it could have been the intention of the legislature to facilitate the wholesale evasion of debt under the banner of 'consumer protection'. Moreover, s 86(5)*(b)* requires that, when it comes to debt review, consumers and credit providers are to act in good faith towards one another.

[12] It may, furthermore, be salutary to reflect on the fact that money-lenders (credit providers), have, since time immemorial, pursued three objectives in the conduct of their business:

i) to recover the money lent (credit provided);

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23 See, for example, the wording of s 88(3)*(b)*(i).

to recover their costs and expenses in operating their business; and
to make a profit.

If any one of these objectives is systematically put at risk, the business of providing credit comes to an end. No amount of 'progressive' rhetoric will alter these self-evident truths. From time to time, there are those who fulminate against the making of a profit, whether by money-lending or otherwise. Those who do so should take the trouble to read Karl Marx's *A Critique of the Gotha Programme* in which he declaims against those who fail to understand the necessity for profit in a viably functioning economy.

[13] A plain reading of s 86(10), especially when read together with s 86(11) of the NCA, makes it clear that the giving of notice by a 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. In plain English, a 'notice' denotes an intention, a preliminary step towards a consequence, rather than the consequence itself.[24] In the particular context with which one is now concerned, it all depends on the extent to which the parties show good faith to one another, have sensible, fair and reasonable proposals and actively engage with one another to find realistic solutions to a particular consumer's problems. Providing incentives for good sense and fairness on all sides will go a long way to achieving the objectives of the Act.

[14] How does one provide such incentives? It seems that one need not search too hard. The principles are provided in a well-known case dealing with what is required in affidavits resisting summary judgment: *Breitenbach v Fiat SA (Edms) Bpk*[25] The important principle set out in that case is this: the defence must not be set out so baldly, vaguely or laconically that a court hearing an application for summary judgment is left with the impression that the respondent is being merely

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24 See *The Oxford English Dictionary*.

25 1976 (2) SA 226 (T).

opportunistic, or at least, lacking in conviction.[26] As I said in another context, the defence must not be 'flimsy'.[27] Where a debtor wishes to avoid summary judgment after proper notice has been given in terms of s 86(10), the court would want to see active, serious, sensible and reasonable proposals having been mooted by the consumer and not an opportunistically supine attitude. Conversely, a credit provider who appears to be adopting a recalcitrant attitude may expect to be deprived of the expeditious and inexpensive remedy of summary judgment. It follows that, in my respectful view, to the extent that Kathree-Setiloane AJ over emphasised the protection of the consumer as a purpose of the NCA in justifying her conclusions in the cases of *Standard Bank of South Africa Ltd v Kruger; Standard Bank of South Africa Ltd v Pretorius* and *SA Securitisation (Pty) Ltd v G Matlala*, she was clearly wrong. In particular, I disagree with her that, by reason of the provisions of s 129(2) of the NCA, a notice to terminate in terms of s 86(10) of the NCA is incompetent once a debt review has been referred by a debt counsellor to a Magistrate's Court for determination.[28] Section 129(2) merely exonerates a credit provider from having to notify a consumer that he or she has a right to approach a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction where the consumer has already taken such steps.

[15] I am mindful of the fact that s 129(1)*(b)*, read together with s 130 of the NCA prevents a credit provider from commencing any legal proceedings before meeting certain requirements, including the giving of a notice in terms of s 86(10). It seems clear enough that a credit provider is prevented from enforcing a credit agreement where:

i) there has not been compliance with certain procedural formalities

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26 At 229A.

27 *eTV (Pty) Ltd and Others v Judicial Service Commission and Others* 2010 (1) SA 537 (GSJ) at 547C.

28 See the *Standard Bank of South Africa Ltd* at para [26].

(section 130(1));

ii) a court has determined that the credit agreement was reckless (section 130(4)*(a)*;

iii) a court has declared a consumer to be over-indebted in terms of the Act (section 83 *(3)*(b));

the credit agreement has been suspended or is subject to an order re-arranging the debt or an agreement to that effect has been entered into (s 130(4)*(e)* and s 130(3)*(c)*(ii)).

None of these considerations apply in the cases before me. As may have become apparent from paras [5], [6] and [7] above, questions do, however, arise as to whether and when a matter is 'pending' before the National Consumer Tribunal (s 130(3)*(b)*) or is 'before' a debt counsellor, alternative dispute resolution agent, consumer court, or ombud with jurisdiction (s 130(3)*(c)*(i)).

[16] As Lord Steyn said in *R v Secretary for the Home Department, Ex parte Daly*,[29] '(i)n law, context is everything'. This was approved by the Supreme Court of Appeal in *Aktiebolaget Hässle and Another v Triomed (Pty) Ltd*.[30] Indeed, Eloff J (as he then was) said of the very word 'pending' in the case of *Noah v Union National South British Insurance Co Ltd*[31] that its meaning depends much upon its context. It seems to me that, in context, the words 'pending' in s 130(3)*(b)* (and also in s 130(4)*(c)*) and 'before' in s 130(3)*(c)* denote a certain immediacy to the events rather than merely a formal referral having been made. As Eloff J noted, 'pending' in the *Oxford English Dictionary* is defined, inter alia, as 'about to happen; to be imminent'.[32] The word 'before', in plain English, means 'in front of'.[33] In other words, it is not good enough for a

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29 [2001] 3 All ER 433 (HL) at 447*a*.

30 2003 (1) SA 155 (SCA) ([2002] 4 All SA 138) at para [1].

31 1979 (1) SA 330 (T) at 332B–333D.

32 At 332B.

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consumer, being pursued for a debt for which he or she has no substantive defence to adopt, as so often happens in this division, a 'catch-me-if-you-can' attitude.

[17] I am fortified in this view by reference to two considerations. The first is that it is trite that, even where a defendant fails to satisfy a court that he or she has a bona fide defence to an application for summary judgment, the court has a discretion not to grant summary judgment.[34] The evolution of our common law principles has thus entailed that, when it comes to applications for summary judgment, a court must take a holistic, rational and fair approach to each matter before it. Summary judgment need therefore not be granted where a consumer deserves a fair opportunity to reorganise his or her financial affairs on a sensible basis. Respect for an important purpose of the NCA — consumer protection — is therefore not necessarily undermined by an application for summary judgment, even though the consumer may have invoked the provisions of Part D of Ch 4 relating to debt review. It all depends on the facts and circumstances of the particular case. The second consideration which strengthens my view that the debt review mechanisms of the NCA do not provide a safe haven for pirates and dilatory sunbathers is that, in terms of s 130(4)*(c)* of the NCA, the court has a discretion to adjourn proceedings where there is a pending debt review in terms of Part D of Ch 4 of the Act. In other words, there is, in my respectful view, much to commend the approach of Binns-Ward J in the *Changing Tides* case where the hearing of the application for summary judgment was adjourned on certain appropriate terms and conditions. A prospective debt review is not, ipso facto, a bar to obtaining summary judgment. In summary, where a credit provider has given a consumer proper notice in terms of s 86(10) of the NCA, a court hearing an application for summary judgment upon a credit agreement, may, depending on the contents of the affidavit resisting summary judgment:

i) grant the application; or

See *The Oxford English Dictionary*.

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See *Gruhn v M Pupkewitz & Sons (Pty) Ltd* 1973 (3) SA 49 (A) at 58D.

dismiss the application; or
adjourn the application on appropriate terms and conditions.
Active endeavours to exchange serious, sensible and reasonable proposals to resolve a consumer's debt problems will be among the factors which will weigh heavily with a court in deciding which order to make.

[18] The respondents are all 'clutching at straws'. In each case, summary judgment is appropriate. Mindful of the provisions of s 26(1) of the Constitution which enshrines the right of access to adequate housing, the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 which elaborate thereupon, and the decisions in the cases of *Jaftha v Schoeman* and *Standard Bank v Saunderson*, I consider that, although it would be right to grant the applicants summary judgment for the debts due to them, it would be an appropriate exercise of a discretion not to make orders that the immovable property in question be declared to be specially executable. After all, among the clear purposes of the NCA is to afford a debtor a reasonable opportunity to discharge a debt on terms that may be less onerous than may otherwise be the case. For the applicants, the recovery of the debt may take a little longer without the order declaring the immovable properties specially executable but at least the respondents will have the opportunity first to explore ways of settling their debt without losing their homes. The *Jaftha* and *Saunderson* cases are not, of course, directly in point but they do indicate a wariness about persons losing their homes.

[19] In view of the fact that these are clearly test cases, I consider it appropriate not to make any costs orders.

[20] The following orders are made:

A. In case number 21862/2010 (*First National Bank v Seyffert*) summary judgment is granted in favour of the plaintiff against the defendants, jointly and severally, the one paying the other to be absolved, for:

(i) Payment of the sum of R219 715,69;

Interest on the aforesaid sum calculated at the rate of 9% per annum from 12 May 2010 to date of payment.

B. In case number 23132/2010 (*First National Bank v Buitendach*) summary judgment is granted in favour of the plaintiff against the defendants, jointly and severally, the one paying the other to be absolved, for:

(i) Payment of the sum of R731 217,72;

Interest on the aforesaid sum calculated at the rate of 8,75% per annum from 29 May 2010 to date of payment.

C. In case number 23380/2010 (*First National Bank v Saunders*) summary judgment is granted in favour of the plaintiff against the defendants, jointly and severally, the one paying the other to be absolved, for:

(i) Payment of the sum of R927 350,14;

Interest on the aforesaid sum calculated at the rate of 7,5% per annum from 5 June 2010 to date of payment.

D. In case number 09987/2010 (*Nedbank v Petersen*) summary judgment is granted in favour of the plaintiff against the defendants, jointly and severally, the one paying the other to be absolved, for:

(i) Payment of the sum of R777 011,18;

Interest on the aforesaid sum calculated at the rate of 9,4% per annum from 1 February 2010 to date of payment.

Attorneys for the applicant in case Nos 21862/2010; 23132/2010; 23380/2010: *Charl Cilliers Inc*.

Attorneys for the applicant in case No 009987/2010: *Nam-Ford Inc*.

Attorneys for the respondents in case No 21862/2010: *Smit & Grové*.

Attorneys for the respondents in case Nos 23132/2010; 23380/2010; 009987/2010: *Taitz & Skikne*.