IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: 9162/2010

Date of hearing: 10 March 2011
Date of judgment: 15 March 2011

In the matter between:

SA TAXI SECURITISATION (PTY) LTD Applicant

and

NDOBELA JOSEPH Respondent

JUDGMENT

MOKHARI AJ

1. The applicant seeks an order directing the respondent to deliver into the possession of the sheriff a **2009 CAM Inyathi XGD 2.2L high roof** with engine number SF491QE071262185A and chasis number LPBMBDDE17H119639 to the applicant. The applicant undertakes to store the motor vehicle in safe custody in garaged premises and that it shall not use the vehicle or permit it to be used pending the finalisation of an action instituted by the applicant as plaintiff against the respondent as defendant before this Court. Summons was issued on 10 March 2010 for an order of confirmation

of termination of the agreement ("the lease agreement concluded between applicant and respondent in respect of the above mentioned motor vehicle"), and the return of the said motor vehicle to the applicant. The action is defended by the respondent and an appearance to defend was entered. The applicant applied for summary judgment which was opposed by the respondent, and an affidavit resisting summary judgment was filed. Leave to defend was granted to the respondent.

2. The current application is essentially prompted by the fact that the respondent has been granted leave to defend the action and that finalisation of that action may take long whilst the respondent continues to use the motor vehicle as a taxi, thus depreciating its value even further. The applicant seeks an interim relief *pendente lite*. Although the respondent opposes the relief sought in this application, he did not file an answering affidavit. When the matter was called in Court, the attorney, Mr Grove, appearing for the respondent, applied for a postponement. The application for a postponement was dismissed. On request by Mr Grove, that he be allowed to make legal submissions to Court despite failure to file both the answering affidavit and the practice note and short heads, I allowed him to make submissions on points of law and the interpretation of applicable provisions of the National Credit Act No. 34 of 2005 ("NCA").

3. On 26 June 2009, the applicant and respondent concluded a written lease agreement in terms whereof the motor vehicle described above was leased to the respondent in order to be used as a taxi. In terms of the lease agreement, the applicant remained the owner of the motor vehicle. On signature of the lease agreement, the motor

vehicle was delivered to the respondent and the respondent is currently in possession of the motor vehicle. The respondent was required to pay monthly instalments in the sum of R6 555.64 commencing 01 August 2009. The respondent paid a deposit of R35 000.00 and thereafter commenced with his repayment of a debt in monthly instalments described above. Subsequently, the respondent breached the terms of the lease agreement in that he failed to pay full amounts of the instalments due in terms thereof. On 16 November 2009 the applicant received form 17.1 from the respondent's debt counsellor, pertaining to the respondent's application for a debt review to the debt counsellor. On 07 December 2009 the applicant was informed by the respondent's debt counsellor that the respondent's application for debt review had been successful and that his debt obligations were in a process of being restructured. The notification took place by means of Form 17.2 which was delivered in compliance with the provisions of regulation 24(10).

4. On 07 December 2009 the respondent's debt counsellor addressed to the applicant a proposal for the respondent's debt restructuring for the applicant's consideration. It appears that the applicant did not respond to the respondent's debt counsellor's proposal and on 23 February 2010 the applicant, and in writing, notified the respondent, his debt counsellor and the National Credit Regulator that it has elected to terminate the debt review in terms of section 86(10) of the NCA. In paragraph 17 of the founding affidavit, the applicant alleges that it was not obliged to nor did it accept the proposal made by the respondent's debt counsellor on behalf of the respondent. It seems to me that the first time when it was communicated to the respondent in writing that his proposal has been rejected was in the founding affidavit. There has

been no prior written rejection of the respondent's proposal either to him or his debt counsellor. I will return to this point later.

5. When the applicant gave notice of termination of the debt review in terms of section 86(10), 60 business days had elapsed entitling the applicant to give such notice. The applicant alleges that it was entitled, after terminating the debt review, to enforce its debt as contemplated in section 129(1)(b)(i) and 131 of the NCA. It is the applicant's contention that it was therefore in terms of section 123 entitled to terminate the lease agreement which it did.

6. In support of its election to terminate the debt review and therefore the lease agreement, the applicant contends that not only did the respondent breach the terms of the lease agreement by failing to honour his obligation to pay full monthly instalments, but defaulted in his own undertaking or proposal to pay a reduced amount. In terms of the proposal, the respondent proposed that the monthly instalment of R6 555.64 be reduced to R2 797.01. However, despite such proposal, between 01 December 2009 to 30 September 2010, the respondent paid amounts less than the proposed amount of R2 797.01 on a monthly basis.

7. The applicant submits that its claim is vindicatory in nature and it has satisfied the requirements for an interim interdict. As pointed out earlier, there is no answering affidavit rebutting the applicant's allegation therein. In that regard, I am required to accept the allegations made by the applicant in the founding affidavit as true.

8. Mr Grove, attacked the application on legal grounds. He submitted that the termination of the debt review and therefore the lease agreement by the applicant is invalid because it conflicts with the principle of good faith, the applicant does not have the requisite *locus standi* to institute these proceedings due to the absence of the certificate of registration as a credit provider by the National Credit Regulator ("NCR"); the application is procedurally defective for non-compliance with section 130(4)(c)(i) and (ii) on the basis that the applicant ought to have acted in terms of section 130 and not rely on section 86(10) of the NCA; that this Court should consider invoking section 85 of the NCA and declare the respondent to be over indebted and make the appropriate order in that regard; that section 3 of the NCA protects the consumers, taking into account that the respondent's entire livelihood and that of his family is depended on the use of the motor vehicle for income generatiion; that if the motor vehicle is taken away from him, it will aggravate the situation and even make it impossible for him to comply with the very obligation imposed on him in terms of the debt review or the payment of the reduced monthly instalments.

9. In support of the submissions, Mr Grove handed up to me a list of authorities of the High Court, both in this division, and other divisions, pertaining to the interpretation and application of the NCA. A heavy reliance was made on the Western Cape High Court judgment in *Wesbank, a division of First Rand Bank Limited vs Deon Winston Papier and another (Case No. 14256/10) delivered 01 February 2011 (unreported)*. According to the submission, the credit provider is required to act in good faith and if it fails to do so, the termination is not valid. The credit provider must not just frustrate the process. In support of the aforegoing submissions, Mr Grove pointed out that

when the respondent's debt counsellor addressed a proposal to the applicant for consideration for the reduction of the monthly instalments, the applicant elected to ignore it and instead waited for 60 business day to elapse and then terminate the debt review and the lease agreement. It was submitted that it is incumbent upon the credit provider to engage with the respondent in good faith in an attempt to resolve the respondent's financial distress in order to rearrange his repayment terms. It is not incumbent upon the credit provider to merely sit back and wait for the 60 business day period to expire in order to enforce its rights by terminating the debt review and then the lease agreement. Such conduct, constitutes bad faith which render any subsequent termination invalid.

10. To date, there are conflicting decisions, in this division, and other divisions of the High Courts as to when the credit provider is entitled to terminate the debt review and the lease agreement. There seem also to be divergence of views expressed in various judgments both in this division and other divisions as to what constitutes good faith, when regard is had to the provisions of sections 86; 87 read with sections 129 and 130 of the NCA. Before dealing with this issue in detail, I propose to first dispose of the first two points raised by Mr Grove. The *locus standi* issue does not arise in my view in that it was incumbent upon the respondent to raise it by way of a notice in terms of Rule 7 which was never done. No explanation was given why that was not done. Furthermore, the preponderance of evidence seems to point that the applicant is indeed a registered credit provider in terms of the NCA. In my view there is no merit in this point and ought to be rejected.

11. The submission that the applicant ought to have invoked the provisions of section 130 of the NCA seems not to be correct in my view. I agree with Ms Stevenson, appearing for the applicant, that the credit provider has an election to either proceed by way of section 129 read with 130 or section 186 of the NCA. In fact, the proper reading of the aforegoing sections indicate that each apply in different scenarios. For instance, section 86 applies when a consumer on his own volition applies for a debt review before a debt counsellor. Section 86 affords a debtor who the moment he or she realises that his or her finances are weak, take proactive steps to approach a debt counsellor for a debt review in order that he or she be declared to be over indebted.

12. The debt counsellor considers the application and if satisfied that the consumer is over indebted, declare him to be over indebted and give notice to all creditors, make proposals to them on the debt restructuring of the consumer. If the recommendations made by a debt counsellor in terms of section 86(7) are accepted by both the consumer and the credit provider in terms of section 86(8), the debt counsellor must record the proposal in a form of an order and file it as a consent order in terms of section 138. If there is no consent by the consumer and the credit provider as contemplated in section 86(8)(a), the debt counsellor must act in terms of section 86(8)(b) and refer the matter to the Magistrate's Court with recommendations. A referral to the Magistrate Court constitutes an application that is made on behalf of the consumer for an order by the Magistrate. The Magistrate may either grant the application in terms whereof both the consumer and the credit provider would be bound or may reject the application in terms whereof the credit provider would be entitled under those circumstances to proceed to terminate the lease agreement and

in appropriate cases launch an application before this Court for vindicatory or other appropriate relief.

13. It seems to me that section 86(10) is the contentious one. It provides that:

"86(10) If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to –

(a) *the consumer;*
(b) *the debt counsellor;*
(c) *the National Credit Regulator, at anytime at least 60 business days after the date on which the consumer applied for the debt review."*

14. For the sake of completeness, it is appropriate to read section 86(10) with 86(11). Section 86(11) provides that:

"If a credit provider who has given notice to terminate a review as contemplated in subsection (10) proceeds to enforce that agreement in terms of Part "C" of Chapter 6, the Magistrate's Court hearing the matter may order that the debt review resume on any conditions the Court considers to be just in the circumstances."

15. Having regard to the submission by Mr Grove that the applicant was obliged to comply with section 130 of the Act and that its election to only proceed in terms of section 86(10) was not appropriate and therefore invalid, I turn to consider the provisions of section 130. In order for section 130 not to be understood in isolation, it ought to be read together with section 129. Section 129 deals with the procedure before the debt enforcement. This procedure, places a duty on the credit provider to be proactive the moment it becomes clear to the credit provider that the consumer is

defaulting in his or her monthly repayment. In that regard, in terms of section 129, the credit provider is required to notify the consumer of his or her default and the steps that the consumer ought to take in order to redress the situation. It is patently clear to me that whilst section 129 places a pre-emptive duty on the credit provider, section 86 places a pre-emptive duty on the consumer to take certain steps the moment it becomes clear to the consumer that his finances have deteriorated and with the possibility of him/her being unable to meet his/her monthly obligations to the credit provider. Section 130 is a debt procedure prescribed in a Court. Section 130(4)(c)(i) and (ii), provides as follows:

"In any proceedings contemplated in this section, if the Court determines that –

(a) *…*
(b) *…*
(c) *The credit agreement is subject to a pending debt review in terms of Part D of Chapter 4, the Court may –*

(i) *adjourn the matter, pending a final determination of the debt review proceedings;*
(ii) *order the debt counsellor to report directly to the Court, and thereafter make an order contemplated in section 85(b)*
(iii) *…"*

16. My understating of this subsection is that it becomes relevant when the proceedings are already before Court and that the credit agreement is subject to a pending debt review. In that instance, the Court seized with the proceedings relating to the aforesaid debt, may adjourn the matter pending the final determination of the debt review proceedings and order the debt counsellor to report directly to it.

17. The submission by Mr Grove on the application of section 130 and as to when it is applicable overlooks an important aspect relating to the fact that the applicant alleges in the founding affidavit that when it gave notice of termination of the debt review, there was no application referred to the Magistrate's Court by the respondent for an order by the Magistrate. It was in fact conceded by Mr Grove that when the respondent referred the matter to the Magistrate's Court for an order by a Magistrate the 60 business days had already elapsed. He submitted that the legislature did not intend that the 60 business days period ought to be a cut off date and after that, the credit provider is at liberty to terminate a debt review. His submission contradicts the judgment by Kathree Setiloane AJ ("as she then was") in *SA Securitisation (Pty) Ltd vs Matlala Gideon (Case No: 63595/2010) (delivered on 29 July 2010) (South Gauteng High Court); Standard Bank of South Africa Limited vs Kruger and Standard Bank of South Africa vs Pretorious, (South Gauteng High Court) (Cases No: 09/45438 & 09/39057) (delivered 23 April 2010)*. I am in agreement with Kathree Setiloane AJ in the above two cases that once the 60 business days have elapsed, the credit provider is entitled to terminate the debt review and cancel the lease agreement.

18. The difficulty the respondent has in this matter is that he waited until 60 business days had elapsed before referring the matter to the Magistrate for a decision. At that time, the applicant was entitled to terminate the debt review and the lease agreement forthwith. It is not in dispute that the debt review and the lease agreement were terminated, it is only the validity of the termination which is challenged. The challenge of the validity of the termination on the basis that the expiry of the 60 business days does not constitute a bar on the respondent to raise the validity issue should fail. I am

in agreement with authorities which say that the termination of a debt review by a credit provider when the consumer has referred the matter to the Magistrate's Court within 60 business days, with the matter still pending before the Magistrate's Court is invalid and of no force and effect. As long as the referral was within 60 days, the credit provider cannot unilaterally terminate the debt review and/or the lease agreement.

(See in this regard: Westbank, a division of First Rand Bank Limited vs Deon Winston Papier supra; SA Securitisation (Pty) Ltd vs Matlala Gideon; Standard Bank of South Africa Limited vs Kruger and Standard Bank of South Africa vs Pretorious supra).

19. I do not agree with decisions or authorities which are contrary to this view.

(See: SA Taxi Securitisation (Pty) Ltd vs Nako and 6 others (Case No: 842/2010) (11 May 2010) (Eastern Cape Division Bisho) (unreported decision); First Rand Bank Ltd t/a First National Bank vs Seyffert and another and 3 similar cases 2010 (6) SA 429 (SGJ).

20. Had the respondent demonstrated that he referred the matter to the Magistrate's Court for a decision within 60 business days, he would have been afforded the protection of the NCA and the termination of the debt review would have been invalid. Similarly the submission that I should grant an order in terms of section 85 of the NCA cannot succeed. There is also no application before me to make any order in terms of section 85 of the NCA. There are no sufficient facts before court to even consider such a request.

21. What remains now is whether the respondent's defence of the applicant's failure to act in good faith should succeed. It must be noted that Mr Grove's submission is that the termination is invalid due to the applicant's conduct which falls short of good faith. In this regard, the Western Cape High Court decision of Wesbank vs Papier supra is apposite. I agree with the reasoning and conclusions reached in Wesbank / Papier decision that good faith is an important requirement of debt review and failure to act in good faith can lead to the termination of the debt review by the credit provider declared invalid. The Papier case also confirmed the interpretation of the 60 business day period in Matlala decision of Kathree Setiloane AJ. Whether the credit provider failed to act in good faith will depend on the facts and circumstances of each case.

22. In this matter the difficulty is that there is no answering affidavit filed controverting the allegations in the founding affidavit. All what I have are submissions from the bar by Mr Grove. Should it be that enough facts are placed before Court demonstrating that the applicant did not act in good faith, that should be a factor to be taken into account by the Court in concluding whether there was good faith on the part of the credit provider or not. In my view there is a duty on the credit provider to engage in a debt review process meaningfully and with the intention to find a solution to the consumer's financial distress. This does not suggest that the credit provider is obliged to accept a proposal from the consumer which defy commercial rationale. This however does not imply that when a consumer present a proposal which does not make commercial sense, the credit provider is entitled to disregard it and not communicate its counter proposal to the consumer. It is not known to the credit provider whether the counter proposal may be accepted by the consumer. It is

therefore not acceptable that the credit provider should merely ignore the proposal and slap the consumer with a termination of the debt review and the lease agreement on the face. To allow the credit provider to conduct itself in that particular manner is to defeat the very purpose for which the Act is intended for, particularly its object which is embodied in section 3 of the Act. The duty to act in good faith is not only confined to credit providers, it extents to consumers as well. It is a reciprocal duty on both parties to engage meaningfully in a debt review negotiations. What I imply is that a consumer is not permitted to sit back when he or she does not receive any counter proposal or response from the credit provider and allow the 60 business days to pass before raising an argument that the credit provider acted in bad faith. The consumer has a reciprocal duty to act diligently and proactively the moment it becomes clear that the credit provider is not engaging in good faith or does not respond to his or her proposals for debt review. In this regard, debt counsellors have a meaningful role to play.

23. Many consumers who fall victim of debt review and experience inability to meet their financial and contractual obligations, are men and women who try on a daily basis to make ends meet, and have resorted to the loan agreement concluded with the credit provider for purposes of earning a living, many of them are either illiterate, semi-illiterate or ignorant of the provisions of the NCA. When they approach the debt counsellor, they do so with the hope that the debt counsellor, possesses the required knowledge of the NCA and would assist them to rearrange their debt obligations. Often times, it appears that the debt counsellor waits too long even on the face of absolute none co-operation from the credit provider before referring the matter to the

Magistrate for a decision. It is this delay by debt counsellors which ultimately places consumers who have applied for a debt review in such painful predicament, effectively being barred from raising defences available to them in the NCA. In my view a consumer who can demonstrate that he or through his or her debt counsellor acted proactively the moment it became clear to him/her that the credit provider does not act in good faith, and refer the matter to the Magistrate within 60 business days, is entitled to raise a point that the credit provider failed to act in good faith. The magistrate will be entitled to take this factor into account when deciding the matter.

24. In this case it is my view that the respondent cannot be availed of a defence that the applicant acted in bad faith and therefore the agreement should be declared invalid because the respondent has not demonstrated that he/she has complied with his/her statutory obligation under the NCA. I am not persuaded that the termination can be impugned on that basis.

25. With the above points unsuccessfully raised, what remains is whether the applicant had satisfied the requirements of an interim relief. Requirements for an interim interdict are well documented in a plethora of judgments of this division and other divisions of the High Courts and the Supreme Court of Appeal. A prima facie right; a reasonable apprehension of irreparable harm if not granted; a balance of convenience; and that there is no any other alternative remedy available to the applicant. *(See: Setlogelo vs Setlogelo, 1914 AD; SA Taxi Securitisation (Pty) Ltd vs H W Yuong (Case No's: 10249/2008 and 9559/2008 and 8115/2008) (delivered 14 November 2008) (Cape of Good Hope Provincial Division); SA Taxi Securitisation (Pty) Ltd vs Chesane,*

Andries Rabohadi (Case No: 26382/2009) (delivered 01 April 2010) (South Gauteng High Court).

26. It is common cause that the applicant is the owner of the motor vehicle. The applicant's cause of action is vindicatory in nature which entitles it to the return of the motor vehicle. As the owner the applicant has a clear and/or prima facie right. For purposes of interim interdict the applicant merely needs to demonstrate a prima facie right though open to some doubt. I am satisfied that this requirement has been complied with. A reasonable apprehension of irreparable harm is present in view of the fact that as the owner of the motor vehicle, the applicant continues to suffer such damage if the respondent continues to utilise the motor vehicle as a taxi depreciating its value even further. It cannot be that the respondent could be entitled to retain both the motor vehicle and the income he receives from its usage as a taxi and nor pay monthly instalments due to the applicant. The balance of convenience also favours the applicant.

27. In the founding affidavit, the applicant has stated that the vehicle will be stored in a place of safety so that in the unlikely event that the applicant is directed in the finalisation of the action to return the vehicle to the respondent, the vehicle would not have suffered any meaningful reduction in value. This in my view is a sensible way of ensuring that pending the finalisation of the action, the vehicle remains in safe custody and in the same condition that the applicant would have found it in. This also benefits to a certain extent the respondent in so far as his financial obligation to the applicant is concerned. The moment the motor vehicle is taken into safe custody, the

respondent's obligation to pay monthly instalments falls away. I am mindful of the submission by Mr Grove that if I grant an order in favour of the applicant, the prejudice that the respondent will suffer is much severe than the prejudice that the applicant will suffer. Mr Grove submitted that the respondent is depended on the motor vehicle for his and family livelihood for subsistence. If the vehicle is taken away from him, it is tantamount to taking away the very basis upon which his entire livelihood is depended. Whilst that is true, such cannot outweigh the interest of the applicant as the owner of the motor vehicle which it has a vindicatory relief. The argument raised about the dire financial situation of the respondent and that the deprivation of the vehicle will lead to more hardship, will only become sound if the concomitant obligation of the respondent has been fulfilled to the applicant regarding the monthly payments. If not, any complain of any financial strain which will become worsen becomes hollow. I cannot in the light of the right that the applicant has established, prima facie or otherwise, the balance of convenience, and irreparable harm not grant the relief sought. I am satisfied that the applicant has also satisfied the requirement that it has no adequate alternative remedies available to it.

28. For these reasons, the applicant has made out a case for the interim relief it seeks.

29. I make the following order:

1. Pending the finalisation of the action instituted by the applicant against the respondent on 10 March 2010,

1.1. The respondent is directed to deliver into the possession of the sheriff a **2009 CAM Inyathi XGD 2.2i high roof** with engine number SF491QE071262185A and chasis number LPBMBDDE17H119639 who shall deliver it to the applicant who shall, in turn at the applicant's own expense, transport the vehicle to garaged premises situated at 17 Bompas Avenue, Dunkeld, Johannesburg.

1.2. The applicant is directed to retain the vehicle at such garaged premises under security pending the outcome of the action.

1.3. The applicant shall not use the vehicle or permit that it be used for any other purpose.

1.4. In the event of the respondent failing to comply with the contents of paragraph 29.1.1 above within 5 days of the service of this order on the respondent's attorneys, the sheriff is authorised and directed to take the vehicle into possession from wherever he may find it and return the vehicle to the applicant as aforesaid.

1.5. The respondent is ordered to pay the costs of the application.

W R MOKHARI A J
Acting Judge of the South Gauteng High Court

APPEARANCES:

On behalf of the applicant: Ms Stevenson, instructed by Marie-Lou Bester Incorporated Attorneys

On behalf of the respondent: Mr S Grove of Smith Grove Attorneys