**IN THE HIGH COURT OF SOUTH AFRICA**
**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

**CASE NO: 9222/2010**

In the application of:

**MERCEDES BENZ FINANCIAL SERVICES SOUTH AFRICA (PTY) LIMITED** Plaintiff

**and**

**PAPANA GIDEON DUNGA** Defendant

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**JUDGMENT DELIVERED ON 20 SEPTEMBER 2010**

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**BLIGNAULT J:**

[1] This is an opposed application for summary judgment.

[2] Plaintiff is Mercedes Benz Financial Services South Africa (Pty) Limited, a company having its principal place of business at 123 Wierda Road, Zwartkop, Centurion. Defendant is Mr Panana Gideon Dunga, an adult male residing at 11 Block LB2, Mendi Avenue, Langa, Cape Town.

[3] Plaintiff instituted this action for the delivery of a motor vehicle and payment of amounts due in terms of an instalment sales agreement.

[4] Paras 11 and 12 of the particulars of claim read as follows:

> *"11. In due satisfaction of the requirements of Section 86(10) of Act 34 of 2005 read together with section 89 and 130 of the National Credit Act 34 of 2005 a letter was sent by, or alternatively on behalf of, the Plaintiff to the Defendant, the Debt Counsellor and the National Credit Regulator on* ***30 NOVEMBER 2009*** *by pre-paid registered mail at the address provided by the Defendant, the registered addresses of the Debt Counsellor and the National Credit Regulator respectively.*
>
> *12. In the aforementioned letter the Defendant was informed that he had not satisfied his obligations, and that the Debt Review process the Defendant was thereby terminated as a period of 60 (sixty) days had lapsed since application was made for Debt Review without resolution."*

[5] Defendant filed a notice of intention to defend the action and plaintiff applied for summary judgment.

[6] Defendant deposed to an opposing affidavit. He said that he went into debt review and paid the monthly instalments required to the Payment Distribution Agency.

[7] At the hearing of the summary judgment application defendant applied for and was granted leave to file an additional opposing affidavit. The matter was postponed for that purpose. This affidavit was deposed to by Ms Derry Burge, his debt counsellor. She stated, *inter alia*, that defendant's debt review had been set down for hearing in the Somerset West magistrate's court on 25 November 2009. Notice of his application in terms of section 86 of the National Credit Act 34 of 2005 ("the NCA") was attached to the affidavit. According to the notice he was to apply for an order declaring that he is over-indebted as set out in section 79 of the NCA and that his debts be restructured. Ms Burge said that plaintiff was notified of this hearing. Ms Burge then made the following statement: "Due to the declaratory order this matter was postponed *sine die*." She proceeded as follows:

> *"15. I state that the North Gauteng High court was deliberating over certain legal issues pertaining to various sections of the NCA and only came to a decision on 21 August 2009,*

*The Declaratory Order, which judgment affected all our court processes.*

16. *I state that the defendant's application for debt review then had to be amended and has been set down again for 3 September 2010."*

[8] Plaintiff filed a replying affidavit, deposed to by Ms Kavitha Kaylaser. She confirmed that no agreement had been reached between the parties and that the debt review application had been set down to be heard in the Somerset West magistrate's court on 25 November 2009. She pointed out, however, that, as appears from the court file, the application was withdrawn on 25 November 2009. Defendant issued a new application in the magistrate's court, under a different case number, on 14 July 2010, being the same date that the application for summary judgment was set down for hearing in this court. This application was due to be heard on 3 September 2010. Ms Kaylaser accordingly contended that when plaintiff's notice of termination of the debt review was sent to defendant, ie on 30 November 2009, there was no debt review application pending in the magistrate's court.

[9] Mr Willie Steyn appeared on behalf of plaintiff at the postponed day of the hearing of the summary judgment application. He accepted that plaintiff could not terminate the debt review process in terms of section 86(10) of the NCA whilst there was a debt review application pending in the magistrate's court. At the time when plaintiff sent the section 86(10) notice to defendant there was, however, no application pending in the magistrate's court as the application had been withdrawn.

[10] Mr Rael Kassel appeared on behalf of defendant at the hearing of the summary judgment application. He submitted that defendant's debt review application in the magistrate's court had been withdrawn in order to bring an application which would conform to the provisions of the NCA as interpreted in the case of *National Credit Regulator v Nedbank Ltd and Others* 2009 (6) SA 295 (GNP). This contention is not really consistent with the facts set forth in Ms Burge's affidavit but I shall accept that it reflects defendant's intention at the time.

[11] The first question to be determined in this matter is whether plaintiff was entitled to terminate the debt review in terms of section 86(10) of the NCA when it purported to do so on 30

November 2009. A second question is whether defendant would have any defence to plaintiff's claim if such termination of the debt review was valid.

[12] The provisions of sections 86 and 87 of the NCA are relevant to these questions. For ease of reference I propose to quote these provisions in full. (All further references to "section" or "sections" in this judgment will be to sections of the NCA):

> ***"86 Application for debt review***
>
> *(1) A consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted.*
>
> *(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.*
>
> *(3) A debt counsellor-*
>
> *(a) may require the consumer to pay an application fee, not exceeding the prescribed amount, before accepting an application in terms of subsection (1); and*

(b) may not require or accept a fee from a credit provider in respect of an application in terms of this section.

(4) On receipt of an application in terms of subsection (1), a debt counsellor must-

(a) provide the consumer with proof of receipt of the application;

(b) notify, in the prescribed manner and form-

(i) all credit providers that are listed in the application; and

(ii) every registered credit bureau.

(5) A consumer who applies to a debt counsellor, and each credit provider contemplated in subsection (4) (b), must-

(a) comply with any reasonable requests by the debt counsellor to facilitate the evaluation of the consumer's state of indebtedness and the prospects for responsible debt re-arrangement; and

(b) participate in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement.

(6) A debt counsellor who has accepted an application in terms of this section must determine, in the prescribed manner and within the prescribed time-

*(a) whether the consumer appears to be over-indebted; and*

*(b) if the consumer seeks a declaration of reckless credit, whether any of the consumer's credit agreements appear to be reckless.*

*(7) If, as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably concludes that-*

*(a) the consumer is not over-indebted, the debt counsellor must reject the application, even if the debt counsellor has concluded that a particular credit agreement was reckless at the time it was entered into;*

*(b) the consumer is not over-indebted, but is nevertheless experiencing, or likely to experience, difficulty satisfying all the consumer's obligations under credit agreements in a timely manner, the debt counsellor may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement; or*

*(c) the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or both of the following orders-*

(i) *that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless; and*

(ii) *that one or more of the consumer's obligations be re-arranged by-*

(aa) *extending the period of the agreement and reducing the amount of each payment due accordingly;*

(bb) *postponing during a specified period the dates on which payments are due under the agreement;*

(cc) *extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or*

(dd) *recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6.*

(8) *If a debt counsellor makes a recommendation in terms of subsection (7) (b) and-*

(a) *the consumer and each credit provider concerned accept that proposal, the debt counsellor must record the proposal in the form of an order, and if it is*

*consented to by the consumer and each credit provider concerned, file it as a consent order in terms of section 138; or*

*(b) if paragraph (a) does not apply, the debt counsellor must refer the matter to the Magistrate's Court with the recommendation.*

*(9) If a debt counsellor rejects an application as contemplated in subsection (7) (a), the consumer, with leave of the Magistrate's Court, may apply directly to the Magistrate's Court, in the prescribed manner and form, for an order contemplated in subsection (7) (c).*

*(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; and*

*(c) the National Credit Regulator, at any time at least 60 business days after the date on which the consumer applied for the debt review.*

*(11) 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.*

**87 *Magistrate's Court may re-arrange consumer's obligations***

*(1) If a debt counsellor makes a proposal to the Magistrate's Court in terms of section 86 (8) (b), or a consumer applies to the Magistrate's Court in terms of section 86 (9), the Magistrate's Court must conduct a hearing and, having regard to the proposal and information before it and the consumer's financial means, prospects and obligations, may-*

*(a) reject the recommendation or application as the case may be; or*

*(b) make-*

*(i) an order declaring any credit agreement to be reckless, and an order contemplated in section 83 (2) or (3), if the Magistrate's Court concludes that the agreement is reckless;*

*(ii) an order re-arranging the consumer's obligations in any manner contemplated in section 86 (7) (c) (ii); or*

*(iii) both orders contemplated in subparagraph (i) and (ii).*

(2) *The National Credit Regulator may not intervene before the Magistrate's Court in a matter referred to it in terms of this section".*

[13] It is necessary to consider the meaning and effect of sections 86(10) and 86(11) in order to deal with the application for summary judgment before me. These sections have given rise to considerable debate in various recent judgments, most of them still unreported. I do not propose to discuss these judgments on a case by case basis. I shall rather attempt to identify the main approaches in them and then comment thereon in order to motivate my own views.

[14] At the outset, before embarking on a discussion of these issues, it may be helpful to state my own conclusions in regard to the interpretation of sections 86(10) and 86(11).

[15] In my view it is necessary to imply a proviso into section 86(10) to the effect that the credit provider may only terminate a debt review if he is acting in good faith.

[16] As to section 86(11), it is in my view necessary to recognise that it contains a *casus omissus* , ie a contingency not provided for

in the statute, and to provide for it by reading in the words "or High Court" immediately after the words "Magistrate's Court."

[17] By way of background I may point out that the NCA has already become notorious for its lack of clarity. In what must have been an unprecedented step, an application was brought by the National Credit Regulator in order to obtain no less than eleven declaratory orders *"aimed at clarifying interpretational difficulties that those who work with the Act experience in practice."* See the judgment of Du Plessis J in *National Credit Regulator v Nedbank Ltd and Others* 2009 (6) SA 295 (GNP). It is noteworthy that Du Plessis J in fact relied upon three implied provisions in the course of his judgment.

[18] The test for implying a provision into a statute is clear. In *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) the Constitutional Court, at para [192], formulated it as follows:

> *"...words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands. In addition, such*

*implication must be necessary in order to 'realise the ostensible legislative intention or to make the [legislation] workable."*

[19] There are dicta in judgments of the Supreme Court of Appeal that may create the impression that there is an absolute rule that a *casus omissus* cannot be supplemented by a court. See, for example, *Barkett v SA National Trust & Assurance Co Ltd* 1951 (2) SA 353 (A) at 361F-G:

*"If it is a casus omissus, this Court cannot supplement the Act by providing for a casus omissus, its sole duty being to construe the Act as it stands."*

[20] Upon analysis, however, it appears that the rule is not absolute. In *S v Tieties* 1990 (2) SA 461 (AD) the question arose whether, and if so, in what circumstances, it was permissible in interpreting a statute to alter the wording thereof. In a comprehensive discussion of this question, Smalberger JA said the following, at 464-464F:

*"It follows from the above principles that, whereas a Court may in appropriate cases depart from the ordinary meaning of the words used in a statute, or even modify or alter such words, it may only do so where this is necessary to give effect to what can with certainty be said to be the true intention of the Legislature. Once*

*such intention has been established the Court should not hesitate to give effect thereto. The correct approach in this regard is, in my view, that set out in Steyn Die Uitleg van Wette 5th ed at 68 as follows:*

> *'Binne die beperkte gebied waarin die afwykende wetgewende wil wel met sekerheid vasgestel kan word bestaan daar egter geen genoegsame rede om terug te deins vir 'n woordverandering wat daardie wil sal uitvoer nie. Die beswaar dat dit nie die taak van die Regbank is om wette te maak nie, vloei voort uit 'n foutiewe opvatting aangaande die werklike aard van 'n Wet. Die mening van Donellus dat die wil, en nie die woord nie, die Wet maak, lyk gesond. Vir wie daardie mening onderskryf, tree 'n Hof nie wetgewend op as hy woordwysigende uitleg toepas nie, maar wel wanneer hy 'n woord wat nie die bedoeling weergee nie en daarom geen Wet is nie, tot Wet verhef.'*

*The principles enunciated above have been consistently followed and applied in our Courts. Instances thereof are to be found in the cases conveniently collected and referred to in Steyn (op cit at 58 - 61 including footnote 133). It is clear from these principles, and the cases that have applied them, that provided it can be indisputably established that the Legislature intended something different from the ordinary meaning conveyed by the words used in a statutory enactment, a departure from such meaning is justified, even if it involves an alteration or substitution of the words used."*

[21] In principle there does not appear to be any difference between the reading in of a word to replace another word and the reading in of a word to fill a gap. In the *Tieties* judgment, as

appears above, Smalberger JA referred with approval to Steyn *Die Uitleg van Wette* 5th ed 58 – 61. The following statement in Steyn, at 60, is pertinent:

> *"Dat 'n woordwysigende uitleg nie in beginsel te verwerp is nie, blyk verder uit Santy's Wine and Brandy Co (Natal) Ltd v District Commandant SA Police 1945 NPD 118 waar die volgende uit Halsbury oorgeneem word:*
>
> > *'... while terms can be introduced into a Statute to give effect to its clear intention by remedying mere defects of language, no provision which is not in the Statue can be implied to remedy an omission, in the absence of any ground for thinking that such a course is necessary to carry out the intention of Parliament.'*
>
> *Positief gestel, sou ons hiervolgens kan sê dat nie alleen taalgebreke verbeter kan word nie, maar dat selfs 'n casus omissus aangevul kan word waar dit noodsaaklik is om daardeur aan die bedoeling van die Parlement gevolg te gee."*

[22] It seems to me therefore that it would be permissible to provide for a *casus omissio* if the intention of the legislature is clear. If that intention is only the subject of surmise, speculation, expectation or even probability, this method of interpretation is not allowed.

[23] In the result, it appears to me that there is no principial difference between the implication of words into a statute and

providing for a *casus omissus*. Devenish *Interpretation of Statutes* 99 indeed calls this an *"artificial distinction."* According to both methods one must have regard to the object of the statutory provision, the context, the workability of the provision, the avoidance of absurd results and the language of the provision itself in order to determine whether it is necessary to read the words in question into the statute. I propose to apply these considerations to sections 86(10) and 86(11).

[24] Common to both enquiries is the object of the debt review provisions contained in sections 86 and 87. Although other parts of the NCA may have wider or other purposes, it seems to me that the object of the debt review provisions is *"clear and indubitable"*. It is the provision of assistance to an over-indebted consumer in an environment that encourages participation in good faith by both parties.

[25] I turn first to section 86(10). For ease of reference I quote the relevant part of it again:

> *"(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 … …*

*… … …*

*at any time at least 60 business days after the date on which the consumer applied for the debt review."*

[26] It is generally recognised in the judgments that I have seen, that a literal interpretation of section 86(10), read on its own, may give rise to unfortunate results. On a literal interpretation the credit provider may give notice of the termination of the debt review after only two conditions are met, firstly that the consumer is in default under a credit agreement and, secondly, that the period of 60 business days has elapsed since the consumer's initial debt review application. Experience has shown that the typical debt review takes longer than 60 business days, often much longer, before it results in an order by the Magistrate's Court in terms of section 87. By terminating the debt review after 60 business days the credit provider may be able to derail the entire debt review process by way of a single unilateral act, regardless of the reasonableness of the conduct of the consumer or his own conduct.

[27] This unfortunate result is described in the following passage in the judgment of Binns-Ward J in the Western Cape High Court,

Cape Town in the matter of *Changing Tides 17 (Pty) Limited NO v Lucas Marthinus Erasmus and Another and two other cases*, delivered on 12 November 2009, para [30]:

> *"My summary of the relevant provisions above makes it clear that a debt review conducted strictly in accordance with the regulations should, within a period of 60 business days, have resulted in either a rejection of the debt review application, or the institution of an application by the debt counsellor to the magistrate's court in terms of either s 86(7)(c) or s 86(8)(b) of the NCA. It should be only in an unusual case that a credit provider gives notice in terms of s 86(10) of the Act. In the ordinary case it would be inappropriate for a credit provider to give notice in terms of the provision if a relevant application was already pending before a magistrate's court and being prosecuted with reasonable efficiency. The object of the provision of s 86(10) cannot be to permit a credit provider carte blanche, without good reason, to negate the operation and effect of a debt review process instigated in terms of s 86 of the NCA."*

[28] I agree with the tenor of Binns-Ward's remarks. I point out, however, that he does not explain on what interpretational grounds he arrives at the conclusions expressed therein. I also do not agree with the logic of the distinction which he draws between the period before and the period after the reference of the debt review application to the Magistrate's Court.

[29] In *Standard Bank of South Africa Ltd v Kruger; Standard Bank of South Africa Ltd v Pretorius* 2010 (4) SA 635 (GSJ) Kathree-Setiloane AJ also dealt with the interpretation of section 86(10). She recognised that a literal reading of section 86(10) would result in an *"absurdity"*. Her conclusion in this regard appears from para [24] of the judgment:

> *"In summary, I am of the view that notice in terms of s 86(10) of the Act is not competent where a debt counsellor has already referred the debt review to the magistrates' court. Any contrary interpretation would render the entire debt review process ineffectual, since all credit providers will simply wait for 60 working days, well knowing that no magistrates' court will be able to adjudicate the debt review in terms of s 87 of the Act to finality within 60 business day from referral to it. Such an interpretation would circumvent the protection afforded by the Act, and would be in conflict with the intention of the legislature. It is vital in this regard that the provisions of the Act, and in particular the provisions s 86(10), be viewed in their proper context and not to the detriment of the consumer, which the Act so clearly seeks to protect."*

[30] Whilst I agree with Kathree-Setiloane AJ's comments about the unfortunate results that would flow from a literal interpretation of section 86(10), I do not agree with her interpretation of section 86(10). It seems to me that she is in effect attempting to read an

implied provision into section 86(10) without motivating or formulating it. It would be anomalous, furthermore, if the credit provider could not terminate the debt review after the application had been referred to the Magistrate's Court but could do so before such reference.

[31] In contrast to the more purposive approaches of Binns-Ward J and Kathree-Setiloane AJ, one finds a literal approach to section 86(10) in other judgments. In two of these judgments it is argued that the consumer is protected by the provisions of section 86(11) from the unfortunate results of the literal interpretation of section 86(10). In *Taxi Securisation (Pty) Ltd v Lulama Sheik Nako and Others,* delivered in the Bisho High Court on 8 June 2010, Kemp AJ, for example, refers in bald terms to *"the protection expressly afforded the credit receiver in terms of section 86(11)"* but he does not analyse the nature or extent of this protection.

[32] The most recent judgment on this topic that I am aware of is that of Eksteen J delivered in the Eastern Cape High Court, Grahamstown on 2 September 2010 in the matter of *Firstrand Bank Limited v Sally Ann Collett.* Eksteen J held that on a proper reading of section 86(10) a notice of termination of the debt review

may be given at any time until the Magistrate's Court has made an order as envisaged in section 87. He considered inter alia Kathree-Setiloane J's concern that such an interpretation would mean that any delay, even an unforeseen delay, would deprive the consumer of the opportunity to have his debt review properly determined before a court. In answering this concern Eksteen J turned to section 86(11). The reference in section 68(11) to the *"Magistrate's Court hearing the matter"*, he said, is a reference to the Magistrate's Court to which the debt review has been referred to in terms of section 86(8)(b). Where a notice terminating the debt review in terms of section 86(10) has been sent, the consumer is afforded a remedy in section 86(11). The Magistrate's Court that exercises judicial oversight over the debt review process may then order that the debt review resume. Section 86(11) is thus designed to protect the consumer in these circumstances.

[33] I turn therefore to the interpretation of section 86(11) before reverting to section 86(10). For ease of reference I quote section 86(11) again:

> *"(11) 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".*

[34] It is my view that a literal interpretation of section 86(11) is untenable. There is, as stated above, a *casus omissus* here which could and should be addressed by reading in the words *"or High Court"* immediately after "Magistrate's Court." Such a reading in would give effect to the object of the debt review provisions of the NCA and render section 86(11) sensible, workable and linguistically appropriate.

[35] As I see it, a literal interpretation of section 86(11) is beset with difficulties. The first is that it gives rise to the problem of inconsistent parallel proceedings. The second is an anomalous result. The third difficulty is that it is not practically workable and the fourth is that it is not linguistically sustainable.

[36] I propose to deal with these difficulties in turn. It may be useful, however, if I first explain briefly how section 86(11) would be applied in practice on the construction suggested by me, ie with

the *casus omissus* provided for by way of the insertion of the words *"or High Court"* immediately after the words *"Magistrate's Court"*. Section 86(11) contemplates two proceedings. The first is the enforcement action by which the credit agreement is enforced by the credit provider against the consumer. This action can be instituted in the High Court or the Magistrate's Court, depending on the jurisdictional limit of the latter. The second proceeding is the debt review application in terms of the NCA which commences with an application in terms of section 86(1) and culminates in an order in the Magistrate's Court in terms of section 87. In terms of section 86(11) it is the court hearing the enforcement action that may order that the debt review application resume. When such a resumption order is made that court will, expressly or by necessary implication, order that the enforcement action be stayed. The debt review application will then resume at the point it had reached prior to the termination thereof.

[37] The first difficulty with the literal interpretation of section 86(11) is that of inconsistent parallel proceedings. On the literal interpretation the further course of the enforcement action (in either court) remains unexplained. If it continues despite the consumer's application for a resumption order in the Magistrate's

Court, it is likely to render the debt review futile. If it is stayed, by what court and on what grounds will such a stay be ordered?

[38] The problem of inconsistent parallel proceedings, although in a slightly different context, was described as an absurd result by Masipa J in *Standard Bank of South Africa Ltd v Panayiotts* 2009 (3) SA 363 (W) para [18]. He said the following:

> *"[18] Any other interpretation could lead to absurdity, since, if different courts were involved, a magistrates' court would be adjudicating a matter whilst it is pending in the High Court. The element of policing would also be problematic, since the High Court would not necessarily know if its request has been heeded and carried out in the magistrates' court."*

[39] My second difficulty with the literal interpretation of section 86(11) is that it leads to an anomalous result, namely that debt review proceedings may only be ordered to resume if there had already been a reference of the debt review to the Magistrate's Court in terms of section 86(8)(b) prior to the termination of the debt review. It is inconceivable that the Magistrate's Court hearing an application for an order in terms of section 87, could, for example, order that the provisions of section 86(7) be by-passed.

[40] The third difficulty with the literal interpretation of section 86(11) concerns its workability in practice. On what basis will the application in the resumed debt review be presented and where will it fit in on the waiting list? What is the status of the debt review in the meantime? It has been terminated but it has not yet resumed. What if the consumer drags his feet? The credit provider would be unable to terminate the debt review again because there is no debt review.

[41] My fourth difficulty with the literal interpretation of section 86(11) is linguistic in nature. It places a strained meaning on the words *"hearing the matter"* and *"resume"*. According to the literal approach it is the Magistrate's Court that is dealing with the application for a section 87 order that is *"hearing the matter"*. However, before a resumption order is made the Magistrate's Court that will deal with the debt review in due course in terms of section 87 is not hearing anything. The debt review application may not even have been enrolled yet. That Magistrate's Court will only be *"hearing (a) matter"* once the debt review resumes and the debt review application comes before it for an order in terms of section 87. Applying the natural meaning of *"hearing the matter"* it

is the court hearing the enforcement action which is empowered to make the resumption order.

[42] The literal approach furthermore interprets the word *"resume"* in a strained manner. The ordinary meaning of that word, in the present context, is *"to continue after an interruption"*. (See the Concise Oxford Dictionary) That is the exact effect of the order that the court is required to make in terms of section 86(11). On the literal approach the court hearing the debt review application will make a resumption order and then, at the same hearing, make an order in terms of section 87. The debt review will resume and be concluded at the same hearing.

[43] On the interpretation of section 86(11) suggested by me, ie with the *casus omissus* provided for, these interpretational and practical difficulties fall away. The court hearing the enforcement action would be approached by the consumer, possibly *in limine*, for a resumption order. That court will presumably consider the consumer's explanation for the termination of the debt review and his prospects of successfully prosecuting the debt review. If it grants a resumption order, it will, expressly or by necessary implication, make an order staying the enforcement action. The

debt review will then continue in terms of section 86(10) from the point where it was terminated until an order is made in terms of section 86(7). There will be no risk of inconsistent findings.

[44] It is interesting to note that that Kathree-Setiloane AJ followed a somewhat similar approach to section 86(11) in another judgment of hers, namely *SA Securitisation (Pty) Limited v Matlala, Gideon*, delivered on 29 July 2010 in the South Gauteng High Court. She said the following, in para [9]:

> *"According to Kemp AJ in SA Taxi Securitisation v Nako, the Magistrate's Court referred to in section 86(11) is the Magistrate's Court to whom the debt review has been referred in terms of section 86(7) of (8) of the Act, and the phrase "hearing the matter" refers to the review before it in terms of section 87 of the Act. With all due respect to Kemp AJ, I am of the view that his interpretation of section 86(11) is misconceived for the following reasons. It is clear from a proper reading of section 86(11) of the Act that the Magistrate's Court referred to in that section is not the Magistrate's Court to which the review has been referred in terms of section 86(7) of (8) of the Act, but rather the Magistrate's Court before which the credit provider seeks to enforce the agreement in terms of Part C of Chapter 6. Hence, the phrase 'the Magistrate's Court hearing the matter' refers to the Magistrate's Court hearing the matter which concerns the enforcement of the agreement in terms of Part C, Chapter 6 of the Act, and not the debt review itself."*

The only problem with this interpretation of section 68(11) is that it cannot be reconciled with the words "Magistrate's Court" standing alone. Kathree-Setiloane AJ was later criticised for this. On the construction of section 86(11) suggested by me such criticism falls away.

[45] I return then to the interpretation of section 68(10). The question to be determined is whether section 86(11), on my construction thereof, provides such meaningful protection for the consumer that it would justify the literal interpretation of section 86(10).

[46] In my view it would not. Upon a literal interpretation of section 86(10) the consumer may find that the debt review is arbitrarily terminated by the credit provider. It would be in the consumer's interest that the debt review resume as soon as possible but he will have to wait for the credit provider to institute enforcement proceedings. The consumer will have to defend the enforcement action in a litigatory environment. He will be saddled with an onus to show at least that he has prospects of success in the debt review application. The parties will be involved in time consuming, costly, and, for many consumers, unaffordable

litigation, the very event which the debt review procedure seeks to avoid.

[47] It is my view therefore that the suggested protection afforded to the consumer in terms of section 86(11), is fraught with difficulties, costs and delays which are contrary to the purpose of debt review proceedings. It is not a factor that can justify a literal interpretation of section 86(10).

[48] The solution suggested by me is the implication of a proviso into section 68(10) to the effect that a credit provider may only terminate a debt review if he is acting in good faith. The implication of such a proviso would be consistent with the purpose of the debt review provisions of the NCA and avoid the unfortunate results of a literal interpretation. It would not jeopardise the workability of section 86(10) and it would fit in with the language of section 86 as a whole, in particular section 86(5)(b).

[49] It is accepted that the content of a statutory provision which is sought to be implied must be clear. See *The Firs Investments (Pty) Ltd v Johannesburg City Council* 1967 (3) SA 549 (W) at 557E - G:

*"Moreover, a strong factor militating against the implication of any such limitation is the difficulty of formulating it. In contract a term will not be implied where considerable uncertainty exists about its nature and scope, for it must be precise and obvious.... I think that the same must apply to implying a term in a statute, for the process is the same...."*

[50] In the present case this is not a problem. The proposed implied provision is informed by the words *"participate in good faith"* in section 86(5)(b). The criterion of *"good faith"* is elastic and capable of application in various circumstances. A passage in the judgment of Nicholas AJA in *Schultz v Butt* 1986 (3) SA 667 (A) at 678J-679D is instructive in this regard. Dealing with the requisite of unlawfulness in the context of unfair competition he said the following:

*"In the Dun and Bradstreet case supra at 218 CORBETT J referred to the fact that in the cases of Geary & Son (Pty) Ltd v Gove (supra) and Combrinck v De Kock (1887) 5 SC 405 emphasis was placed upon criteria such as fairness and honesty in competition and said:*

> *"Fairness and honesty are themselves somewhat vague and elastic terms but, while they may not provide a scientific or indeed infallible guide in all cases to the limits of lawful competition, they are relevant criteria which have been used in the past and which, in my view, may be used in the future in the development of the law relating to competition in trade."*

*See also Stellenbosch Wine Trust Ltd and Another v Oude Meester Group Ltd ; Oude Meester Group Ltd v Stellenbosch Wine Trust Ltd and Another 1972 (3) SA 152 (C) at 161G - H. In judging of fairness and honesty, regard is had to boni mores and to the general sense of justice of the community (cf Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others 1981 (2) SA 173 (T) at 188 - 189 and the cases there cited, and Lorimar Productions Inc and Others v Sterling Clothing Manufacturers (Pty) Ltd ; Lorimar Productions Inc and Others v OK Hyperama Ltd and Others ; Lorimar Productions Inc and Others v Dallas Restaurant 1981 (3) SA 1129 (T) at 1152 - 1153)".*

[51] For purposes of this judgment it is not necessary to define the precise ambit of the suggested *"good faith"* criterion. Suffice it to say that in the absence of special circumstances I would not regard the termination of a debt review by the credit provider whilst the consumer is prosecuting it in good faith and in a reasonable manner, as action taken in *"good faith"*.

[52] For these reasons I conclude that it is necessary to imply a proviso into section 86(10) to the effect that a credit provider may only terminate a debt review if he is acting in good faith.

[53] In my view it is also necessary to recognise that section 86(11) contains a *casus omissus* and provide for it by reading in the words "or High Court" immediately after the words "Magistrate's Court."

[54] I revert to the summary judgment application presently under consideration. I propose to apply sections 86(10) and 86(11) with the implied provisions suggested by me.

[55] Although the wording of the order made by the Somerset West magistrate reads that defendant's application was withdrawn, I shall assume in defendant's favour that the intention at the time was not to terminate the debt review, but to prosecute it with certain amendments.

[56] The problem for defendant, however, is that he did not prosecute the application in such a way after it was withdrawn on 25 November 2009. It would appear, in fact, that defendant did nothing at all until he filed a new application more than seven months later. In my view this was clearly not a reasonable way of prosecuting the debt review.

[57] It seems to me therefore that plaintiff's termination of the debt review in terms of section 86(10) was valid.

[58] That is, however, not the end of the road for defendant. Upon my interpretation of section 86(11) defendant would be able to ask for an order in the present proceedings that the debt review resumes. In summary judgment proceedings, therefore, defendant would have been able to raise the defence that he intends to ask for such an order. In order to show that he has a *bona* fide defence he would presumably have to allege that he has reasonable prospects of obtaining a favourable order in the debt review application.

[59] It is apparent from defendant's opposing affidavit in the summary judgment proceedings that he did not have in mind a defence based on section 86(11). In view of the fact that defendant's debt review application had already been referred to the Magistrate's Court and that its withdrawal thereof was perhaps not due to a lack of any belief on his part in its prospects of success, defendant may yet be able to set out a defence based on the provisions of section 86(11).

[60] The court has a residual discretion in deciding whether to grant or refuse summary judgment. According to *Tesven CC and Another v South African Bank of Athens* 2000 (1) SA 268 (SCA) para [26]

> *"...the discretion may be exercised in a defendant's favour if there is doubt as to whether the plaintiff's case is unanswerable and there is a reasonable possibility that the defendant's defence is a good one.*

[61] As I pointed out above, there has been much confusion in regard to the application of section 86 and defendant's attorney might well not have been aware of the defences that are available to him. In these circumstances it seems to me that this is an appropriate case for the exercise of my discretion in favour of defendant.

[62] In the result, I refuse summary judgment and order that costs are to stand over for determination at the trial.

**A P BLIGNAULT**