

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

REPORTABLE

CASE NO: A158/2017

In the matter between:

LEE-ANN SANSOM

Appellant

(NCRDC 732)

and

FELICIA JUANITA MARS

1st Respondent

[...] (CONSUMER)

ABSA BANK LTD

2nd Respondent

EDGARS-EDCON

3rd Respondent

NEDBANK

4th Respondent

NEDBANK LTD

5th Respondent

AFRICAN BANK LTD

6th Respondent

JUDGMENT: 13 SEPTEMBER 2017

ALLIE, J:

1. This is an appeal against the decision of the Magistrates Court, Worcester in which the magistrate held that the Magistrates Court doesn't have the authority under the National Credit Act ¹ ("the Act"), to grant an order in which a variation of interest rates from the initial credit agreement is sought, even in circumstances where the variation

¹ The National Credit Act 34 of 2005

of interest rates were mutually agreed by the consumer and credit provider.

2. This appeal is essentially concerned with questions of law. The respondents do not oppose the appeal.
3. The Magistrates Court had many cases on its roll in which similar relief was sought and it was agreed that the matter *in casu* would be used as a test case to determine the fate of all the remaining similar matters.
4. The matter is unopposed because the applicant and respondents are *ad idem* concerning the relief sought.
5. The common cause facts are as follows. The consumer in this matter has 5 credit providers, three of whom agreed to a re- arrangement where the interest during the period of debt review would be lower than the interest rate in the credit agreements. One credit provider didn't agree to a reduction in interest rate and that agreement remains unchanged and one credit provider held an agreement with no interest rate at all.
6. The court *a quo* dismissed the application for the following reasons:
 - 6.1. The Magistrates Court is a creature of statute and the National Credit Act does not provide for a variation of interest rates;

- 6.2. The judge in the case of **Nedbank Limited v Jones and Others**² didn't qualify his decision by saying that the decision only applies to magistrates *mero motu* varying interest rates nor did the judge make an exception for cases where there is mutual agreement to vary interest rates;
- 6.3. The Magistrates Court is bound by *stare decisis*, to follow the decision of the High Court in the Division of the Western Cape.

Interpretation of the Relevant Provisions of the National Credit Act

7. The Act expressly vests the authority and power to re-arrange debts in the Magistrates Courts, subject to the provisions of the Act.
8. The Act attempts to achieve a balance between upholding the privity of contractual relationships between consumers and credit providers and necessary interference with the terms of credit agreements to ensure that a re-arrangement that is mutually beneficial to credit providers and consumers can be achieved for the duration of the debt review.
9. The debt review process is meant to mediate the competing interests of consumers and credit providers. Therefore the court ordering a re-arrangement, must consider the extent to which a proposal by a debt counsellor achieves a mediated settlement with due regard to the

² 2017 (2) SA 473(WCC)

amount of the debt, the extent of the over-indebtedness, the financial means of the consumer and the period within which the debt will be amortised. Interest rates and ancillary costs form an integral part of indebtedness and ought to be taken into consideration when decisions are made on how payments can best be re-arranged.

10. The purpose of the Act has often been selectively interpreted with emphasis on sub-paragraphs (g) and (i) of section 3. Section 3 reads as follows:

“Purpose of Act

The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by-

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

(b) ensuring consistent treatment of different credit products and different credit providers;

(c) promoting responsibility in the credit market by-

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

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

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

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

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

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

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

(f) improving consumer credit information and reporting and regulation of credit bureaux;

(g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;

(h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and

(i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.

11. The purposes are expressed in the first part of the section and the sub-paragraphs of the section list the means of achieving the stated purposes. Those purposes aim to provide social and economic relief for low income consumers.

12. I am fortified in the above conclusion by the **Sebola**³ decision where the Constitutional Court held as follows:

“A major overhaul of previous credit legislation was essential. This was also necessary because low-income consumers relied increasingly on commercial credit and many were becoming swamped with debt. Reform came with the passage of the Act in 2005. It is weighty legislation, both in size and impact. It consists of 173 sections, together with three schedules and regulations. The statute ‘represents a clean break from the past and bears very little resemblance to its predecessors’ ”

13. Section 85 of the Act is the provision that allows a court to refer a consumer to a debt counsellor or it may declare the consumer to indeed be over-indebted and then proceed to make an order in terms of section 87 to relieve the consumer’s over indebtedness. That section allows for early intervention by a court, even prior to a debt counsellor having been appointed.

14. Section 85 reads as follows:

“ 85 Court may declare and relieve over-indebtedness

³ Sebola and Another v Standard Bank of South Africa Ltd and Another 2012 (5) SA 142 (CC) at para 39

Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may-

(a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of section 86 (7); or

(b) declare that the consumer is over-indebted, as determined in accordance with this Part, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness.

13. The relief available to a consumer who is believed to be over-indebted is contained in section 86(7). Section 86 (7) reads as follows:

“ 86. Application for debt review

(1) ...

(2)

(3) ...

(4) ...

(5)

(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.

14. Section 86 (8) deals expressly with circumstances in which a court is obliged to grant orders sought by agreement between the credit provider and the consumer. The prerequisites contained in subsection 8 (a) are completely different to the category of consent orders contemplated by section 138, the latter being orders arising out of alternative dispute resolution, mediation or investigation by the National Credit Regulator to which a respondent has agreed.

15. Section 86 (8) provides as follows:

(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.

16. The Magistrates Court accordingly has the power to grant orders by agreement in the circumstances set out in the section. Admittedly the section also provides that those consent orders must be made in terms of section 138, which is clearly based on a misconception of the purpose of section 138.
17. The error that the legislature made in framing section 86(8) consent orders as residing under the power to grant orders in terms of section 138, does not render invalid the express provision in section 86 (8) that orders by consent with the credit provider and consumer must be filed with court. Accordingly draft orders formulated with the consent of credit providers and consumers, once filed with the court, ought to be made orders of the court.
18. The Act provides a mechanism by which a credit provider may apply to court to have a debt review terminated. Section 86 (10) provides as follows:

(10)

(a) 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, at any time at least 60 business days after the date on which the consumer applied for the debt review, give notice to terminate the review in the prescribed manner to-

- (i) the consumer*
- (ii) the debt counsellor; and*
- (iii) the National Credit Regulator; and*

(b) No credit provider may terminate an application for debt review lodged in terms of this Act, if such application for review has already been filed in a court or in the Tribunal

19. The Act is patently clear about an order of re-arrangement having application only for the duration of the debt review period. A credit provider may apply for termination of the debt review if the conditions contained in section 86 (10) are met. In the event of termination of the debt review, it follows that the re-arrangement order would no longer apply.
20. The re-arrangement order cannot extinguish the consumer's liability under the credit agreement, it merely extends the period within which payment is to be made. Section 3 (g) states expressly that the method employed in restructuring ought to achieve a result that is *"based on the principle of satisfaction by the consumer of all responsible financial obligations."*

Stare decisis and distinguishing cases with different facts in issue

21. The magistrate has the power in terms of section 87 of the Act to conduct a hearing and determine whether he /she will accept the application for re-arranging the consumer's obligations and if it is accepted, then the magistrate may:
 - 21.1. extend the period of the agreement and reduce the amount of each payment accordingly; and/or

- 21.2. postpone dates on which payments are due for a specified period;
and/or
 - 21.3. combine sub-paragraphs (1) and (2) above; and/or
 - 21.4. recalculate the consumer's obligations where there has been a violation of Parts A & B of Chapter 5 and Part A of Chapter 6 of the Act, which relate to, *inter alia*, the concluding of unlawful credit agreements, unlawful provisions in the credit agreement, failure to provide a consumer with pre-agreement disclosures, where applicable, failure to provide the consumer with a copy of the credit agreement, levying a consumer who reported a lost or stolen card with liability after having done so in circumstances where the card wasn't used by the consumer.
22. The Magistrate's Court has a duty to take account of the financial circumstances of the consumer, the consumer's obligations under the credit agreement, the credit provider's rights under the credit agreement, the extent to which the consumer is over indebted, such representations as are made on behalf of the credit provider and consumer and the proposal made by the debt counsellor or consumer, if no debt counsellor is appointed.
23. Particularly in loan agreements with financial institutions, consumers are usually obliged to pay monthly instalments which are apportioned to the capital sum and to the interest portion. Each instalment therefore has an interest component. When a magistrate reduces the instalment, he or she consequentially also reduces the amount apportioned to the payment of interest without necessarily declaring a reduction in the interest rate.

24. Indeed, if interest rates could never be reduced in re-arrangement orders, consumers would find themselves unable to extinguish their indebtedness because they would be saddled with the same interest rate during the extended period as they would had the original credit agreement's instalments not been re-arranged.
25. Clearly the initial instalments are calculated by credit providers with due regard to the period of the agreement, the rate of interest payable at the time and a variation in interest rate. The extended duration of the credit agreement would cause undue hardship to consumers and credit providers alike if it were not open to them to agree a reduced rate of interest for a specified time.
26. The Act does not expressly impose an obligation on the Magistrate's Court to ensure that the reduced payment should cover the interest portion of the agreement. The purpose of the Act as articulated in section 3 however requires the court to decide the terms of re-arrangement by embarking upon an exercise whereby the competing interests and needs of consumers and credit providers are mediated. In short, the court is bound to adjudicate in a manner which will result in achieving the purposes of the Act which is to: *"promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers."*

27. In **Sebola** ⁴ the court said the following concerning how a court ought to give effect to the purposes of the Act:

“The statute sets out the means by which these purposes must be achieved and it must be interpreted so as to give effect to them. The main objective is to protect consumers. But in doing so, the Act aims to secure a credit market that is “competitive, sustainable, responsible [and] efficient”. And the means by which it seeks to do this embrace “balancing the respective rights and responsibilities of credit providers and consumers”

28. It is in recognition of the long term adverse consequences for both consumers and credit providers, that the parties in this case and in the many other cases pending before the court *a quo* which await the result of this appeal, have agreed a varied rate of interest over the period of debt review.

29. In the exercise of its power to extend the duration of the credit agreement and to vary the amount of instalments payable by the consumer, the Magistrate’s Courts implicitly has the power to vary the rate of interest payable for the duration of the period of debt review.

30. The court in Jones attempted to follow the decision in **Nedbank Limited v Norris and Others** ⁵.

31. **Norris**’ case concerned a decision by a magistrate to reduce the instalments to an amount which didn’t cover the monthly payments for insurance cover

⁴ *Supra* at para 40

⁵ 2016 (3) SA 568 (ECP)

included in the indebtedness and to totally remove the interest by ordering that no interest was payable. The magistrate failed to apply his mind to all the factors that he is required to take into consideration. Those are not the facts of **Jones'** case nor are they facts similar to the facts *in casu*.

32. In **Jones'** case, the court *a quo* had made a re-arrangement order reducing the monthly instalments and the interest rate was fixed at 10.4 % per annum without stipulating a period of repayment.
33. The applicant in that case was dissatisfied with the re-arrangement order because the instalment didn't cover the interest portion and the interest rate was fixed for an indefinite period.
34. The Appeal Court in **Jones** found that:
 - 34.1 the magistrate had reduced the amount of the indebtedness permanently which is contrary to the powers of the Magistrates Court as set out in section 86 and 87 of the Act;
 - 34.2 the Magistrates Court does not have jurisdiction to vary or reduce a contractually agreed interest rate determined by a credit agreement and an order in those terms are null and void;
 - 34.3 a re-arrangement proposal that contemplates a monthly instalment which is less than the monthly interest does not meet the purposes of

the Act and is *ultra vires* the Act and the Magistrate's Court has no jurisdiction to grant such an order.

35 The court in **Jones'** case relied on sec 3 (i) of the Act as it was articulated in the case of **Kubanya v Standard Bank of S.A. Limited** ⁶ and more specifically to the following paragraph in that case to determine the purpose of the Act:

"[35]..... It deserves re-emphasis that the purpose of the Act is not only to protect consumers, but also to create a 'harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements'. "

36 As outlined earlier, section 3 (i) remains one of 9 methods of achieving the objective of the Act and is not more paramount than the other sub- paragraphs in section 3.

37 As Maya JA (as she then was) stated in the **Rossouw** ⁷ case, the purpose of the Act is:

"I understand the legislature to have basically meant to protect the consumer from exploitation by credit providers by, inter alia, preventing predatory lending practices; to ameliorate the financial harm which a consumer may suffer where unable to meet his obligations under a credit agreement and generally to

⁶ 2014 (3) SA 56 (CC) at [35]

⁷ Rossouw v First Rand Bank Limited t/a FNB Home Loans (formerly First Rand Bank of South Africa Ltd) 2010 (6) SA 439 (SCA) at para 32

achieve equity in the lending market by levelling the playing field between parties who do not have equal bargaining power.

- 38 In my view, the *ratio* in **Jones** is too broad and overarching and does not admit of exceptions. The order made in Jones' case fails to recognise that there are instances in which a magistrate, after duly applying his/her mind to all the relevant factors, will be required to vary the duration of the credit agreement, the instalments due and payable and interest that forms part of the indebtedness under the credit agreement to achieve an equitable and fair result for the parties.

Costs

- 39 This appeal is supported by both applicant and respondents and is brought to clarify the prevailing legal position, hence no order as to costs would be the most appropriate order concerning legal costs.

IT IS ORDERED THAT:

1. The appeal succeeds.
2. The case of Nedbank v Jones 2017 (2) SA 473(WCC) is not authority for the Magistrate's refusal to make the consent orders proposed in this case and the other similar cases held in abeyance pending the outcome of this appeal, namely case numbers: 3094/16; 3248/16; 3249/16; 3431/16; 3499/16; 3500/16; 3532/16; 3835/16; 3836/16; 4148/16; 4149/16; 80/17; 81/17 and 82/17 enrolled in the Worcester Magistrates Court.

3. The application for debt review which forms the subject of this appeal is referred back to the Magistrate *a quo* for reconsideration and for adjudication consistent with the *ratio* set out in this judgment.
4. No order as to costs is made.

R. ALLIE

FORTUIN, J:

I agree.

C.M. FORTUIN

DOLAMO, J:

I agree.

M.J. DOLAMO



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AFRICAN BANK LTD

Sixth Respondent

Coram : ALLIE, J et FORTUIN, J et DOLAMO, J

Judgment by: : **R. ALLIE, J**

For the Applicant : **Mr Paul M Taylor**

Instructed by : Vian Bester Attorneys
Worcester

For the Respondent(s) : **No opposition**

Date(s) of Hearing : **25 AUGUST 2017**

Judgment delivered on : **13 SEPTEMBER 2017**