Nedbank Ltd v Swartbooi
Unreported Case No 708/2012 (ECP)

Termination of debt review in terms of the National Credit Act – not the end of the road for over-indebted consumers

1 Introduction

Before discussing the decision in *Nedbank Ltd v Swartbooi* it would be useful, first, to briefly discuss the relevant provisions of the National Credit Act (34 of 2005) (NCA).

One of the primary aims of the NCA is to provide debt relief to an over-indebted consumer (s3(g)) by allowing him or her to apply, in terms of section 86, to a debt counsellor for the review of his or her debt obligations pursuant to a credit agreement as defined in the NCA (see s8). On receipt of the application, the debt counsellor must notify all credit providers that are listed in the application, in the prescribed manner and form, of the debt review application (s86(4)(b)(i)). Within a period of 30 business days the debt counsellor must determine whether the consumer appears to be over-indebted (s86(6)(a) read with reg 24(6)). If the debt counsellor concludes, on account of the assessment, that the consumer is not over-indebted (s86(7)(a)) the debt counsellor must reject the application and the consumer may apply directly to the Magistrate's Court for a debt restructuring order (s86(9)). However, if the debt counsellor concludes that the consumer is over-indebted (s86(7)(c)), the debt counsellor will draft a proposal for the restructuring of the consumer's obligations and submit it to all credit providers for their consideration. It is important to note in this regard, that the NCA does not

require any negotiations in respect of consumers who are found to be over-indebted (*National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP) 317). However, in practice, debt counsellors prefer to negotiate with credit providers in the hope of reaching a compromise with them. Negotiations are also undertaken pursuant to the obligation in terms of section 86(5) "to participate in good faith in the review and any negotiations designed to result in responsible debt re-arrangement". If the parties do not reach an agreement, the debt counsellor must bring an application to the Magistrate's Court in terms of section 87(1) for an order in terms of which the consumer is declared over-indebted and his or her debt obligations are restructured pursuant to the debt counsellor's proposal (s86(7)(c) read with ss86(8)(b) and 87(1)). The restructuring powers of the court are limited and the court may in essence, only order that the amount of the instalment be reduced and the payment term be extended or, in the alternative, postpone the dates on which payments are due, or extend the payment term and postpone the dates on which payments are due under an agreement (s86(7)(c)(ii)). The consumer therefore does not receive any discharge of his debt obligations. It should be noted in this regard that the NCA aims to provide "mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of *all* responsible financial obligations" (s3(g); our emphasis).

Section 88(3) protects the consumer by providing for a moratorium on debt enforcement in certain instances. While a consumer is under debt review, or where a debt restructuring order applies to him or her and the consumer strictly complies with such order, a credit provider may not enforce any of its rights in terms of a credit agreement. Section 88(3) is subject to section 86(10) which allows a credit provider to give notice to the consumer to terminate the debt review. Section 86(10), which is especially important for the purposes of this case discussion, provides as follows:

> 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.

Where a consumer is under debt review, section 129(1)(b) provides that a credit provider may not commence any legal proceedings to enforce a credit agreement before first providing notice to the consumer as contemplated in section 86(10). In terms of section 130 certain requirements must be complied with before a credit provider may approach a court for an order to enforce a credit agreement. Section 130(1)(a) provides that a credit provider may approach the court for debt enforcement only if, at that time, the consumer is in default and has been

in default under that credit agreement for at least 20 business days. Furthermore, at least ten business days must have elapsed since the notice in terms of section 86(10) has been delivered. In terms of section 130(3) the court may only determine a matter if it is satisfied, *inter alia*, that the credit provider has not approached the court during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction (s130(3)(c)(i)).

A notice to terminate a debt review does not appear to be a dead-end for the consumer (Scholtz *Guide to the National Credit Act* (2008) par 11 3 3 3) as section 86(11) provides that a court may order a resumption of the debt review. Section 86(11) reads as follows:

> 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.

In *Swartbooi,* the court indicated that a termination in terms of section 86(10) is not the end of the road for an over-indebted consumer seeking debt relief, as section 86(11) allows for a resumption of the debt review process (parr 14 & 16). The exact effect of termination in terms of section 86(10), the correct interpretation of section 86(11) pertaining to the court which is empowered to order a resumption and the interrelationship between these two sub-sections have been the subject of many conflicting court decisions (E.g. *Wesbank v Martin* 2012 3 SA 600 (WCC); *Changing Tides 17 (Pty) Ltd v Erasmus* [2010] JOL 25358 (WCC); *Firstrand Bank v Seyffert* 2010 6 SA 429 (GSJ); *Firstrand Bank Ltd v Evans* Case No 1693/2010 (ECP); *Firstrand Bank Ltd v Collett* 2010 6 SA 351 (ECG*); Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga* 2011 1 SA 374 (WCC); *Firstrand Bank Ltd v Raheman* 2012 3 SA 418 (KZD); *Firstrand Bank Ltd v Britz* Case No 5243/2011 (2012-02-09) (FB)). In *Collett v Firstrand Bank Ltd* (2011 4 SA 508 (SCA)) the SCA held (par 11) that a credit provider is entitled to terminate a debt review in terms of section 86(10) after a debt counsellor had referred the matter to the Magistrate's Court for an order envisaged by section 86(7)(c) and while the hearing in terms of section 87 is still pending. The court further indicated that the right of the credit provider to terminate the debt review is balanced by section 86(11) and that it is at this moment that the participation of the credit provider in the debt review becomes relevant (par 15; see also *Seyffert v Firstrand Bank Ltd* 2012 6 SA 581 (SCA) par 7). However, notwithstanding the decision of the SCA in *Collett*, the above-mentioned issues pertaining to section 86(10) and (11) are still wrapped in uncertainty. The aim of this case discussion is therefore to analyse and evaluate the facts and decision in *Swartbooi* in view of the relevant provisions of the NCA discussed above and in particular, the provisions of section 86(10) and (11). In addition, the proposed legislative amendments to the said provisions which are currently under consideration, are also discussed (see National Credit Amendment Bill

GN 560 of 2013 in *GG* 36505 of 2013-05-29). The aim of this discussion is to determine whether the said uncertainties will be addressed and to what extent the consumer's opportunity to obtain the debt relief provided for in the NCA will be improved.

2 Facts

Swartbooi was an opposed application for summary judgment (par 1). In the main action the plaintiff (applicant) sought payment by the defendants (respondents), of an amount of R645 734, 38, an order declaring certain immovable property executable and interest on the amount claimed. The amount claimed was in respect of two loan agreements between the plaintiff and the defendants, in terms of which the plaintiff lent and advanced to the defendants an amount of R613 000,00. A mortgage bond was registered in respect of the property that the plaintiff sought to have declared executable. It was not in dispute that the defendants were in default with regard to the repayment instalments of the loans. The defendants who were married in community of property, opposed the application for summary judgment on the basis that the claim in question was the subject of debt review proceedings and that an application for debt re-arrangement was pending before the Magistrate's Court, Port Elizabeth (parr 3–5).

On 11 July 2011, the defendants applied for debt review in terms of section 86 of the NCA. On the same day, the debt counsellor notified the plaintiff of the application for debt review (s86(4)(b)(i)). Before expiry of the required 30 business days period (in terms of section 86(6)(a) and reg 24(6)) the plaintiff was notified that a debt counsellor had determined that the defendants were over-indebted. On 30 September 2011, that is before expiry of the 60 days period (in terms of s 86(10) – see the discussion in 1 above) a copy of the defendants' application for a debt rearrangement order was served on the plaintiff and set down for hearing on 12 October 2011, a few days after the said 60 business days period had expired. On that day, the application was postponed to 9 December 2011 as some of the defendants' credit providers wished to oppose the application. On 24 November 2011 the defendants' debt counsellor received a copy of the plaintiff's opposing papers in which the plaintiff made certain counter-proposals in respect of the application for debt re-arrangement. However, on 12 February 2012, the plaintiff gave notice in terms of s 86(10) to terminate the debt review. The reasons given for such termination were stated as follows: "Partial payment, no rearrangement agreement reached". It was common cause that the parties had not reached an agreement with regard to the terms of the proposed debt rearrangement and that they agreed that the application should be postponed to 16 March 2012 (par 6). The defendants therefore argued that they had a *bona fide* defence to the plaintiff's claim since the plaintiff did not act *bona fide* in proceeding to institute debt enforcing proceedings through their current firm of attorneys when they were parties to an agreement, through their other attorneys, that a debt re-arrangement application would be brought before the Magistrate's Court

on 16 March 2012. They stated further, that they had, since the issue of summons, brought an application under section 86(11) for a resumption of the debt review proceedings and suggested that the plaintiff's claim be stayed pending the finalisation of the section 86(11) application. However, it is not clear from the facts to which court the application for resumption was brought (see the discussion in 4 2 2 below).

In the summons the plaintiff alleged that 60 business days had elapsed since the inception of the debt review process and that the defendants were in default under the credit agreements. They further alleged that they terminated the debt review on the 15 February 2012 pursuant to a notice given to the "First Defendant and the Second Defendant by way of *e-mail, registered mail or fax* to the Debt Counsellor and the National Credit Regulator" (the court's emphasis) and that the debt review process for the defendants was therefore terminated (par 8). Apparently, with reference to section 130(3)(c), the plaintiffs also alleged that the credit provider did not approach the court, alternative dispute resolution agent, consumer court or ombud with jurisdiction during the time that the matter was before a debt counsellor (par 9).

At the hearing of the application *in casu*, it was contended on behalf of the plaintiff that the debt review was cancelled because no agreement could be reached between the parties as to the terms on which the defendants' debts would be restructured. It was also contended that it was evident from the papers that it was unlikely that the defendants would ever be able to meet their liabilities and that there would thus be no purpose served by reinstatement of the debt review (par 10).

3 Decision

By referring to *Joob Joob Investements (Pty) Ltd v Stocks Mavundla Zek Joint Venture* (2009 5 SA 1 (SCA) 11C–G) and Van Loggerenberg (*Erasmus Superior Court Practice* (1994 *et seq*) General Remarks to Rule 32 B1-206) Dambuza J pointed out that the purpose of summary judgment relief is to prevent delay of a plaintiff's claim through what amounts to abuse of court process. Summary judgment is furthermore to be regarded as a stringent or extraordinary remedy in that it effectively closes the door of the court on the defendant without affording an opportunity to ventilate the case by way of trial (par 11).

The court pointed out that it was not in dispute that the amount claimed by the plaintiff was owing to it by the defendants or that the defendants were in default with their repayment instalments under the loan agreement with plaintiff. Section 86 clearly affords consumers the opportunity to restructure their debts and bars credit providers from enforcing credit agreements without complying with the provisions of the Act (see e.g. ss86(10) and 130 discussed in 1 above). This restriction was, as submitted by counsel for the plaintiff (par 12):

> [I]ntended by the Legislature to afford consumers 'breathing space' and to avoid disgorging them of their assets without offering them an opportunity to recover from what might be a '*bad patch*' in their financial circumstances.

The court also emphasised (par 12) that credit providers are obliged to act *bona fide* when participating in the debt review process (see s86(5) discussed in 1 above). Furthermore, the plaintiff's allegation in the summons that the defendants were in default, did not, according to the court, on its own, entitle the plaintiff to proceed with enforcement of the credit agreement. The court also pointed out that it still remained open to the defendants to raise the issue of exception to the plaintiff's summons regarding the allegation made that the section 86(10) notice was given to the defendants by way of e-mail, registered mail or fax (par 13).

The court pointed out that although a debt review may be terminated by a credit provider whilst a referral thereof to the Magistrate's Court is pending, the matter does not end there (par 14). In this regard the court referred to the decision of the court *a quo* in *Firstrand Bank Ltd v Collett* where Eksteen J stated as follows (par 28):

> The credit provider, in my view, does not have carte blanche to terminate the process without good reason. Where a referral to the magistrates' [sic] court is being prosecuted with due efficacy, it would appear to me that, more often than not, it would be inappropriate for the credit provider to serve a notice in terms of s86(10). There may, however, be circumstances where the debt counsellor and the consumer may intentionally delay the hearing in terms of s87, to the prejudice of the credit provider, whilst the consumer might cease all payments under the credit agreement. In such circumstances the credit provider might be justified in terminating the debt review process. Where, however, the credit provider attempts to enforce the credit agreement pursuant to such notice, the consumer is entitled urgently to approach the magistrate hearing the matter to exercise his judicial oversight. Where justice requires, the process will be ordered to resume.

Dambuza J concluded that it would have prejudiced the defendants unduly if summary judgment were to be granted in circumstances where a termination of the debt review would have been so unjustified or improper as to warrant a re-instatement of the debt review (par 15). The defendants' averment that they maintained regular payments in terms of the debt review agreement and that this was supported by a schedule of payments forwarded to the plaintiff by the Payment Distribution Agent was of significance to the court. The basis for termination contended on behalf of the plaintiff, was the inability of the parties to reach agreement on the terms of debt restructuring as well as the absence of prospects that the defendants will ever afford the repayment instalments. However, as pointed out by the court, the summons did not make any mention of the latter (par 15).

The court pointed out that a resumption of the debt review process in terms of section 86(11) is a remedy that remains available to consumers, despite a termination in terms of section 86(10) (par 16). The court once

again referred (par 16) to the decision of the court *a quo* in *Collett* where Eksteen J held "that the consumer is not prejudiced by the right of the credit provider to terminate the debt review process. The rights of the consumer are fully protected in s86(11)" (par 28).

In light of the allegation of the defendants that they have complied with the terms of the debt review arrangement, the discrepancy or ambiguity in the plaintiff's summons as regards the basis for termination of the debt review and the fact that reinstatement of the debt review remains a real possibility, the court finally held that the defendants do indeed have a *bona fide* defence as envisaged in Rule 32 of the Practice Rules (par 17). As a result, the court refused the application for summary judgment (par 18).

4 Analysis and Evaluation

4 1 Crux of the Decision

The court indicated (par 13) that the fact that a consumer was in default did not, on its own, entitle a credit provider to proceed with enforcement of the particular credit agreement. A credit provider must first comply with the pre-requisites for debt enforcement in terms of the Act. The court also indicated that a credit provider is not entitled to terminate the debt review process without good reason and that such termination must therefore comply with section 86(5) which requires that credit providers should act in good faith in the process of debt review (parr 12 & 14). Should a credit provider therefore terminate the debt review, it would not be the end of the road for an over-indebted consumer where such termination is found not to comply with the good faith requirement (parr 14& 15). In such a case, a consumer would be entitled to invoke the remedy provided for in section 86(11) by applying to the Magistrate's Court dealing with the matter for the resumption of the debt review process (par 16). Where the credit provider therefore proceeds to enforce a credit agreement and a termination is found to be so improper or unjustified that resumption of the debt review process would probably have been ordered, the court held that summary judgment should be refused as the consumers will then have a *bona fide* defence to the credit provider's claim (parr 17 & 18).

4 2 Issues Arising From the Facts and Decision

4 2 1 Exact Effect of Termination

The court held that a notice of termination of the debt review in respect of a particular credit agreement which was not given in good faith is not the end of the road for an over-indebted consumer as such consumer may still apply for a resumption of the debt review in terms of section 86(11) (parr 14 & 16). It would appear that the court was of the view that a termination notice actually terminates the debt review process and that the only remedy available to such a consumer would be to apply for a

resumption of the debt review in terms of section 86(11). The correctness of this viewpoint depends, *inter alia*, on the legal position pertaining to the exact effect of a termination notice in terms of section 86(10). Section 86(10) provides that a credit provider "may *give notice* to terminate the review" (our emphasis). This wording is susceptible to more than one interpretation. It is submitted that a likely interpretation is that it may indicate that a notice to terminate in terms of section 86(10) does not actually terminate the debt review, but that it simply serves as a *notice* of an intended termination and that it is merely a pre-requisite for debt enforcement in terms of the Act. Thus a debt review in respect of which a section 86(10) termination notice is given, is not terminated at the moment that the said termination notice is delivered. Section 86(10) is therefore open for an interpretation that the Magistrate's Court may still be approached for a debt restructuring order in terms of sections 86 and 87 up until the stage that the credit provider actually proceeds to enforce the particular agreement.

In *Collett* (par 14), Malan JA apparently held the contrary view, namely that section 86(10) "entitles a credit provider to *terminate* the debt review relating to a specific credit agreement …" (our emphasis). It would therefore appear that the SCA is of the opinion that a notice in terms of section 86(10) is not merely a notice of an intended termination, but that its effect is indeed to terminate the debt review (see also *Changing Tides 17 (Pty) Ltd v Grobler* Case No 9226/2010 (GNP) par 24, where Murphy J interpreted the SCA's decision in *Collett* in the same way). According to this interpretation, a debt restructuring order in respect of a particular agreement would thus not be possible once a notice of termination in terms of section 86(10) was given unless a resumption of the debt review is subsequently ordered by the court.

However, it should be noted that there is authority for an interpretation that a section 86(10) termination notice does not in fact terminate the debt review pertaining to a specific agreement and that the court dealing with the debt restructuring application may still grant a debt restructuring order in respect of such a credit agreement (see the *Martin*, *Raheman* and *Britz*-cases *supra*) It should be noted that both *Raheman* and *Britz* were decided after the SCA's decision in *Collett*. In *Raheman* (par 9) Mokgohloa J sought to distinguish the facts in *Raheman* from those in *Collett* as the order for debt-restructuring in *Raheman* was already granted when proceedings for debt enforcement were instituted, while the application for restructuring in *Collett* was still pending when enforcement proceedings were instituted. In *Britz* (par 20) Phalatsi AJ stated that a section 86(10) notice is of no force and effect where a rearrangement order was finally granted by the court. In *Martin* (par 7), Binns-Ward J held that the effect of a section 86(10) notice is in fact not *ipso facto* to terminate a debt review, but rather to afford a period of notice (i.e. at least ten business days – s129(2) read with s130(1)(a)) upon the completion of which the credit provider may institute proceedings for debt enforcement. According to Binns-Ward J, actual termination as intended in the termination notice would then only take place once the

credit provider initiates debt enforcement proceedings after such notice has been given. It should be noted that neither section 86(10) nor section 130(1)(a) indicates what the purpose is of the ten day notice period which is required to elapse after delivery of a section 86(10)-notice (Scholtz par 11 3 3 3). In an earlier decision by Binns-Ward J in *Changing Tides v Erasmus* (*supra*) the court indicated (par 41) that the evident purpose of the notice is to enable the consumer and/or debt counsellor to urgently bring an application for debt restructuring in terms of section 87(7)(c) or 86(8)(b). These cases thus indicate that the purpose of a notice of termination is merely to enable the credit provider to institute proceedings for debt enforcement and that it does not actually terminate the debt review in respect of the particular credit agreement.

However, in *Changing Tides v Grobler* (*supra*), Murphy J held (parr 18 & 20) that a Magistrate's Court dealing with the debt restructuring application is not empowered to grant a debt restructuring order where the credit provider has already given a notice of termination. Murphy J indicated that this is the case as only the court who deals with the debt enforcement proceedings is entitled to grant an order for resumption of the debt review (see par 26 and the discussion in 4 2 2 below).

It thus appears that the divergence of opinion as to whether the notice in terms of section 86(10) is merely a notice evidencing an *intention* to terminate the debt review at a later stage or whether it is the giving of the notice itself that terminates the debt review, hinges largely on the interpretation of the ten business day period mentioned in section 130(1)(a) which has to expire before debt enforcement may commence. As it currently stands, there is no explanation of the purpose to be served by these ten business days that first have to expire prior to enforcement. This is odd as it is a well-known principle of interpretation of statutes that the legislature does not intend to make meaningless legislation (Botha *Statutory Interpretation: An Introduction for Students* (2012) 133). A possible answer to this apparent *lacuna* is that the legislature probably intended that the section 86(10) notice merely serves as an indication of an intention by the credit provider to terminate the debt review and enforce the relevant credit agreement and that the ten business day period that has to elapse after delivery of the section 86(10) notice is presented as a final opportunity to the consumer to obtain a debt restructuring order prior to enforcement. It is then the actual institution of enforcement proceedings and not the notice in terms of section 86(10), which terminates the debt review. It is on this basis that it is submitted that the Magistrate's Court dealing with the debt restructuring application should still be able to grant a restructuring order in respect of a credit agreement even though a termination notice has already been given in respect of such credit agreement. It is further submitted that the wording of section 86(10) ("notice to terminate" instead of "notice of termination") indicates that a termination notice does not have the effect of actually terminating the debt review. Its purpose is only to serve as a notice of an intended termination. Only when the credit provider has indeed proceeded to enforce a credit agreement will actual termination

take place, in which case the consumer will have to apply for resumption of the debt review in order to protect his or her interests.

In *Swartbooi*, the credit provider in fact proceeded to enforce the credit agreement in respect of which the notice of termination was given. It is therefore submitted that the consumer's remedy would indeed have been to apply for a resumption of the debt review in terms of section 86(11) as the particular credit agreement would actually have been terminated pursuant to the notice in terms of section 86(10).

4 2 2 Correct Interpretation of Section 86(11)

As indicated, section 86(11) provides that if a credit provider who has given notice to terminate a debt review in terms of section 86(10) proceeds with enforcement of the agreement, the Magistrate's Court hearing the matter may order that the debt review resume.

In *Swartbooi* the court stated, that although a debt review may be terminated by a credit provider whilst a referral thereof to the Magistrate's Court is pending, the matter does not end there. Dambuza J further emphasised that a credit provider may not terminate the debt review process without good reason and that a consumer may invoke his or her remedy in terms of section 86(11) to request a resumption of the debt review process if the credit provider has not acted *bona fide* in this regard (parr 12 & 14–16). Dambuza J referred to the decision of the court *a quo* in *Collett*, which decision accorded with that of the SCA in *Collett* in respect of this particular issue.

However, there are conflicting decisions regarding which court is empowered to order such resumption and the decision of the court *a quo* and that of the SCA in *Collett* differ in this regard. It is not clear whether the court in *Swartbooi* was in fact aware of the decision of the SCA in *Collett* as the court did not refer to this case at all. Eksteen J, delivering the decision of the court *a quo* in *Collett* (parr 23–27), interpreted the words "the magistrate's court hearing the matter" in section 86(11) to be a reference to the Magistrate's Court to which the matter has been referred in terms of section 86(8)(b) for a hearing, that is, the Magistrate's Court hearing the application for debt restructuring (see also *Changing Tides v Erasmus* (par 41), *Wesbank v Martin* (par 12) and *Firstrand Bank v Evans* (par 31)). Eksteen J pointed out that the jurisdiction provided for in section 86(11) is specifically restricted to a Magistrate's Court and that it is only the Magistrate's Court which conducts a hearing and provides judicial oversight over the debt review process that would have all the information the consumer was required to provide in terms of regulation 24 before it and which is required to exercise a discretion as to whether or not the debt review should resume. However, the SCA in *Collett* held (par 17) that the court that is being referred to in section 86(11) is the enforcement court and that the word "court" should be read to refer to a Magistrate's Court as well as a High Court (see also *Dunga supra* par 34). It therefore appears that the Court in *Swartbooi* may have overlooked the

decision of the SCA in this regard, and it is submitted that the court in *Swartbooi*, being the enforcement court, was supposed to deal with the issue of resumption of the debt review in terms of section 86(11). Since section 86(11) does not expressly require a substantive application to be brought by the consumer, it is submitted that the court was entitled to *suo motu* order a resumption of the debt review process if it was appraised of sufficient facts to justify such resumption (see Scholtz par 11 3 3 4).

Section 86(11) provides that the court *"may* order that the debt review resume on any conditions the court considers to be just in the circumstances". The wording thus indicates that the court is vested with a discretion in terms of section 86(11) regarding whether it should order the resumption of a debt review (Scholtz par 11 3 3 4). The defendants in *Swartbooi* argued that the plaintiff did not act *bona fide* in proceeding to institute debt enforcing proceedings through one set of attorneys when they were parties to an agreement through another set of attorneys, that a debt re-arrangement application would be brought before the Magistrate's Court on 16 March 2012. Of significance to the court in refusing the application for summary judgment, was the defendants' averment that they maintained regular payments in terms of the debt review agreement which was supported by a schedule of payments forwarded to the plaintiff by the Payment Distribution Agent. The plaintiff relied on an absence of prospects that the defendants would ever be able to afford the repayment instalments and that there would thus be no purpose served by a reinstatement of the debt review process. However, as pointed out by the court, the summons did not make any mention of this issue. In *Wesbank v Schroder* ([2012] JOL 28767 (EL) (par 17)) the court indicated, with reference to the decision of the SCA in *Collett* (parr 15 & 18), that the party who seeks to invoke the remedy in terms of section 86(11) should place sufficient information before the court to enable the court to exercise its discretion in his favour. This information should not only relate to the conduct of the credit provider during the debt review process but also to the prospect that the court, as envisaged in section 87(1), will sanction the recommendation of the debt counsellor and order a re-arrangement of the consumers' obligations.

However, the facts in *Swartbooi* also indicate that the defendants did in fact, since the issue of summons, bring an application for a resumption of the debt review proceedings (par 7). However, as indicated, it is not clear to which court the application was brought. It is submitted that a consumer who wants a debt review to resume need not wait until the credit provider applies for summary judgment before making such a request to the court. Such consumer may also approach the court from which the summons was issued (i.e., the enforcement court) immediately upon service of the summons, by bringing a substantive application for resumption of the debt review process (Scholtz par 11 3 3 4). However, it is not clear whether this was the case in *Swartbooi* or whether there was an application for resumption erroneously brought to the Magistrate's Court dealing with the application for debt restructuring.

The fact that the court failed to make an order in terms of section 86(11) may be an indication that the latter situation applied in this matter.

4 2 3 Mala Fide *Termination,* Bona Fide *Defence and Dismissal of Summary Judgment*

Summary judgment is a remedy that is to the avail of a plaintiff who has issued summons against a defendant for, *inter alia*, a liquidated amount of money, in instances where the debtor defends the claim but the plaintiff believes that the debtor does not have a *bona fide* defence to such claim (High Court Rule 32(1)(a)). The summary judgment remedy enables the plaintiff to obtain judgment against the defendant at an early stage in the proceedings without the matter proceeding to trial and thus, apparently, without full observance of the *audi alteram partem* principle, given that "the doors of the court are closed" to the debtor at an early stage (*Joob Joob Investments supra* 11C-G; Van Loggerenberg B1-32). It is for this reason that the summary judgment procedure has been regarded as extraordinary and stringent. In brief, the summary judgment process entails that where the debtor is of the opinion that he has a *bona fide* defence to the plaintiff's claim, one of the options to his avail is to file an opposing affidavit setting out fully the nature and grounds of the defence and the material facts relied upon for the defence (High Court Rule 32(3)(b); *Breitenbach v Fiat SA (Edms) Bpk* 1976 2 SA 226 (T); *Tesven CC v South African Bank of Athens* 2000 1 SA 268 (SCA)). Once the court finds that the defendant has indeed disclosed a *bona fide* defence, it has no discretion to grant summary judgment and must of necessity, dismiss the application for summary judgment and grant the defendant leave to defend the action (High Court Rule 32(7)).

In order to ward off summary judgment the *bona fide* defence raised by the debtor has to be valid in law (*Standard Bank of SA Ltd v Friedman* 1999 4 SA 928 (SCA) 938D–H). However, over-indebtedness *per se* is not a defence on the merits in respect of a claim for payment of money (*Collett supra* (SCA)). Thus it follows that over-indebtedness *per se*, cannot be regarded as a *bona fide* defence to an application for summary judgment entitling a consumer who raises such over-indebtedness to have the summary judgment application dismissed. The defendant's over-indebtedness can, at most, have a dilatory effect on the proceedings during which it is raised in the sense that the consumer may, at the court's discretion, be afforded an opportunity to obtain debt relief in the form of debt restructuring (NCA s85). If such debt restructuring order is eventually made, it may effectively cause the indefinite suspension or postponement of the main enforcement proceedings instituted against the consumer in view thereof that as long as the debtor complies with the debt restructuring order no enforcement may occur in respect of a credit agreement which is subject to such order (s88(3)).

It should however, be noted that in the context of summary judgment proceedings, the consumer's over-indebtedness may be presented to the court via different scenarios. One such scenario, as appears from the

facts of *Swartbooi,* occurs where the debtor, during summary judgment proceedings, raises his over-indebtedness in the context of a pending debt review that is alleged to have been *mala fide* and unlawfully terminated pursuant to a notice in terms of section 86(10), prior to enforcement of a credit agreement that was subject to such review. Where this situation occurs, it is addressed by section 86(11) of the NCA. It is to be noted that section 86(11) does not specify any specific grounds on which such resumption may occur, save to suggest that in an instance where a credit provider who has given notice to terminate a debt review as contemplated in section 86(10) proceeds to enforce that credit agreement, the court may order that the debt review resume. The court is given a wide discretion to order such resumption based on "any conditions" that it considers to be "just in the circumstances". It is thus possible that even in the case where such termination was procedurally valid in the sense that notice to terminate was given after the appropriate number of days, in the correct manner and to the correct parties, a court may still "undo" the termination and order a resumption of the review "on conditions that it deems just in the circumstances". Obviously the circumstances will have to justify the conditions and, as case law suggests, such circumstances would usually be that the credit provider failed to comply with the duty regarding good faith participation in a debt review (s86(5)) and *bona fide* termination of such debt review (see *Dunga* and *Collett* (SCA) *supra*).

Section 86(11) itself is silent on the effect of a resumption order on enforcement proceedings that were instituted prior to the granting of the resumption order. When one has regard to the concept of "resumption" of legal proceedings, the word "resume" means to "begin again or continue after a pause" (http://oxforddictionaries.com/defenition/english/resume accessed on 2013-08-12). This begs the question whether the effect of the resumption is that the debt review proceedings in the scenario that was present in *Swartbooi*, are revived and the enforcement proceedings nullified, or whether it is merely a case of the court, in its discretion, allowing the debt review to proceed due to the fact that it has been terminated contrary to the inherent notion of good faith which the court in *Dunga* (*supra* par 15) read into section 86(10).

It is submitted that section 86(11) is a remedy aimed at addressing a credit provider's failure to co-operate in, and terminate a debt review in good faith as the basis for a resumption order. Thus, it is not procedural defectiveness, but lack of *bona fides* which grants access to the remedy provided for in section 86(11). Such lack of *bona fides* may not necessarily be that of the credit provider, it may even be that a court deems it just to order resumption of a debt review that was procedurally lawfully terminated by a credit provider because the debt counsellor was not *bona fide* in conducting the debt review proceedings (see *Standard Bank of South Africa Ltd v Kallides* (1061/2012) [2012] ZAWCHC 38 (2012-05-02)). The effect of a resumption order appears to be that the debt review is allowed to proceed from the point where it was terminated, which could have been while the debt counsellor was still

attending to the assessment of the debtor's state of over-indebtedness; while he was in the process of referring the matter to court; or while the matter was still pending before the court. If a resumption order in terms of section 86(11) is refused, it disposes of the issue relating to debt review and, if the credit provider's papers are in order and no other defence on the merits exists, summary judgment ought to be granted in favour of the plaintiff-credit provider. However, if an order is granted in terms of section 86(11) for the resumption of the debt review, the resumed proceedings may or may not result in the consumer eventually being declared over-indebted and having his or her debt restructured. If, eventually, a finding of over-indebtedness is made and a debt restructuring order is granted, its effect would then be to "suspend" the summary judgment proceedings indefinitely pending compliance with the restructuring order. If it happens that the resumed debt review proceedings are for some reason not pursued any further by the debtor, or the court eventually finds him not to be over-indebted or refuses to make a debt restructuring order because it is not economically feasible, the dilatory "defence" of over-indebtedness falls away, entitling the plaintiff, credit provider to summary judgment.

The gist of this argument is that at the stage that the enforcement court makes a resumption order in terms of section 86(11), the outcome of the debt review proceedings which are allowed to resume are not certain and thus its effect on the enforcement proceedings is not certain. Therefore, it is submitted that the most appropriate order that the court ought to make regarding summary judgment proceedings at the stage that section 86(11) is raised, is to postpone the summary judgment proceedings either *sine die* or to a specific date, if the court grants an order for the resumption of debt review proceedings or allows a postponement to facilitate the bringing of a section 86(11) order.

It is submitted that the situation in *Swartbooi*, where the *mala fide* termination of a debt review in terms of section 86(10) of the NCA was raised and the defendant applied in terms of section 86(11) for a resumption order, as opposed to a "defence" merely based on an allegation of over-indebtedness, constitutes a *bona fide* defence of a *sui generis* nature created by the NCA. As opposed to merely alleging that he is over-indebted, which in itself has been held not to have constituted a *bona fide* defence, a defendant who is actually subject to a pending debt review has, as set out above, an added layer of protection afforded to him, namely a statutory moratorium on enforcement. It is therefore submitted that in the latter instance it is not the defendant's over-indebtedness but actually this statutory moratorium on enforcement which affords him the *sui generis* statutory *bona fide* defence to summary judgment, should a credit provider attempt to enforce the credit agreement whilst it is subject to a pending debt review that should not have been terminated. It is further submitted that the *sui generis* situation where a debt review is allowed to resume in terms of section 86(11) in instances where there has been proper procedural compliance with section 86(10) but lack of good faith by a *credit provider* would thus also

constitute a *bona fide* defence to an application for summary judgment (not because the consumer is over-indebted, but because of the lack of compliance with good faith as a statutory pre-enforcement requirement inherent in proper termination of debt review).

It thus appears that the notion of a *bona fide* defence in the context of summary judgment proceedings following upon termination of debt review which is subsequently allowed by a court to resume in terms of section 86(11), has acquired a whole new meaning. Where a *bona fide* defence would ordinarily entitle a defendant to have summary judgment proceedings dismissed, this specific *bona fide* defence created by the NCA, attracts its own procedural rules. These rules merely require the summary judgment proceedings to be adjourned or postponed, not dismissed, pending the eventual outcome of the debt review proceedings and thereafter, if a debt restructuring order is made, pending compliance with such order by the consumer. It is further submitted that procedurally, the exercise of the *sui generis* discretion to order resumption of a previously terminated debt review in terms of section 86(11) should precede the exercise of the overriding discretion that the court has in summary judgment proceedings.This is because the first-mentioned discretion has a direct bearing on the exercise of the last-mentioned discretion, given that the granting of a section 86(11) order confirms the existence of the *sui generis bona fide* defence that a pending debt review was not participated in and not terminated in good faith.

The facts in *Swartbooi* (namely employing one set of attorneys to "negotiate" the debt review terms, agreeing to the postponement of the hearing of the debt restructuring application and some time later, using other attorneys to attend to the enforcement whilst the aforesaid proceedings were still pending) suggest that there may have been a possibility that the credit provider *in casu* acted *mala fide* in terminating the debt review (parr 6-7). However, despite hinting at the resumption of the debt review proceedings and listing some considerations in support thereof, Dambuza J, contrary to the suggestion by the defendants that the plaintiff's claim be stayed pending finalization of their section 86(11) application, actually failed to first consider what should happen to the said section 86(11) application as would have been appropriate. As it appears that the resumption application presumably served before another court and not before the court *in casu,* it is submitted that the present court, being the enforcement court and thus the court having jurisdiction (per *Collett* (SCA)) to entertain the section 86(11) application, should at least have postponed the summary judgment proceedings and should have ordered the consumers to withdraw the application before such other court and bring it afresh before the present High Court for consideration. However, the court failed to make any order in this regard despite arguments regarding the desirability or otherwise of a debt review resumption having been raised by both parties (parr 6, 7 & 10). It is thus submitted that the court erred in the first instance by not making any order relating to an application in terms of section 86(11), when it was apparently possessed of sufficient facts to at least make an order that

the matter be postponed so as to afford the consumers the opportunity to bring their section 86(11) application in the correct forum. The court further erred by dismissing the summary judgment application instead of merely postponing it in circumstances which indicated that the court, although it made no order in terms of section 86(11), clearly favoured the resumption of the debt review (parr 13-17).

4 2 4 Manner of Delivery of a Section 86(10) Notice

In addition to expressing his opinion that the plaintiffs were not entitled to summary judgment on the basis of the consumer's indebtedness alone, Dambuza J indicated that "it remained open to the defendants to raise the issue of exception to the plaintiff's summons that the notice in terms of section 86(10) was given to the defendants by way of email, registered mail or fax". The NCA, in section 86(10), does not prescribe how the notice to terminate should be given to the consumer. It may be argued that the section 86(10) notice, being a requisite notice before enforcement (s129(1)(b)), is a "legal notice" and that it must be "delivered" to the consumer at his address as chosen in the contract (s96(1)) or subsequently amended address (s96(2)). The issue of "delivery" of a section 86(10) notice has not been dealt with definitively in case law. Due to the failure of section 86(10) to stipulate a specific method of delivery, it is submitted that the section 86(10) notice, may be delivered to a consumer in accordance with section 65(2), which provides as follows (for a contrary view, namely that the section 86(10) notice should be "served" on the consumer, see *Standard Bank of South Africa v Wessels* Case No: 64923/2011 (20 April 2012) (GNP) par 28):

> If no method has been prescribed for the delivery of a particular document to a consumer, the person required to deliver that document must–
>
> (a) make the document available to the consumer through one or more of the following mechanisms–
>
> (i) in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer's expense, or by ordinary mail;
>
> (ii) by fax;
>
> (iii) by email; or
>
> (iv) by printable web page; and
>
> (b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a).

However, the gist of section 65(2) is that the manner in which the credit provider delivers the notice to terminate a debt review in terms of section 86(10) to the consumer, must be consonant with the method that the consumer chose in the credit agreement for purposes of delivery of documents and notices.

Where a section 86(10) notice is not delivered in the prescribed manner, this amounts to non-compliance with a statutory pre-

enforcement notice. This is a procedural defect which would ordinarily entitle a consumer to raise an exception against a plaintiff's particulars of claim on the basis that it lacks a completed cause of action (High Court Rule 23). Ordinarily, the effect of upholding such an exception would eventually be to dispose of the plaintiff's claim (Van Loggerenberg B1-159). However, section 130(4)(c) of the NCA provides its own *sui generis* remedy in respect of non-compliance with section 86(10). The relevant parts of this section provide as follows:

> In any proceedings contemplated in this section, if the court determines that–
>
> …
>
> (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); or
>
> (iii) if the credit agreement is the only credit agreement to which the consumer is a party, order the debt counsellor to discontinue the debt review proceedings and make an order contemplated in section 85(b).

Thus, it appears that section 130(4)(c), as a *lex specialis*, "overrides" or "trumps" the usual effect of the ordinary exception procedure afforded by the prevailing rules of civil procedure applicable in the High Courts and Magistrates' Courts, which procedure ordinarily would have applied to the premature enforcement of an agreement absent compliance with a statutory pre-enforcement requirement such as the section 86(10) notice to terminate.

5 Proposed Amendments to Section 86(10) and (11)

According to the 2013 policy review of the NCA (see The Draft National Credit Act Policy Review Framework, 2013 – GN 559 of 2013 in *GG* 36504 of 2013-05-29, hereafter "Policy Review") the aim of introducing the debt review process was

> … to rehabilitate an over-indebted consumer through counselling and assistance to restructure his or her debt obligations, with a view to re-introduce the consumer, once rehabilitated, into the commercial world as an able credit user and asset to the economy.

However, the Policy Review concedes that the success of the debt review process has been compromised, *inter alia*, by the lack of clarity with regard to processes and conflicting judicial interpretations (par 2 4 4 1). The uncertainties in this regard have negatively affected the ability of consumers to successfully access the debt review remedy and consumers have thus been denied the opportunity to obtain the debt relief provided for in the NCA (Policy Review par 2 4 4 2).

The Policy Review points out that a credit provider may, in terms of the current section 86(10), terminate a debt review until a debt review order has been granted, notwithstanding that the matter has been referred to court. However, a number of factors such as a lack of co-operation of credit providers and court backlogs prevent some consumers from timeously obtaining these orders. Although a debt review process that is unnecessarily prolonged can detrimentally affect the interests of credit providers, the interests of consumers and credit providers should be balanced. At present section 86(10) allows the credit provider to terminate a duly instituted court process without notice or oversight by the judiciary to whom the matter has been referred. Moreover, the remedy contained in section 86(11) seldom provides effective checks and balances to section 86(10) (Policy Review par 2 4 6 2).

In order to address the above-mentioned shortcomings, it is proposed that section 86(10) be amended by inserting the underlined reservation clause in the existing Act (s10(b) of National Credit Amendment Bill):

> 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: Provided that an application for debt review has not been lodged in court as contemplated in section 87, in which case the credit provider shall be precluded from terminating the debt review in terms of this section.

The proposed amendment to section 86(10) thus confirms the interpretation of the court in *Wesbank v Papier* (2011 2 SA 395 (WCC)) where Griesel J held (par 34), on a contextual and purposive interpretation of section 86, that a consumer is protected against enforcement proceedings, not only once a rearrangement order has been made, but also while proceedings for such an order are pending. Delivery of a section 86(10) notice would thus not be competent once any of the steps referred to in section 86(7)(c), 86(8)(b) or section 86(9) have been taken.

It is submitted that the words "shall be precluded from *terminating* the debt review" in the proposed reservation clause of section 86(10), point toward an intention that a notice to terminate as contemplated in section 86(10), should in fact terminate the debt review process pertaining to a particular credit agreement where an application for debt restructuring is not yet pending. A debt restructuring order in respect of an agreement that had so been terminated would thus no longer be possible (see the *Martin*, *Raheman* and *Britz* cases and the discussion in 4 2 1 above) and

the consumer's only remaining remedy would be to approach the enforcing court (see *Collett* (SCA) par 17) with a request in terms of section 86(11) to resume the debt review process in respect of the particular agreement. However, this raises the question once again as to what the purpose of the ten day notice period in section 130(1)(a) is, since the proposed section 86(10) read with section 86(11), will *now* have the effect that the ten day period can neither be utilized to bring an application for debt restructuring before enforcement, nor can it be utilized to request the Magistrate's Court dealing with the debt restructuring application to order a resumption of the debt review.

It is proposed to amend section 86(11) by omitting the word "Magistrate's" from the existing Act (see s10(c) of National Credit Amendment Bill):

> 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.

The proposed amendment to section 86(11) clearly confirms the decision of the SCA in *Collett* that the court that is being referred to in section 86(11) is the enforcement court, which may either be a Magistrate's Court or a High Court.

However, we cannot see why the consumer has to wait for the credit provider to institute enforcement proceedings before he or she is able to invoke the remedy in terms of section 86(11). As indicated by Blignaut J in *Dunga* (par 46), it is in the consumer's interest that the debt review process resume as soon as possible. If the consumer has to wait for the credit provider to proceed with enforcement, he or she will have to defend the enforcement action in a litigatory environment and will be involved in time-consuming, costly and, for many consumers, unaffordable litigation, all being consequences which the debt review procedure actually seeks to avoid (see *Dunga* par 46). It is therefore submitted that section 86(11) should rather be amended to afford both the restructuring and enforcing court the power to deal with a request for resumption as soon as a termination notice has been given (see the suggestion in Scholtz par 11 3 3 4 that section 86(11) could be amended by removing any reference to the proceedings aimed at the enforcement of a credit agreement in section 86(11)). Such amendment will then also allow the restructuring court, when exercising its discretion to grant the restructuring order, to take into consideration any evidence that a termination did not comply with the good faith requirement in section 86(5) of the NCA.

6 Conclusion

The decision in *Swartbooi* restates the viewpoint of the SCA in *Collett* that a notice of termination in terms of section 86(10) is not the end of the

road for an over-indebted consumer seeking debt relief. The consumer may still invoke his or her remedy in terms of section 86(11) to request a resumption of the debt review process. However, the court did not actually refer to, discuss or apply the decision of the SCA in *Collett*, but only referred to the decision of the court *a quo,* despite the fact that it did not correspond with the decision of the SCA in all respects. As indicated, the court *a quo* was of the view that the Magistrate's Court hearing the debt restructuring application was empowered to deal with the application for resumption in terms of section 86(11), while the SCA was of the view that only the enforcing court had such jurisdiction. Moreover, the facts regarding the court to which the section 86(11) application was actually brought in *Swartbooi*, were unclear. In accordance with the interpretation of the SCA in *Collett*, it is submitted that the court in *Swartbooi*, being the enforcement court, and not the Magistrate's Court dealing with the debt restructuring order, had the power to deal with a possible resumption of the debt review process. As indicated however, the facts are not clear and it may also have been possible that the application for resumption in *Swartbooi* was in fact brought to the court from which the summons was issued (i.e. the enforcement court) immediately after service of the summons on the defendants. It is therefore submitted that the decision in *Swartbooi* only contributes to the legal uncertainty which, despite the decision of the SCA in *Collett*, currently exists with regard to the interpretation of section 86(10) and (11).

The court further erred in dismissing the summary judgment application instead of merely postponing the said application pending the outcome of the section 86(11) application. As the matter stands now, the plaintiffs have erroneously been deprived of their summary judgment remedy at a stage when it was not appropriate to order the dismissal of the summary judgment, the section 86(11) resumption application seems to have been brought in the wrong forum and will have to be withdrawn and re-applied for in the High Court which is the enforcement court *in casu* and, if the resumption application is not granted, the probability of a long and costly trial process looms.

The legal uncertainty regarding sections 86(10) and 86(11) clearly needs to be urgently addressed by legislative amendment. It is submitted that the proposed amendments to section 86(10) and (11) will help to address most of these uncertainties and will also bring about a better balancing of the interests of consumers and credit providers. The proposed amendment to section 86(10) limits a credit provider's right to terminate the debt review process and will thus afford a consumer a better and more reasonable opportunity to obtain the debt relief provided for by section 86 of the NCA. However, the fact that a consumer still has to wait for the credit provider to institute enforcement proceedings before being able to invoke his or her remedy to request a resumption of the debt review process, in fact reduces the consumer's prospects of successfully accessing the debt relief measure provided for

by section 86 of the NCA and thus also his or her chance of eventual rehabilitation and becoming a productive member of society again.

M ROESTOFF
C VAN HEERDEN
University of Pretoria