

SOUTH AFRICA / JUDGMENT

SA Taxi Impact Fund (RF) (Pty) Ltd v Jacobs (10003/2023) [2024] ZAWCHC 278; [2025] 1 All SA 538 (WCC) (25 September 2024) [2024] ZAWCHC 278

COURT

Western Cape High Court, Cape Town

BEFORE

Gordon-Turner

CASE / FILE NUMBER

10003/2023

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: 10003/2023

In the matter between:

SA TAXI IMPACT FUND (RF) (PTY) LTD

Applicant

and

SIDNEY CLIFFORD JACOBS

Respondent

Hearing date: 9 September 2024

JUDGMENT DELIVERED ON 25 SEPTEMBER 2024

GORDON-TURNER, AJ:

Introduction

1. This is an application for summary judgment brought by a registered credit provider as defined in Section 40 of the National Credit Act, 34 of 2005 (“the NCA”) against a respondent who possesses an operating license permitting him to operate a taxi on a particular route approved by the taxi association of which he is a member.
2. The applicant seeks orders confirming the termination of the credit agreement concluded between the applicant (plaintiff) and respondent (defendant) on 25 April 2022, and return of a certain 2013

Toyota Quantum motor vehicle (“the Toyota Quantum”) financed in terms of that credit agreement.

3. The applicant raises two defences[1], in the alternative to each other:

3.1 That his debt review can be reinstated under section 86(11) of the NCA, on the basis that the action was brought prematurely and in contravention of the applicant’s obligations, as a credit provider, to engage with the respondent, as its debtor, in good faith with a view to continuation of the credit relationship; and

3.2 In the alternative, that the applicant failed to conduct a thorough assessment regarding his eligibility for the credit facility, and that the Court should declare him over-indebted and make an order contemplated in section 87 to relieve his over-indebtedness.

The credit agreement

4. The salient terms of the credit agreement are as follows:

4.1 The applicant agreed to finance the purchase of a taxi vehicle for the respondent, namely the Toyota Quantum;

4.2 After interest of R399 454.45 plus service fees, short-term vehicle

insurance and tracking connection fees over the term of the agreement, the total amount payable by the respondent to the applicant was the sum of R1 032 139.90;

4.3 Monthly instalments were to be paid by the respondent to the applicant over 77 months commencing on 1 July 2022, the last instalment being due on 1 November 2028;

4.4 The monthly repayment by respondent to applicant inclusive of the

finance instalment, cost of insurance and tracking connection fee was the sum of R13 404.40, and was linked to the prime rate,

commencing at 19,25%;

4.5 Despite delivery of the vehicle to the respondent, ownership of the

vehicle remained vested with the applicant until all amounts outstanding in terms of the credit agreement had been paid by the

respondent;

4.6 In the event that the respondent failed to pay any instalments on due date or failed to satisfy any of his other obligations in terms of the agreement, the applicant, without prejudice to any of its other rights, was entitled to terminate the agreement, repossess the vehicle, dispose of the vehicle in accordance with the provisions of the NCA, recover from the respondent any remaining settlement value after that sale as contemplated in Section 127(7) of the NCA, claim interest on that instalment amount at 19,25% per year calculated from date of termination of the agreement to date of payment, claim costs on an attorney / client scale, and claim all expenses incurred in tracing the respondent before or after the institution of action, attaching the vehicle, removing it, valuing it, storing it and in relation to the sale of the vehicle.

Debt review

5. Within eight months of concluding the credit agreement with the applicant, the respondent applied in terms of Section 86(1) of the NCA to have himself declared over-indebted. On 15 December 2022, the relevant debt counsellor delivered to the plaintiff the Form 17.1 notice contemplated in Section 86(4)(b)(i) of the NCA. This was followed on 20 December 2022 by the delivery of a Form 17.2 by the debt counsellor to the applicant recording that the debt counsellor had found the respondent to be over-indebted. No evidence was adduced by either party that the debt counsellor had determined that the

credit agreement appears to be reckless.

6. The applicant delivered a certificate of balance to the debt counsellor on 21 December 2022. This indicated a contractual monthly instalment of R14 220.29 at an interest rate of 22%.

7. On 4 January 2023, the debt counsellor provided the applicant with a debt restructuring proposal for repayment of a total of R882 938.46, and that extended the period of the instalment sale agreement from 1 November 2028 to 15 March 2030, that is, by 17 months. It was made at a time when the respondent ought to have serviced the first eight monthly instalments, and had he done so, he would have reduced the total amount repayable by an amount in the order of R104 000.00. However, on 27 March 2023, he was in arrears with his instalments in the sum of R67 574.81. It follows that when he applied for debt review in December 2022, he was in arrears, and therefore in default of the credit agreement. Based on the available figures disclosed in the papers, the respondent's proposal necessarily fell short of the total amount repayable of R1 032 139.90.

8. On 10 March 2023, the applicant responded to the respondent's proposal by rejecting it and making a counter-proposal. At that time, the remaining term was 68 months. The applicant did not offer an extension of the term, noted that the current arrears were then R77 547.31, that the interest rate (as linked to prime rate) was currently 22,25%, and that the applicant was not prepared to consider any reduction of the interest rate. The total monthly payment required in the counter-offer was R17 876.56.
9. The respondent avers that the required instalment in terms of the applicant's counter-proposal would be R3 656.27 more than the contractual instalment initially indicated on the certificate of balance, and that this was unaffordable to him given his monthly nett income of only R12 848.75 (out of a gross income of R14 000.00 per month).
10. On 5 April 2023, the applicant gave notice to the respondent, the debt counsellor and the National Credit Regulation, in the prescribed manner, of its election to terminate the debt review in terms of Section 86(10) of the NCA. By 5 April 2023, neither the respondent nor his debt counsellor had applied for review in a court or the National Consumer Tribunal as contemplated in terms of section 86(10)(b) of the NCA[2]. It is not disputed that the termination notice was duly dispatched and received in accordance with the required procedures. The applicant had thereby given notice to the respondent of the latter's breach of the instalment sale agreement and the amount outstanding and due in terms thereof at that stage. Notice was also given of the applicant's intention to terminate the agreement on failure by the applicant to pay the outstanding sum.
11. By the date of termination by the applicant on 5 April 2023, the respondent had been in default of the agreement for at least twenty business days, and more than sixty business days had passed since the date on which the respondent had applied for debt review. By my calculation, the business days from date of the debt counsellor's notice in terms of section 86(4)(b)(i) of the NCA on 20 December 2022 expired on 17 March 2023.
12. Upon service of the summons thereafter, the applicant terminated the agreement. More than ten business days had elapsed since the applicant had delivered its Section 86(10)(a) notice[3]. The respondent does not contend that the instalment agreement was not lawfully cancelled. The defendant does not appear to appreciate that upon cancellation, he ceased to have any right to possess the Toyota Quantum. This is afforded further attention below.
13. The total amount outstanding as at 12 June 2023 was R573 998.51. However, in this summary judgment application, the applicant claims only the return of the Toyota Quantum and attorney and client costs.

The respondent's defences to summary judgment

The primary defence: alleged breach of obligation to negotiate in good faith

14. The respondent alleges that, as required in terms of section 86(5) of the NCA[4], the applicant failed to negotiate in good faith[5] with the respondent prior to terminating the debt review process. The basis for this submission is twofold:

14.1 First, the applicant's counter-proposal took two months, thereby consuming a considerable portion of the 60 day period within which debt review may be cancelled by a credit provider in terms of Section 86(10)(a) of the NCA. This left only ten business days for negotiations, which the respondent considered insufficient.

14.2 Secondly, the respondent contends that the counter-proposal was plainly unaffordable to him and (so it was implied) the applicant would know this.

15. Regarding the alleged tardiness of the applicant's counter-proposal, there was still an opportunity for the respondent to respond to the applicant's counter-proposal and to maintain negotiations with the applicant prior to the expiry of the 60 day period, and within the weeks thereafter prior to termination of the debt review, and it was incumbent upon the respondent to do so. The applicant's counter-proposal was made within a reasonable time. The fact that it was unattractive to the respondent does not mean it was not made in good faith.

16. Email correspondence (attached to the plea) was addressed by the debt counsellor to the applicant on 29 March 2023, which was admittedly after expiry of the 60 day period provided in section 86(10)(a), but prior to the applicant's 5 April 2023 notice of termination of the debt review. The debt counsellor advised that the applicant's counter-proposal was unaffordable as his income was only R14 000 per month and asked how the matter could

be resolved.

17. This further approach was answered by the applicant on 9 May 2023 with a new debt restructuring proposal. The applicant required payment of respondent's full arrears of R90 000.00 on or before 20 May 2023, but was prepared to extend the term to 102 months (adding 25 months to the contract), to fix the interest rate at 22,75%, and to reduce instalments to R13 100.00 per month commencing on 1 June 2023.

18. The respondent, via his debt counsellor, rejected this second counter-proposal on 1 June

2023. The applicant made a further counter-proposal on 5 June 2023 requiring an up-front payment of R43 000 on or before 20 June 2023, to enable a term extension adding 24 months to the contract, keeping the interest rate at 23,25%, and instalments at R14 410.00 per month commencing on 1 July 2023.

19. To my mind, the applicant's willingness to entertain a further debt restructuring proposal, and to respond with improved counter-proposals, with several elements of compromise, undercuts the respondent's contention that the applicant did not participate in good faith in the debt review process. The applicant could not be expected to continue negotiations

indefinitely and, as it were, bid against its prior proposals. The applicant's obligation, as credit provider, in terms of section 86(5) of the NCA to "participate in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement" had been discharged and the debt review was properly terminated. There is no merit in reinstating the debt review process on the strength of this unfounded complaint.

20. Even if I am mistaken in this finding, reinstatement of the debt review process as a defence to a claim by the credit provider is both futile and incompetent, and I cannot, therefore, exercise my overriding discretion to refuse summary judgment. I refer to the unreported judgment of Binns-Ward J in *ABSA Bank v Walker*[6] in which the learned Judge considered substantially similar facts.

20.1 The defendant in that matter contended that the plaintiff had fallen short of the obligation on it in terms of the Act to treat with the debtor in good faith, and was thus prohibited from availing of the right of termination provided in terms of s 86(10) of the NCA[7].

20.2 Binns-Ward J held as follows[8] (my underlining):

"[11] The defendant's submission that the plaintiff was bound to respond to the debt re-arrangement proposal in good faith is supported by authority; see Collett v FirstRand Bank Ltd 2011

- (4) SA 508 (SCA), at para 13 and 15. The judgment in *Collett*, however, also makes it clear that a credit provider is entitled, without qualification, to have resort to s 86(10) in any case in which the consumer is in default of his contractual obligations at the time he makes

application for debt review. The defendant has not contended that that was not the position in her application for debt review, or that she was not still in default when the plaintiff gave notice of termination in terms of s 86(10). The consumer's remedy, when a credit provider has terminated a debt review in circumstances in which it has failed to treat with the consumer's debt re-arrangement proposals in good faith, is to apply, in terms of s 86(11) of the NCA, for a resumption of the debt review, or, in the context of a summary judgment application, to ask the court, in the exercise of its overriding discretion, to refuse the application for summary judgment; see *Collett* at para 15, 16 and 18. It seems to me that there would be little purpose served in the exercise of the court's discretion in favour of a defendant in a summary judgment application if the refusal of judgment were not attended by an order directing a resumption of the debt review, either in terms of s 86(11) or by way of a 'general review' in terms of s 85 of the NCA. As the appeal court noted at para 18 of its judgment in *Collett*, 'Of course, sufficient information on which the request for a resumption of the debt review is based must be placed before the court.'

20.3 Such limited information as the respondent in this matter has put before the Court is summarised further below. In my view, it is insufficient.

20.4 Moreover, as in *Absa Bank v Walker*[9], the respondent's proposal:

20.4.1 Envisages his retaining possession of the Toyota Quantum, which partially negates the applicant's right of security in that asset, and due to the effect of depreciation would reduce the value provided by the security in the asset during the extended period (a facet that the applicant was prepared, in its second proposal, to tolerate provided the arrears were immediately extinguished);

20.4.2 Facilitates his ability as a purchaser of the Toyota Quantum in terms of an instalment agreement to keep and use the vehicle on more favourable terms of payment which is not the purpose of debt restructuring – the goal should be to fulfil his financial obligations[10];

20.4.3 Expects a resumption of the debt review with the object of obliging the applicant to accept the proposed debt rearrangement, which would negate the right of cancellation conferred upon, and exercised by, the applicant in terms of s 123(2) of the NCA, without regard to the fact that upon the cancellation of the agreement, the respondent ceased to have any right to possess the vehicle.

21. The debt restructuring proposal made on behalf of the defendant plainly contemplated that he would retain possession of the Toyota Quantum. However, the credit agreement has been validly cancelled, and the defendant no longer enjoys the right to retain the vehicle.
22. The Court enjoys no power[11] to reinstate the cancelled agreement, or to order a resumption of the debt review under section 86(11) of the NCA.

The secondary defence: declaration of reckless credit

23. The point of departure is the definition of reckless credit set out in the NCA which is as follows:

“80 Reckless credit

- (1) A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119 (4)-
 - (a) the credit provider failed to conduct an assessment as required by section 81 (2), irrespective of what the outcome of such an assessment might have concluded at the time; or
 - (b) the credit provider, having conducted an assessment as required by section 81 (2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that-
 - (i) the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement; or
 - (ii) entering into that credit agreement would make the consumer over-indebted.

(2) When a determination is to be made whether a credit agreement is reckless or not, the person making that determination must apply the criteria set out in subsection (1) as they existed at the time the agreement was made, and without regard for the ability of the consumer to-

- (a) meet the obligations under that credit agreement; or
- (b) understand or appreciate the risks, costs and obligations under the proposed credit agreement, at the time the determination is being made.”

(my underlining)

24. In his plea, the respondent claims an order on terms of sections 83(1) and 83(2) of the NCA declaring the credit agreement to be reckless and making an order in terms of section 83(3) of the NCA. The contention of reckless credit was not explained in the plea. In his opposing affidavit, the respondent did not limit himself to an order under section 83(3) only, expanding his defence so as to ask for an order “as set out in section 83 of [the NCA]”.

25. The relevant sections provide:

“83 Declaration of reckless credit agreement

- (1) Despite any provision of law or agreement to the contrary, in any court or Tribunal proceedings in which a credit agreement is being considered, the court or Tribunal, as the case may be, may declare that the credit agreement is reckless, as determined in accordance with this Part.
- (2) If a court or Tribunal declares that a credit agreement is reckless in terms of section 80 (1) (a) or 80 (1) (b) (i), the court or Tribunal, as the case may be, may make an order-
 - (a) setting aside all or part of the consumer's rights and obligations under that agreement, as the court determines just and reasonable in the circumstances; or
 - (b) suspending the force and effect of that credit agreement in accordance with subsection (3) (b) (i).
- (3) If a court or Tribunal, as the case may be, declares that a credit agreement is reckless in terms of section 80 (1) (b) (ii), the court or Tribunal, as the case may be-
 - (a) must further consider whether the consumer is over-indebted at the time of those proceedings; and
 - (b) if the court or Tribunal, as the case may be, concludes that the consumer is over-indebted, the said court or Tribunal may make an order-
 - (i) suspending the force and effect of that credit agreement until a date determined by the Court when making the order of suspension; and

(ii) restructuring the consumer's obligations under any other credit agreements, in accordance with section 87.”

26. The defendant’s plea was accordingly predicated on the Court finding that entering into the credit agreement would make the respondent over-indebted. If so found, the Court would be obliged to determine whether the consumer is over-indebted at the time of the proceedings, in which event the Court could suspend the force and effect of the credit agreement, and restructure the respondent’s obligations under any other credit agreements.
27. In his opposing affidavit the respondent tacked to the position that his (current) monthly net income is less than the contractual monthly instalment “therefore, the [the applicant] did not comply with the onus placed on it to do a diligent affordability assessment in respect of my financial capabilities, and that the loan was advanced recklessly.”
28. The respondent has conflated his current position with that represented by him to the applicant at time of assessing his credit application – this is both illogical and in conflict with the provisions of section 80(2) of the NCA, resulting in the above flawed

conclusion.

29. Furthermore, the respondent has disregarded the fact that the credit agreement is cancelled. That necessarily precludes the grant of an order suspending the force and effect of that credit agreement as contemplated by sections 83(2)(b) and 83(3)(b)(i) of the NCA (as well as precluding consequential restructuring of the debt under section 83(3)(b)(ii)). Even if suspension of the credit agreement was a competent solution, all elements of the agreement would be suspended, so the respondent would not be entitled to continue to retain possession of the Toyota Quantum during the period of suspension[12], and he would not be obliged to make payments during that period.
30. That leaves the respondent, should a declaration of reckless credit be indicated, with the possible remedy under section 83(2)(a), of setting aside all or part of the consumer's rights and obligations under the credit agreement (to the extent that this is competent in respect of a cancelled agreement). For the respondent, this remedy is self-defeating: his right to retain possession of the Toyota Quantum vehicle would be set aside in such circumstances, the applicant would be entitled to restoration of the vehicle[13], and the respondent would be relieved of any further indebtedness or deficiency claim under the agreement.
31. The respondent’s case is predicated upon his retention of the Toyota Quantum and continued operation of his taxi business. As Levenberg AJ has held[14]:

“[46] If the consumer obtained possession and use of a motor vehicle in circumstances in which no credit should have been extended to the consumer, it would be fundamentally unfair and counterproductive for the consumer to continue to use the vehicle, while at the same time not making any payments under the agreement.

...

- [50] That the NCA does not contemplate the consumer retaining ‘the money and the box’ is also borne out by the provisions of s 130(1) of the NCA. That section provides that the failure of a consumer to surrender its security is a factor that militates in favour of immediate enforcement of the credit agreement by the credit provider.”
32. Hence, the respondent’s claim to an order under section 83(2)(a) does not present a bona fide defence to the relief sought in this application.
33. This is all the clearer once the evidence regarding alleged reckless credit is considered. He is required, for purposes of summary judgment, to set out the material facts, which if proved at trial, would sustain his defences, and to do so with a reasonable amount of verificatory detail[15] - bearing in mind also that the respondent bears the onus to prove reckless credit[16].
34. The respondent contends that the applicant did not comply with the requirements pertaining to reckless credit, as determined in section 81(2) and (3) of the NCA. Those sections provide:
- “(2) A credit provider must not enter into a credit agreement without first taking reasonable steps to assess-*
- (a) the proposed consumer's-
- (i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;
- (ii) debt re-payment history as a consumer under credit agreements;
- (iii) existing financial means, prospects and obligations; and
- (b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement.
- (3) A credit provider must not enter into a reckless credit agreement with a prospective consumer.”
35. The respondent submits that his monthly net income is less than the contractual monthly instalment “therefore, the Plaintiff did not comply with the onus placed upon it to do a diligent affordability assessment in respect of my financial capabilities”, and that the loan amount was advanced recklessly.
36. The applicant (plaintiff) submits that the instalment agreement was not reckless credit because it used the services of another company in the same group as the applicant, SA Taxi Development Finance (Pty) Ltd (SA Taxi), to perform a credit vetting process. Before the credit agreement was concluded, SA Taxi conducted a credit assessment which the applicant submits was as required by the NCA.

36.1 The assessment revealed that the commercial purpose intended by the respondent would succeed. In arriving at this conclusion, SA Taxi first established whether the respondent possessed an operating licence which permitted him to operate a taxi on the route run by the particular organisation of which he was and is a member. The respondent furnished proof of his membership and a copy of his operating licence.

36.2 The respondent was required to complete a so-called 'taxi route form' which contains details of the number of daily trips he would make, the number of passengers to be conveyed on each trip, the fees payable by those passengers, and, as a product of all those entries the monthly income he anticipated by the operation of a taxi

on that route. The respondent provided this information on his taxi route form signed on 25 April 2022. He estimated his monthly

income would be R67 320.00 per month and his operational expenses R15 038.50. The applicant relied on the veracity of

this information so provided. The respondent does not dispute that the applicant advised him that the application for credit would be based on the contents of the taxi route form. He acknowledged in his opposing affidavit that he did not achieve his anticipated figures, but contends that this does not mean that this business has failed.

36.3 SA Taxi undertook its own calculation of the costs associated with the operation of that route, including petrol and maintenance costs and the driver's salary. SA Taxi drew on its own experience as the financier of thousands of taxis throughout South Africa, which affords it insight into the average amounts of such expenditures,

against which the data provided by the respondent could be evaluated.

36.4 SA Taxi concluded that, after allowing for the monthly instalments in terms of the anticipated credit agreement as well as insurance and the costs of a tracking device, a reasonable prospect existed that a taxi operator, such as the respondent, would derive a profit from the operation of a taxi on the route. The respondent's net monthly profit was estimated to be R52 281.50 per month.

36.5 The respondent was also required to complete and sign a form headed "Credit Application for Vehicle Finance". That form was populated with details of the goods required, the respondent's personal particulars (name, residential address, contact details, marital status, occupation, employer's name), his bank account and next of kin details, and his insurance requirements. It did not, however, provide for the respondent to disclose details of any debts or other credit agreements to which he may have been party. It did stipulate that he consented to SA Taxi checking his credit record with any credit reference agency, that he declared all current debt repayments by his extended family and himself as currently being met, and that he confirmed that his current income exceeds all his monthly expenses[17].

37. The respondent is critical of the credit vetting process undertaken by SA Taxi on behalf of the applicant on the bases that:

37.1 The applicant failed to do a diligent affordability assessment taking into account his debt repayment history (of which he provided no particulars either then or in his opposing affidavit) and his existing financial means (of which he also provided no particulars);

37.2 The applicant did not take into consideration any further existing financial obligations such as his monthly household expenses, other credit obligations that he 'might have' or even that he 'might have to pay tax' – again no particulars were provided by the respondent;

37.3 The applicant did not make allowance for repairs and services;

37.4 The taxi route form sets out only 'anticipated' figures;

37.5 The taxi route form anticipated 12 daily trips with 15 passengers each, but in fact only 6 trips daily of 15 passengers each are undertaken for 22 days per month, yielding gross income of only R35 640.00 per month.

38. The respondent's last three points of criticism of the credit assessment are readily met by the fact that the respondent was the source of the information populated on the taxi route form. The applicant cannot fairly be criticised for relying on his representations, particularly as he was forewarned about the importance of the form. In any event, SA Taxi evaluated his information against the average figures at its disposal as a result of financing thousands of taxi other vehicles.

39. The respondent's argument that the applicant was insufficiently diligent in assessing affordability disregards that the applicant was entitled to rely on, or at the very least, have regard to the respondent's declarations in his credit application form. There is no basis to hold that the applicant was under an obligation to carry out further investigations in order to determine whether the respondent's declarations were indeed true and correct^[18]. Absent any particulars being provided by the respondent of his debt repayment history, and, at the time of applying for credit, of his existing financial means and financial obligations, it is not possible to gauge if his first two points of criticism gave rise to reckless credit.

40. The respondent has therefore failed to provide sufficient information to the Court to enable the Court hold that a declaration of reckless credit is a bona fide defence, and to exercise its discretion to grant the respondent's request for a resumption of the debt review on either of the bases advanced by the respondent.

41. In the result, the following order is issued:

41.1 Termination of the credit agreement concluded between the parties on 25 April 2022 is confirmed.

41.2 Summary judgment is granted in favour of the plaintiff against the defendant for delivery up of the 2013 Toyota Quantum 2.5 D-4D Sesfikile 16S with engine number 2[...] and chassis number A[...] to the plaintiff forthwith.

41.3 The defendant shall pay the plaintiff's costs on the scale as between attorney and client.

F GORDON-TURNER, AJ

ACTING JUDGE OF THE HIGH COURT

Appearances Counsel for Applicant/Plaintiff Adv Celest Tait Instructed by Marie-Lou Bester Inc.
For the Respondent/Defendant Mr Nduli Legal Aid Instructed by Steyn Coetzee Inc.

[1] He abandoned the point that the applicant did not provide the debt counsellor with the certificate of balance within the prescribed

timeframe.

[2] See footnote 2 for wording of the sub-section. Even if the debt counsellor had referred the matter to the Magistrates' Court, the applicant's right to give notice in terms of Section 86(10) would continue until the Magistrate made an order as envisaged in Section 87 of the NCA. See, in this regard, *Collett v FirstRand Bank Ltd* 2011 (4) SA 508 (SCA) at para [6] and para [14]

[2] See footnote 2 for wording of the sub-section.

Even if the debt counsellor had referred the matter to the Magistrates' Court, the applicant's right to give notice in terms of Section 86(10) would continue until the Magistrate made an order as envisaged in Section 87 of the NCA. See, in this regard, *Collett v FirstRand Bank Ltd* 2011 (4) SA 508 (SCA) at para [6] and para [14]

[3] Section 86(10) of the NCA provides: “ (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.”

[3] Section 86(10) of the NCA provides:

“ (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.”
- [4] Section 86(5) of the NCA provides: “(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 debt review and in any negotiations designed to result in responsible debt-rearrangement.”

[4] Section 86(5) of the NCA provides:

“(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 debt review and in any negotiations designed to result in responsible debt-rearrangement.”

[5] As considered in by the SCA in *Collett v FirstRand Bank Ltd* supra at para [13]: “Where, as in this case, the consumer has applied for debt review before the credit provider has proceeded to enforce the credit agreement, the consumer and credit provider are obliged, as s 86(5) requires, not only to comply with any reasonable request by the debt counsellor to facilitate an evaluation of the consumer's indebtedness and the prospects for responsible debt-restructuring, but also to participate in good faith in the review and negotiations.”

[5] As considered in by the SCA in *Collett v FirstRand Bank Ltd* supra at para [13]:

“Where, as in this case, the consumer has applied for debt review before the credit provider has proceeded to enforce the credit agreement, the consumer and credit provider are obliged, as s 86(5) requires, not only to comply with any reasonable request by the debt counsellor to facilitate an evaluation of the consumer's indebtedness and the prospects for responsible debt-restructuring, but also to participate in good faith in the review and negotiations.”

[6] (2307/14) [2014]ZAWCHC 92 (17 June 2014)

[7] Ibid at para [10]

[8] Ibid at para [11]

[9] Ibid at paras [12] & [13]

[10] See, as cited by Binns-Ward J: *Standard Bank of South Africa Ltd v Panayiotts* 2009

(3) SA 363 (W) at para 77; *SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar Cases* 2011

(1) SA 310 (GSJ) at para 35-36 and 46-50; *Pelzer v Nedbank Ltd* 2011

(4) SA 388 (GNP), at para 6.3-6.4; *Standard Bank of South Africa Ltd v Newman* [2011] ZAWCHC 91, at para 11; *Absa Bank Ltd v O'Connor* [2012] ZAWCHC 152 at para 3; *Nedbank Ltd v Jaars* [2012] ZAWCHC 270, at para 22-23; *SA Taxi Securitisation (Pty) Ltd v Melaphi* [2014] ZAWCHC 47, at para 11

[10] See, as cited by Binns-Ward J:

Standard Bank of South Africa Ltd v Panayiotts 2009

(3) SA 363 (W) at para 77;

SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar Cases 2011

(1) SA 310 (GSJ) at para 35-36 and 46-50;

Pelzer v Nedbank Ltd 2011

(4) SA 388 (GNP), at para 6.3-6.4;

Standard Bank of South Africa Ltd v Newman [2011] ZAWCHC 91, at para 11;

Absa Bank Ltd v O'Connor [2012] ZAWCHC 152 at para 3;

Nedbank Ltd v Jaars [2012] ZAWCHC 270, at para 22-23;

SA Taxi Securitisation (Pty) Ltd v Melaphi [2014] ZAWCHC 47, at para 11

[11] *ABSA Bank v Walker supra* at para [16]

[12] *SA Taxi Securitisation (Pty) Ltd v Mbatha and two similar cases* 2011

(1) SA 310 (GSJ) at para [48]

[13] Ibid at para [47]

[14] Ibid at para [46] & para [50]

[15] Ibid at para [25] & [26]

[16] *Absa Bank Limited v Potgieter* (2344/2013) [2017] ZAECPEHC 8 (31 January 2017) at para [43]

[17] The respondent was, it seems, not required to provide the particulars contemplated in Section 3 of Annexure A to the National Credit Regulations Including Affordability Assessment Regulations published under GN R202 in GG 38557 of 13 March 2015

[18] Absa Bank Limited v Potgieter supra at para [46]

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