



IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ~~YES~~ / NO
 (2) OF INTEREST TO OTHERS JUDGES: ~~YES~~ / NO
 (3) REVISED

.....

DATE

SIGNATURE

Case No: A629/2013

In the matter between:

MOTOR FINANCE CORPORATION (PTY) LTD

Appellant

and

JAN JOUBERT

1st Respondent

(in his capacity as Debt Counsellor)

CHRISTOFFEL JOHANNES MARAIS

2nd Respondent

RONA MARAIS

3rd Respondent

ABSA BANK LIMITED

4th Respondent

EDCON (PTY) LTD

5th Respondent

RCS CARDS (PTY) LTD

6th Respondent

TRUWORTHS LIMITED

7th Respondent

JDG TRADING (PTY) LTD

8th Respondent

MASSMART

9th Respondent

(a division of RCS CRADS (PTY) LTD)

Coram: P. EBERSOHN et M. R. CHETTY AJJ

JUDGMENT

M.R. CHETTY AJ

1. The appellant is a “credit provider” which provided vehicle asset finance to the second and third respondents, (who are husband and wife, married to each other in community of property) for the purchase of a motor vehicle. Shortly after the purchase of the vehicle, the second and third respondents (to whom I will refer to as the ‘consumers’) found themselves in financial difficulty and approached the first respondent, a registered debt counsellor in terms of section 44 of the National Credit Act (‘the NCA’) No. 34 of 2005 for assistance to restructure or re-arrange their financial obligations.

2. The first respondent brought an application on behalf of the consumers in December 2010 in terms of sections 86 and 87 of the NCA for an order that they be declared over-indebted and that their financial obligations be restructured in terms of the National Credit Act. In terms of section 86(7)(c) of the Act, if, as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably concludes that the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate’s Court make either, or both, of the following orders:

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

- (i) *that one or more of the consumer's obligations be re-arranged by*
 - (aa) *extending the period of the agreement and reducing the amount of each payment due accordingly;*
 - (bb) *postponing during a specified period the dates on which payments are due under the agreement;*
 - (cc) *extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement;"*

3. As the first respondent's recommendations were not acceptable to creditors, an application was made to the court *a quo* in terms of section 86(8)(b) of the Act to accept his recommendation for the re-arrangement of the consumers' financial obligations and extensions to the periods for their repayment.

4. The appellant in the court *a quo* opposed the application for debt relief. After considering the application, the learned magistrate granted an order that the joint estate of the consumers be declared over-indebted, that their monthly repayment obligations be lowered, and the period of repayment of those debts be extended.

5. The appellant, which was one of six credit providers cited as a respondent in the court *a quo*, financed the consumers' purchase of a 2004 model vehicle through an instalment sale agreement based on a linked annual interest rate of 10%, taken over a period of sixty (60) months. Prior to the application for debt relief, the consumers had already paid eight (8) instalments towards their debt over a period of sixty (60) months. Due to financial difficulties, no further payments were made and their indebtedness at the time of their application was R118 604,33. Their monthly instalments were R2 906,40. One of the grounds of appeal raised by the appellant is that the magistrate

erred by wrongly accepting as reasonable the proposal of the first respondent that the consumers' obligations to the appellant should be reduced and extended to a repayment period of 153 months (as opposed to the remaining 52) and that the monthly instalments be reduced from R2 906,40 to R916,50. The net effect of the order is that the payment period has been stretched out over 12 and a half years, rather than the original 5. Together with the instalments already paid, the total repayment period would stretch over 13 years. Mr Van Den Berg, who appeared for the appellant, submitted that apart from erring in allowing the consumers to make a case for relief in their replying papers rather than their founding affidavit, the magistrate failed to account for the relevant industry standards with regard to the maximum repayment periods applicable to credit agreements, and relevant to the nature of the item subject to the transaction. In this regard it was submitted that the imposition of maximum repayment periods have been accepted as part of the landscape of credit finance for a number of years and the Credit Agreements Amendment Act, 9 of 1985 provides that "*no person shall be a party to a credit agreement in terms of which the period within which the full price is payable, exceeds the appropriate prescribed period*". To that end, the Act prescribed differing periods in terms of which household items could be repaid, in comparison to the period applicable to motor vehicles. The distinction is intrinsically linked to the rate of the deterioration in value of the item due to use, and its value as security for the loan advanced. I will return to this ground of appeal later.

6. At the outset, counsel for the appellant attacked the procedure employed by the first respondent in the court *a quo*, contending that he had failed to make out a proper case in the founding affidavit for the relief sought. Apart from the formal allegations relevant to the application, the founding affidavit of the first respondent avers that the consumers are married in community of property, with the husband being employed as a

mechanic at a motor dealership. The third respondent, the wife, is currently unemployed and has found difficulty finding employment due to her epilepsy. It is argued that prior to the third respondent becoming unemployed, the consumers were able to afford their debt. In addition, the documents annexed to the founding affidavit reflect that the consumers have five dependents, all aged under 21 years. The consumers further attached to the application a form completed by the first respondent's offices, setting out their income and expenses, as well as outstanding debts.

7. The appellant contends, as it did in the court *a quo*, that the application was factually deficient, lacking the necessary evidence that could enable a court to properly assess their financial predicament and whether there was indeed a basis for concluding that the consumers were over-indebted. Whilst the over-arching objective of the NCA is to encourage responsible borrowing and an avoidance of over indebtedness, it also provides a mechanism in section 3(g) for resolving over indebtedness on the principle of satisfaction by the consumer of all responsible financial obligations. While the NCA does not specify the procedure to be followed in applications for debt relief, it is now accepted that in the Magistrate's Court the procedure in accordance with Rule 55 of the Magistrate's Courts Act must be followed. See Nedbank v National Credit Regulator 2011 (3) SA 581 (SCA) at para [28] where the Court noted that:

"The Magistrates' Courts when exercising jurisdiction conferred by another statute follow their own Act and Rules unless there are indications in the enabling legislation allowing for a departure. Rule 55 of the Magistrates' Courts Rules contains the machinery to permit the proper determination of a dispute regarding s 86(7)(c).

8. Accordingly, an applicant should set out sufficient facts to disclose a cause of action, and whereas in pleadings a party is not permitted to plead evidence, the nature of applications is that the affidavits constitute not only the pleadings but all of the evidence on which the applicant relies. See Hart v Pinetown Drive-In Cinema (Pty) Ltd 1972 (1) SA 464 (D); Louw and others v Nel 2011] 2 All SA 495 (SCA) at para [17]. It follows therefore that an applicant has to make out a case in his or her founding affidavit. See Director of Hospital Services v Mistry 1979 (1) SA 626 (A); Pat Hinde & Sons (Brakpan) (Pty) Ltd v Carrim 1976 (4) SA 58 (T).

9. The complaint of the appellant is that the application contemplated in terms of section 86 of the NCA requires the debt counsellor, in making a proposal to the Magistrate's Court, should state the basis on which the proposal was reached and all evidence leading to the proposal being placed before Court. In the absence of such evidence, the debt counsellor would be merely expecting that the court would 'rubber-stamp' the proposal for debt relief. However, the court retains a discretion, in terms of section 87, to consider whether to accept a proposal. In this instance, before a court can decide to issue an order declaring the debtors affairs to be re-arranged or the credit agreement to be reckless, it is obliged to have regard to the proposal and information before it. That burden can only be discharged where the applicant under section 86 places full documentary evidence before the court, and not, as contended by the appellant, when the debt counsellor merely pays lip service to the regulations and the Act. In terms of section 79 over-indebtedness can only be determined if the consumer discloses his or her *"financial means, prospects and obligations; and the probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party"*. In Standard Bank of South Africa Ltd v Panaliotts (2009) (3) SA 363 at para [9], Masipa J noted the followed:

“[9] Having regard to the wording of s 79, such proof must inevitably involve details of, inter alia, the consumer's financial means, prospects and obligations. Financial means would include not only income and expenses, but also assets and liabilities. Prospects would include prospects of improving the consumer's financial position, such as increases, and, even, liquidating assets.-”

[10] In the case of an instalment agreement, secured loan, lease or mortgage agreement (all of which involves goods as the subject-matter of the agreement), the consumer's financial means and prospects must include the prospect of selling the goods in order to reduce the consumer's indebtedness.”

10. In the present case, the consumers did not set out in their founding affidavit proof of income; bank statements from which their monthly and fixed expenses could be easily ascertained and importantly; what prospects existed for the improvement of their financial predicament. Only once there has been this level of disclosure, can the debtor's affairs be fully interrogated. On that basis, the appellant contends that the application should have been dismissed due to insufficient evidence. The observations of Masipa J in Standard Bank of South Africa v Pannayiotis (supra) are apposite

“[56] *In casu* the defendant's allegations regarding his over-indebtedness are inherently and seriously unconvincing. I say this for the following reasons: the defendant has set out insufficient facts to show that he is over-indebted as envisaged in s 79. In addition such facts are so vague and bald that they do not amount to a bona fide defence.

[57] The basis of the alleged over-indebtedness seems to boil down to the following:

[58] The defendant cannot afford to keep up with the payment to the plaintiff because his salary, at R22 000 per month, is not sufficient to allow him to properly meet his financial obligations towards the plaintiff.

[59] He does not state how long this position endured before he fell into arrears with his payment. Neither does he say how long the position is likely to last before things get back to normal.

[60] In my view it does not seem likely that the defendant will recover financially very soon.”

11. In light of the consumer's application being subjected to intense scrutiny from the appellant (the sixth respondent in the court *a quo*), a number of critical deficiencies in the founding affidavit were extrapolated. For example, the second respondent (the husband) failed to attach his proof of income from which his precise earnings could be ascertained as well as the nature and amount of his monthly deductions. In as much as the consumers contend that the third respondent (the wife) has epilepsy and is unable to secure employment, she failed to adduce proof of where she had been previously employed and how much she earned. There is no indication of whether she currently collects or has applied for a state disability grant. It is stated that she resigned six (6) years prior to the application for debt relief due to ill health. One is not entirely certain what impact this had on the consumer's financial affairs as the third respondent had been unemployed for a substantial period prior to the application for debt relief. In that sense, the consumers had been reliant on the single income of the husband for some time. This in turn raises concerns about the possibility for a change in circumstances that would allow for the consumers to extricate themselves from this financial predicament. All

of these factors would affect the amount available for the distribution to creditors.

12. Counsel for the appellant contended that the obligation for disclosure on an applicant applying for debt relief is in some way analogous to the position of an applicant for voluntary surrender of his/her estate in terms of the Insolvency Act. In such cases, the court must be satisfied that the applicant owns realisable property sufficient to defray all costs of the sequestration and that the sequestration of the applicant's estate will be to the advantage of creditors. In order to make this assessment the courts have long required an applicant to make a full and frank disclosure. See Ex parte Swart 1935 NPD 432 at 433; Berrange NO v Hassan & another 2009 (2) SA 339 (N) at 354A-B. There are, in my view, a number of parallels with applications for debt relief which come before the Magistrate's Courts on a daily basis. Many of these applications are unopposed, often because of the minor amounts involved and likelihood of costs not being recoverable in the event of opposition. In such cases, there is an obligation on the consumer, guided and assisted by the debt counsellor, to act in the utmost good faith. In Ex Parte Arntzen 2013 (1) 49 (KZP), Gorven J at paragraph [8] commented on the measure of disclosure required in voluntary surrender applications in terms of the Insolvency Act :

"This may be particularly so in relatively small estates where their prospect of recovering legal costs, even if they successfully oppose the application, is remote. This renders creditors peculiarly vulnerable to voluntary surrender applications which, at a superficial level, make out a case that sequestration is inevitable. In such a case an overburdened court, confronted with an

unopposed application, may not scrutinise the application as carefully, and thus become aware of material non-disclosures, as it would do if it were opposed. A further reason for requiring a higher level of disclosure in voluntary surrender applications, is that an outright order can be given on the first appearance in court whereas, in most sequestration applications, a provisional order precedes a final order in a two stage process.

Later, at paragraph [9], the learned judge observed:

“In essence what was required was full and frank disclosure along with clear proof of the necessary facts. The proof of the indebtedness giving the applicant *locus standi* generally required documentary proof. In addition, a full and complete list of the assets of the respondent was required, including a valuation by a qualified person containing cogent reasons for arriving at the valuation, both for movable and immovable property.”

13. On the basis of the arguments advanced I am satisfied that the respondent (on the basis of the contents of the founding affidavit) had not met the standard of disclosure required of an applicant seeking debt relief or debt re-arrangement. However, the first respondent filed a “supplementary affidavit” seeking to address many of the pitfalls in his founding affidavit. The first respondent this time gave a comprehensive breakdown of the consumers’ income and expenditure, supported by documentary evidence including the second respondent’s salary advice. In addition, details are provided of the third respondent’s state of health and an averment that she is permanently incapable of securing employment following her resignation six years ago. As a result, the consumers became reliant on the income of the second respondent alone.

14. The appellant submitted that the court *a quo* erred in accepting the first respondent’s affidavit into evidence. It was contended that no provision exists in

Magistrate's Court Rules for a supplementary affidavit in application proceedings. That is so but that omission is regularly ignored and replying affidavit are accepted. More particularly, the appellant contends that the first respondent sought to make out a case for debt relief and re-arrangement based on the contents of his supplementary affidavit. In this regard, the authorities are clear that an applicant must normally stand or fall by his founding affidavit. Thus, an applicant will not be allowed to introduce new material in reply except within a very narrow ambit. However, Harms in Civil Procedure in the Superior Courts (B-53) pointed out that the present tendency seems to permit a greater flexibility, and rightly so, in the absence of prejudice to the other party. See Nick's Fishmonger Holdings (Pty) Ltd and Another v Fish Diner in Bryanston CC and Others 2009 (5) SA 629 (W).

15. Counsel for the appellant elevated the supplementary affidavit filed by the first respondent as evidence of a "trial by ambush". I do not agree, particularly as nothing stopped the appellant from raising the same arguments which it presently does to show why the consumers should not be granted the relief they seek. I am of the view that unless the applicant intends to supplant a cause of action set out in the founding affidavit, parties should be entitled to have their case adjudicated on the fullest facts available, even if through omission these facts did not appear in the founding affidavit. In the present case, the first respondent's founding affidavit was significantly bereft of the details that ought to have been set out. The essential ingredients for an application for debt relief were however foreshadowed in the founding affidavit – the consumers' contended that they were over indebted and gave some indication (albeit incomplete) of their income and expenses.

16. In all probability, the first respondent, who was entrusted with bringing the application, assumed that the application would be a mere formality and the application would not be met with such resistance. As matters turned out, a number of creditors did not oppose the application for debt relief and were content to abide the decision of the court. The first respondent's tardiness should not however prejudice the consumers in having their application for debt relief being properly considered. In any event, as a result of the further information placed before the court, the credit providers now had a better, more informed picture of the consumers' financial circumstances as all (or most) of the deficiencies were addressed in the supplementary affidavit. Whilst counsel for the appellant argued that the appellant was prejudiced in that no provision existed for it to file an affidavit in reply, (he always could apply for such leave) this did not prevent the appellant from using the information disclosed to properly argue its case. Ultimately, the court has a discretion to decide whether to allow the introduction of additional affidavits. In any event, counsel for the appellant sought to persuade us that the consumers had not made out a case for debt relief, and relied extensively on the averments and annexures to the supplementary affidavit and the manner in which they contradicted the averments in the founding affidavit. I accordingly find that the appellants were not prejudiced in the court *a quo*, and I find no grounds to interfere with the courts decision to allow the introduction of the supplementary affidavit.

17. Counsel for the appellant submitted that the court *a quo* failed to properly consider the information placed before it by the consumers. Had the information been properly considered, it was submitted, the court would not have reached the decision it did. In support of this argument, the appellant referred to factual discrepancies in the affidavits supplied by the consumers. In their founding affidavit, it is stated that the consumers have five dependents. However, in the supplementary affidavit it is stated

that the consumers have two children. To the extent that they refer to a daughter aged 21 years of age, it was submitted that she is an adult and there is no explanation as to why she is unable to support herself. The first respondent also sought to make out a case in the court *a quo* that the third respondent's epilepsy has resulted in the consumers devoting a considerable amount every month towards her medication. The second respondent's salary advice reflects that an amount of R2056,50 is deducted per month for membership to a medical aid scheme. In the breakdown of the 'essential expenses' set out in the supplementary affidavit, R500-00 is allocated for medical costs, of which R200 is used for the third respondent's "chronic medication". The account from a medical practitioner, tendered in support of the monthly expenses of the consumers, did not correlate with what they contended are their essential monthly expenses. In addition, the consumers have cited a payment of R200 per month to be allocated for payment to a veterinarian in respect of an account for a total amount of R816,00. Similarly, an amount of R1000 per month is allocated in their list of essential expenses towards the payment of arrear school fees for their children. In respect of all three expenses referred to above, there is no explanation from the first respondent why these items were not reflected in the list of the existing creditors, in order that their accounts could be paid off from the net amount available for distribution. Instead, certain amounts are now considered preferential and therefore paid off quicker than other debts.

18. I am in agreement with the appellant's counsel that the court *a quo* erred in considering these amounts to constitute essential or reasonable monthly expenses, and accordingly erred in accepting this as part of the debt restructuring process. Instead, these amounts should have been reflected as existing debts, for which the debt relief was sought. The end result is that if due care and diligence had been exercised in preparing the list of income and expenses of the consumers, the net amount available

for distribution could be significantly higher than that offered as part of the debt counsellor's recommendation. Even if there is sufficient evidence to support the conclusion' that the consumers are over-indebted, the second part of the enquiry is defective insofar as it concerns the amounts available for the re-arrangement of their financial affairs.

19. A pivotal aspect of the appellants' case is that the court *a quo* erred in restructuring the amount owed to the appellant over a period of 153 months, at a rate of R916,50 per month. Mr van den Berg contended that one of the first pitfalls with this re-arrangement is that the appellant will fall foul of the *in duplum* rule, especially if one considers the linked interest rate of 10% and the extended period of repayment. It was submitted that the court *a quo* erred in extending the period of repayment beyond a period of 84 months, and in so doing failed to take any cognisance of the Industry Agreed Consensual Debt Restructuring Rules to be deployed under section 48(1) of the Industry Code of Conduct to Combat Over-indebtedness, which formed part of the National Credit Regulator Debt Review Task Team Report, May 2010. The outcome of the Task Team's investigations was the result of discussions with a range of affected parties including banks, credit providers, magistrates and industry specialists. The Report proposes that in the case of vehicle asset finance, debt restructuring should be considered on the basis of 1.5 times from the date of inception of the contract, subject to a limit of 84 months in respect of private vehicles and an extension of 1.25 times the contractual term for commercial vehicles over the same period. In the case of mortgage bonds, the Report proposes an extension up to 240 months from the date of restructure subject to a maximum repayment term of 360 months from inception of the loan.

20. As set out earlier, the period over which a debt can be restructured must take into account the value and nature of the goods. The appellant contends that if the restructuring of a debt allows for a motor vehicle to be paid off over a period of ten years, the credit provider ceases to have any asset of value beyond a period of 84 months, which can be sold in execution to recover the outstanding loan.

21. A further argument raised by the appellant is that even if it accepted the proposal to have the debt restructured over 153 months, the consumers will still not be able to discharge their debt, particularly because the credit agreement was subject to a linked interest rate capable of fluctuation, making the determination of the final amount owing difficult to ascertain with any certainty. In this regard, the appellant relies on the dictum from Seyffert & another Firstrand Bank Limited t/a First National Bank 2012 (6) SA 581 (SCA) where Malan JA referred to the comments of the judge in the court *a quo* concerning the contents of the application for debt relief:

[5] When the matter came before it, the High Court granted summary judgment. In dealing with both the present matter and three similar applications, the learned judge remarked:

‘The affidavits of the respondents have been cryptic to the extent of coyness. These affidavits are laconic, if not supine, with regard to the real possibility of extrication from financial difficulties which the respondents face. Even where the respondents presented some acceptable evidence as to the fact that they had referred the matter to a debt counsellor, and in some instances annexed that person’s recommendations, in no such instance does the proposal make any economic sense at all. Indeed, the proposals are devoid of economic rationality.’

He also said:

‘The conundrum that arises from s 86(10) is this: may a debtor, who has made an application for debt review in terms of s 86(1) of the NCA, by the simple expedient of making such an application, indefinitely frustrate the enforcement of a debt to which he or she has no real defence and where no serious effort is being made to enter into some sensible arrangement for the rescheduling or re-arrangement of his or her debt (as is provided for in the NCA)?’

22. It was further contended that the application endorsed by the court *a quo* should have been rejected as there is nothing in the application which indicates what plan the debtors have to extricate themselves from this situation. It seems most likely that the third respondent will not be gainfully employed as a result of her epilepsy. The second respondent (the husband) is the only bread winner, and supports his family comprising of his wife, two children as well as his aged parents. Malan JA’s comments in *Seyffret* (supra) with regard to the deficiency in the application bear some similarity to the facts in the present matter. The learned Judge at paragraph [16] held :

“.....They may well be over-indebted but this is no reason why the respondent should have accepted their proposals. The respondent was entitled in law to terminate the debt review and, on the facts, justifiably did so. Only scant material was presented by the appellants to the court below, and their evidence falls short of inspiring confidence that their affairs will improve so as to enable them to eventually discharge their obligations. Neither of the proposals envisages the discharge of the debt within the agreed period or within any suggested, and feasible, extended time. This is not a case where a debt review can usefully be employed.”

23. What should have happened, according to the appellant’s counsel, is that the motor vehicle or the consumers’ house should have been put up for voluntary surrender in terms of the Act, thereby ensuring that there was a realistic probability that a re-

arrangement of the debts and the obligations entailed therein, could be successfully discharged. Counsel submitted that it is not the intention of the NCA to provide a moratorium to debtors, during which they do not pay for the goods but still have the benefit of being allowed to retain it. In response to this argument, the court *a quo* found that the second respondent should indeed retain possession of the motor vehicle, on the basis that without a car he would have to take two buses to get to work each day, as well as the fact that, as a foreman, he could be required to work on a weekend when public transport is scarce. The court *a quo* also took into account the third respondent's medical condition in arriving at its decision that the second respondent should retain possession of the vehicle. This conclusion is in contrast to the view expressed in Pelzer v Nedbank Limited 2011 (4) SA 388 (GNP) where the Court held that :

“6.3 In my opinion it is clear from the purpose of the act that a consumer who is over-indebted is granted a "moratorium" and is assisted to get his "house in order". But his liability to repay does not disappear, neither is he entitled to hang on to the goods which are the subject matter of the agreement, whilst not paying. On the contrary, the goods must be sold to reduce his debt. At the heart of it all lies that this has to be done (where no time limits are prescribed) within a reasonable time. It could never have been the intention of the legislature that the process can drag on forever and thus be abused.”

In Standard Bank of South Africa Limited v Newman (27771/2010) [2011] ZAWCHC 91 (15 April 2011/), Binns-Ward J expressed a similar sentiment to that in *Pelzer(supra)*. At paragraph [11] the learned Judge noted the following

“.....I do not consider that the object of debt review and restructuring is to enable a consumer in terms of an instalment sale agreement to continue in possession and use of the credit provider's property after the relevant contract has been cancelled.(cf *BMW Financial Services (SA) (Pty) Ltd v Donkin* 2009 (6) SA 63 (KZD)). The object of debt

review is directed at a restructuring of monetary debt with the object of the ultimate settlement of such debt. After the cancellation of an instalment sale agreement the only consideration of monetary debt that would be centrally relevant would be that arising if the proceeds of the realisation of the *res vendita* did not settle the balance of the purchase price still outstanding at the time of the cancellation of the contract. ..”.

24. In light of the circumstances of the consumers (as set out in the application brought by the debt counsellor) and the authorities referred to above, I am unable to find any basis to support the reasoning or conclusion reached by the court *a quo* that the consumers ought to retain possession of the motor vehicle. The deficiency in the debt relief application brought by the debt counsellor in terms of sections 86 and 87 of the NCA have already been dealt with exhaustively earlier in this judgment. I am inclined to accept the view of counsel for the appellant that the first respondent probably included the barest of detail regarding the consumers’ income and expenses, in anticipation of little opposition from creditors. When the application was opposed by the appellant the matter took on a different tone. The second respondent then became obliged to put up documentary proof to substantiate the reasonable expenses incurred by the consumers on a monthly basis. As set out earlier, the second respondent’s supplementary affidavit raised more queries than providing answers. Even if the consumers are over-indebted, counsel for the appellants raised the more significant concern of the extended period over which the repayment has been re-arranged without any consideration given to the industry standards.

25. Regretfully, on appeal, the first respondent (and the consumers through him) did not fare any better. Firstly, there was no compliance with the practice directions of this Court and the first and further respondents filed their heads of argument two days before

the hearing of this appeal. The first respondent's offices erroneously believed that the second and third respondents had ceased to pay their debt counselling proceeds for more than a year. On this basis, the first respondent took the view that he would not oppose the appeal. Only at a later stage was it discovered that the first respondent had confused the names of the second and third respondents with another debtor having the same surname; and did their preparations for the appeal commence. The heads which were eventually received were woefully inadequate, drafted without advancing any argument worthy of mention. The heads were mainly devoted to a recitation of the provisions of the NCA without any attempt to explain why they were significant in the context of the appeal or why they were being relied on. Even when reference was made to two reported decisions dealing with the provisions of the NCA, no attempt was made to indicate the relevance of the decision to the issues on appeal. The heads of argument sowed confusion by making reference to testimony by the second respondent during the course of the debt review application. As the record filed by the appellant did not contain any transcript of the 'proceedings' in the court *a quo*, we believed the record to be defective and therefore the appeal should be postponed. Only shortly before the appeal could be heard, was the Court informed that the reference in the first respondent's heads of argument to oral testimony was incorrect and that the record was indeed a true copy of the proceedings in the Court *a quo*. During the course of argument before us, counsel for the first respondent was unable to articulate a single argument of any substance, which could have influenced us to find in the first respondent's favour.

26. Counsel for the appellant submitted that the appeal be upheld and that the matter be remitted to the court *a quo* for the application for debt relief to be considered afresh,

taking due cognisance of the issues raised on appeal. The appellant contended that the costs of the appeal be paid by the debt counsellor, being the first respondent. Section 44 of the Act provides for the registration of debt counsellors with the National Credit Regulator and section 46 deals extensively with factors that would disqualify one from being appointed as a debt counsellor. Regulation 10 provides that a debt counsellor have a Grade 12 certificate or equivalent Level 4 qualification and have completed a debt counselling course. A background in law, accounting or financial services would be appropriate. It follows however, that a debt counsellor who brings an application for debt relief on behalf of beleaguered consumers, is performing a statutory function.

27. The counsellor has a duty to act bona fide and to place before the court accurate information that could enable the court and creditors to properly and accurately assess whether the consumer is over indebted. It goes without saying that the counsellor is obliged to place credible information before the court. The consequences of a successful debt relief application are significant, for both the creditor and the consumer. In Absa Bank Ltd and Others v Robb 2013 (3) SA 619 (GSJ) Boruchowitz J held at paragraph [10] that “A debt counsellor who refers an application to the Court under s 86(8)(b) and s 86(7)(c) is not a litigant in the ordinary sense, but fulfils a statutory obligation.”

28. Courts are slow to grant costs orders against persons acting in a statutory capacity on the basis that this could dissuade them from carrying out their statutory functions. The debt counsellor’s analysis of a consumer’s financial affairs could lead to the conclusion that a consumer is “over-indebted” in terms of section 86(6) of the Act. This triggers a number of other interventions, including an order by the Court that a consumer’s obligations be re-arranged in terms of section 86(7)(c).

29. Boruchowitz J ordered that a debt counsellor who withdrew an application for debt relief at the last minute was not immune from an adverse costs order. The learned judge commented in paragraph [24]:

“The obvious reason for this is that there is no public interest in encouraging public officials, or those who wield statutory power, to bring wholly unmeritorious applications to court. Dissuading such officials from doing so by costs orders in appropriate cases in fact enhances the public interest. To clog the court roll with cases which are instituted and then later withdrawn is contrary to the public interest and the efficient administration of justice.

[26] If a costs order were granted in this case it would serve the important purpose of cautioning debt counsellors to properly apply the provisions of the Act, the Regulations and the National Credit Regulator's guidelines before bringing applications to court for debt review.”

The learned judge said at paragraph [26] that:

“The above caution would serve not only the interests of the courts in maintaining the efficient administration of justice, but also the interests of both consumers and creditors be assured that an application for debt review will be made on their behalf only when there are reasonable grounds for concluding that they are over-indebted. And the interests of credit providers are protected because only reasonably meritorious applications for debt review would be pursued.”

30. I am satisfied that this is a case where, in light of the debt counsellor's failure to act with the requisite degree of diligence, a deficient application for debt relief was placed before the court *a quo*. I have no doubt that the Magistrate's Courts are inundated with debt relief applications, and to this end, may not scrutinise the

applications with the necessary degree of care required. This is highlighted by the number of consumers, according to information from the National Credit Regulator, with impaired records increasing by 95,000 from 9.25 million to 9.34 million quarter on quarter and 413,000 on a year on year basis, according to statistics released by the National Credit Regulator in March 2013. The high volume of work passing through the offices of debt counsellors is no excuse for poorly or incomplete motivated applications being submitted to court in terms of the Act.

31. For these reasons the appeal must succeed. However, as the appellant was one of seven creditors whose debts were re-arranged, and the only creditor to have opposed the order sought by the consumers in the court *a quo* and the only creditor to have lodged an appeal against the decision of the learned magistrate, any relief following from this appeal must relate only to the appellant's interests in the debt relief application. We would be acting beyond the scope of this appeal if the relief we grant is to impact on the restructuring of debts involving amounts owing to other creditors who are satisfied with the outcome in the court *a quo*. Accordingly the order we grant below seeks to ensure that the interests sought to be protected by the appellant are dealt with, as best as possible, to the exclusion of the debt re-arrangement scheme applicable to the remaining creditors.

32. The following orders are granted:

- a. The appellant's application for condonation for the late filing of the notice of intention to appeal, is granted;

- b. The first, second and third respondent's application for condonation in respect of the late filing of their heads of argument is granted;
- c. The appeal is upheld;
- d. The order of the Magistrate, in so far as it relates to the appellant as a creditor provider and to the restructuring of the debt owed to it by the second and third respondents, is set aside;
- e. The Magistrate is directed to reconsider the application for debt relief and re-arrangement to the debt owed by the second and third respondents to the appellant in terms of sections 86, 87 and 88 of the National Credit Act, 34 of 2005, with due consideration to :
 - i. Whether the second and third respondents should be ordered to return the motor vehicle, being the subject matter of the credit transaction, in order that it may be sold to set off such amounts that are due and payable to the appellant;
 - ii. alternatively, that regard be had to the Industry Standards for the period of restructuring of secured loans, as contained in the report of the National Credit Regulator Debt Review Task Team, 2010, and as applicable to vehicle and asset finance.
- f. That the first respondent and the appellant herein be permitted to file such affidavits as are necessary in the court *a quo* for a proper enquiry in terms of sections 86 and 88 of the National Credit Act

g. The costs of this appeal be paid by the first respondent.



M R CHETTY

Acting Judge of the North Gauteng High Court

I agree

P Z EBERSOHN

Acting Judge of the North Gauteng High Court

For the appellant : Adv. JP van den Berg

Instructed by Van Heerden's Inc, Pretoria

For the respondent: Adv. C Myburgh

Instructed by Theresa Postma Attorneys, Pretoria

Date of Hearing: 14 June 2013