assumption of the contingent liabilities. The expenditure must first be actually incurred in order to qualify for the deduction of those liabilities. This requires an undertaking of an obligation to pay or an actual incurring of a liability before a taxpayer will be able to claim any deduction of any contingent liabilities in terms of the general deductions formula.

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# *Wesbank v Deon Winston Papier and the National Credit Regulator*

*(unreported Western Cape High Court case no 14256/10 (WCC))*
*Termination of debt review in terms of section 86(10) of the National Credit Act 34 of 2005*

## 1 Introduction

The National Credit Act 34 of 2005 (NCA) comes to the rescue of consumers who are over-indebted (s 79) and/or to whom reckless credit (s 80) has been granted by affording them the opportunity to obtain debt relief *inter alia* by voluntarily applying for debt review in terms of section 86 of the NCA with a view to eventually obtain restructuring of their credit agreement debt by agreement (s 86(8)(a)) or court order (s 86(7)(c)). The debt review procedure, which is conducted by a debt counsellor, is set out in section 86 of the NCA read with regulation 24 made thereunder. Provision is made in section 86(10) of the NCA for termination of a debt review in the following terms:

> 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.

As remarked by Blignaut J in *Mercedes Benz South Africa v Dunga* (2011 1 SA 374 (WCC)hereafter "the *Dunga* matter") the NCA is by now notorious for its lack of clarity (17) and this is especially so on the topic of termination of debt review in terms of section 86(10) of the NCA. A considerable number of dissenting judgments on the topic were delivered during 2010 adding to the confusion. Two main views are discernable from these judgments: View one, as espoused by Kathree-

Setiloane AJ in *Taxi Securitisation v Kruger* (*Standard Bank of SA Ltd v Kruger; Standard Bank of SA Ltd v Pretorius* (2010) JOL 25356 (GSJ), hereinafter "the *Kruger* matter") and later in *SA Securitisation (Pty) Limited v Matlala* (2010) JOL 26095 (GSJ) hereinafter "the *Matlala* matter"), is that once a debt counsellor has referred a proposal for debt restructuring in terms of section 86(8)(b) or 86(7)(c) of the NCA to the magistrate's court, termination of the debt review in accordance with section 86(10) is no longer competent. View two, as espoused by Kemp J in *Taxi Securitisation v Nako* ((2010) JOL 25653 (E) hereafter "the *Nako* matter") and by Eksteen J in *Firstrand Bank Ltd v Evans* (unreported case no 1693/2010 (ECC) Port Elizabeth hereafter "the *Evans* matter"). Eksteen J delivered a similar judgment a few days later in *Firstrand Bank Ltd v Collett* (2010 6 SA 351 (ECG)) which entails that termination of debt review in accordance with section 86(10) is competent even after referral of the proposal to a magistrate's court until just before the magistrate's court makes an order in terms of section 87 of the NCA.

## 2 Brief Overview of the Mail Debate Relating to Termination of Debt Review

The debate regarding the cut-off time for termination of debt review in terms of section 86(10) of the NCA, was sparked by the judgment of Kathree-Setiloane AJ in the *Kruger* matter. In this matter it was held that in those instances where a debt counsellor has lodged an application to a magistrate's court for purposes of debt re-structuring within sixty days from the date on which the consumer has applied for debt review, the credit provider may not terminate the debt review in terms of section 86(10) despite the fact that the application for re-structuring has not been heard by the court within the aforesaid sixty days. The court premised its judgment on the view that termination in terms of section 86 is only competent in respect of the actual debt review process that is conducted by the debt counsellor in accordance with section 86 and that the referral to court in terms of section 86(8)(b) for a hearing falls outside the ambit of such termination as it is done in accordance with section 87 of the NCA (parr 13 & 14). The court also referred to section 129(2) of the NCA which provides that section 129(1), which *inter alia* requires a section 86(10) notice to be delivered prior to enforcement, does not apply to a credit agreement that is subject to a debt re-structuring order or to proceedings in a court that could result in such an order and indicated that a referral by a debt counsellor falls in the latter category, thus indicating that a notice to terminate in terms of section 86(10) would be incompetent once a debt counsellor has made such a referral (par 26). Kathree-Setiloane AJ further stated (par 15):

> I am of the view that any contrary interpretation in terms of which a credit provider would be entitled to terminate the debt review process after a period of 60 days, despite it having been referred to a magistrate's court, would lead to an absurdity in that any delay by any party to such application, any delay occasioned at the instance of the court or even any delay due to unforeseen circumstances would deprive the consumer of the opportunity to have that matter properly determined by that court.

In the *Nako* matter, the Eastern Cape High Court espoused a different view by holding that section 129(2) does not preclude a credit provider from instituting legal proceedings where a debt counsellor has referred a matter to the magistrate's court, which proceedings could result in a debt re-structuring order. The court held that section 129(2) merely renders the provision of a notice recommending a consumer to refer a matter to a debt counsellor redundant, as the matter has already been referred to a debt counsellor (10).

Kemp AJ further criticised *Kruger* by stating that section 87 is dependent on a proposal in terms of section 86 and to argue that the words "that is being reviewed in terms of this section" in section 86(10) refer only to a debt review by a debt counsellor loses sight of this fact. He referred to section 86(11) which provides 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.

Consequently Kemp AJ held that the argument as put forward in *Kruger* also loses sight of the protection provided by section 86(11) and specifically the words "hearing the matter" contained therein.

According to Kemp AJ it would have been unnecessary to include the words "hearing the matter" in section 86(11), if the judge in *Kruger* was correct, as these words refer to a matter pending before the magistrate's court and on *Kruger*'s construction there would have been no matter before it in terms of section 86(10)(par 43). Thus Kemp AJ was of the opinion that the court referred to in section 86(11) is the court before which the debt restructuring proposal is serving.

Subsequent to *Nako*, the issue of termination of debt review in terms of section 86(10) was considered again by Kathree-Setiloane AJ in the *Matlala* matter in which she disagreed with the interpretation of Kemp AJ in *Nako* of "hearing the matter" as mentioned in section 86(11). She indicated that in her opinion these words refer to the court in which the credit agreement is being enforced and not the court to which the debt review has been referred in terms of section 87 of the NCA (par 9). According to her, Kemp AJ misunderstood section 129 and failed to give proper consideration to section 129(2) of the NCA (par 13). She further referred to *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP) where it was stated that a debt re-structuring referral by a debt counsellor has to be made by means of an application in terms of magistrate's court rule 55 and that service of such referral must be done in accordance with magistrate's court rule 9. She then concluded that service, and not merely issuing, of a referral on the credit provider would constitute a referral to the magistrate's court in terms of section 86(8)(b) or 86(7)(c) (14).

In the *Evans* matter where Eksteen J considered the conflicting judgements by Kathree-Setiloane AJ and Kemp AJ, he indicated that the role of the debt counsellor conducting a debt review in terms of section 86 is not completed by mere reference of his or her debt re-structuring recommendation to the magistrate's court, but that the debt review process that is regulated by section 86 continues until the magistrate's court makes an order in terms of section 87 (Eksteen J relied on *National Credit Regulator v Nedbank Ltd supra* for the latter opinion). He was consequently of the opinion that the credit provider's right to terminate a debt review in terms of section 86(10) continues until the magistrate's court has made an order in terms of section 87 (18 and 19). In support of his opinion Eksteen J referred to section 86(11) and the words "the magistrate's court hearing the matter" and interpreted it, based on similar terminology employed in section 86(8)(b), to be a reference to the magistrate's court to which the matter has been referred for a hearing in terms of section 86(8)(b) (par 25). He remarked 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 before it all the information the consumer was required to provide in terms of regulation 24 and which is required in order to exercise a discretion as to whether the debt review should resume (parr 26 to 29). Accordingly the consumer is not prejudiced by the right of the credit provider to terminate a debt review in terms of section 86(10) as the consumer's rights are fully protected by section 86(11). Eksteen J, however, remarked that a credit provider does not have a *carte blanche* to terminate a debt review in terms of section 86(10) and that such termination would be inappropriate where the referral to the magistrate's court is prosecuted with due efficacy (par 30).

A plethora of diverging judgments currently exist on the topic. From the case law, it becomes clear that two major concerns underlie the problematic issue of termination of debt review. On the one hand, there is the need to protect consumers by affording them appropriate debt relief and to avoid situations where *mala fide* credit providers terminate debt reviews which are pursued by consumers in good faith and with due efficacy whilst often attempting to effect payments in accordance with their repayment proposal pending the outcome of the debt review. On the other hand, there is however also the need to recognise the rights of credit providers to enforce credit agreements and obtain repossession of their security especially in those instances where the credit provider has co-operated in the debt review in good faith but where the debt review process is abused by *mala fide* consumers who fail to make any payments, make ridiculous repayment proposals and continue to use the credit provider's ever-depreciating security whilst securing a payment holiday for themselves without the slightest intention to abide by the NCA's objective of "… eventual satisfaction of all responsible consumer obligations under credit agreements." (s 3(i)).

Due to the mounting confusion regarding termination of debt review and undesirable side effects thereof, the judge president of the Western Cape High Court instructed a full bench consisting of Traverso, Griesel and Dlodlo JJ to consider the issue of the cut-off time for termination of debt review in the recent matter of *Wesbank Ltd v Papier* (hereinafter "the *Papier* case").

The National Credit Regulator (hereafter "NCR") applied for and was granted leave to intervene as *amicus curiae* (par 2). The judgment was delivered by Griesel J.

## 3 Facts and Judgement

In March 2007 the plaintiff and defendant entered into a lease agreement in respect of a 2003 Mazda 6 motor vehicle. The total commitment was payable by way of an "initial rental" of R13,157.89 followed by 53 instalments of R2,772.90 and a final instalment in September 2011 (par 3). The defendant encountered financial problems and on 29 September 2009, he applied for debt review in terms of section 86(1) of the NCA. On 2 October 2009, the debt counsellor informed all credit providers and credit bureaux, by means of Form 17.1 that the consumer had applied for debt review. A further notice, confirming the successful outcome of the application for debt review, the defendant's over-indebtedness and that the debt obligations were in the process of restructuring, was forwarded to credit providers on 30 October 2009. This notice was combined with a debt-restructuring proposal, offering an amount of R5,300.00 to be *pro rata* distributed to creditors. *In casu*, monthly instalments of R1,762.44 as an alternative to R2,772.90, were tabled (par 4).

Having received no response from the plaintiff, the defendant proceeded with monthly instalments in the proposed amount (par 5). On 12 March 2010 the debt counsellor set the matter down at the Vrendenburg magistrate's court for a debt restructuring hearing on 11 June 2010. The defendant and his spouse were cited as applicants and the various creditors, including the plaintiff, as respondents. The court pointed out that the heading to the application was somewhat misleading as it stated "Notice of Motion: Application by consumer to court for debt review in terms of section 86(10) and 86(11) of the National Credit Act 34 of 2005". The court remarked that from the relief sought it was clear that the intention was a proposal for re-arrangement under section 86(7)(c)(ii). The applicants sought amongst others, an order to be declared over-indebted as contemplated in section 79, an order for debt restructuring in accordance with the annexed proposal and an order for credit providers, who had terminated the debt review, to resume the review in terms of section 86(11) (6).

However, on 4 June 2010 (exactly one week prior to the date for which the debt restructuring hearing was set), the plaintiffs' attorneys delivered a notice of termination by registered mail to the consumer, the debt

counsellor as well as the NCR. The notice pointed out that the consumer was in default and that the agreement was in arrears for more than 20 business days. It demanded immediate payment of the arrears, in the alternative, voluntary surrender of the vehicle in terms of section 127, failing which the plaintiff intended to cancel the agreement and commence with enforcement proceedings (par 7).

The application under consideration was consequently instituted on 29 June 2010. The plaintiff *inter alia* alleged that the debt review had been terminated by delivery of the section 86(10) notice, that 60 business days have elapsed since the application for debt review and that the defendant was in default on the date of the said notice (par 8). The court quoted the following further allegations as contained in the plaintiff's particulars of claim (par 8):

> 12.5 The agreement is therefore not subject to pending debt review as contemplated in s 86 of the NCA as:
>
> 12.5.1The defendant has not surrendered the vehicle to the plaintiff as contemplated in s 127 of the NCA;
>
> 12.5.2There is no matter arising under the agreement and pending before the National Credit Tribunal that could result in an order affecting the issues to be determined by the court.
>
> 13 The matter is not before a Debt Counsellor, Alternative Dispute Resolution Agent, Consumer Court or the Ombud with jurisdiction.
>
> 13.1 The defendant has not:
>
> 13.1.1agreed to a proposal made in terms of s129(1)(a) of the NCA or acted in good faith in fulfilment of such agreement as no such agreement has been reached;
>
> 13.1.2complied with an agreed plan as contemplated in s129(1)(a) of the NCA as no such plan has been agreed; or
>
> 13.1.3brought the payments under the credit agreement up to date, as contemplated in s129(1)(a) of the NCA.
>
> 13.2 More than 10 business days have passed since the delivery of the above notices in terms of s86(10) of the NCA;
>
> 13.3 The defendant has been default [*sic*] under the agreement for more than 20 business days.

The orders relevant to the application for summary judgment were confirmation of cancellation of the agreement and delivery of the vehicle with costs (par 9).

In his opposing papers, the defendant drew attention to the debt review process and the subsequent application issued on 12 March 2010 that was set down for hearing on 11 June 2010. The defendant emphasised the fact that the debt review application has been issued prior to the plaintiff's summons (par 10) and further drew the court's attention to the provisions as contained in section 86(11). He stated that

he would argue for re-instatement of the debt review in terms thereof (par 11).

The court formulated the question for consideration as follows (par 12):

> [W]hether it is competent for a credit provider to terminate a debt review process in terms of s 86(10) after an application has been lodged with a magistrate's court for an order restructuring a consumer's debts as envisaged in s 86(7)(c) of the Act but before an order has been made in terms of s 87(1).

The court remarked that the Act has drastically changed the traditional legal debt collection procedures in line with its aims. It referred to the aim to "promote a fair and non-discriminatory marketplace for access to consumer credit" and the aim "to protect consumers", amongst others by "addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations". According to the court, the credit provider's right to enforce a credit agreement where a consumer is in default is limited in line with these aims (par 13).

Griesel J found it ironic that a piece of legislation with such admirable intentions became a "fertile ground for litigation" as described by Kemp AJ in the *Nako* matter (par 14).

The court referred to the particular relevance of Chapter 4, headed "Consumer Credit Policy" for the present matter and specifically part D which introduces the concepts of "over-indebtedness and reckless credit" and which provides for the re-scheduling of debt under such circumstances. With reference to the *Dunga* matter, the court stated that the object of chapter 4 part D is to "provide protection and assistance to an over-indebted consumer in an environment that encourages participation in good faith by both parties". It referred to the mechanisms contained in sections 85 to 88, consisting of debt review and debt re-arrangement (par 15).

The court quoted section 86(10) and noted that the subsection contains no limitation on the credit provider's right to terminate the debt review, except for two jurisdictional requirements, namely that the consumer must be in default under the agreement and that 60 business days must have elapsed since the application for debt review. Griesel J remarked that it is common cause that *in casu*, these requirements as well as the 10 business day "limbo period" following delivery of the section 86(10) notice, as required by section 130(1), have been met before summons was issued. The plaintiff, following a literal interpretation, submitted that enforcement is competent as the above requirements have been met (par 17).

The plaintiff relied on a line of case law (*Firstrand Bank Ltd v Evans* (unreported case no 1693/2010 (ECC)) hereafter "the *Evans* matter",

*Firstrand Bank v Seyffert* 2010 6 SA 429 (GSJ), as well as the *Collett* and *Nako* matters), of particular importance the *Evans* matter where Eksteen J decided that the credit provider's right to terminate a debt review continues until the magistrate's court has made an order in terms of section 87 (par 18). The court pointed out that a different view, namely that it is not competent to terminate a debt review in terms of section 86(10) once the matter has been referred to the magistrate's court, was however taken by a number of diverging decisions (*Standard Bank of South Africa Limited v Pretorius* 2010 (4) SA 635 (GSJ), *Changing Tides 17 (Pty) Ltd NO v Erasmus and another, Changing tides 17 (Pty) Ltd NO v Cleophas and another; Changing Tides 17 (Pty) Ltd v Frederick and another* (2010) JOL 25358 (WCC) , *Wesbank v Martin* unreported case no 13564/2010 (WCC) as well as the *Kruger* and *Matlala* matters) (par 19). The court stated that it would be an excessively burdensome and wearisome task to analyse and discuss the reasoning in each of these judgments. It however joined the ranks of the latter line of judgements and then proceeded to set out the reasons for the decision (par 20).

Griesel J remarked that although the wording of section 86(10) seems clear and unambiguous, a contextual approach as opposed to a literal interpretation is favoured (parr 21 & 22). It referred to a judgment by Ngcobo J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* (2004 4 SA 490 (CC)) which stated that (par 21):

> The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous. Recently, In *Thoroughbred Breeders' Association v Price Waterhouse*, [2001 (4) SA 551 (SCA)] the SCA has reminded us that:
>
> "The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the face of it to have a readily discernible meaning".

Griesel J held that, if context is considered, it is clear that a literal approach to section 86(10), read in isolation, would lead to a "blinkered" approach, which in turn could readily lead to the wrong answer. He remarked that the provisions are merely one aspect of a detailed process described in the heading to section 86 as "Application for debt review". The court then proceeded to briefly set out the debt review process in the following terms (par 22): A consumer applies to be declared over-indebted "in the prescribed manner and form" to a debt counsellor (s 86(1)), whereafter the debt counsellor informs all credit bureaux and relevant credit providers of the application (s 86(4)(b)). The consumer and each credit provider must now "participate in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement" (s 86(5)(b)). The debt counsellor must make a determination of over-indebtedness within 30 business days (s 86(6)(a) read with reg 24(6)).

In the event that the consumer is found not to be over-indebted, the debt counsellor issues a "letter of rejection" (s 86(7)(a) read with reg 25), *inter alia* advising the consumer of the right to approach the court within

20 business days for an order contemplated in section 86(7)(c) (s 86(9) read with reg 25(5)).

If the consumer is however found to be over-indebted, the procedure contained in section 86(7)(c) must be followed in that the debt counsellor may issue a proposal to the magistrate's court recommending an order that *inter alia* the consumer's debts be re-arranged (s 86(7)(c)(ii)) (par 24).

The court stated that section 86(7)(c) sets in motion the "debt re-arrangement by court" as opposed to the "voluntary re-arrangement" under section 86(8)(a). It remarked that, unlike the position under section 86(9), where a time period is set, neither the Act nor the regulations provide for a time period within which the proposal must be issued to court under section 86(7)(c). The court stated that if one however considers the context, the position becomes clear. It refers to the determination of over-indebtedness that must take place within 30 business days (reg 24(6)) and if a consumer is found not to be over-indebted, such consumer must be advised of the right to approach the court within 20 business days (reg 25(5)). Based on these provisions, the court concluded that the 60 business day period referred to in section 86(10) was introduced with the above timeframe in mind. It allows adequate time to approach the court for relief in terms of section 87 (par 25).

The court noted that once a debt re-arrangement order has been granted, a credit provider may not commence enforcement proceedings (s 130(4)(e)), but asked what the situation would be where the re-arrangement order has been applied for but not yet granted, which is the question under consideration *in casu*. With reference to the 50 business day period (from date of application to a debt counsellor) that a consumer has to approach the court in terms of section 87, the court stated that it could never have been the intention of the legislature that the balance of the process (including a hearing before and a re-arrangement by a magistrate's court) should be finalised within the remaining ten business days. Griesel J commented that such a situation would be unattainable in the majority of cases. He referred with approval to the matter of *Dunga* where Blignault J stated that (par 26):

> Experience has shown that the typical debt review takes longer than 60 business days, often much longer, before it results in an order by the Magistrate's Court in terms of section 87. By terminating the debt review after 60 business days the credit provider may be able to derail the entire debt review process by way of a single unilateral act, regardless of the reasonableness of the conduct of the consumer or his own conduct.

In light of the above, the court observed that even where the consumer meticulously follows the correct procedure, there would be a vast number of matters that will not be finalised by a section 87 order prior to the lapse of the 60 business day period (27). It consequently stated that on the plaintiff's literal interpretation, a credit provider would be entitled "to derail the entire debt review process" in each matter where the 60

business day period has lapsed before a re-arrangement order was granted (par 28).

The court further considered the evidence as put forward by the NCR where instances of credit providers following the literal interpretation and thereby circumventing and undermining the debt review process were tabled. According to the NCR, some credit providers terminate the process in terms of section 86(10) as a matter of course as soon as the 60 business days have expired. Such terminations apparently take place despite indications by the debt counsellor that the debt review application was successful; or where the consumer makes regular payments in line with the proposal forwarded to credit providers; or where a hearing in terms of section 87 for the debt review application was already set. The NCR alleged that some credit providers even go so far as postponing the hearing in the magistrate's court and directly thereafter terminate the debt review in terms of section 86(10), followed by a summons and an application for summary judgment. The court remarked that on the plaintiff's interpretation, credit providers are entitled to terminate the debt review process even in instances where the consumer and debt counsellor have done all in their power to call upon and employ the debt review provisions (par 29).

Griesel J agreed with the NCR that such conduct by credit providers is inconsistent with the NCA and stated that it is a strong pointer that a literal interpretive approach should not be followed. If a literal interpretation was to be followed it would be "counter-productive" and contrary to the purpose of the NCA if it allows for a debt review to be unilaterally terminated at the exact moment when a consumer needs the protection of the NCA the most. The court stated that "[i]t would be like providing the consumer with an umbrella and then snatching it back the moment it starts raining". The court commented that the literal approach meant that only those fortunate consumers, applying for a debt review at a favourable time and in an efficient jurisdiction without a backlog would succeed in obtaining the relief as intended by the Act (par 30). The court was of the view that the literal approach *in casu,* overlooked the fact that the application for debt review was successful at the debt counsellor and that it may therefore also find favour with the magistrate (par 31). It further stated that the plaintiff's interpretation pays no attention to the fact that the magistrate's court before which the debt review application was pending has become "seized" with the matter. It is therefore significant, so the argument goes, that section 86(10) does not mention the magistrate or parties to the pending application to be notified of the termination. Therefore, an untenable situation may occur that a presiding officer, may be in the process of preparing a judgment, unaware that the matter has been "unilaterally and extra-judicially [sic] terminated" by the provision of a simple notice in terms of section 86(10). The court pointed out that, on the literal interpretation, an existing judicial process becomes dependent on the simple sending of a

notice between parties, which is an absurd result and could never have been the intention of the legislature (par 32).

The court refers to another strange result, as pointed out by the NCR, that occurs when the literal interpretation is favoured, namely that by allowing for a termination of a pending matter, premature enforcement in the High Court is encouraged. This will predictably result in higher litigation costs at the expense of those who can least afford it as is the case in the matter before the court (par 33).

The court decided that, in applying a purposive approach and taking cognisance of the context in which the relevant provisions appear, a proper interpretation of section 86 is that the consumer is protected against enforcement proceedings where a re-arrangement order has been granted by a magistrate under section 87, but also where proceedings which could result in such an order are pending. Therefore, it was decided that delivery of a section 86(10) notice is not competent once the steps referred to in sections 86(7)(c), 86(8) or 86(9) have been taken. The court remarked that this barrier would no longer exist once a magistrate's court has dismissed the application or the application has been withdrawn or abandoned (par 34).

In the matter before the court, the credit provider purported to terminate the debt review one week prior to the date for which the hearing was scheduled and based on the reasoning of the court above, such termination was invalid. Therefore, so Griesel J continued, the parties should return to the magistrate's court before which the hearing was pending in order to pursue their rights and remedies in terms of the credit agreement. The court pointed out that the plaintiff will have adequate opportunity to state its case at such time (par 35).

The court granted an order where the application for summary judgment was stayed, pending a final determination of the debt review and that it should resume in the magistrate's court for Vredenburg. The clerk of the court was further directed to set the matter down for hearing at the earliest date available and costs of the application stood over.

## 4 Critical Evaluation

Debt-stressed consumers everywhere have welcomed the judgment of the full bench of the Western Cape High Court with open arms (See for instance the report by H Wasserman entitled "Court strikes blow for indebted" at http://www.fin24.com/Money/Money-Clinic/Court-strikes-blow-for-indebted-20110202 (accessed on 2011-02-02)). Clearly the facts of the *Papier* case were so glaringly against Wesbank that it is probable that even those courts who were in favour of termination of debt review after referral of a debt restructuring proposal would in this specific instance have found in the consumer's favour. It should be noted that the court simply held that termination of debt review once a debt restructuring proposal has been referred to court, is not competent. It did

not attach any conditions to its ruling on this issue. Thus the judgment cannot be construed as "authorising" termination of a debt review after referral of a debt restructuring proposal because the credit provider acted in good faith and duly complied with his debt review duties whilst the consumer for instance has not been making any payments or the restructuring application was set down months into the future.

As remarked by Griesel J, it would indeed have been an unduly onerous and tedious task to analyse and discuss individually the reasoning in each of the "ever-growing number of judgments on the topic" (par 20). Without derogating the judgment, the result whereof is agreed with by the authors, it is submitted that probing into the main cases espousing the two different views as set out above, might have strengthened the court's judgment and have eliminated the possibility of the issue regarding the cut-off time for termination of debt review from being taken on appeal and perpetuating the wave of uncertainty on this issue. In short, some elaboration on the most important cases in the debate might have served to cement the notion of legal certainty regarding the cut-off date for termination of debt review, especially since it appears that the spotlight in this matter was basically exclusively on the protection of the consumer, largely as a result of the assistance rendered by the NCR in its capacity as *amicus curiae*.

It is agreed with the court's remark that it is clear that, although the provisions of section 86(10) appear, on the face thereof, clear and unambiguous, a literal interpretation of the provisions of section 86(10), read in isolation, would amount to a "blinkered approach" (par 22) that could easily lead to the wrong answer. When interpreting the NCA it is imperative to take into account the purposes of the NCA as set out in section 3 thereof (s 2) and indeed the whole context of the Act in order to conclude on the intention of the legislature where there is doubt regarding the scope and extent of a specific provision. From section 3 it is clear that the Act is *inter alia* aimed at addressing and preventing over-indebtedness of consumers and providing mechanisms for resolving over-indebtedness based on the principle of (eventual) satisfaction of all responsible financial obligations (s 3(g)). However, this is not the sole purpose of the NCA and should not blind one to the fact that these processes are often abused by consumers and not only by credit providers, as seems to be the impression created in the *Papier* judgment.

The court indeed superficially referred to the "whole" debt review process as set out in section 86. However it did not consider other sections of the Act, such as sections 86(11) and 130(1)(a) and its interaction with section 86(10) which might have provided further grounds supporting the courts eventual conclusion. Whereas it is agreed that one should not have a "blinkered approach" to section 86(10), it is submitted that a proper contextual approach to termination of debt review would have been well served by an analysis of section 86(11) and section 130(1)(a) and their role in the debt review process.

The court considered the period of 60 business days mentioned in section 86(10) and its interrelation with the 20 business day time frame (Reg 25(5)) within which the consumer must approach the court after rejection of the application of debt review by the debt counsellor, (par 25). The court favoured the view expressed by Binns Ward J in *Wesbank Ltd v Martin* (14) by concluding that the time period in section 86(1) was introduced with the 20 day time frame in mind. The court stated that (par 26):

> Given the fact that a consumer has a period of 50 business days [being the 30 business days allowed for the assessment by the debt counsellor as per reg 86(6) and a further 20 business days to approach the court as per reg25(5)], calculated from the date of his application to the debt counsellor, within which to 'approach' the magistrate's court for an order in terms of s 87, it could never have been contemplated that the rest of the process - including a hearing before the magistrate and a rearrangement order in terms of s 87 - should all be finalised within the remaining ten business days.

It is submitted that the reasoning of the court lies at the root of the argument in favour of the date of referral of a matter to court as cut–off date for termination of debt review. For purposes of interpretation it can be accepted that the legislature is aware of other legislation that might impact on the legislation that it has drafted and it can thus be accepted, that within the context of termination of debt review and enforcement of credit agreements, it was aware of time frames pertaining to court procedures, as well as of the fact that a debt counsellor or consumer who refers a matter to court has no control over the court roll or the state of congestion thereof and would not be in a position to ensure that a debt restructuring matter is disposed of within 60 business days from the date on which the consumer first applied for debt review. In this regard it is submitted that the maxim *Lex non cogit ad impossibilia* might be relevant as it is inconceivable that the legislature could have intended to force a consumer or debt counsellor to comply with a procedure within a time frame that, in most instances, would make it impossible to achieve the objective of completing a debt review and obtaining a court ordered restructuring. (See also the *Dunga* matter (par 26) as cited in par 25 of the *Papier* judgment). As Griesel AJ succinctly put it (par 27):

> It follows that, even if the consumer does everything 'by the book', there will inevitably be a large number of cases where the period of 60 days will have elapsed without an order as contemplated by s 87 having been obtained.

Although the court did not elaborate on exactly what is meant by the term "referral" it is submitted that the view espoused in the *Matlala* case, namely that a "referral" occurs only once the application for debt restructuring has been served on the consumer and relevant credit providers (par 14), is correct and should be applied. If the moment of service of the debt restructuring application is not regarded as constituting a referral for purposes of termination of debt review in terms of section 86(10), it could have the effect that a consumer would be able to ward off termination of debt review by merely issuing the rule 55 application, but thereafter failing to serve it and to prosecute it to finality,

thus securing an indefinite moratorium on debt enforcement. Furthermore it is submitted that to regard the moment of issue of such a referral as the definitive moment at which the referral is regarded to be made, would create legal uncertainty as it cannot be expected of the credit provider to take notice of a process at a stage when he is not actually notified of such step having been taken by means of proper service of the rule 55 application.

With regards to the view regarding the cut-off date for termination as espoused in the *Nako-* and *Evans-* cases, the court pointed out that it would entitle the credit provider unilaterally "to derail the whole debt review process". It is submitted that although termination of a debt review in respect of a credit agreement has the effect of "slicing" that specific agreement out of the debt review process and that technically the review can still proceed in respect of the remaining agreements, the practical effect of such a termination is very often to bring the whole debt review process to a halt because of the cost impact that the enforcement might have on the consumer's distressed budget.

Evidently, the fact that the NCR joined the court proceedings as *amicus curiae,* outlining various instances of abuse (many of them glaringly unfair and undoubtedly contrary to the spirit of the NCA) of the debt review process, also added value in filling the court in on how dire the position regarding debt review terminations and the apparent abuse of the process by certain credit providers is. However, it should be noted that the mere fact that a debt counsellor informs a credit provider that a consumer's application for debt review, in the absence of a referral done in accordance with rule 55 and served in terms of magistrate's court Rule 9, will not constitute a bar against termination in terms of section 86(10). Indeed it can be agreed with the court that many of the instances of abuse listed by the NCR are inconsistent with the Act and provide strong indicators against a literal interpretation of section 86(10). The "umbrella" remark actually very vividly illustrates this point and there is merit in the court's observations that this approach would mean that only those consumers fortunate enough to apply for debt review at a favourable time or in a jurisdiction without a long backlog will succeed in having their debts re-arranged by the magistrate's court. However, sight should not be lost of the many credit providers who are also out in the credit rain without umbrellas. (See the judgment in *Firstrand Bank Ltd v Mvelase* [2010] JOL 26418 (KZP) decided on 2010-10-26) where the court favoured a more balanced approach to termination of debt review. It is submitted that a consideration by the court of the "good faith" requirement laid down in section 86(5) of the NCA and the fact that it applies to both credit providers and consumers, might have added to a perceivably more balanced approach to termination of debt review. (See also the *Dunga* matter where Blignaut J read an implied provision into s 86(10) to the effect that a debt review can only be terminated if the credit provider acts in good faith.)

A very important point that is made by the court relates to the fact that section 86(10) only requires notice to the consumer, debt counsellor and NCR and not the court thus justifying the inference that the legislature did not intend that once a court was seized with a debt restructuring matter

(ie after it was referred (duly served)) such process could unilaterally be terminated by a credit provider. It is indeed inconceivable that the legislature could have intended to go against the grain of fixed principles of civil procedure by providing that an existing judicial process could become contingent upon the mere sending of a letter between private parties, without any notification to the court which is seized with the matter.

The court decided that the corollary to the fact that enforcement is not possible while proceedings for a debt re-arrangement order is pending, is that delivery of a notice of termination is also "not competent once any of the steps referred to in sections 86(7)(c), 86(8) or 86(9) have been taken." It then continued that: "[o]bviously this impediment will cease to exist, once a magistrate's court has dismissed the application for re-arrangement or the application has been withdrawn or abandoned."

It is agreed, as stated above, that the initiation of enforcement proceedings is not competent whilst proceedings that could result in a debt-restructuring order is pending (s 129(2)) and therefore delivery of a section 86(10) notice is not competent. However, once the "barrier" to enforcement has been removed in that the pending matter has come to an end, eg due thereto that the application for debt restructuring is dismissed by the court, it is submitted that a section 86(10) notice is not necessary and that the credit provider may immediately commence enforcement proceedings by issuing and serving summons. The reason for this submission lies in the wording of section 88(3) that provides that:

> [s]ubject to section 86(9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86(4)(b)(i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until:
>
> (a) The consumer is in default under the credit agreement, and
>
> (b) one of the following has occurred:
>
> (i) an event contemplated in section 88(1)(a) to (c); or
>
> (ii) the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal.

The events referred to in section 88(3)(b)(i), are listed in section 88(1)(a) to (c):

> (a) the debt counsellor rejects the application and the prescribed time for direct filing in terms of section 86(9) has expired without the consumer having so applied;
>
> (b) the court has determined that the consumer is not over-indebted, or has rejected a debt counsellor's proposal or the consumer's application; or
>
> (c) a court having made an order or the consumer or credit providers having made an agreement re-arranging the consumer's obligations, all the consumer's obligations under the credit agreements as re-arranged are

> fulfilled, unless the consumer fulfilled the obligations by way of a consolidation agreement.

If one reads section 88(3) in context it is clear that the words "subject to section 86(10)" does not apply where the consumer is in default and the court has either determined that the consumer is not over-indebted or has rejected the debt restructuring proposal or the application altogether as no debt review exists and therefore the process by which the section 86(10) notice can be terminated no longer exists. Under these circumstances, a credit provider may thus immediately proceed to issue and serve summons (See *Firstrand Bank Ltd v Fillis and another* 2010 6 SA 565 (ECP)).

A final remark relates to the court's reference to the various practical problems experienced by consumers as well as allegations of credit providers abusing the process as tabled by the NCR. Even though the Act has the protection of consumers at its very core, it should be noted that section 3(d) mentions, as one of the measures of protecting consumers, the promotion of "equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers". As indicated, the court, aided by the intervention of the NCR as *amicus curiae*, thoroughly considered unscrupulous practices by credit providers and the grossly unfair and absurd results that terminations after referrals to the magistrate's court have in practice, all of which the authors are in agreement with, but did not consider the various abuses of the debt review process by consumers and debt counsellors that credit providers are exposed to in many instances. It is often the consumers and debt counsellors who display a lack of good faith during the debt review process by delaying the process and by placing matters well into the future even though the court roll in a specific court is not necessarily excessively congested. The consumer in the mean time is enjoying the luxury of a payment holiday and thus not even attempting to make any payment in terms of what is often a repayment proposal that is not even viable.

## 5 Conclusion

As the judgment was delivered in the Western Cape High Court, it merely has persuasive as opposed to binding effect in other jurisdictions. It can be expected that certain other jurisdictions would follow suit whilst others may not. The probability also exists that the judgment may be perceived as too one-sided and in favour of consumers, given that the court did not deal with the flip side of the debt review coin, namely the abuse of the process by consumers and debt counsellors to the detriment of credit providers.

Although the court, having held that the termination of the debt review in terms of section 86(10) was not competent where the matter has already been referred to court and thus deemed it not necessary to deal with the provisions of section 86(11), it is submitted that a proper reflection on the debt review challenges facing both consumers and credit providers and the scope and application of section 86(11) to act as

a probable mechanism affording protection to both parties, might have led to a more balanced approach on the issue of termination of debt review.

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# *Minister for Justice and Constitutional Development v Tshishonga* 2009 9 BLLR 862 (LAC)

*Just and equitable compensation for non-patrimonial loss*

## 1 Introduction

Section 23(1) of the Constitution of the Republic of South Africa 1996 guarantees a fundamental right in respect of labour relations by providing that "everyone has the right to fair labour practices". The Labour Relations Act 66 of 1995 (hereinafter "the LRA") gives effect to the right to fair labour practices in that employees have the right not to be unfairly dismissed or subjected to unfair labour practices. Section 193 of the LRA provides for remedies when an employee is unfairly dismissed. Reinstatement or re-employment is the primary remedy in cases of unfair dismissal except where the provisions of section 192(3) of the LRA apply, in which case reinstatement cannot be ordered by the labour court or an arbitrator. When an employee wishes not to be reinstated or re-employed, or the circumstances surrounding the dismissal would make the continued employment relationship intolerable, or it is not reasonably practicable to reinstate or re-employ the employee or the reason for dismissal is that it is only procedurally unfair, compensation would be the most appropriate remedy (s 193(2) LRA).

Under the 1956 labour dispensation, the Labour Relations Act 28 of 1956 granted the industrial court "an unfettered discretion" with regard to compensation in unfair dismissal cases. The amounts granted by the court on a case-by-case basis differed drastically (Grogan *Workplace Law* (2009) 177). The 2002 amendments to the LRA did away with the distinction between substantively and procedurally unfair dismissals but retained the ceiling of 24 months' compensation for automatically unfair dismissals (*ibid*) and 12 months' compensation for all other unfair dismissals. Section 194(1) provides: