



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: A2023/041291

Heard on: 26/10/2023

Judgment: 23/01/2024

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

IN THE MATTER BETWEEN:

NESTA NELL

APPELLANT

AND

**THE MAGISTRATE FOR
THE DISTRICT OF EKURHULENI
NORTH (HELD AT TEMBISA)**

FIRST RESPONDENT

MR NKULULEKO WESLEY

SECOND RESPONDENT

ABSA BANK LIMITED

THIRD RESPONDENT

CONNECT FINANCIAL SOLUTIONS (PTY) LTD

FOURTH RESPONDENT

WOOLWORTHS (PTY) LTD

FIFTH RESPONDENT

FOSCHINI RETAIL GROUP (PTY) LTD

SIXTH RESPONDENT

BMW GROUP FINANCIAL SERVICES

SEVENTH RESPONDENT

OLD MUTUAL FINANCE (PTY) LTD

EIGHTH RESPONDENT

ABSA BANK LIMITED

NINTH RESPONDENT

WOOLWORTHS CARD ACCOUNT

TENTH RESPONDENT

RCS CARDS (PTY) LTD

ELEVENTH RESPONDENT

ABSA BANK LIMITED

TWELFTH RESPONDENT

ABSA BANK LIMITED

THIRTEENTH RESPONDENT

JUDGMENT

STRIJDOM J

1. This is an appeal against the whole of the order and judgment of the regional magistrate H Malevu.¹

2. The appellant is the duly appointed debt counsellor practitioner of the second respondent.

3. The appellant on behalf of the second respondent brought an application for debt review in terms of section 86 of the National Credit Act No 34 of 2005 (hereinafter 'the NCA') in the court *a quo*.

4. The appellant sought an order inter alia:
 - 4.1 declaring the second respondent over indebted in accordance with the provisions of section 79 (1) of the NCA;

¹ Caseline: Section 02-1 to 02-11

4.2 that the second respondent's debts to the third to thirteen respondents be restructured;

4.3 ordering the debt review process to be reinstated in terms of section 86 (11) of the NCA in so far as it may be necessary in the event that the court *a quo* was to find that there had been an unlawful termination of the debt review process by any of the credit providers.

5. The seventh respondent opposed the application on the basis that a notice in terms of section 86 (10) of the NCA was forwarded to the debtor, the Debt Counsellor and to the National Credit Regulator in terms of which the seventh respondent terminated the debt review.

6. The second respondent applied for debt review in terms of section 86 of the NCA on 4 January 2022.

7. A period of more than 60 days had elapsed within which the debt review proceedings were not referred to the magistrate's court.

8. On the 1st April 2022, the seventh respondent caused a notice in terms of section 86 (10) of the NCA to be served upon the appellant, the second respondent and the National Credit Regulator in terms of which the seventh respondent terminated the debt review.

9. The application for debt review was subsequently referred to the magistrate's court for consideration in terms of section 87 of the NCA.

10. On 6 March 2023 the court *a quo* granted the draft order prepared by the appellant; however, the court *a quo* amended the draft order to the effect that the seventh respondent would be excluded from the debt review.²

11. The crisp issues for termination in this appeal are the following:

11.1 did the learned magistrate err in finding that the seventh respondent was entitled to terminate the debt review proceedings;

11.2 did the learned magistrate err in not ordering the debt review process to be reinstated in terms of section 86 (11) of the NCA.

12. The court *a quo* found that the seventh respondent did comply with the procedural requirements of section 86(10) by terminating debt review prior referral to the magistrate's court.

² Caseline: Section 05-1 to 05-16

13. The court *a quo* further found that the seventh respondent had not taken any step to enforce the credit agreement as listed in Part C of Chapter 6 of the NCA against the consumer, hence the court did not enforce the provisions of section 86(11) to reinstate the debt review proceedings.³

14. It is common cause that the appellant and second respondent did not refer this debt review proceedings to court prior to the expiry of the 60 days and that the seventh respondent terminated the debt review in accordance with section 86(10) of the Act due to their default. The seventh respondent gave notice of termination to the second respondent, the Debt Counsellor and the National Credit Regulator in accordance with the provisions of section 86(10) of the Act; more than 60 (sixty) days after this date on which the second respondent applied for debt review.

15. It was submitted by the appellant that if regard is had to the counter proposal of the seventh respondent, they would only have been entitled to terminate the debt review proceedings after the 7th of April 2022.

16. The debt review proposal was sent to the seventh respondent on the 21st of January 2022.

³ Caselines: Section 29-1 to 29-6

17. On the 21st of January 2022, the seventh respondent advised the appellant that the proposal has been declined and suggested the following restructuring proposal:

'Accepted Debt Review instalment pm R7 570.29. Current Interest Rate 8% linked to the prime interest rate. The above amendments will only be effective upon receipt of your acceptance letter in writing within 10 business days of receipt of this letter. We confirm that the next instalment is due on 07 April 2022.'⁴

18. No evidence was presented that the restructuring proposal was accepted by the appellant and or second respondent in a written letter. It was further stated by the seventh respondent that after they received the form 17.1 no further correspondence was received and the section 86 (10) notice was delivered on those grounds.⁵

19. Section 86 (10) of the NCA provides as follows:

'If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to –

(a) The consumer;

⁴ Caselines: Section 31-12 and 13

⁵ Caselines: Section 21-4 para 2.3 Opposing Affidavit

(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.'

20. In **Standard Bank of South Africa v Kruger**⁶ para 22-23 it was held that

'It is furthermore clear from a proper reading of section 86(10) that it is not the magistrate that is required to make a determination at least 60 days from the date on which the consumer applied for the debt review, in terms of section 86(1) of the Act, then the credit provider would be entitled in terms of section 86(10) of the Act, to give notice to terminate the review in the prescribed manner, to the consumer, the Debt Counsellor and the National Credit Regulator. Any contrary interpretation would not have been contemplated by the legislature, as it would be to the detriment of the consumer.'

21. Section 86 (11) 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.'

⁶ Case No: 45438/09 (GSJ)

22. It is evident that at the time of the hearing of the debt review application the seventh respondent had not taken any step to enforce the credit agreement as listed in part C of chapter 6 of the NCA against the second respondent. In my view the learned magistrate did not err by not reinstating the debt review proceedings.

23. Appeals on fact are disposed of in accordance with the principles set out in

R v Dhlumayo and Another.⁷

24. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.

25. When the facts and the law were examined, there is in my view no sound or rational basis for the conclusion that the learned magistrate misdirected himself on the facts or the law.

26. In the result, the following order is made:

Order

1. The appeal is dismissed.

⁷ [1948] 2 ALL SA 566 (A); 1948 (2) SA 677 (A)

2. No cost order is made.

STRIJDOM J J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

I agree and it is so ordered

MDALANA-MAYISELA J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

For the Appellant: Adv C Spangenberg

Instructed by: Grove and Dormehl Attorneys

For the Seventh

Respondent: Adv SG van Der Walt

Instructed by: Mac Robert Inc