REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
THE KWAZULU-NATAL HIGH COURT **CASE NO.15548/08**
DURBAN

In the matter between

BMW FINANCIAL SERVICES (SA) (PTY) LTD Plaintiff

and

C J DONKIN Defendant

J U D G M E N T

Delivered 4 June 2009

WALLIS J.

[1] In September 2006 Mrs Donkin purchased a BMW 120d motor vehicle from the plaintiff under an instalment sales agreement. She committed herself to making payments of R4656.01 per month for fifty-nine months and a final balloon payment of R110 086.40. Her total commitment over the five year period was R385 791.30. From the outset her payments were irregular, perhaps made more difficult by the monthly instalments increasing as a result of upward adjustments of interest rates. From September 2007 she fell steadily further into arrear and only eight payments were made after that date, three of them being no more than a token.

[2] On 7 August 2008 the plaintiff despatched a notice in terms of section 129(1)(a) of the National Credit Act 34 of 2005 ("the NCA") drawing her attention to the arrears that then stood at R37 243.73 and requiring her either to remedy the default or to refer the agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud having jurisdiction, with the intention that any dispute under the agreement be resolved or to agree on a plan to bring her payments up to date. The notice went on to say that unless she responded within ten days of delivery of the notice the plaintiff would proceed to enforce the agreement.

[3] There was no response to this letter of demand and on 11 September 2008 the plaintiff wrote to Mrs Donkin cancelling the agreement. Thereafter on 25 November 2008 it issued summons in the present action. Notwithstanding the attempt by Ms

Nel to persuade me otherwise, on the basis of cases not dealing with this point, I am satisfied that the plaintiff thereby commenced these proceedings.[1] The orders it sought were delivery of the motor vehicle; confirmation of the cancellation of the agreement; payment of the difference between the amount outstanding and the greater of the market value or selling price of the vehicle; interest and costs.

[4] The action was opposed and summary judgment was sought and refused. At the same time the trial was placed on the expedited roll and on that basis came before me. The plaintiff limited its case at this stage to an order for recovery of the motor vehicle. The parties then agreed that I should determine their entitlement to such an order on the basis of certain facts put forward by the defendant as the ground for her defence to the action. These were (in addition to those set out in paragraphs [2] and [3] above) that on 25 November 2008 the defendant had contacted a debt counsellor and provided him with certain information, namely, her name and place of work; her net income; her living expenses; her total debts and her monthly repayments. The debt counsellor worked out that she was approximately 60% over-indebted and explained the process of debt review. The defendant expressed her willingness to subject herself to the debt review process and made an appointment to see the debt counsellor on 4 December 2008, taking with her relevant documents. At that meeting the required form 16 was completed and on about 18 December 2008 the debt counsellor provided notice to all credit providers and the credit bureaux including the plaintiff. No response was received to this notification. Thereafter a further notice confirming the defendant's over-indebtedness was sent on 3 March 2009 together with a proposal for restructuring and again no response was forthcoming. On about 27 March 2009 the debt counsellor made application to the Magistrates' Court, Durban for a hearing on the 25 May 2009 in which an order authorising the debt re-arrangement would be sought. The proposed debt re-arrangement included the defendant's indebtedness to the plaintiff. That matter has now been postponed to 27 July 2009.

[5] The plaintiff recorded that these facts were agreed for the purpose of enabling me to determine the legal issues that are set out below. It reserved its right to challenge the

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[1] *Marine and Trade Insurance Co. Ltd v Reddinger* 1966 (2) SA 407 (A) at 413 D; *Labuschagne v Labuschagne: Labuschagne v Minister van Justisie* 1967 (2) SA 575 (A) at 584. As Howie AJA (as he then was) said in *mv Jute Express v Owners of the Cargo on Board the mv Jute Express* 1992 (3) SA 9 (A) at 19 D: "The concept of an issued summons bringing no action into existence is one which is compatible neither with logic nor established practice"

correctness of the facts relating to the defendant's dealings with the debt counsellor in future proceedings. I was asked therefore to deal with the defences raised by the defendant as a matter of law it being the view of both parties that this could serve to expedite the disposal of the proceedings, because it would resolve the question of the effect of the cancellation of the credit agreement on the Defendant's right to retain the vehicle. The matter was then argued on the basis that in terms of Rule 33(4) the question of the plaintiff's entitlement to recover possession of the motor vehicle pursuant to the cancellation of the instalment sale agreement notwithstanding the defendant's reference of her financial circumstances to a debt counsellor for debt review and her entitlement to invoke section 85 of the NCA, is separated from the remaining issues in this case and all further proceedings in this action are stayed until that question has been disposed of.

[6] The parties formulated the questions that I am required to decide in the following terms:

(1) Whether on the agreed facts the defendant made application for debt review as contemplated by section 86(1), read together with Regulation 24 of the Regulations under the NCA, prior to institution of the action?

(2) Whether in terms of section 130(3)(c)(i) the court is entitled to hear the matter, if the answer to (1) above is in the affirmative even though the plaintiff proceeded to cancel the agreement on or about 12 September 2008?

(3) Whether in terms of section 85 of the NCA, should the court make a decision that the defendant is over-indebted and after evidence exercise its discretion to refer the matter to a debt counsellor for a recommendation in terms of section 85(a), or in terms of section 85(b) declare the defendant to be over-indebted as determined in accordance with that part of the NCA and make any order contemplated in section 87 of the Act to relieve the consumer's over-indebtedness, that order would have the effect of reinstating the agreement for the purposes of a restructuring order as contemplated by section 87, or whether that recommendation or order in terms of section 87, would relate only to any potential damages claims after the vehicle has been sold?

(4) In the premises whether the defendant can avoid an order confirming cancellation of the agreement and return of the vehicle by reliance on section 85 of the Act?

[7] The plaintiff's right to terminate the agreement by cancellation arises in the first instance from those provisions of the agreement that give it that right in the event of non-payment of instalments. The right is qualified by the provisions of section 123(1)(a) of the NCA, which permit such termination only in accordance with that section. Section 123(2) provides that:

> "If a consumer is in default under a credit agreement, the credit provider may take the steps set out in Part C of Chapter 6 to enforce and terminate that agreement."

Part C of Chapter 6 is headed "Debt Enforcement by Repossession or Judgment". Section 129(1) then deals with the procedure to be followed before debt enforcement and provides that:

> "(1) If the consumer is in default under a credit agreement, the credit provider:
>
> (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
>
> (b) subject to section 130(2) may not commence any legal proceedings to enforce the agreement before:-
>
> (i) first providing notice to the consumer as contemplated in paragraph (a), or in section 86(10), as the case may be; and
>
> (ii) meeting any further requirements set out in section 130."

[8] Ms Nel's first contention on behalf of the defendant was that Mrs Donkin had applied for debt review under section 86(1) of the NCA before the commencement of these proceedings.[2] She then relied on section 130(3)(c)(i) of the NCA which provides that:

> "Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that:-

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[2] The issue as formulated in the first question put to me refers to her making application for debt review "prior to the institution of action" but it is plain from the argument that this refers to the commencement of proceedings, which is the expression used in the NCA itself.

(a) …

(b) …

(c) that the credit provider has not approached the court:-

(i) during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction;"

Her contention was that the plaintiff had approached the court during the time that the matter was before a debt counsellor and that this was impermissible.

[9] Mr de Beer's response to this contention was primarily that the application for debt review did not include the plaintiff's claim by virtue of the provisions of section 86(2) of the NCA, which provides that:

> "An application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under the credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement."

He advanced this contention firstly on the basis that the steps contemplated in section 129 were taken once the credit provider gave notice under section 129(1) and did not include the commencement of legal proceedings and secondly on the basis that the application to the debt counsellor was only made on 4 December 2008 when, I was informed from the Bar, the form 16 provided in terms of the NCA Regulations was completed. On either basis he submitted that the present agreement was excluded from the debt review process.

[10] Sections 86(2) and 130(3)(c)(i) are designed to ensure that there is no overlap between the processes being followed under debt review and the processes that flow from a creditor seeking to enforce a debt at a time when no debt review process is in place. If the creditor commences enforcement proceedings it first gives a notice under section 129(1)(a). That notice invites the debtor to refer the credit agreement (not the debt) to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction. The purpose of such reference is either to resolve a dispute that may exist in relation to that agreement or to reach agreement on a plan that will enable the debtor to bring his or her payments under the agreement up to date. In other words what is contemplated is a consensual process mediated by the

person to whom the credit agreement has been referred. This is a process entirely distinct from the general debt review under section 86, which depends upon the debtor being over-indebted.[3] Whilst a person who has fallen into arrears in terms of a credit agreement may well be over-indebted and a reference to a debt counsellor consequent upon a notice in terms of section 129(1)(a) could conceivably lead to an agreement between the consumer and the credit provider that a debt review under section 86 is desirable, this is not necessarily the case. It may simply be that the consumer needs to resolve issues arising in respect of the one agreement alone and that they are otherwise managing their financial affairs satisfactorily. By contrast the process of debt review under section 86 starts from the premise that the consumer believes that he or she is over-indebted and is seeking an overall solution to their financial difficulties. That can be arrived at either by way of the acceptance of a debt counsellor's recommendation by all of the consumer's credit providers or by way of a court order from the Magistrates' Court. The differences between the processes following upon a consumer's positive response to a notice under section 129(1)(a) and a reference to a debt counsellor for debt review under section 86(1) are such that it is clear that the former does not result in the debt counsellor conducting a debt review under section 86.

[11] One can readily imagine the difficulties that would arise if a debt counsellor or one of the other entities mentioned in section 129(1)(a) was already dealing with a particular credit agreement and thereafter the consumer could approach a different debt counsellor in order to commence a debt review of their finances encompassing the debt arising under the credit agreement that was already being dealt with by the first debt counsellor or other entity. The immediate and obvious difficulty is that the NCA contains no mechanism for reconciling the two processes, nor does it afford priority to one over the other. The risk of differing outcomes would be ever present in such a situation. Hence the legislature sought to exclude it by way of the reciprocal provisions of sections 86(2) and 130(3)(c)(i). In terms of the former once the credit provider has taken steps under section 129(1)(a) to enforce the agreement it is excluded from any debt review process. Under the latter a court may not determine a matter whilst the matter is before a debt counsellor. In effect in each instance the prior process takes precedence and the other process is excluded until it is complete.

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[3] See sections 86(1) and 86(7)(a) and (b) which deal with the consequences of a conclusion that the debtor is not over-indebted. As to when a debtor is over-indebted see section 79.

[12] I appreciate that there is a parallel between the language of section 129(1)(a) and that of section 130(3)(c)(i) that might suggest that the reference to a matter being before a debt counsellor in the latter section is restricted to a situation where the reference to the debt counsellor arose as a result of the response to a section 129(1)(a) notice. However, in my view, that is too narrow a construction of section 130(3)(c)(i). A particular credit agreement and the issues relevant thereto arising from a default on the part of the consumer are as much a matter before a debt counsellor when they arrive on the latter's desk via section 86(1) as when they emanate from the consumer's response to a section 129(1)(a) notice. Accordingly the ordinary meaning of the language used in the section encompasses both situations. Furthermore the narrower construction would create an awkward situation where the debt review process was underway and an impatient credit provider proceeded to enforce the credit agreement. On the narrower construction of section 130(3)(c)(i) there would be nothing to prevent them from doing so and in the absence of a response to the section 129(1)(a) notice nothing to prevent them from proceeding to procure a judgment and execute upon it. The disruption that would occasion to the debt review process is apparent. The confusion engendered would be compounded by the fact that section 86(2) would not be applicable in those circumstances and accordingly the particular credit agreement and the particular debt would remain part of the debt review process. This raises the spectre of inconsistency between a court-ordered rearrangement of the consumer's obligations on the one hand and a judgment on the other. That is manifestly undesirable and does not arise on the broader interpretation.

[13] Against that background I turn to consider the first two questions raised in this case. The contention on behalf of the defendant is that the matter was before the debt counsellor when Mrs Donkin spoke to him on 25 November 2008. Implicit in this contention is the proposition that, contrary to Mr de Beer's submission, section 86(2) only comes into operation and excludes an agreement from the debt review process where the credit provider has both given a notice under section 129(1)(a) and commenced legal proceedings to enforce the agreement, because otherwise the mere giving of the notice would have triggered the operation of section 86(2) and this credit agreement would patently have been excluded from the debt review process by that section. There are arguments both ways in this regard[4] but I am content for

[4] Professor Otto in *The National Credit Act Explained* p 85 footnote 25 submits that the consumer's application for a debt review is stayed from the moment that the credit provider draws his attention to his default in writing as required by section 129(1)(a). The submission is

present purposes to accept the contentions of the defendant without determining their correctness because of my answer to the first question formulated by the parties. That answer also relieves me of the necessity of resolving the conundrum that arises when the application for debt review and the commencement of the legal proceedings occur simultaneously.

[14] In terms of section 86(1) an application to a debt counsellor must be made "in the prescribed manner and form". Regulation 24 of the Regulations promulgated under the NCA[5] provides that a consumer who wishes to apply to a debt counsellor to be declared over-indebted must:

> "(a) submit to the debt counsellor a completed Form 16; or
> (b) provide the debt counsellor with the following information:
> (i) personal details, including:
> (aa) name, initials and surnames; identity number, if the consumer does not have an identity number, the passport number and date of birth;
> (bb) postal and physical address;
> (cc) contact details.
> (ii) all income, inclusive of employment income and other sources of income (specify).
> (iii) monthly expenses, inclusive of, but not limited to:
> (aa) taxes;
> (bb) unemployment insurance fund;
> (cc) pensions;
> (dd) medical aid;
> (ee) insurance;
> (ff) court orders;
> (gg) other (specify).
> (iv) list of all debts, disclosing monthly commitment, total balance outstanding, original amount and amount in arrears (if applicable) inclusive of, but not limited to:
> (aa) home loans;
> (bb) furniture retail;
> (cc) clothing retails;
> (dd) personal loans;
> (ee) credit card;
> (ff) overdraft;
> (gg) educational loans;
> (hh) business loans;
> (ii) car finances and leases;

strengthened by the differences in processes that follow from a reference under section 86(1) and a reference under section 129(1)(a). However, there is force in the submission that section 86(2) refers to "the steps contemplated in section 129 to enforce the agreement" and that section 129(1)(b) is the section that deals with enforcement of the agreement.

[5] Government Notice R489 of 31 May 2006 deals with the manner in which an application for debt review is to be made.

(jj) sureties signed;
(kk) other (specify).

(v) Living expenses, inclusive of, but not limited to:
(aa) groceries;
(bb) utility and continuous services;
(cc) school fees;
(dd) transport costs;
(ee) other (specify).

(vi) A declaration and undertaking to commit to the debt restructuring.

(vii) A consent that a credit bureau check may be done.

(viii) Confirmation that the information is true and correct.

(c) Submit to the debt counsellor the documents specified in form 16.

(d) Pay the debt counsellor's fee, if any, …"

Form 16 merely provides a form in which the information set out in the Regulations can be furnished to the debt counsellor. It requires the consumer to attach a copy of their salary slip and, in regard to their debt obligations, copies of all outstanding balances due. Presumably this refers to monthly statements provided by the credit provider.

[15] Making an application for debt review has important consequences. The consumer's name is circulated to credit bureaux and the debt counsellor is empowered to undertake investigation into what would otherwise be the private affairs of the consumer. The consumer is precluded by section 88(1) of the NCA from entering into any further credit agreements until either the application is rejected; the court determines that they are not over-indebted or all their obligations under credit agreements as rearranged have been fulfilled. Under section 130(3)(c)(i) court proceedings in respect of a debt are precluded until the debt review process is complete. That constitutes a limitation upon the constitutional right of access to courts for the resolution of disputes.

[16] It is important in those circumstances that there is clarity on when the debt review process commences. Ordinarily the completion of form 16 serves that purpose. Where form 16 is not completed Regulation 24 requires the debt counsellor to be furnished with all the information that would be provided if the statutory form had been completed by the consumer. The detail reflected in Regulation 24(1)(b) is of such a nature that in order for the consumer to provide it and the debt counsellor to record it it will be necessary for the debt counsellor to have a clear record of the information furnished by the consumer. This is necessary as the debt counsellor

must prepare and deliver a completed form 17.1 to all credit providers within five days after receiving the application for debt review.[6] The existence of that record would ordinarily enable the date of the application to be firmly established. The need to be able to establish with some degree of certainty the date upon which the application for debt review is made arises because of the serious consequences that flow from the making of such an application.

[17] Where information is furnished to the debt counsellor, without a form 16 being completed, there is always a substantial risk that the information will fall short of what is required in order for there to be compliance with Regulation 24(1)(b). That raises the question of the effect of such non-compliance. Whilst no argument was specifically addressed to me on these lines it seems that the effect of Ms Nel's submission is to contend that the requirements of section 86(1), when read with Regulation 24(1)(b), are not peremptory requiring strict compliance, but fall in the category of those statutory provisions (whether peremptory or directory in form) that demand only substantial compliance.[7] Accepting for present purposes that something less than completing form 16 in all respects or something less than providing all the information required by Regulation 24(1)(b) may be acceptable, I think that what happened here falls well short of sufficient compliance with the requirements for making an application for debt review. The information that the defendant says that she provided to the debt counsellor is set out in paragraph [4] of this judgment. It omits her identity number; her physical and postal address; her telephone numbers and the name of her employer. All of this is essential so that when the debt counsellor contacts credit bureaux and credit providers there can be some certainty that the information sought and given relates to the correct person. Regulation 19 requires that this information be given to the credit bureaux when submitting information to them. Without it the debt counsellor cannot do what the law requires.

[18] Apart from these omissions there was no breakdown of the Defendant's income; her living expenses; her debts, their nature and the identity of her creditors. Again this was essential information to enable credit providers and credit bureaux to be

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6 As required by Regulation 24(2).

7 *Nkisimane and Others v Santam Insurance Company Limited* 1978 (2) SA 430 (A) at 433 I – 434 D. Ms Nel quite rightly did not suggest that there could be an application for debt review without any attempt whatsoever to comply with the provisions of Regulation 24.

informed of her application. Not surprisingly in the circumstances they were only informed after she had met with the debt counsellor on 4 December 2008 more than five days after the initial telephone call on which day, so I was informed by counsel, form 16 was completed. Whilst I am told that the defendant expressed her willingness to subject herself to the debt review process that falls some way short of a "declaration and undertaking to commit to the debt restructuring" as required by Regulation 24(b)(vi). There was also no consent in terms of Regulation 24(b)(vii) to a credit bureau check being done. Nor was there, nor could there have been, a confirmation of the correctness of the information given to the debt counsellor.[8] These last three are all vitally important requirements in order to commence the debt review process.

[19] Overall in my view, whatever transpired between the defendant and the debt counsellor on 25 November 2008, it did not amount to the defendant making an application for debt review, even on the assumptions I have made in her favour. On any more stringent basis it is plain that she did not make an application on that date. I am reinforced in this conclusion by the fact that on 4 December 2008 the defendant completed Form 16, which is one of the ways in which an application for debt review is made. There would have been no need for her to do so had the application already been made. Accordingly she had not applied for debt review before the present action commenced and section 86(2) applies so that the agreement between her and the plaintiff is excluded from the debt review process that she instituted on 4 December 2008. The first question put to me for decision must be answered in the negative and the second question accordingly falls away.

[20] That leaves the defence under section 85 of the Act, which reads as follows:

> "Despite any provision of law or agreement to the contrary, in any court proceedings in which credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may:
>
> (a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and

[8] There is much to be said for the proposition that the declaration and undertaking to commit to the debt restructuring and the consent to a credit bureau check, as well as the confirmation of the correctness of the information, must be in writing even if form 16 is not completed. They constitute the authority for the debt counsellor to proceed with the debt review and if not in writing a dispute could easily arise in regard to these matters if the consumer had second thoughts about engaging in the process of debt review.

make a recommendation to the court in terms of section 86(7); or

(b) declare that the consumer is over-indebted, as determined in accordance with this Part and make any order contemplated in section 87 to relieve the consumer's over-indebtedness."

It is accepted that the present action constitutes proceedings in which a credit agreement is being considered and that the defendant has alleged that she is over-indebted. That suffices to make section 85 of application in these proceedings.[9]

[21] Mrs Donkin is accordingly entitled to invoke the section. However, that will not avail her in resisting the claim for the return of the motor vehicle if there is no possibility under the various forms of relief that may be granted in terms of that section to have the cancelled agreement reinstated. If the cancellation cannot be reversed then she must return the vehicle for the simple reason that the plaintiff is the owner of the vehicle and she has no lawful right as against the plaintiff to retain it. The only basis upon which she may be entitled to retain the vehicle will be if it is possible for her, by invoking the provisions of section 85, to bring about the situation where the cancellation of the agreement is set aside and the agreement is reinstated, whether on the same or altered terms. For present purposes all that I have to decide is whether that is a notionally feasible outcome of the defendant's reliance upon section 85. If as a matter of law on a proper interpretation of the relevant provisions of the Act there is no power to bring about the reinstatement of the cancelled agreement, whether on the same or varied terms, the cancellation will

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[9] *Standard Bank of SA Limited v Hales and Another* 2009 (3) SA 315 (D) at para [6]. I have some reservation whether it is correct, as held in that case, that the court has a general discretion to be exercised judicially in the application of section 85. My reservation flows from the following statement in *Schwartz v Schwartz* 1984 (4) SA 467 (A) at 473-4:

> "A statutory enactment conferring a power in permissive language may nevertheless have to be construed as making it the duty of the person or authority in whom the power is reposed to exercise that power when the conditions prescribed as justifying its exercise have been satisfied. Whether an enactment should be so construed depends on, *inter alia*, the language in which it is couched, the context in which it appears, the general scope and object of the legislation, the nature of the thing empowered to be done and the person or persons for whose benefit the power is to be exercised."

This passage was recently cited with approval in *South African Police Service v Public Servants' Association* 2007 (3) SA 521 (CC) para [17]. That this approach may possibly be applicable was clearly not drawn to the attention of the learned judge in *Hales*. However, it is unnecessary for me to explore it any further as the trial has not yet reached the stage where any exercise of discretion would arise.

remain intact and the defendant will have lost her right to possession of the motor vehicle.

[22] The NCA makes express provision for a consumer who falls into arrears to prevent the credit provider from exercising a right of cancellation, even one that has accrued, by paying the arrears, together with default charges and the reasonable costs of enforcing the agreement up to that stage.[10] However that right falls away once the agreement has been lawfully cancelled.[11] In the present case it is not disputed that the agreement was lawfully cancelled on 11 September 2008 and that as a result the defendant had lost the right to reinstate it by payment in terms of the NCA.

[23] The contention on behalf of the defendant is that reinstatement of the agreement is nonetheless a permissible consequence of the exercise of the court's powers under section 85. It is accepted that the NCA does not expressly provide for such reinstatement, but the submission is that it necessarily flows from an examination of the possible consequences of the court deciding to act under section 85. In other words the defendant contends that as the requirements for the court to act under section 85 have been fulfilled there is a possibility that the court may, under that section, make an order that will in due course have the result of the agreement being reinstated and her right to possess the motor vehicle being restored. She accordingly contends that the plaintiff is not entitled to a final order for the restoration of the motor vehicle at this stage because of the possibility that once the court has considered her arguments in terms of section 85 its order may bring about a situation where the agreement is reinstated and her right to possession of the motor vehicle is restored. It follows, so the argument goes, that until the court has determined the issues raised by her invocation of section 85 it cannot order her to return the motor vehicle to the plaintiff. As I am dealing with the trial of the action in which final relief is sought that stance is permissible. The situation might have been different if, as is frequently the case in these matters, the plaintiff had sought an interim order for possession of the motor vehicle pending the outcome of the trial. No such order was, however, sought in this case. It is accordingly necessary to consider whether the defendant is correct in contending that one possible

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10 Section 129(3).

11 Section 129(4)(c)

outcome of her resort to section 85 is an order reinstating the agreement that has been cancelled.

[24] The first option available to a court under section 85 is to refer the matter to a debt counsellor in terms of section 85(a). The debt counsellor must then evaluate the consumer's circumstances and make a recommendation to the court in terms of section 86(7). That recommendation may take various forms. The debt counsellor may conclude that the consumer is not over-indebted in which event no further relief is available to the consumer. Alternatively, even if the debt counsellor concludes that the consumer is not over-indebted she or he may decide that the consumer is experiencing, or is likely to experience, difficulty in satisfying their obligations in a timely manner. In that event they may recommend that the consumer and the credit provider (for there is only one in this situation) consider and agree on a plan of debt rearrangement.[12]

[25] Of relevance for the purposes of the present argument is a conclusion by the debt counsellor that the consumer is over-indebted. What follows from that conclusion is either a recommendation that the agreement constitutes reckless credit or a recommendation that there be a debt rearrangement or possibly both of these. In argument Ms Nel focused on the contents of a debt rearrangement as involving one or more of:

> "(aa) extending the period of the agreement and reducing the amount of each amount accordingly;
>
> (bb) postponing during a specified period the dates on which payments are due under the agreements;
>
> (cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement;
>
> (dd) recalculating the consumer's obligations because of contraventions of Part A or B of the Chapter 5, or Part B or A of Chapter 6."

The same powers of rearrangement of debt are available to the court if instead of referring the matter to a debt counsellor under section 85(a) it makes a finding under section 85(b) that the consumer is over-indebted and then makes an order

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[12] It is not clear what the court should do if it receives that recommendation and it is not accepted by the parties, but that is a question for another day and another case.

under section 87. That in turn contemplates an order that a credit agreement is reckless or a rearrangement of the consumer's obligations in any manner contemplated in section 86(7)(c)(iii).

[26] The foundation for the defendant's argument is the contention that if one examines each of the possible methods by which the consumer's obligations can be rearranged in terms of section 86(7)(c)(ii) they all presuppose the continued existence of the credit agreement in question. Thus, so it is submitted, one can only extend the period of the agreement and reduce the amount of each payment due if the agreement itself is extant. So also with the references in the other sub-paragraphs to postponing the dates on which payments are due under the agreement; extending the period of the agreement and postponing the dates on which payments are due and recalculating the consumer's obligations. The contention is that each of these possible means of debt rearrangement is only feasible if the credit agreement continues to exist. Accordingly, so the argument runs, where the credit provider has cancelled the agreement it is necessarily implicit in these provisions that in the course of a debt rearrangement the cancelled agreement can be reinstated. Of course, if that occurs, in the case of an agreement such as the one at present under consideration it must follow that the credit provider is obliged to restore the goods to the consumer or, if the goods have not yet been repossessed, that the consumer is entitled to retain them.

[27] It is true that the wording of sub-paragraphs (aa) to (cc) of section 86(7)(c)(ii) of the NCA is particularly attuned to an agreement such as an instalment sale agreement or a financial lease of movables or any other arrangement where the consumer commits herself or himself to making regular payments to the credit provider in discharge of her or his obligations. However, the implication for which the defendant contends could only arise if that was the only situation covered by these provisions. Such a narrow construction would impose substantial limitations on the process of debt review that are inconsistent with the purposes of debt review and the broader purposes of the NCA itself. Those purposes are set out in section 3 of the Act and three of them seem particularly apposite to the present issue. The relevant portions of section 3 read as follows:

> "The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent,

> competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by:
>
> (a)-(b) …
>
> (c) Promoting responsibility in the credit market by –
>
> (i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and
> (ii) discouraging reckless credit granting by credit providers and contractual default by consumers;
>
> (d)-(f) …
>
> (g) 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;
>
> (h) …
>
> (i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements."

The emphasis is on the consumer reaching a point where their debts are discharged as such debts may exist at a particular point in time.

[28] Were the process of debt restructuring to be restricted in the manner suggested by the defendant to circumstances where there are ongoing payment obligations by the consumer that can be revised as to amount and extended as to the period over which they are to be paid, a very considerable number of debts that would contribute to the consumer's over-indebtedness could not be affected by the debt rearrangement. While some debts such as those under instalment sale agreements, mortgage bonds or leases of movable or immovable property will fit the model of sources of indebtedness requiring the consumer to make regular payments to the credit provider, many other instances will not. Thus the indebtedness on an overdraft is repayable in its entirety within a reasonable period of demand. The standard fare of households that are over-indebted consists of things such as overdrafts, overdue credit cards, accounts for clothing and similar household goods, the pharmacist's bill and the like that do not necessarily involve the payment of instalments at regular intervals. Unless all those debts form part of the debt rearrangement process it may be rendered a futile exercise. That was clearly not the intention of the NCA. In my view it is plain that the intention of the NCA is that all the debts of

an over-indebted consumer can be the subject of a debt review and a debt rearrangement. That will be so whether the debts arise from the non-fulfilment by the debtor of periodic obligations under credit agreements or are lump sums payable immediately or within a reasonable period of demand.

[29] That view is reinforced by having regard to the provisions of section 79(1) where the concept of a consumer being over-indebted is set out. The consumer is over-indebted if on the available information it appears that the consumer is or will be unable to satisfy in a timely manner "**all** the obligations under **all** the credit agreements to which the consumer is a party" having regard to the consumer's financial means, prospects and obligations and their history of debt repayment. The references to all the consumer's obligations and all the credit agreements to which the consumer is a party are particularly telling. It serves to dispel entirely the notion that debt review and debt rearrangement is limited to certain types of indebtedness alone. When section 86(7)(c)(ii) is seen through the prism of that understanding of the purpose of debt review and debt rearrangement its provisions are readily capable of being applied as much to a lump sum indebtedness immediately due as to an ongoing indebtedness under an agreement.

[30] This understanding of the scope of debt review and debt rearrangement is reflected in Regulation 24 and form 16 to the Regulations. A consideration of the Regulation and the form reveals that their purpose is to obtain a comprehensive picture of the consumer's means and the consumer's obligations. It includes not only the conventional household debts to which I have referred but also debts such as those arising under a deed of suretyship, which would ordinarily relate to an indebtedness in a fixed amount payable immediately. That flows from the principle that the liability of the surety is accessory to that of the principal debtor and accordingly it is only where the principal debtor's liability is due that it will be permissible to seek recovery from the surety.

[31] There is one further point that should be made in this regard. It is that in determining whether a consumer is over-indebted the debt counsellor or the court, as the case may be, is charged with determining the consumer's financial position at the time of the enquiry into that consumer's over-indebtedness. The enquiry looks to the ability of the consumer to satisfy the obligations existing at the time of the

enquiry. It is not concerned with past obligations but with existing obligations and the ability of the consumer at present and in the future to discharge those obligations. Thus in looking at the extent of the consumer's obligations in respect of a credit facility or a credit guarantee[13] what is examined is the settlement value, representing the sum payable at the time of the investigation to extricate the consumer from that obligation. That is important because an instalment sale agreement such as the one under consideration in this case constitutes a credit facility in terms of section 8(3)(a) of the NCA. All of this makes it clear that the process of debt review and debt rearrangement involves looking at the global picture of the consumer's obligations at the time of such debt review and debt rearrangement. What follows from this is that if a particular agreement has been cancelled prior to the debt review or debt rearrangement process, the obligation that falls for consideration in that process is the obligation as it existed after such cancellation not the obligation whilst the agreement was still extant.

[32] It may be that an unanticipated side effect of this is that it operates as an incentive to a credit provider who supplies goods, such as the plaintiff in this case, to cancel an agreement and seek repossession of the goods rather than to have the goods caught up in a process of debt review and potential debt rearrangement.[14] However, it would be surprising if in complex legislation of this type, such effects did not arise and they may in practice be less important than they appear at first glance as in many instances of debt rearrangement one would anticipate that the underlying credit agreement would be terminated and the goods restored to the credit provider against an agreement to pay a diminished surrender value over a specified period of time. After all the process of debt rearrangement is not one-sided. The credit provider is entitled to terminate the debt review in respect of a particular credit agreement under section 86(10) and may oppose a debt rearrangement by the court under section 87(1) of the NCA. The apparent anomaly may therefore prove less troublesome in practice than it might at first sight appear. It does not provide a basis for a conclusion that debt review and rearrangement may involve the compulsory reinstatement of a cancelled agreement.

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13 Both a credit facility and a credit guarantee constitute credit agreements in terms of section 8(1) of the Act. A credit facility is defined in section 8(3) and a credit guarantee in section 8(5).

14 This is a possibility to which Professor Otto, *supra*, pp 86-7 adverts.

[33] It follows that the defendant's contention that a cancelled instalment sale agreement, such as her agreement with the plaintiff, can be reinstated as a result of a debt rearrangement flowing from a court's order under section 85 of the NCA cannot be sustained. The NCA does not itself expressly provide for such reinstatement and all the textual and contextual indications point in the opposite direction. Accordingly the defendant's invocation of section 85 in this case can only operate in respect of her obligations to the plaintiff arising from the cancellation of the instalment sale agreement and cannot serve to reinstate that agreement. That being so her right to retain possession of the motor vehicle was terminated by the plaintiff's cancellation of the instalment sale agreement. That right cannot be restored through the mechanisms of the NCA. Accordingly my answer to the third question posed by the parties is that an order under section 85 cannot have the effect of reinstating the cancelled agreement for the purposes of a debt rearrangement and can only relate to damages and other claims that the plaintiff may have after the vehicle has been repossessed and sold.

[34] That conclusion means that the defendant is not entitled to resist the plaintiff's claim for the return of the motor vehicle. This leaves only the question of the costs of the proceedings thus far. In terms of the agreement it is provided that the plaintiff is entitled to recover costs on the scale as between attorney and client, but it was accepted by counsel that the court nonetheless retains a discretion as to the proper order in regard to the costs of these proceedings and the scale on which they should be paid. Whilst that may be so it is a judicial discretion that cannot simply be based on sympathy for a person finding herself in dire financial circumstances or on avoiding inequity or oppressiveness that has not been demonstrated.[15]

[35] I accordingly make the following orders:

1. An order confirming the cancellation of the instalment sale agreement concluded between the plaintiff and the defendant on 12 September 2006 in

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[15] *S A Permanent Building Society v Powell and others* 1986 (1) SA 722 (A) at 728A-729C. It is not for me as a judge of first instance to depart from a considered decision of that court in the absence of a full argument that the enforcement of such an agreement would be contrary to current constitutional norms such as the right of access to courts and that this should affect the exercise of my discretion and even then it may be doubtful whether this course would be open. *Ex Parte Minister of Safety and Security: in re S v Walters* 2002 (4) SA 613 (CC) paras 57-61.

terms of which the plaintiff sold to the defendant a BMW 120d motor vehicle with engine number 87566109 and chassis 60PW68595.

2. An order that the defendant restore and redeliver the motor vehicle to the plaintiff.
3. An order that the defendant pay the costs of the action up to and including the hearing on 25 May 2009 on the attorney and client scale.
4. All other claims for relief by the plaintiff are adjourned in accordance with the order for the separation of issues.

DATE OF HEARING	25 MAY 2009
DATE OF JUDGMENT	4 JUNE 2009
PLAINTIFF'S COUNSEL	MR L.W. DE BEER
PLAINTIFF'S ATTORNEYS	BASCERANO NEL & RICHTER INC. c/o NICOLSON, STILLER & GESHEN
DEFENDANT'S COUNSEL	MS C A NEL
DEFENDANT'S ATTORNEYS	AMC HUNTER INC