REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT
DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO.16975/09

In the matter between

BMW FINANCIAL SERVICES
(South Africa) (Pty) LIMITED Plaintiff

and

VISHALAN PATCHIAPPEN MUDALY Defendant

J U D G M E N T

Del. 20 August 2010

WALLIS J.

[1] On 31 August 2007 Mr Mudaly purchased a second-hand BMW M3 SMG from BMW Financial Services (BMW) for a total price of R432 139.38. He agreed to repay this over five years by way of fifty-nine payments of R6 272.87 and a final balloon payment of R62 040.00. During the year following the conclusion of the agreement he made eleven payments, although twice there were temporary defaults. However from September 2008 onwards he made no further payments and as at December 2009 owed R300 621.50 under the agreement.

[2] On 19 May 2009 BMW sent a notice to Mr Mudaly by registered post in terms of s 129(1)(a) of the National Credit Act[1] (the NCA). More than 10 business days later on 8 June 2009 Mr Mudaly made an application to a firm of debt counsellors, Fidelity Debt Counselling Services (Pty) Limited, for debt

1 Act 34 of 2005.

review in terms of s 86(1) of the NCA. A proposal was formulated by the debt counsellor and circulated to creditors, including BMW, but rejected by them. On 7 October 2009 attorneys acting on the instructions of the debt counsellor lodged an application with the clerk of the Magistrates' Court, Chatsworth, for an order for the re-arrangement of Mr Mudaly's obligations in terms of s 87(1)(b)(ii) of the NCA. That application was not, however, served although, on 20 October 2009, the attorneys wrote to BMW informing them that the application had been issued. Service was only effected on BMW on 4 December 2009.

[3] In the meantime on 30 October 2009 BMW gave notice in terms of s 86(10) of the NCA to terminate the debt review. A letter cancelling the credit agreement was sent on 2 November 2009 and the present proceedings for repossession of the motor vehicle and other relief were commenced on 11 December 2009.

[4] At this stage of the proceedings BMW seeks an order for the return of the motor vehicle. Its case is that in consequence of Mr Mudaly's breach the agreement has been cancelled and, as it retains ownership of the vehicle, it wishes to recover its property. Mr Mudaly claims that because he commenced a process of debt review in terms of the NCA he does not have to restore the motor vehicle until the magistrate has dealt with the application in terms of s 86(8)(b)(ii) of the NCA. In the alternative he contends that he is over-indebted and that in terms of s 85 of the NCA the court should make an order to rearrange his obligations, the effect of which will be that he may retain the motor vehicle.

[5] The first issue is whether the agreement between Mr Mudaly and BMW was ever subject to the process of debt review that he initiated through Fidelity Debt Counselling Services. This depends upon the proper interpretation of s 86(2) of the NCA which reads:

'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 that credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement.'

It will be recalled that BMW had given notice in terms of s 129(1)(a) to Mr Mudaly and the period of 10 business days had elapsed without response before he commenced the process of debt review. The question is whether as a result BMW had taken the steps contemplated in s 129 so that this particular agreement fell outside the process of debt review.

[6] Since the inception of the NCA the interpretation of s 86(2) has provoked considerable academic debate spawning differing views. The debate starts with an article by Professors van Heerden and Otto entitled '*Debt Enforcement in terms of the National Credit Act 34 of 2005*'[2] where they say:

'A question that inevitably arises in the context of the section 129(1)(a) is whether a party to whom such a notice is delivered may apply for debt review. Different schools of thought prevail in this regard. On the one hand, there is the view that section 86(2) prevents a consumer to whom a section 129(1)(a) notice has been delivered from applying for debt review. Section 86(2) provides that an application for debt review 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 has proceeded to take the steps contemplated in section 129 to enforce that agreement. On the other hand, it may be argued that the steps mentioned in section 129 are not steps *to enforce the agreement*, but are merely required procedures *before debt enforcement.*

It may be asked what would happen if a consumer to whom a section 129(1)(a) notice has been delivered approaches a debt counsellor for the purpose of bringing his payments up to date and it then transpires that he is seriously over-indebted. Must the debt counsellor now inform him that the debt counsellor cannot assist him any further because of the fact that the consumer has received a section 129(1)(a) notice and that the consumer should now wait until

2 2007 TSAR 667

the matter is before a court in order to raise the issue of over-indebtedness? Clearly by that time the consumer may be in an even greater predicament.'[3]

The authors suggest that there should be an amendment of section 86(2) to substitute section 130 for section 129, but no such amendment has been made.

[7] The authors of an article in *De Rebus*[4] say that:

'As the notice contemplated in s 129(1)(a) will contain a proposal to a consumer to refer the credit agreement to a debt counsellor, it would seem that the steps referred to in s 86(2) refer, at least, to the service of a summons on the consumer to enforce the debt (but see Otto 85 fn 25 for a contrary view).'[5]

Whilst Professor Otto holds the view that service of a notice is sufficient to exclude a credit agreement from the debt review process this is not the view espoused by Professor van Heerden in her contribution to Scholtz *et al, Guide to the National Credit Act*[6] where she writes:

'Section 86(2) provides that an application in terms of section 86 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 that credit agreement had proceeded to take the steps contemplated in section 129 to enforce the agreement. As section 129 refers to steps required *before* debt enforcement, it is submitted that the legislature actually intended the debt-review process to be available to a consumer for as long as the credit provider does not serve a summons on him. Court proceedings commence when a summons is served to enforce a consumer's obligation under a credit agreement. If the consumer then wishes to rely on over-indebtedness, the matter must be dealt with in terms of section 85 which empowers the court either to refer the matter to a debt counsellor for evaluation or recommendation or to make such a declaration itself.'

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3 At 667-668.

4 Danie van Loggerenberg SC, Leon Dicker and Jacques Malan, '*Aspects of Debt Enforcement under the National Credit Act'* 2008 (January/February) DR 40.

5 The reference is to Professor Otto's *The National Credit Act Explained* where the author simply 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 s 129.

6 Para 11.3.3.2(d), p11-10 (Issue 2).

[8] Professor Boraine and Mr Renke regard the issue of summons, rather than its service, as crucial when they say:

'It is our submission that, as s 86(2) refers to steps contemplated in s 129 (in other words the whole of s 129 and by incorporation also s 130), and not only to the steps contemplated in s 129(1)(a) to enforce the agreement, the issue of summons is meant. To interpret s 86(2) to read that the delivery of the s 129(1)(a) notice to the consumer means that the credit provider has proceeded to take steps to enforce the agreement (with the effect that no application for debt review may be made) would be nonsensical as it is proposed in the s 129(1)(a) that the consumer refers the matter to a debt counsellor.'[7]

[9] From a judicial perspective in *National Credit Regulator v Nedbank Limited and Others* 2009 (6) SA 295 (GNP) at 318E-319B du Plessis J was asked to make a declaratory order that:

'The reference in s 86(2) to the taking of a step in terms of s 129 to enforce a credit agreement is a reference to the commencement of legal proceedings mentioned in s 129(1)(b) and does not include steps taken in terms of s 129(1)(a) of the National Credit Act, 2005.'

Although all the parties before him agreed that such an order should be made the learned judge declined to do so. He said:

'In my view the purpose of s 86(2) is to ensure that consumers do not apply in terms of s 86(2) to be declared over-indebted only to frustrate a credit provider who has already started to enforce a credit agreement under which the consumer is in default. While s 129(1)(a) envisages alternative dispute resolution and 'a plan to bring the payments under agreement up to date', it does not envisage general debt-restructuring under ss 86 and 87. Moreover, even the steps set out in s 129(1)(a) are preliminary to debt enforcement. I am not satisfied that the parties are correct in their interpretation of s 86(2). In the absence of full argument, and in view thereof that there are many other persons with an interest in this order, I deem it unwise to say more than that. In the exercise of my discretion the order will not be granted.'

[10] In a footnote the learned judge mentioned that he seemed to recall that he had previously delivered a judgment on the topic. His recollection was correct.

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7 A Boraine and S Renke '*Some Practical and Comparative Aspects of the Cancellation of Instalment Agreements in terms of the National Credit Act 34 of 2005 (Part 2)'* 2008 De Jure 1 at 9 fn 186.

In *Nedbank Limited v Ditsheho Isaac Motaung*, Case No.2245/07 (TPD) he dealt with the contention that the case before him was barred by s 130(3)(c)(i) of the NCA because the matter was before a debt counsellor when the action was instituted. The facts of the case were similar to the present one. An s 129(1) notice had been delivered to the defendant on 15 February 2007 and the application for debt review was made on 17 September 2007. Du Plessis J held that when the application for debt review was made the plaintiff had already proceeded to take the steps contemplated in s 129 to enforce the agreement and accordingly the application for debt review did not apply to the credit agreement under consideration before him. A similar view was apparently expressed by Lamont J in *R F Potgieter v Greenhouse Funding (Pty) Limited and Another* WLD Case No 31825/2008 delivered on 20 January 2009, which is not available to me, and these decisions were followed by Southwood J in *Mercedes Benz Financial Services SA (Pty) Limited v A J H Viljoen*, North Gauteng Case No 18995/09 delivered on 19 November 2009.[8]

[11] In addressing the issue it is important to recognise at the outset that the debt review process under s 86 is fundamentally different from that which arises if a consumer in default under a credit agreement accepts the proposal of the credit provider in a notice under s 129(1)(a) to refer the credit agreement to a debt counsellor. The process under s 86 is one directed generally at the consumer's financial affairs and in the first instance at securing a declaration that the consumer is over-indebted. In terms of s 79(1) a consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that he or she 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. By contrast a notice under s 129(1)(a) affords the consumer the opportunity of

8 The problem is one I noted but did not decide in *BMW Financial Services (SA) (Pty) Limited v Donkin* 2009 (6) SA 63 (KZD) paras [11] and [13] and footnote 4.

referring the particular agreement in respect of which such notice is given to a debt counsellor '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'. The proposal is directed at achieving a situation where the consumer and the credit provider, through the agency of the debt counsellor, negotiate a resolution to the consumer's particular difficulties under a particular credit agreement. It is a consensual process the success or failure of which will depend upon whether the parties can arrive at a workable basis upon which to resolve the issues caused by the consumer's default. By contrast s 86 may lead to a court-imposed rearrangement of the consumer's obligations in terms of s 87(1)(b)(ii) of the NCA. The invitation extended to the consumer by a credit provider under a notice in terms of s 129(1)(a) is not an invitation to engage in a general process of debt review. It is a limited process directed at resolving the consumer's difficulties under a particular credit agreement.

[12] The fallacy that the acceptance by a consumer of a proposal by a credit provider under s 129(1)(a) to refer a particular credit agreement to a debt counsellor involves an application for debt review under s 86(1) underpins the views expressed in some of the academic writing.[9] I agree with the view expressed by du Plessis J in the *National Credit Regulator* case that s 129(1)(a) 'does not envisage general debt-restructuring under ss 86 and 87'. That was also the conclusion I reached in *Donkin's* case, *supra,* where I said:

'…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 s 86, which depends upon the debtor being over-indebted. While a person who has fallen into arrears in terms of a credit agreement may well be over-indebted and a reference to

9 For example, van Loggerenberg *et al* and Boraine and Renke. The passing suggestions to similar effect in *First Rand Bank Limited v Olivier* 2009 (3) SA 353 (SECLD) para [17] 360B-C and *Starita v Absa Bank Limited and Another* 2010 (3) SA 443 (GSJ), para [12], that such reference is one under s 86 are with respect incorrect.

a debt counsellor consequent upon a notice in terms of s 129(1)(a) could conceivably lead to an agreement between the consumer and the credit provider that a debt review under s 86 is desirable, this is not necessarily the case.' [10]

After reconsidering the matter I remain of that view.

[13] The language of s 86(2) occasions some difficulties. It refers in the plural to the 'steps contemplated in section 129' to 'enforce' the agreement. That seems incompatible with this merely requiring the giving of notice under section 129(1)(a), both because that is a single step and because it is not a step directed at enforcing the agreement but at resolving the problem occasioned by the consumer's default. Consistently with the language used this must then be a reference to s 129(1)(b), which refers to both the giving of notice and meeting the requirements in s 130. Does that however justify the conclusion that the steps must include the commencement of legal proceedings?

[14] In my view the relevant provision referred to in s 86(2) is s 129(1)(b), as that makes sense of the use of the plural 'steps'. However, there is nothing in that section that suggests that these steps include the commencement of legal proceedings. The section prescribes the steps that must be taken prior to legal proceedings being commenced. Those steps are the giving of notice under s 129(1)(a), or the termination of a pre-existing debt review under s 86(10), and 'meeting any further requirements set out in section 130'. The further requirements are those set out in ss (1) and (2) of s 130. In the first instance those involve the elapse of certain periods of time and the failure of the consumer to remedy the default during those periods. They may involve the consumer simply not responding to the notice (sub-sect 1(b)(i)) or rejecting the credit provider's proposals (sub-sect 1(b)(ii)). Where the agreement is an instalment agreement, a secured loan or a lease it becomes relevant whether the consumer has surrendered the relevant property to the credit provider. If the consumer has surrendered the property then the further requirements set out in s 130(2) must be met before any action can commence.

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10 Para 10.

[15] It follows that on the basis of s 129(1)(b) there are various steps which the credit provider will have to take before action can be commenced and the debt enforced. Those steps do not include the commencement of proceedings to enforce the debt, but are prior to it. As a straightforward matter of the language of s 86(2) it seems to me that the problems disappear if one construes the expression 'the steps contemplated in section 129 to enforce that agreement' as referring to the steps in s 129(1)(b). In other words it refers to the steps that must be taken by the credit provider in order to arrive at the point where they are entitled to commence legal proceedings to enforce the agreement. Those steps may be positive, such as the giving of notice, the acceptance of the surrender of the property and the sale of the property, or may be negative such as the obligation to await the elapse of the time periods in s 130(1) and 130(1)(a). Whatever their character once those steps have been taken the credit provider is entitled to commence legal proceedings. It is at that stage, as a matter of language, that s 86(2) debars the consumer from applying for debt review.

[16] As with any other question of statutory construction that provisional conclusion should be tested in the light of the context provided by the Act viewed as a whole. Are there any indications in the Act and the scheme that it provides that militate against this construction and in favour of a different view? In my view there are none. The purposes of the Act are set out in s 3 and it is unnecessary to rehearse them in full here. They are directed at providing protection to the consumer and redressing the imbalance that will usually exist between the credit provider and the consumer. They aim to prevent exploitation of the consumer by reckless lending and to facilitate the resolution of the difficulties that afflict consumers who become over-indebted. In doing so a balance is to be struck between the interests of the consumer and those of the credit provider. That flows from the fact that in addressing the over-

indebtedness of consumers the Act aims to provide mechanisms based on the principle of satisfaction by the consumer of all responsible financial obligations.[11] The provisions of s 86 and ss 129 and 130 seek to provide that balance by establishing mechanisms for the review of a creditor's indebtedness, either in relation to a particular agreement or in relation to over-indebtedness generally, whilst also preserving the right of the credit provider if those mechanisms do not succeed in resolving the problem, to enforce the agreement.

[17] On the interpretation suggested by the language the consumer who runs into financial difficulties may apply for debt review at various stages. They may apply before any of their creditors start to complain of defaults and take steps to enforce their agreements. Alternatively the consumer may be alerted to those problems by a notice under s 129(1)(a). If the difficulty confronting the consumer is an isolated one then the sensible approach is to respond positively to the credit provider's proposal that the particular agreement be referred to a debt counsellor or other agency with a view to resolving disputes and developing and agreeing on a plan to bring the payments under the agreement up to date. If the consumer realises that their problem is a broader one then they have the time provided for in s 130(1)(a) to bring an application for debt review in order to obtain a declaration that they are over-indebted. If they are engaged in the consensual process with one credit provider there is no reason why they should not agree that the process cease and an application for general debt review be brought. They can also commence a debt review from which this particular agreement is excluded.

[18] This approach does not debar the consumer from obtaining a debt review as seems to be thought by some of the academics. If, the consumer does not take

11 Sections 3(g) and (i).

advantage of those opportunities, so that the credit provider becomes entitled to commence proceedings to enforce the debt, why should the credit provider be prevented from doing so? As pointed out in the *National Credit Regulator* case[12] there is no reason to construe s 86(2) as enabling the consumer to frustrate a credit provider who has already reached the stage of being entitled to enforce their agreement by way of legal proceedings. An application for debt review under s 86(1) should be directed at resolving the consumer's financial difficulties prior to the need to resort to litigation not at creating a barrier to legitimate recovery proceedings.

[19] That conclusion is reinforced by three factors. First s 86(2) is not an absolute barrier to debt review. It only precludes the incorporation in a general process of debt review of the particular agreement that is excluded by s 86(2). Second, it does not preclude the consumer from raising the question of over-indebtedness in any proceedings instituted by the credit provider. That right is preserved by s 85. Under this section the court may be asked to refer an excluded credit agreement to a debt counsellor. Thus, if the consumer has commenced a general process of debt review in relation to all other credit agreements the court could effectively make an order that would result in a consolidation of all credit agreements in one debt review process. Thirdly, if the intention were that s 86(2) would only apply if the consumer had commenced proceedings to enforce an agreement, there seems to be no conceivable reason why the section would not simply have said so. There would be no need at all for it to refer to the credit provider taking the steps contemplated in s 129 if it was intended that the relevant part of s 86(2) should be construed as if it read:

'…if, at the time of that application, the credit provider has lawfully commenced proceedings to enforce that agreement.'

12 P318 I-J.

[20] It follows that the correct interpretation of s 86(2) lies somewhere between the views of those who hold that it is triggered by the giving of notice under s 129(1)(a) and those who contend that it only operates once legal proceedings have commenced. In my view the proper construction is that the bar in s 86(2) to the inclusion of a particular credit agreement in a debt review process comes into existence when the credit provider under that agreement has taken all steps necessary to enable it lawfully to commence legal proceedings. If all the requirements laid down in ss 129 and 130 for the commencement of legal proceedings to enforce the agreement have been satisfied a debt review application under s 86(1) will not extend to that credit agreement.

[21] In this case BMW Financial Services sent its notice in terms of s 129(1)(a) to Mr Mudaly on 20 May 2009. He did not respond to the notice and more than ten business days elapsed after the delivery of the notice before he attempted to apply for debt review. In the circumstances the debt review by Fidelity Debt Counselling Services did not apply to the agreement in issue in this case. It is not suggested that BMW waived its rights to advance this contention in consequence of their allowing the period of sixty days referred to in s 86(10) to elapse or giving notice under that section. In those circumstances Mr Mudaly's reliance upon the debt review process is misplaced, and the plaintiff's cancellation of the agreement was lawful.

[22] In the light of that conclusion it is perhaps unnecessary to deal with the alternative contention on behalf of BMW that they had lawfully brought the debt review process to an end in terms of s 86(10) of the NCA. However as it leads to the same conclusion it is best to deal with it in case I am wrong on the first point.

[23] The assumption underlying this point is that the debt review process included the credit agreement between Mr Mudaly and BMW. In terms of s 86(10):

'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.'

BMW sent such a notice on 30 October 2009 more than 60 days after the date on which Mr Mudaly applied for the debt review. His contention is that the giving of such notice was impermissible because Fidelity Debt Counselling Services had by that time referred the matter to the Magistrates' Court with its recommendation in terms of s 86(8)(b) of the NCA. This contention raises a number of issues but it is unnecessary to go into those matter because they depend upon the correctness of the contention that the debt counsellor had referred the matter to the Magistrates' Court under s 86(8)(b). In the absence of that factual underpinning the contention is without merit.

[24] In the *National Credit Regulator* case it was held that a reference in terms of s 86(8)(b) is an application falling within rule 55 of the rules of the Magistrates' Court. That was not disputed before me and in my view it is correct. In terms of rule 55(1) an application to the court for an order affecting any other person shall be on notice, which shall be delivered, in cases where the State is not the respondent, not less than ten days before the date of hearing. Rule 2(1) defines 'deliver' as meaning 'to file with the clerk of the court and serve a copy on the opposite party'. In other words a person who delivers an application under s 86(8)(b) has only done so once it has been served on both

the clerk of the court and all other parties. Until that happens the debt counsellor has not referred the matter to the Magistrates' Court and it is permissible for a credit provider to terminate the debt review process in respect of a particular credit agreement by giving notice in terms of s 86(10). That is a sensible conclusion because otherwise the consumer could obtain an indefinite moratorium by the expedient of the debt counsellor serving an application to refer a matter to the Magistrates' Court with a recommendation under s 86(8)(b) on the clerk of the court but not serving it on any of the affected creditors. Then any attempt by a creditor to enforce the agreement would be met by the contention that the matter had been referred to the Magistrates' Court.[13]

[25] No reason has been advanced why the application lodged at court on 7 October 2009 was not served immediately on BMW. Whatever the reason, this was not done until 4 December 2009. Until that stage therefore the debt review process was still in train and the matter had not been referred to the court. Accordingly BMW was entitled to terminate the debt review in relation to its credit agreement by way of notice under s 86(10). That is what it did and it was entitled to do so. In the result I hold that Mr Mudaly's endeavours to rely upon his application for debt review as a bar to the plaintiff's claim are ill-founded. That leaves only the question of over-indebtedness in terms of s 85.

[26] The first question is whether Mr Mudaly is over-indebted in the sense given to that expression by s 79 of the NCA. As I am asked to apply s 85 on the basis that Mr Mudaly is over-indebted the determination falls to be made at the date of trial. In making it s 79(1) requires me to have regard to Mr Mudaly's financial means, prospects and obligations and probably propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the

13 I accordingly agree with the conclusion to this effect in *SA Securitisation (Pty) Limited v G Matlala* in South Gauteng Case No.6359/2010 at para [16]

consumer is a party, as indicated by the consumer's history of debt repayment. I agree with Masipa AJ in *Standard Bank of SA Limited v Panayottis* 2009 (3) SA 363 (W), para [55] that it is for a consumer who raises the defence of over-indebtedness to establish on a balance of probabilities that he or she is over-indebted as envisaged by the section.

[27] In evidence Mr Mudaly was simply taken through the various credit agreements reflected in the form 16 provided to the debt counsellors. Those showed, as at June 2009, that he had total obligations of R2 720 109.21. The primary indebtedness was a mortgage bond in favour of Standard Bank over certain immovable residential property. The amount owing at the date of trial was in excess of R1.7 million. Then there were two credit agreements with BMW, the one in respect of the BMW M3 that is the subject of this case and the other in respect of a Mercedes Benz C55 AMG that he had purchased a few months prior to buying the BMW. There he owed some R523 000. The existence of these debts was not in issue. The remaining debts were for amounts less than R100 000.

[28] It is plain that Mr Mudaly has not been servicing these debts. However, as Ms Olsen pointed out, the reasons for that are wholly obscure. Mr Mudaly operates a business through a close corporation called Diesel Bulk Haulage cc of which he is the sole member. According to the credit application that he signed in August 2007 when he purchased the BMW he had at that time been employed by that business for some three years. In evidence-in-chief he made no endeavour to produce any information in regard to the business, its turnover, its profitability or the income that he derived from it. In cross-examination he suggested that during 2006 the turnover of the business had been R120 000 to R130 000 per month and that this increased in the following year to R160 000 to R180 000 per month. He said that by 2008 it had reached R180 000 to

R190 000 per month and occasionally R200 000. He said that from 2006 to 2008 his drawings were between R40 000 and R50 000 per month, although he told BMW in August 2007 that his gross remuneration and net take-home pay was R80 000 per month. This discrepancy was not explained. All he said in regard to the various credit agreements that were the subject of the debt review (including the present one) was that at the time he incurred those debts he was comfortably able to service them.

[29] Mr Mudaly said that the reason for the turnaround in his fortunes was that in July 2008 he had committed both his vehicles to a single contract in the Eastern Cape in terms of which he made those vehicles available to a contractor called Mertiq, that was itself a sub-contractor to the party providing transport services to the client. He says that he performed the work for three months but was not paid as a result of which his business ran into cash flow difficulties and this is the source of his current financial problems. Not a single document was produced in this regard.

[30] According to the form 16 provided by Mr Mudaly and confirmed by him as being true and correct his gross salary at June 2009 (and currently) is R25 000. When asked whether this was before or after tax he looked bemused and was unable to answer. He provided no document to suggest that the figure is correct even though it should be reflected in the books of account of the close corporation and there should be entries in bank statements relating to it. In addition the records provided to SARS should also be available to provide ready substantiation for his claim. None were produced and the debt counsellor was unable to say how he verified this or indeed any of the information in the form. The overwhelming impression is that the debt counsellor did not bother to verify the amounts given to him.

[31] An examination of the bank statements produced by Mr Mudaly was equally unsatisfactory. They were statements with ABSA Bank for the period from 31 August 2008 to 30 January 2009. As far as can be seen the account existed solely for the purpose of paying the debit orders in favour of BMW in respect of the two motor vehicles. During this period they reflect only two external deposits, one of a cheque that was subsequently stopped and a small cash deposit. A cheque from the close corporation was deposited into the account in September 2008 but dishonoured. Other than demonstrating that Mr Mudaly was not paying his bills the bank statements are unhelpful in showing why this is so. What is clear from this bank account is that it does not reflect Mr Mudaly's drawings from the business.

[32] There are other problems with the documents that have been produced. Thus they reflect only one credit card issued by ABSA Bank. However, amongst the documents produced by Mr Mudaly is an account from First National Bank in respect of what appears to be a platinum credit card showing an outstanding balance of R56 861.59.[14] In regard to a Sanlam Loan that is disclosed as a debt in an amount of R52 947.82 there is a notice dated 22 October 2008 of a debit order against an ABSA Bank account 4066573869. That is not the account for which some statements have been produced. Nor does the personal loan account number (BAU 93588T) match the number of the account on the unsecured loan disclosed in form 16. In respect of that latter loan there is a document referring to an authorisation to deduct amounts due to the lender from a Standard Bank account in Mr Mudaly's name.[15] No statement has been produced in respect of that account and no explanation of what has happened to it. On the documents that have been produced therefore there are bank accounts and a credit card that

14 Exhibit D 6.

15 Exhibit D 2.

do not feature in the debt review and no explanation for this. Quite plainly there has been no proper attempt to comply with his obligations in regard to discovery.

[33] Finally Mr Mudaly was asked whether the business still had a bank account and whether he was in possession of any business accounts for 2008 or 2009. He blandly answered in the negative. When I asked him how he was managing to conduct the business in those circumstances, his answer was that his fiancée has an account, which he described as a 'sole trader account' in the name of Diesel Bulk Haulage. Apparently the income of the business goes through that account and its expenses are paid from that account. However it also contains personal funds belonging to his fiancée, who was present in court but not called as a witness. He was asked whether he had given any statements in respect of that bank account to the debt counsellor and he answered in the negative.

[34] All one can say about this is that it demonstrates a deplorable failure on the part of Mr Mudaly to produce information and documents that were plainly relevant to determining whether he is over-indebted. I do not see on what basis the court can have regard to Mr Mudaly's financial means, prospects and obligations and his probable propensity to satisfy his obligations when he has chosen not to make anything remotely resembling a full disclosure of his financial position. The court is faced with a man who admittedly owes in excess of R2 million and is seeking protection under the NCA, but retains a house, two luxury motor vehicles and continues to operate his business, albeit through the agency of a third party, without any proper attempt at disclosure. Inevitably the suspicion must arise that he is concealing the true state of affairs from the court. Certainly he has not taken the court into his confidence.

[35] In those circumstances there is much to be said for Ms Olsen's contention that Mr Mudaly has not discharged the onus of proving that he is over-indebted. However, I cannot entirely disregard the fact that substantial credit providers were satisfied with his creditworthiness and his ability to repay amounts in excess of R40 000 per month in 2007. I also cannot disregard the fact that for a period of about a year he appears to have managed to service these debts. As in my view there are other reasons why he is not entitled to relief in terms of s 85 I prefer not to decide the case on the basis of a failure to discharge the onus of proving over-indebtedness.

[36] In terms of s 85 if a court is satisfied that a consumer is over-indebted the court may either refer the matter directly to a debt counsellor for the purpose of the debt counsellor making a recommendation to the court in terms of s 86(7) or declare that the consumer is over-indebted and make any order contemplated in s 87 to relieve the consumer's over-indebtedness. In *Standard Bank of SA Limited v Hales and Another* 2009 (3) SA 315 (D) this court held that s 85 confers a discretion upon the court whether to grant relief under that section even where the consumer demonstrates that he or she is over-indebted. In *Donkin*[16] I expressed a reservation as to whether there is a general discretion or whether s 85 confers a power to act if the consumer is over-indebted and imposes a duty in the ordinary course to exercise that power. On further reflection I think that my reservation was misplaced. My reason for saying this is that it is clear from the provisions of the Act and in particular s 87(1)(a) that not every case of over-indebtedness will lead to an order in favour of the consumer rearranging their obligations. Even if, after a process of debt review, the debt counsellor has made a recommendation for rearrangement and referred it to the Magistrates' Court that court is obliged to conduct a hearing and having

16 Footnote 9

regard to the proposal and information before it and the consumer's financial means, prospects and obligations may reject the recommendation. Once it does so that is an end to the matter and there is no further bar in the statute to creditors seeking to recover what is due to them. It seems to me that if those are the powers of a magistrate upon a referral under s 86(8)(b) then this court, when seized of a case of over-indebtedness under s 85 must similarly be entitled to refuse to make any order. A rearrangement of the consumer's obligations is not a necessary outcome of over-indebtedness and the process of debt review.

[37] On the assumption therefore that Mr Mudaly is over-indebted the question is whether the court should grant either form of relief set out in s 85. There is clearly no point in referring the matter to a debt counsellor. That has already been done and for the reasons I have given BMW falls outside that debt review process. In any event the debt rearrangement plan put forward by the debt counsellor is before me and it is accordingly possible for the court to assess whether that plan would permit Mr Mudaly to satisfy in a timely manner all his obligations under the credit agreements. However, when the plan is examined I have no hesitation in saying that if anything it demonstrates that there is almost no prospect of his doing so. I say so for the following reasons.

[38] The plan relates to eight creditors of which the Standard Bank is by far the largest (over R1.7 million at the present day) in respect of a home loan. The loan has been taken in respect of a property in which Mr Mudaly does not reside. He told us that the windows and doors have been knocked out and many of the interior walls have been demolished as part of a process of refurbishment. This has left the house uninhabitable and no doubt substantially diminished its value as security. The proposal by the debt counsellor reflects that the current loan of over R1.7 million would have to increase over the next twenty years, without any repayment of capital at all, to a figure of some R6.7 million. Only

thereafter, and then only on some extremely favourable assumptions such as that every year for the next twenty years Mr Mudaly's income available for discharging this indebtedness will increase by 15%, is it then thought that he might start repaying that loan. The proposal contemplates that by that stage his monthly instalments will be nearly R75 000 a month and that they will rise over the following ninety-two months to the point where he is paying R198 745 in discharge of the debt. It is not anticipated that the debt will be restored to its current level until month 322, that is nearly twenty-seven years hence. By that stage Mr Mudaly, who is at present thirty-four, will be close to retirement. The proposal then suggests that the home loan will be paid off in 10 months.

[39] That recommendation appears to have been formulated without any regard for its implications for the bank. It fails to recognise that the bank would have to reflect the ever-increasing indebtedness in its books as a loan to Mr Mudaly. This in turn would impact upon the bank's prudential requirements as reported to the South African Reserve Bank. It would have an impact on the bank's ability to lend to other customers. Manifestly the bank would be better off to repossess the property at this stage, sell it, even at a loss, and use the amounts recovered to make profitable loans. The payment proposal is entirely unrealistic.

[40] The proposed repayment schedule has a similar effect in respect of both the motor vehicle loans. In the case of the BMW Mr Mudaly's indebtedness would reach its peak after four years at some R448 000. The debt in respect of the Mercedes Benz would reach its peak at the same time at slightly less than R600 000. By that stage the BMW will be twelve years old and the Mercedes Benz ten years old. Even though repayment of the debt is anticipated to commence then it is only anticipated that the two cars will be paid off after a further eighty months, that is nearly eight years later. By that stage both vehicles will be over twenty years old. Again, to suggest that the credit providers in

respect of these agreements should wait that long to attempt to recover payment whilst their security, in the form of the vehicles, is likely to devalue completely seems utterly unreasonable. BMW would clearly be better off by repossessing the vehicles, disposing of them and financing sales to more reliable debtors. More to the point it is not realistic to expect Mr Mudaly to meet this payment schedule for the next 11 years any more than it is realistic to expect him to meet the schedule in respect of the home loan.

[41] It is here that Mr Mudaly's complete and utter failure to produce any proper indication of his financial circumstances and the operations of his business, must count against him. In the absence of that information the court cannot possibly conclude that he has a 'probable propensity to satisfy in a timely manner all the obligations under all the credit agreements' to which he is a party. In fact in the 14 months since he referred his situation to the debt counsellor he has only made one payment of R16 000 for distribution to his creditors and has given no indication of a commitment to making any payments at all. Mr Juselius, the debt counsellor, gave evidence and said that quite frankly he did not expect Mr Mudaly to meet his obligations. Nor do I. This is clearly a case where the court cannot and should not grant relief in terms of s 85.

[42] I need only add that the debt re-structuring proposed by Mr Juselius and leading to the results described above was generated by a computer. No thought appears to have been given to whether it was a reasonable and fair proposal that properly balanced the interests of the consumer and his credit providers. Patently it was not and it should never have been recommended to creditors. Debt counsellors need to be aware that their function is not merely mechanical. No doubt it is possible as an exercise in arithmetic to produce a schedule of repayments in just about every situation that on its face suggests that the consumer's debts will eventually be paid. This does not justify repayment

schedules being produced by computers and placed before creditors when they are patently unreasonable or absurd as was the case here. If that is the best that can be done the debt counsellor should advise the consumer and the credit providers that it is not feasible to prepare a repayment schedule that achieves the purposes of the NCA. The parties must then pursue their other remedies. Where this obligation is ignored by debt counsellors it encourages the raising of defences without merit simply to postpone the evil hour when goods will have to be restored and the consumer is forced to face up to their financial circumstances.

[42] In the circumstances the plaintiff is entitled to the relief that it seeks and 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 31 August 2007 in terms of which the plaintiff sold to the defendant a BMW M3 SMG motor vehicle with engine number 60172778 and chassis number OJR03094.
2. The defendant is to restore and redeliver the motor vehicle to the plaintiff.
3. The defendant is to pay the costs of the action up to and including the hearings on 10 and 12 August 2010 on the attorney and client scale.
4. All other claims for relief by the plaintiff are adjourned *sine die*.

DATES OF HEARING	10 AND 12 AUGUST 2010
DATE OF JUDGMENT	20 AUGUST 2010

PLAINTIFF'S COUNSEL	MS L K OLSEN
PLAINTIFF'S ATTORNEYS	NEL & RICHTER INC Represented locally by J.H. NICOLSON, STILLER & GESHEN
DEFENDANT'S COUNSEL	MS B L HARTWELL
DEFENDANT'S ATTORNEYS	MAREE INC.