REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

Case no. 2793/10

In the matter between:

FRANCOIS COETZEE **FIRST APPLICANT**

SUSANNA ELIZABETH COETZEE **SECOND APPLICANT**

and

NEDBANK LTD **RESPONDENT**

JUDGMENT

GORVEN J:

1] This is an application for the rescission of a default judgment granted by the Registrar of this Court in favour of the respondent against the applicants. An applicant for rescission must show good cause why the application should be granted.[1] The accepted formulation as to what this entails was set out in *Grant v Plumbers (Pty) Ltd* [2] to the following effect:

(a) He must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.

(b) His application must be *bona fide* and not made with the intention of merely

1 Rule 31(2)(b) of the Uniform Rules of Court
2 1949 (2) SA 470 (O) at 476-7

delaying plaintiff's claim.

(c) He must show that he has a *bona fide* defence to plaintiff's claim. It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.

2] It is not disputed that the applicants did not become aware of the judgment or, indeed, that action had been instituted, until execution was attempted. It is clear that there was no wilful default on the part of the applicants in failing to defend the action. It is also clear that the applicants have consistently attempted to make use of the debt review provisions of the National Credit Act[3] ("the Act"). There is no indication that the application is made purely to delay the respondent's claim. The only matter on which the respondent joined issue in the application is whether the applicants have shown that they have a bona fide defence to the action brought by the respondent. In other words, whether they have set out "averments which, if established at the trial, would entitle [them] to the relief asked for".

3] The following facts emerged in the application. The applicants are in default under the agreement on which the respondent sued. During 2008 they applied, in terms of s 86(1) of the Act, for a review of their indebtedness. A debt counsellor thereafter sent the respondent a notice as envisaged in s 86(4)(b)(i) of the Act. It appears that little else, if anything at all, was done by the debt counsellor. The respondent contests receiving

3 Act 34 of 2005

the notice from the debt counsellor, but accepts that this averment must be taken at face value for the purpose of the application. Approximately one year after the application for debt review, the respondent sent the applicants a notice in terms of s 129(1)(a) of the Act. Once the period provided for in s 130(1) of the Act after delivery of this notice had elapsed, the respondent instituted action.

4] The applicants asserted that, arising from these facts, the respondent was barred from enforcing the debt by the provisions of s 88(3) of the Act. They submitted that this was so because no notice in terms of s 86(10) of the Act had been sent by the respondent, thus terminating the debt review process. They had thus set out a *bona fide* defence to the action. The respondent did not claim to have sent such a notice. Nor did it claim that any specific provision of the Act overcame the obstacle to enforcing its rights under the agreement. Its contention was that, because the debt review process had not progressed within a reasonable time, it had been terminated by way of the effluxion of time.

5] It is as well to reflect briefly on the scheme of this aspect of the Act. It governs the circumstances in which agreements to which it applies, including the present one, may be enforced by the credit provider. This means that it regulates the common law rights of parties to enforce rights under these agreements. In the light of the presumption against the abolition of existing common law rights, “a legislative intention to remove appellant’s common-law right of action will not be inferred in the absence

of statutory language which clearly conveys that intention expressly or by necessary implication".[4] Section 129(1)(b) bars enforcement of rights under an agreement in which a consumer is in default before certain requirements are met. These include that the credit provider must give notice to the consumer in terms of s 129(1)(a) or s 86(10) of the Act. If the process in s 86 has not been invoked by the consumer, the notice must be given in terms of s 129(1)(a). If the process in s 86 has been invoked, the necessary notice is one in terms of s 86(10). Section 130(1) provides that the debt may be enforced if a certain time has elapsed after such a notice was given.[5] Section 130(3)(c)(i) provides that a court may determine a matter relating to such an agreement only if it is satisfied that the credit provider has not approached the court during the time that the matter was "before a debt counsellor". This reference to a matter being before a debt counsellor is a reference to the procedure introduced by s 86 of the Act.

6] Section 86 sets in motion a process designed to shed light on whether a consumer is over-indebted. If the consumer is over indebted, the process should result in an agreement with credit providers or a court order for the rescheduling of the consumer's debt. The object of the process is to attempt to ensure that all debts which did not arise from the grant of reckless credit are paid in full. This is in line with a stated purpose of the Act set out in s 3(g).[6] The process is initiated by an application by the consumer to be declared over-indebted. This is what was done in this case

4 per Howie AJA in *Palvie v Motale Bus Service (Pty) Ltd* 1993 (4) SA 742 (A) at 748A-B
5 It is clear from the context that the reference in s 130(1)(a) to s 86(9) should be one to s 86(10).
6 S 3 deals with the purpose of the Act. S 3(g) states this purpose as "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".

by the applicants. It is instructive that all that is thereafter required of a consumer is, essentially, to co-operate with the debt counsellor in the process. Not only that, but the consumer has no power to advance the debt review process or to ensure that it takes place properly. The process is driven entirely by the debt counsellor. The process is governed by time limits set by regulations promulgated under the Act. If the consumer is in default under an agreement the credit provider is entitled under s 86(10), after a period of a least sixty business days has elapsed from the application for the debt review, to terminate the process. Once terminated, s 88 (3) no longer stands in the way of a credit provider wishing to enforce its rights in a court of law because s 88(3) is made "[s]ubject to section 86 … (10)".

7] The crisp issue in this matter is whether or not the provisions of s 88 (3) barred the respondent from instituting action against the applicant in the present matter. This reads as follows:

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

8] There are five situations set out in s 88(3) which overcome the bar to enforcing rights under an agreement. These are as follows:

1. Where the debt counsellor rejects an application by finding that the consumer is not over-indebted and the consumer does not thereupon apply to the Magistrate's Court for an order as envisaged in s 86(7)(c) within the stipulated time period.[7]
2. Where a credit provider terminates the debt review process on notice to the relevant parties if more than 60 days has elapsed after the consumer applied in terms of s 86(1).[8]
3. If the court has determined that the consumer is not over-indebted, or has rejected a debt counsellor's proposal or the consumer's application.[9]
4. If a court having made an order or the consumer and credit providers having made an agreement re-arranging the consumer's obligations all the consumer's obligations under the credit agreements as re-arranged are fulfilled, unless the consumer fulfilled the obligations by way of a consolidation agreement.[10]
5. If the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal.[11]

9] Section 86(10) provides as follows:

> If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to

7 s 86(9) read with s 88(1)(a)
8 s 86(10)
9 s 88(1)(b)
10 s 88(1)(c)
11 s 88(3)(b)(ii)

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.

10] As indicated above the respondent must be taken to have received notice in terms of s 86 (4)(b)(i) for purposes of this application. This means that, unless one of the five situations mentioned in paragraph [8] hereof applied, s 88(3) barred the enforcement of the respondent's rights under the agreement. The respondent claimed that the debt review process had been terminated. It did not contend that any of situations 1, 3, 4 or 5 mentioned in paragraph [8] hereof applied.

11] The respondent's submissions emerged during argument and were not particularly well focussed. As I understand it, they were related submissions which developed along the following two lines. The first was that s 86(10) requires the consumer to be in default under "a credit agreement which is being reviewed in terms of this section". This was not the case because the time limits relating to the debt review process had not been adhered to and there had been inaction in the process for an inordinate period of time. The debt review process had thus been terminated by effluxion of time and it could no longer be said that the credit agreement was "being reviewed". No notice in terms of s 86(10) was therefore necessary to terminate the process. Secondly, the presumption

in interpreting statutes is that the common law will be amended as little as possible in order to achieve the objects of the legislation. The bar on enforcing rights under the agreement must then have fallen away when the debt review process had been stalled for an inordinate time and the bar was no longer applicable.

12] Neither party was able to point to any direct authority on these issues. I was also unable to find any. I shall examine each submission in turn.

13] On analysis, the first submission is circular and self-defeating. On the facts of this matter, the only way that s 88(3) could be overcome, thus entitling the respondent to enforce its rights under the agreement, is if s 86(10) had been complied with. This is because the respondent accepts, for the purpose of the argument, that it must be taken to have received a notice in terms of s 86(4)(b)(i). Receipt of the notice is the factor which triggers the provisions of s 88(3). The only means available to the respondent past the hurdle to litigation imposed by s 88(3) was to act in terms of s 86(10). But, said the respondent, s 86(10) did not apply because it applies only to credit agreements which are “being reviewed” and the review in question had been terminated. Therefore s 86(10) did not apply. But if s 86(10) did not apply, the situation overcoming the bar constituted by s 88 (3) on which the respondent would have to rely could also not apply. Section 88(3) was not made to apply to credit agreements which are “being reviewed”, it was made to apply in a more focussed fashion to situations where a notice in terms of s 86(4)(b)(i) has been received, regardless of whether nothing

further is done. Even assuming that the debt review process could be terminated in the manner contended for by the respondent, because the respondent must be taken to have received notice in terms of s 86(4)(b)(i), s 88(3) does apply. If s 86(10) was not utilised by the respondent as the basis on which to terminate the debt review process, therefore, this bars the enforcement of the debt under the agreement in question.

14] In the second submission, the respondent seemed to contend that once the debt review process had been terminated by effluxion of time, there was no longer a need to comply with the Act and, in particular, to rely on the legislated situations which overcome the bar in s 88(3). As mentioned above, this was not clearly formulated but seemed to be based on a contention that the bar in s 88(3) unduly amended the common law contrary to the presumption that the legislature does not intend to do so unduly.[12] The authorities are consistent, however, that, where the plain intention of the legislature is to amend the common law, the presumption is rebutted.[13] This is precisely the situation here. The legislature clearly intended to regulate the right of credit providers to enforce their rights under such agreements in court once a debt review process has been initiated. The object is to determine whether the consumer is over-indebted and, if so, whether her or his obligations should be rescheduled so that the debt can ultimately be satisfied. As mentioned, there are five situations where the bar set up in s 88(3) does not apply. Each of these addresses a possible outcome of the process. The credit provider need only wait 60

12 *Law Society of the Cape of Good Hope v C* 1986 (1) SA 616 (A) at 639E-F
13 *Casely NO v Minister of Defence* 1973 (1) SA 630 (A); *Palvie* fn 4 *supra* ; *Law Society supra*

business days to see if the process is likely to result in what it regards as a workable rescheduling before itself bringing about one of the five situations by the use of s 86(10) to terminate the process. The clear intention of the legislature was to provide for a process which allows time to achieve the objects of the Act without a credit provider defeating this by instituting action within a certain period after the process commences. The provisions which regulate the right of a credit provider to enforce rights under an agreement whilst the objects of the Act are being pursued are clear and consistent with the purpose of the Act. They unambiguously, by the plain intention of the legislature, limit the common law right asserted by the respondent.

15] On interpretation of the legislation, therefore, the submissions of the respondent have no foundation. The debt review process does not terminate by effluxion of time. Neither is it open to a credit provider to ignore the provisions of s 88(3) of the Act after a lengthy period has elapsed after the debt review process was initiated.

16] In the result, the applicants have raised an issue which, if decided in their favour, would mean that the respondent was barred by the provisions of s 88(3) of the Act from instituting action in this matter to enforce it rights under the agreement. The applicants have, accordingly, set out averments which would, if proved at the trial, constitute a defence to the action. They are therefore entitled to the relief sought.

17] The application was not launched within the twenty day period required by Rule 31(2)(b), under which rule it was brought. An application for condonation was launched. The respondent opposed this on the ground that an unreasonable time had elapsed before the application was launched. It is clear that the applicants have, well prior to the issue of summons, sought to obtain debt relief under the Act. When he became aware of the judgment, the first applicant immediately telephoned the respondent's attorney indicating that a debt review process under the Act was under way. When it became clear in early 2010 that the debt counsellor had not advanced the debt review process, the applicants made a fresh application for debt review. It is not necessary to consider the status of that application. Suffice it to say that the applicants amply demonstrated their intention to make use of the provisions of the Act and the debt review process contained therein. In the light of the explanation given by the applicants for their failure to comply with the twenty day period provided in Rule 31(2) (b), I am inclined to exercise my discretion in favour of granting the condonation sought.

18] The following order is made:

1. Condonation is granted to the applicants for the late launch of the application.
2. The default judgment granted by the Registrar of this Honourable Court against the applicant under case number 13252/09 on 10 October 2009 is rescinded.
3. The respondent is ordered to pay the costs of the application.

DATE OF HEARING:	17 September 2010
DATE OF JUDGMENT:	12 October 2010
FOR THE APPLICANTS:	Adv P Jorgensen instructed by
	Du Toit Havemann & Lloyd
FOR THE RESPONDENT:	Mr J Murray, attorney, of Mooney Ford Attorneys