

**FORM A**

**FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION JUDGMENT**

**PARTIES:** Changing Tides v John Gilbert Hattingh

Case Number: 2213/09

High Court: Eastern Cape Division

DATE HEARD: 24/11/2009

DATE DELIVERED: 19/01/2010

JUDGE(S): Roberson J

LEGAL REPRESENTATIVES –

*Appearances:*

for the Applicant(s): Adv P Scott

for the Respondent(s): Adv N Mullins

*Instructing attorneys:*

for the Applicant(s): Jacques du Preez attorneys

for the Respondent(s): Pierre Kitching attorneys

CASE INFORMATION –

*Nature of proceedings.*

**Topic:**

**Key Words:**

**IN THE HIGH COURT OF SOUTH AFRICA**

**(EASTERN CAPE, PORT ELIZABETH)**

**CASE NO. 2213/09**

In the matter between

**CHANGING TIDES 17 (PTY) LTD**

**PLAINTIFF**

and

**JOHN GILBERT HATTINGH**

**FIRST DEFENDANT**

**MAUREEN ANN HATTINGH**

**SECOND DEFENDANT**

**DARRYM HATTINGH**

**THIRD DEFENDANT**

**SANDY-LEE HATTINGH**

**FOURTH DEFENDANT**

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**JUDGMENT**

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**ROBERSON AJ**

This was an application for summary judgment. The plaintiff is the trustee of the South African Home Loans Guarantee Trust ('the Trust'). According to the particulars of claim, the first and second defendants entered into a loan agreement with Blue Banner Securitisation Vehicle RC1 (Pty) Ltd. ('Blue Banner'), and the Trust guaranteed the loan. The first and second defendants in turn indemnified the Trust against liability of any kind incurred by the Trust as a result of the first and second defendants failing to perform their obligations under the loan. An indemnity bond was registered over certain immovable

property, in favour of the Trust. The first and second defendants failed to perform their obligations under the loan and the Trust is subject to a claim by Blue Banner. The third and fourth defendants concluded deeds of suretyship in terms of which they bound themselves to Blue Banner and the Trust for payment due by the first and second defendants. The plaintiff instituted action for payment of the outstanding balance of the loan and other relief.

The first and second defendants delivered notices of intention to defend the action. It was agreed at the hearing of the application for summary judgment that the third and fourth defendants were to be regarded as having delivered notices of intention to defend and the application was against all four defendants.

A number of defences were raised on behalf of the defendants. I intend to deal with only one, which is that the first and second defendants have applied for debt review in terms of s 86 of the National Credit Act 34 of 2005 ('the Act'), which it is common cause applies in this case. S 88 (3) of the Act provides, *inter alia*, that a credit provider who has received notice in terms of s 86 (4)(b)(i) of the Act, subject to the provisions of s 86(9) and (10), may not exercise or enforce by litigation any right or security under that credit agreement. According to the first defendant's opposing affidavit, he and the second defendant applied to a debt counsellor for debt review on 11 February 2009. Notice of the application was given to creditors, including the Trust, in terms of s 86 (4)(b)(i) of the Act, and the Trust responded by providing information about the terms of the loan

agreement, the amount in arrears and the current balance. The debt counsellor's proposal regarding debt re-arrangement was forwarded to the Trust on 23 April 2009 but on 19 May 2009 the Trust gave notice in terms of s 86(10) of the Act to terminate the review on the basis that no proposal for debt restructure had been received. The debt counsellor responded to this notice of termination by informing the Trust that it had sent a proposal but had received no reply. On 10 June 2009 the first and second defendants applied to the Magistrate's Court for an order that their estate be declared over indebted and that their debt be re-arranged in accordance with a draft order. This application was made on notice to the creditors, including the Trust. On 3 August 2009 the Trust wrote to the debt counsellor acknowledging receipt of the proposal and the offer it contained. In that letter the Trust asked for certain information and made a counter-proposal, in terms of which it would consider accepting a minimum monthly payment. The last paragraph of the letter read as follows:

‘Please be advised that we do not wish to oppose applications unnecessarily and believe that the parties should try to assist one another in finding solutions, however if we cannot come to a solution herein kindly set the matter down and advise us accordingly.’

It was submitted on behalf of the plaintiff that the debt review process had been properly terminated and that was the end of the matter. No court order had been made within 60 business days of the application for review and the Trust was entitled terminate the review in terms of s 86 (10) of the Act. S 86 (10) of the Act provides that if a consumer is in default under a credit agreement that is being reviewed, the credit provider may give

notice to terminate the review at any time at least 60 business days after the date of the application for debt review.

I do not think that the matter is as simple as that. The basis of the termination as set out in the Trust's notice was that no proposal for debt restructure had been received, whereas according to the opposing affidavit it had. The Trust thereafter appeared by its conduct to be participating in the review process and to have waived the right to terminate the review process. The tone of the letter of 3 August 2009 was one of an attempt to negotiate, and if no settlement could be reached, to let the Magistrate's Court decide the dispute. There was no mention in the letter of 3 August 2009 that the review process had been terminated. If the review process had not been validly terminated then the defendants could raise the defence they did.

Put at its lowest, the opposing affidavit has raised a legal issue regarding the effect of the notice of termination and it would not be appropriate for this court to decide such issue in summary judgment proceedings. Interpretation of sections of the Act by the courts is still developing, with a declaratory order regarding certain sections, including s 86, only recently having been made in the case of *National Credit Regulator v Nedbank Ltd and others* 2009 (6) SA 295 GNP. It was only in that judgment that it was declared that if a debt counsellor found a consumer to be over indebted (as allegedly happened in the present case) that he must refer the matter to the Magistrate's Court with the recommendation of re-arrangement.

I therefore make the following order:

Summary judgment is refused.

The defendants are given leave to defend.

Costs of the application are to be costs in the cause.

**J.M. ROBERSON**  
**ACTING JUDGE OF THE HIGH COURT**

Appearances:

Plaintiff: Advocate P. Scott instructed by Jacques du Preez Attorneys, Port Elizabeth.

Defendants: Advocate N. Mullins, instructed by Pierre Kitching Attorneys, Port Elizabeth.