THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 20905/13

In the matter between:

MOTOR FINANCE CORPORATION **PLAINTIFF**
(A DIVISION OF NEDBANK)

And

DEON DANIEL PETERSEN **DEFENDANT**

Coram: ROGERS J

Heard: **21 MAY 2014**

Delivered: **29 MAY 2014**

JUDGMENT

ROGERS J:

Introduction

[1] The plaintiff ('MFC') seeks summary judgment against the defendant ('Petersen') for confirmation of the termination of an instalment sale agreement of a vehicle and for the return of the vehicle. The National Credit Act 34 of 2005 ('the Act') applies to the agreement. If summary judgment succeeds, any monetary claim which MFC may have in consequence of the termination will be determined later. Mr Louw appeared for MFC and Ms Wade for Petersen.

[2] Since there is a debt rearrangement order ('DRO') in place which includes a rearrangement of MFC's claim, the first question I shall need to decide is whether, for as long the DRO stands, I can grant judgment in MFC's favour at all. If that question is answered in favour of MFC, the further questions that arise are [a] whether a creditor can terminate a debt review in terms of s 86(10) if the consumer was not in default at the time the debt review process started but fell into default during the course of the debt review (for reasons which will appear, I shall refer to this as the '*Collett* point'); [b] if not, whether Petersen was already in default of his obligations to MFC when the debt review began; [c] whether MFC could only terminate the debt review if it acted in good faith and, if so, whether MFC indeed terminated the debt review in good faith; [d] whether I should in my discretion refuse summary judgment, *inter alia* because of the prospect of the debt review being revived in terms of s 86(11).

The facts

[3] The instalment sale agreement was concluded during November 2010. Petersen was required to pay a monthly instalment of R2 745 over a period of 72 months (seven years).

[4] Petersen faithfully paid the instalments until August 2013. In the intervening period, however, he incurred further debt to the point where he concluded that he should seek debt review, which he did on 1 August 2013.

[5] The instalments owing to MFC were payable on the first day of each month by way of debit order. The first instalment in respect of which Petersen defaulted was the instalment due 1 August 2013.

[6] During about August or September 2013 the debt counsellor circulated a debt rearrangement proposal among creditors. This proposal provided for Petersen to pay MFC a monthly amount of R892,95. The period over which this amount was to be paid was 149 months. On 6 September 2013 MFC rejected this proposal and counter-offered a monthly instalment of R1 947,29. A period was not specified in the counter-proposal but presumably it was intended to endure until the debt was repaid in full. This would have taken the instalment sale agreement way beyond the original contract period of seven years but far short of the additional period of 149 months proposed by the debt counsellor. On 3 October 2013 MFC sent a chaser, asking the debt counsellor whether the counter-proposal was going to be accepted. On 10 October 2013 the counsellor replied that, having regard to fairness to other creditors, the counter-proposal could not be accommodated and that an application to the magistrate's court for a DRO would follow.

[7] On 24 October 2013 the counsellor caused the notice of motion for a DRO to be issued out of the Malmesbury Magistrate's Court ('MMC'), with the scheduled hearing date being 5 December 2013 ('the DR application'). Petersen and his wife were the first and second respondents. The third to eighteenth respondents were the creditors. MFC was the ninth respondent. In terms of the proposal contained in the application, Petersen was to pay his counsellor R6 763,75 per month for distribution among his creditors. Petersen says in his affidavit opposing summary judgment that he has since October 2013 regularly paid this amount, and it appears that MFC has since then received the monthly amount for which the debt rearrangement proposal makes provision.

[8] About a month later, on 19 November 2013, MFC addressed a notice in terms of s 86(10) to Petersen, the counsellor and the National Credit Regulator. The notice was duly delivered. By way of that notice MFC terminated, or purport to terminate, the debt review in relation to Petersen's indebtedness to MFC.

[9] On 2 December 2013 MFC delivered a notice to oppose the DR application. On 5 December 2013, and at MFC's request, the DR application was postponed to 20 February 2014 to afford MFC time to file opposing papers.

[10] About two weeks later, on 18 December 2013, MFC issued summons in the present case. The particulars of claim alleged that Petersen had applied for debt review on 1 August 2013 but that MFC had duly terminated the debt review by way of its letter of 19 November 2013. The summons also served as MFC's notice of cancellation of the instalment sale agreement. The summons was served on 10 January 2014. On 23 January 2014 Petersen gave notice of his intention to defend the action.

[11] A couple of days earlier, on 20 January 2014, MFC delivered its opposing affidavit in the MMC proceedings. On 22 January 2014 the counsellor's attorneys wrote to MFC's attorneys. I quote the following relevant paragraphs from this letter:

'2. Mr Petersen was not in default with MFC at the time he applied for debt review. In fact, he was R100 in credit. According to the Supreme Court of Appeal judgment in *Collett v Firstrand Bank* 2011 (4) SA [sic], a credit provider may not terminate the debt review process if the consumer applies for debt review before he is in default.

3. In the premises, your notice of termination is illegitimate and your client is effectively still part of the debt review process. This naturally renders the High Court action premature.

4. In the alternative to the above, should your client have been entitled to withdraw from the debt review process, the credit provider is obliged, in section 86(5) to the NCA, to act in good faith during the entire debt review process.

5. Initially, MFC were late to file their notice of opposition of the application for debt review in the Magistrate's Court. On 15 November 2013, MFC purported to withdraw from the debt review. On 5 December 2013, an attorney appeared on behalf of MFC at the Magistrate's Court, despite this purported withdrawal. The application was postponed on MFC's insistence to 20 February 2014, despite their purported withdrawal. An opposing affidavit was filed by MFC on 21 January 2014, more than two months after MFC's purported withdrawal, and indeed after summons was issued in this matter in the High Court.

6. In the light of the above, it would appear that MFC failed in their duty to participate in the debt review process in good faith, which would constitute a reason to place the agreement back under debt review in terms of section 86(11) of the NCA.'

[12] The counsellor's attorneys invited MFC, in the light of the above, to withdraw the action, failing which a special costs order would be sought.

[13] MFC did not withdraw the action. Instead, and following the entry of appearance to defend, MFC on 5 February 2014 applied for summary judgment to be heard on 10 March 2014.

[14] On 20 February 2014 the magistrate postponed the DR application to 20 March 2014 because the counsellor was ill and unable to attend.

[15] On 6 March 2014 Petersen delivered his opposing affidavit in the summary judgment application. I shall return presently to the grounds of opposition.

[16] On 10 March 2014 the summary judgment application was postponed to 21 May 2014, with costs to be costs in the cause.

[17] The DR application served again in the MMC on 20 March 2014. The case was postponed to 17 April 2014 to allow MFC to file an application for condonation in respect of the late filing of its answering papers.

[18] On 17 April 2014 the magistrate dismissed MFC's application for condonation. MFC's attorney then left court. The candidate attorney who was appearing for the counsellor made certain submissions to the magistrate in support of the DRO. In the summary judgment proceedings before me, Petersen filed a supplementary opposing affidavit by the candidate attorney in which the latter said the following regarding the MMC proceedings on 17 April 2014:

'Even though Applicants/Plaintiff's affidavit [ie, MFC's opposing affidavit on the merits of the debt review] was not before court, I revealed to the Honourable Court that Applicant/Plaintiff purported to terminate in terms of Section 86(10) of the National Credit Act. In support of my contention that this "termination" was not well-founded, I quoted from the *Collett* judgment. The Honourable magistrate Pretorius concluded that the Plaintiff/Applicant was not entitled to terminate the debt review process.'

[19] The magistrate proceeded to make the DRO. A copy is attached to the candidate attorney's affidavit. In terms of the DRO, the magistrate declared Petersen and his wife to be over-indebted; ordered them to make payments to the credit providers, in a total monthly amount of R7 385,62, as per an amended debt restructuring proposal attached to the order; and ordered that the debt obligations of Petersen and his wife 'be restricted as per the attached amended debt restructuring proposal'. A costs order was also made. Its import was not debated before me; it appears to convey that MFC must pay the costs occasioned by its opposition, save for which all parties will bear their own costs.

The DRO of 17 April 2014

[20] In order to understand the DRO made by the magistrate, it is necessary to explain the *Collett* point. In *Collett v Firstrand Bank Ltd* 2011 (4) SA 508 (SCA) the Supreme Court of Appeal held that a credit provider was entitled to terminate a debt review in terms of s 86(10) even though an application was pending in the magistrate's court for a DRO. (This position will change when the National Credit Act Amendment Act 19 of 2014 is brought into force but that is not relevant here.)

[21] In the course of delivering the court's judgment, Malan JA said that a consumer who was overindebted or in strained circumstances could apply for debt review in terms of s 86(1) whether or not he was in arrears under any particular credit agreement. The learned judge of appeal proceeded:

'[9] … Where the consumer is not in default of any of his obligations, the credit provider is unable to terminate the process, because s 86(10) gives the right to terminate the debt review only where the consumer is in default. In such a case the creditor must await the hearing in terms of s 87. Nor can the credit provider proceed to enforce the credit agreement, because the consumer is not in default. Where the consumer, however, is in default the credit provider is entitled to enforce that credit agreement, provided the consumer has not made application for debt review pursuant to s 86(1) and the credit provider has complied with the requirements of ss 129 and 130. In terms of s 86(2), an application for debt review concerning a particular credit agreement may not be made if the credit provider has "proceeded to take the steps contemplated in section 129 to enforce that agreement".'

[22] Malan JA continued by observing that the purpose of debt review was not to relieve the consumer of his obligations but to achieve either a voluntary debt rearrangement or a debt rearrangement by the magistrates' court (para 10). Under ss 86 and 87 there was 'only one unified process, the purpose of which is the restructuring of the consumer's debts by amending the terms of the credit transaction between the parties'.

[23] He then dealt with the decision of this court in *Wesbank, A Division of FirstRand Ltd v Papier* 2011 (2) SA 395 (WCC), which held that a credit provider's right to terminate the debt review was forfeited once the counsellor delivered an application to the magistrates' court for a DRO. In *Papier* the court concluded that the lawmaker had selected a 60-day period in s 86(10) to allow the debt counsellor 30 days, and thereafter the consumer 20 days, to approach the magistrates' court for a DRO. Only if this was not done could the credit provider (effectively after a further 10 days – 60 days in all) terminate the process. Malan JA rejected this interpretation of the section (the underlining is mine):

'[12] … I do not think that s 86 requires the consumer or his debt counsellor to "approach the court" within the period of 60 days. Indeed no time period is specified within which the debt counsellor must make application to the magistrates' court. Nor does the NCA require the process of debt-restructuring to be complete within the period of 60 days after the application was made. To do so would obviously be unrealistic… A sounder approach is to recognise the express words of s 86(10), which gives the credit provider a right to terminate the debt review in respect of the particular credit transaction under which the consumer is in default, and only when he is in default, at least 60 business days after the application for debt review was made. It must be emphasised that it is only when the consumer is in default that the credit provider has this right. If he is not, the debt review continues without the credit provider being entitled to terminate it. It is not that the credit provider is "derailing" the process when he terminates the debt review: it is the consumer that is in breach of the contract, not the credit provider. <u>If the consumer applies for debt review before he is in default the credit provider may not terminate the process</u>. But if the consumer is in default the consumer is entitled to a 60 business days' moratorium, during which time the parties may attempt to resolve their dispute.'

[24] The argument before me in relation to the *Collett* point was that the words I have underlined mean that, if the consumer was not in default when he applied to a

debt counsellor to be placed under debt review, a credit provider cannot thereafter terminate the debt review in terms of s 86(10), even though the consumer subsequently falls into default. On the premise that this argument is correct, Ms Wade for the defendant contended that the defendant had not been in default of his agreement with MFC at the time he applied for debt review, because he made such application on 1 August 2012 but had until midnight on that day to pay his instalment.

[25] Reverting now to the DR application which served before the magistrate on 17 April 2014, one knows (at least on the facts alleged in the affidavit opposing summary judgment) that the magistrate rejected MFC's application for condonation and thus presumably did not take into account the facts alleged in the opposing papers which MFC had filed. What those facts were I do not know because the papers in the DR application (which Ms Wade told me exceeded 100 pages) are not before me. What one does know is that the magistrate, after hearing *inter alia* the submission on behalf of Petersen which I have previously quoted, made the DRO attached to Petersen's affidavit opposing summary judgment. While the submission made to the magistrate is recorded in the supplementary opposing affidavit in very brief terms, it is reasonable to infer that it was exactly the same point as the one subsequently advanced to me in opposition to summary judgment, namely that Petersen had not been in default when he sought debt review; and that for this reason, and by virtue of the words I have emphasised in the *Collett* judgment, the s 86(10) notice had been invalid.

[26] It might notionally have been possible for Petersen to contend that the s 86(10) was invalid for a different reason, namely that MFC did not act in good faith when giving the notice. In *Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga* 2011 (1) SA 374 (WCC) Blignault J held that it was necessary to imply a proviso in s 86(10) to the effect that a credit provider may only terminate a debt review if in so doing he is acting in good faith (para 52). He found it unnecessary to define the precise ambit of the good faith criterion beyond observing that, in the absence of special circumstances, he would not regard the termination of a debt review as being in good faith if the consumer was prosecuting it in good faith and in a reasonable manner (para 51).

[27] However, if this was the point which Petersen's attorney had wished to make to the magistrate, the attorney would presumably have relied on *Dunga*. Although *Collett* refers to a duty of good faith on the part of creditors and the consumer, Malan JA did not in terms hold that a s 86(10) notice would be invalid if given in bad faith. What he indicated in para 15 of his judgment was that the failure by a credit provider to participate in the debt review process might be a factor in favour of ordering a resumption of the debt review in terms of s 86(11), with a concomitant stay of summary judgment proceedings. I thus do not think that a legal representative, relying on absence of good faith as a ground for invalidating a s 86(10) notice, would have based the argument on *Collett*. That is not to say that *Dunga* cannot be reconciled with *Collett*, only that *Collett* is not specifically authority for the point made by Blignault J in para 52 of *Dunga*.

[28] To this I would add that, even in the present proceedings, Petersen does not in terms allege that MFC did not act in good faith in giving the s 86(10) notice. MFC is criticised because its counter-proposal was much higher than the proposals made in respect of other creditors and was one which he would never have been able to accept. However, this does not without more mean that MFC was acting in bad faith. A consumer's financial position may be such that he is simply not in a position to make a reasonable rearrangement proposal in respect of a particular creditor. A credit provider does not act in bad faith by rejecting an unreasonable proposal and counter-proposing an amount which the consumer is unable to afford.

[29] Be that as it may, it is clear to me that the magistrate must have found, for one reason or another, that MFC's s 86(10) notice was invalid, and as I have said this was probably on the basis of the *Collett* point. The reason why the magistrate must have made a finding of invalidity is that, without such a finding, he could not have made the DRO. If a creditor gives a valid s 86(10) notice, the notice removes, from the debt review process, the debt which is the subject of the notice. If the magistrate had thought that MFC's notice was valid, he could not have made a DRO which included the debt owed by Petersen to MFC.

[30] Mr Louw submitted that there was no necessary implication of such a finding by the magistrate. However, and despite the strength with which he pressed this submission, I fear that I was unable to grasp its basis.

[31] He said that MFC was not necessarily 'unhappy with' the DRO made by the magistrate and that the DRO could stand together with an order from the high court cancelling the instalment sale agreement and requiring Petersen to return the vehicle to MFC. I do not understand how it can be said that MFC finds the DRO acceptable. After all, one knows that MFC opposed its grant in the magistrate's court and that its attorney only left after the magistrate refused to condone the late filing of MFC's papers.

[32] To the extent that Mr Louw was suggesting that the DRO could stand as an order requiring Petersen to pay off, by way of the stipulated instalments, whatever monetary amount might be owing by him pursuant to the cancellation of the instalment sale agreement and the return of the vehicle, the suggestion is untenable. The debt counsellor made the rearrangement proposal and subsequently brought the DR application well before MFC's purported termination of the debt review. Insofar as it related to MFC, the rearrangement proposal and the subsequent DR application were clearly premised on the continued existence of the instalment sale agreement and the modification of its terms by lengthening its period and reducing the monthly payment. This proposal, if accepted by MFC or ordered by the court, would have entitled Petersen to retain possession of the vehicle because *ex hypothesi* the agreement would not have been cancelled. I have no doubt that this is the very outcome which MFC attempted to resist in the magistrate's court but it failed.

[33] There is no reason to read the DRO made by the magistrate as anything other than an order giving effect to what the debt counsellor had proposed in the DR application. The magistrate could not have intended his order (insofar as MFC is concerned) to relate to a monetary obligation arising from the termination of the instalment sale agreement. This would be contrary to the proposal made by the counsellor, which was formulated prior to the purported termination of the debt review. Furthermore, I have evidence (which, at the stage of summary judgment, I

must accept) that the magistrate in fact found that the termination of the debt review was invalid. And, as a matter of law, it is far-fetched to suppose that the magistrate had in mind the termination of the agreement rather than its continuation. A proposal originally made with a view to keeping the instalment sale agreement alive could not, without material alteration, be transmogrified into a proposal for the payment of an amount owing upon termination. Only by sheer (and highly implausible) co-incidence would the amount owing pursuant to termination be the same as the amount owing without a termination. If the repossessed vehicle reached a good value upon sale by the credit provider, there might be very little owing pursuant to a termination. Yet in terms of the DRO the magistrate ordered Petersen, among other things, to pay MFC a specified monthly instalment over a period of 130 months at a specified rate of interest and restricted MFC's rights accordingly.

[34] In resisting this conclusion, Mr Louw submitted that I was reading words into the DRO which were not there. However, the DRO must be read in the context of the application which the debt counsellor brought and the contentions which were advanced to the magistrate. Although I do not have the application itself, I have explained that it must have been premised on the continuation in force of the instalment sale agreement over a lengthened period; and I have also referred to the fact that Petersen's legal representative submitted to the magistrate that MFC's s 86(10) was invalid. The DRO is an order unaccompanied by reasons. One does not ordinarily find the reasoning of the court contained in its order. This does not mean that the magistrate did not have reasons for doing what he did. One must assume that a court which makes an order has made all such findings of fact and law as were necessary for the making of the order. For example, if one were shown an order directing a defendant to make specific performance of a contract to the plaintiff, one would be entitled to assume that the court found, among other things, that a contract existed between the parties and that the defendant had thus far failed to make performance.

[35] In assessing the summary judgment application I am thus entitled to assume that the magistrate found MFC's s 86(10) notice invalid and made a DRO premised on the instalment sale agreement still being in existence. That order has not been set aside on review or appeal (though one or other of those procedures might yet be

pursued by MFC and the magistrate would then be obliged or at least entitled to provide reasons).

[36] What effect does that have on the present proceedings? The summons in this case was issued after the launching of the DR application but prior to the making by the magistrate of the DRO. The issuing of the summons was the act by which MFC purported to give notice to Petersen that it was cancelling the instalment sale agreement. At the time the magistrate made the DRO, the high court had not yet determined whether or not the s 86(10) alleged by MFC in its particulars of claim was a valid notice and had not yet determined whether the purported termination of the instalment sale agreement in the summons was valid. That is what I am being asked now to determine; but another court, albeit of lower jurisdiction, has already made an order, subsequent to the issue of summons in this case, which could not have been made without a finding that the s 86(10) notice was invalid and that the instalment sale agreement continued in force. MFC and Petersen were parties to that litigation. Although nominally the counsellor appeared in his own right, his submissions can be taken to have been made in what he regarded as the best interests of Petersen and the body of creditors. Clearly MFC would have standing to attack the DRO by way of appeal or review; and Petersen would have to be cited in any such review or appeal and would be entitled to oppose it.

[37] The fact that the high court is superior in the judicial hierarchy does not mean that an order of the magistrate's court can simply be disregarded by a judge because he thinks the magistrate erred. An administrative decision stands until set aside on review (*Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* 2004 (6) 222 (SCA) paras 27-38; *Opposition to Urban Tolling Alliance & Others v South African National Road Agency Ltd & Others* [2013] 4 All SA 639 para 38). The case for adopting that view in regard to an order of a magistrate given in judicial proceedings is an *a fortiori* one. Sound judicial administration would be thrown into disarray if a litigant could, without challenging a magistrate's order on appeal or review, ask a judge in other proceedings to give a different decision.

[38] At very least, the facts disclosed in the affidavits opposing summary judgment provide a basis for regarding as *res judicata* the question whether the s 86(10)

notice was valid and the further question whether MFC was entitled to cancel the instalment sale agreement as it purported to do by way of issue of summons in this case. The form of *res judicata* applicable here is so-called issue estoppel which has been recognised in number of judgments of the Supreme Court of Appeal over the last decade (see, for example, *Smith v Porritt* 2008 (6) SA 303 (SCA) para 10; *Yellow Star Properties 1020 (Pty) Ltd v Department of Development Planning and Local Government (Gauteng)* 2009 (3) SA 577 (SCA) paras 21-23 and 32; *Prinsloo NO & Others v Goldex 15 (Pty) Ltd & Another* [2012] ZASCA 18 paras 10-15; *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC* 2013 (6) SA 499 (SCA) paras 18-23; *Hyprop Investments Ltd & Others v NSC Carriers and Forwarding CC & Others* [2014] 2 All SA 26 (SCA) paras 5 and 13-14). Both MFC and Petersen were parties to the DR application. There has been a final decision by the magistrate (the DRO), a decision which could not have been granted without a determination of the validity or otherwise of MFC's s 86(10) notice and of MFC's resultant cancellation of the agreement. Put differently, a finding that MFC's s 86(10) notice was bad was 'an essential element of the judgment on which reliance is placed' (per Scott JA in *Smith v Porritt* para 10). In *Boshoff v Union Government* 1932 TPD 324, a leading early judgment in our law on issue estoppel, Greenberg J quoted with approval the following passage from an English text (a passage in turn quoted by Wallis JA in *Caesarstone supra* para 20):

'Where the decision set up as *res judicata* necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms…'.

[39] The cases cited hold that the court has a residual discretion to decide a suit even though it would involve a fresh decision on a matter which is already *res judicata*. At the stage of summary judgment I am not prepared to say that, if the present matter went to trial, reliance by Petersen on issue estoppel would necessarily fail. There is, in my view, an important policy consideration which favours the conclusion that a creditor should not be permitted to disregard a DRO which includes its claim. The assessment of a DR application requires a

consideration of the consumer's financial position as a whole. A magistrate who makes a DRO does so, it must be assumed, on the basis that he considers all the debts listed in the DRO to be part of the re-arrangement. If he finds a particular debt to be excluded (by virtue, for example, of a valid s 86(10) termination), the existence of that debt and the fact that the consumer will be afforded no relief in respect thereof will be factors to be taken into account in determining whether the proposed DRO is realistic. The attitude of a creditor to the proposed DRO may be affected by whether or not the debt of another creditor is or is not part of the re-arrangement. Creditors should take DR proceedings in the magistrate's court seriously. If the magistrate gives a decision which a creditor regards as wrong, the creditor should ordinarily pursue the remedy of appeal or review. To this may be added the observation of Navsa JA in *Socratous v Grindstone Investments* 2011 (6) SA 325 (SCA), in the context of the kindred defence of *lis pendens*, that courts are 'public institutions under severe pressure' (para 16).

[40] Mr Louw submitted that, at the time the magistrate made the DRO on 17 April 2014, MFC's claim for cancellation and return of the vehicle was *lis pendens* because of the high court proceedings. However, this is an argument that the magistrate erred by granting the order; it is not a sufficient basis (assuming the *lis pendens* contention to be sound) for disregarding the order without attacking it on review or appeal. In the same way, and depending on the answer to the *Collett* point, one might say that the magistrate erred by including MFC's claim in the DRO but that does not mean that the DRO can simply be ignored. A judicial officer, whether a magistrate or a judge, may grant an order for reasons subsequently found to be unsound. Procedures exist for correcting wrong decisions.

[41] I add that it is by no means obvious to me that a *lis pendens* objection to the magistrate's order would have been good. Apart from the fact that the second court has a discretion whether or not to adjourn its proceedings because of the first proceedings (Cilliers *et al Herbstein & Van Winsen The Civil Practice of the High Court of South Africa* 5th Ed at 606), one could just as well say, if the magistrate had not yet adjudicated the matter, that I should not entertain the summary judgment application because the same issue was pending in the magistrate's court. The fact

is that the DR application was launched before the present proceedings and was determined prior to the present proceedings.

[42] Section 88(3) reads as follows:

'(3) 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 re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal.'

[43] The reference to s 86(10) in the opening words of s 88(3) naturally does not mean that a notice in terms of s 86(10) may be given after a DRO has been made. In terms of s 86(10) notice thereunder can be given only if the consumer is currently in default and the agreement is 'being reviewed'. If the credit agreement has (usually with other debts of the consumer) already been reviewed and the review has resulted in a DRO, the only circumstance in which the credit agreement can be enforced by litigation is if the consumer defaults on any obligation in terms of the DRO.

[44] In the present case, the review process has been completed and a DRO is in place. Although MFC purported to terminate the review prior to the grant of the DRO, the magistrate must have concluded that the termination was invalid and that the resultant summons in the high court was not a valid cancellation of the instalment sale agreement. MFC does not allege that Petersen has defaulted on his obligations under the DRO. For as long as the DRO stands, it is my view that MFC is precluded from enforcing its claim.

[45] I was referred in argument to numerous judgments, some of them unreported. They are in the main distinguishable. In *Notri Securitisation 3 (Pty) Ltd v*

Desmond [2011] ZAECPEHC 3, for example, there was no dispute as to the validity of the s 86(10) notice and there was no DRO in place. What was pending before the magistrate, at the time of the summary judgment proceedings before the high court, was an application for resumption of the debt review in terms of s 86(11). There was also no DRO in place in *Standard Bank of South Africa Ltd v Botha* Case 21726/2011 (unreported judgment of Cloete AJ, as she then was, delivered on 23 February 2012).

[46] Closer to home is the decision of Murphy J in *Changing Tides 17 Pty Ltd v Grobler & Another* [2012] 3 All SA 518 (GNP). In that case the magistrate had made a DRO after the plaintiff had given a s 86(10) notice and issued summons foreclosing on an indemnity mortgage bond. In the summary judgment proceedings before Murphy J there was agreement that the plaintiff's s 86(10) notice had been valid; what the defendants wanted was a resumption of the debt review. Murphy J found that the magistrate had had no jurisdiction to include the plaintiff's claim in the DRO, given the valid s 86(10) notice (see para 26). (I mention in passing that this is consistent with my view that the magistrate in the present case could not have included MFC's claim in his DRO without a finding that MFC's s 86(10) notice was invalid.) Murphy J had doubts as to whether the invalid DRO allowed a sufficient monthly instalment to the plaintiff to justify the resumption of the debt review. But importantly, for present purposes, his conclusion on the overall case was the following (para 28):

' … The difficulty though is that the order is invalid and has not yet been set aside, and the full facts and circumstances pertaining to the debt review are not properly before the court. In the premises, I believe it will be in the interests of justice in this case to adjourn the application for summary judgment to afford the respondents an opportunity to bring an application for resumption of the debt review and for the applicant to bring a counter-application to set aside the order of the magistrate. Such a course is justifiable on grounds of the law having been in a state of uncertainty until the SCA recently brought welcome clarity in *Collett*.'

[47] It will be noted that Murphy J, though he did not elaborate upon the matter, was not prepared simply to disregard the DRO, even though he believed it was invalid. He clearly thought that it was necessary for the plaintiff to bring an

application to set aside the magistrate's order. If it were otherwise, he would simply have postponed the summary judgment application to allow the defendants to bring a resumption application in terms of s 86(11). See also *Mostert & Another v Standard Bank of South Africa Ltd & Another* [2013] ZAFSHC 83 para 15 where the court was not prepared to disregard an existing DRO made subsequent to a purported s 86(10) termination.

[48] The only other case I need mention is the unreported judgment of Gangen AJ delivered on 15 May 2012 in *Motor Finance Corporation (Pty) Ltd, a division of Nedbank Ltd v Baradien* Case 6455/12 (coincidently the same plaintiff as in the present case). In that case the magistrate made a DRO after the plaintiff had given a s 86(10) notice but before the issuing by the plaintiff of summons in the high court for the cancellation of an instalment sale agreement and the return of the vehicle. The defendant opposed summary judgment on the basis that the s 86(10) notice had not been properly served. She said that she had faithfully complied with her obligations under the DRO. In the high court Gangen AJ found that the s 86(10) had been duly delivered and that there was no allegation that the notice had not been received. On the basis that the magistrate should not have included the plaintiff's claim in the DRO, Gangen AJ proceeded to grant summary judgment. It does not appear from the judgment that the question I have considered at some length in this judgment received attention. To the extent that her approach differs from mine, I am satisfied that her decision was incorrect and should not be followed.

[49] Mr Louw referred me to several authorities in support of the proposition that a resumption of debt review ordered pursuant to s 86(11) does not have the effect of undoing a valid cancellation of a contract relating to the sale of a motor vehicle. Mr Louw submitted that such cases were distinguishable from those dealing with mortgage bonds over immovable property since in the latter instance there was no cancellation until the mortgage bond was cancelled at the deeds office. It is unnecessary to deal with these submissions. They would arise only if I were to find that I could disregard the DRO and to find, further, that MFC's s 86(10) termination was valid, since then there would remain the question whether I should in my discretion refuse summary judgment because of the possibility of a successful

application for resumption in terms of s 86(11). On the view I take of the matter, I do not reach that stage.

[50] The conclusion I have reached naturally does not mean that the magistrate's order, insofar as MFC is concerned, was correct. I entertain considerable doubt as to whether the passage I have underlined in para 12 of *Collett* was intended by Malan JA to have the meaning for which Petersen contends, though I can understand why the magistrate, taking the passage in its literal sense, reached the conclusion he did. It is also questionable whether, in the case of an instalment sale agreement relating to a vehicle, it is equitable to make a DRO which extends the period of the transaction so that its total length from beginning to end will be (as here) more than 14 years. The value of the security afforded to the creditor by its retained ownership of the vehicle might be negligible well before the end of the extended period.

[51] However, I do not think I should prejudge those questions or the further factual question as to whether Petersen was in default when he applied for debt review, since on the approach I take to the present application for summary judgment they will fall to be determined in review or appeal proceedings against the DRO. Other questions may also arise, for example whether the magistrate's order refusing condonation for the late filing of MFC's opposing papers is impeachable.

[52] I should mention that Petersen did not, in his opposing papers, specifically raise the contention that the validity of the s 86(10) termination could not be determined in the present proceedings because of the existence of the DRO. Ms Wade likewise did not raise this contention in her written submissions. She dealt directly with the merits of the termination. However, the point is one of law, based on the facts alleged in the opposing papers. I put it at the outset of oral argument to Mr Louw. Ms Wade embraced it at the commencement of her oral argument but proceeded to address the other matters in case they arose for decision.

Conclusion

[53] The only point I decide in this judgment is that MFC is precluded from obtaining summary judgment for as long as the DRO stands. I leave the other questions open.

[54] I do not think the correct course is to refuse summary judgment. If MFC were to have the DRO set aside on review or appeal, it might appear from the review or appeal judgment that Petersen has no remaining defence to the claim for summary judgment. I thus propose to follow the same course as Murphy J did in *Changing Tides*, namely to postpone the application for summary judgment *sine die*.

[55] Although Murphy J's order in *Changing Tides* directed the defendant to bring a s 86(11) resumption application within a specified time and contemplated a counter-application for review by the plaintiff, I respectfully consider that the correct course is for MFC (if so advised) to bring an application for review or appeal against the DRO, in reaction to which Petersen may (again, if so advised) bring a conditional application or counter-application for a s 86(11) resumption of the debt review. This seems to me to be the correct order of events, because for as long as the DRO stands it would make no sense for Petersen to apply for the resumption of the debt review. I see no need to put MFC to terms in regard to the review or appeal; the DRO will apply unless and until MFC takes one of these steps. The effect of any delay on MFC's part will be for another court to decide.

[56] As to costs, MFC has not succeeded at this stage in obtaining summary judgment and, on the view I take, should not have pursued the case for summary judgment while the DRO stood. On the other hand, Petersen may be gaining only a temporary respite. Furthermore, the point on which I have declined to grant summary judgment is not one which was raised by Petersen or his counsel, and it is by no means clear that I would have decided the other points in his favour had it been necessary to decide them. Although I could reserve the costs of the hearing, I doubt that a fair outcome in that respect will be affected by anything that happens in the future. I thus propose to direct that the parties bear their own costs of the

hearing on 21 May 2014 but that for the rest the costs of the application for summary judgment stand over for later determination.

[57] I make the following order:

[a] The application for summary judgment is postponed *sine die*.

[b] The plaintiff may re-enrol the application for summary judgment if the debt rearrangement order granted by the magistrate's court on 17 April 2014 is set aside, whether on review or appeal.

[c] The parties shall bear their own costs in relation to the hearing on 21 May 2014. Save as aforesaid, the costs of the application for summary judgment shall stand over for later determination.

_____

ROGERS J

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