

which were secured by a number of mortgage bonds registered by the respondents in favour of the applicant over certain immovable property of theirs (the property). The applicant also seeks an order declaring the property executable. The applicant is calling up the bonds on the ground that the respondents are in default with payment of their monthly instalments, in breach of the credit agreement. The respondents are opposing the application. I shall henceforth refer to the applicant as the plaintiff and the respondents as the defendants as in the main action.

- [2] The defendants do not dispute that they are indebted to the plaintiff in the amount claimed or that they had defaulted with their monthly instalments. Their defence is set out in the opposing affidavit filed by the second defendant. Therein she says that she invoked the mechanism of the National Credit Act, 34 of 2005, (the NCA) and applied for debt review in terms of section 86 thereof and that such application was granted by a magistrate's court as evidenced by the relevant order attached to the opposing affidavit. In terms thereof an arrangement was made pursuant to which she had to pay reduced monthly instalments. She refers to the notice issued

by the plaintiff on 5 June 2009 in terms of section 86(10) of the NCA purporting to terminate the debt review and says that because she did not receive such notice there has not been proper termination of the debt review. She also claims that she could not have received it because no mail is delivered at Langenhovenpark, where she lives. In a nutshell, her defence is that the plaintiff was precluded by the provisions of the NCA from instituting action to enforce the terms of the credit agreement.

- [3] Mr. Gilliland, for the plaintiff, contended that the defence raised by the second defendant is not *bona fide* and that even if it is found to be *bona fide*, it would apply only in respect of the second defendant. In this regard, counsel pointed out that the first defendant has not availed himself of the provisions of the NCA, in that he was no party to the application for debt review. Counsel contended that therefore the first defendant was not covered by the order of re-arrangement of the obligations under the credit agreement. Regarding the application for debt review by the second defendant, Mr. Gilliland submitted that the notice in terms of section 86(10) terminating the debt review had been

properly delivered and that the plaintiff was therefore entitled to institute legal proceedings.

[4] Mr. Buys, for the defendants, submitted that the plaintiff was precluded from initiating legal proceedings by virtue of the provisions of section 88(3), since a re-arrangement of debt had taken place. Regarding the notice in terms of section 86(10), he contended that it was not a valid notice since it was issued prematurely before the expiry of the 60 days referred to therein. He also contended that the defendants were not in default of payment in terms of the re-arrangement. He referred to annexures "VAS2" and "VAS3" to the opposing affidavit which indicate that the defendants made various payments to the debt counsellor for distribution amongst the creditors.

[5] The argument that the plaintiff was precluded from instituting action by virtue of the provisions of section 88(3) has no merit. This sub-section is clearly subject to the provisions of section 86(10) and is not applicable where a notice in terms of the latter section has been issued. I now deal with the

contentions around the notice in terms of section 86(10).

This section 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 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.”

Compliance with the requirements of this provision would entitle the credit provider to proceed with legal action to enforce its rights under the credit agreement.

- [6] The defendants claim that the plaintiff issued the notice before the expiry of the 60 days period. It will be noted that the 60 days period starts to run as from the date on which an application was made to a debt counsellor in terms of section 86(1). The defendants do not know such date but instead seem to rely on the date of the order made by the

magistrate's court on 29 May 2009. The plaintiff, on the other hand, says that the 60 days has expired without reference to any date. The plaintiff goes on to allege that the defendants have not disputed its averment on the point. I should say that the plaintiff is mistaken in this regard, because par. 9 of the opposing affidavit pertinently avers that the 60 days period had not expired.

- [7] In the absence of certainty as to when was the application for debt review submitted to the debt counsellor, I am unable to say whether there has been compliance with the provisions of 86(10). In my view, the onus to show that there has been compliance with the relevant provisions rests on the plaintiff. In the premises it has not been shown that the requirements of the relevant section have been complied with. This triggers the provisions of section 129(1)(b)(i) and section 130(1)(a), which means that the institution of action *in casu* was premature. I must of course make it clear that this finding applies only to these summary application proceedings and it may be that at the trial the plaintiff may prove that the 60 days period had in fact expired.

- [8] There is another obstacle to the grant of summary judgment. The defendants aver that they were not in default with the instalments payable under the debt re-arrangement and have annexed documents purporting to evidence the payments made. Mr. Gilliland challenged the authenticity of these documents and contended that at best they show only that payments were made to the debt counsellor. It should be noted that a section 86(10) notice can only be issued if the consumer is in default under a credit agreement that is being reviewed. Where there has been a re-arrangement, as *in casu*, this can only mean that the consumer must have defaulted with payment of the instalments payable in terms of the debt re-arrangement. The second defendant avers that she has been making the applicable instalments and the documents annexed to the opposing affidavit tend to support this. If this is established at the trial, it will provide a good defence. Under these circumstances summary judgment cannot be granted.
- [9] The proposition that summary judgment could be granted only against the first defendant by virtue of the fact that he did not avail himself of the mechanism of the NCA is

untenable. The two defendants are jointly and severally liable for the debt due to the plaintiff. If the one has made arrangements for payment and is paying, the other is absolved. *A fortiori*, where the arrangement to pay has been made in terms of the ameliorating provisions of the NCA. Besides, the grant of summary judgment against the first defendant will have the effect of denying the second defendant the benefits of the debt review and would defeat the very purpose and essence of the NCA. And I doubt that there could be part execution of the jointly owned fixed property. Finally, I deal hereunder with the contention that there was no compliance with the requirements of section 86(10) by virtue of the fact that there has not been proper delivery of such notice.

- [10] A reading of sections 129 and 130 of the NCA reveals that where the circumstances call for the notice in terms of section 86(10) it is not necessary to issue a notice in terms of section 129(1). The two are alternative procedures. The difference between the two is clear: A section 129 notice is a prerequisite for the institution of legal proceedings where no debt review proceedings have been commenced, whereas

the notice in terms of section 86(10) terminates the debt review process. However, the same rules for delivery apply to both notices.

- [11] Now the defendants allege that they did not receive the notice in terms of section 86(10) because no mail is delivered at their place of residence and to which the relevant notice was posted by registered post. In **ABSA BANK LTD v PROCHASKA t/a BIANCA CARA INTERIORS** 2009 (2) SA 512 (D&CLD) it was stated that where a consumer has chosen a *domicilium* in the credit agreement, the notice in terms of section 129 must be delivered to such address and to no other. In **MATIMUTHU MUNIEN v BMW FINANCIAL SERVICES (SA) (PTY) LIMITED AND ANOTHER**, case no. 16103/2008, a judgment of the KwaZulu-Natal High Court, Durban delivered on 3 April 2009, it was held that it is not a requirement of the NCA that the notice in terms of section 129 should actually be received by the consumer. It suffices that it has been sent to the chosen address through any of the modes of delivery set out in section 65(2), which include registered post. I agree with these decisions. In the instant case the notice was sent by

