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OVER-INDEBTEDNESS UNDER THE NATIONAL CREDIT ACT AS A *BONA FIDE* DEFENCE TO SUMMARY JUDGMENT

1 Introduction

One of the purposes of the National Credit Act 34 of 2005 (NCA) is to provide debt relief to an over-indebted consumer (s 3(g) of the NCA) by allowing him or her to apply, in terms of section 86, to a debt counsellor for the review of his or her debt obligations pursuant to a credit agreement as defined in the NCA. If the debt counsellor on account of the assessment required in terms of section 86(6)(a) and regulation 24(6) concludes that the consumer is over-indebted (s 86(7)(c)), the debt counsellor will draft a proposal for the restructuring of the consumer's obligations and submit it to all credit providers for their consideration. In terms of section 79, a consumer is over-indebted

> "if the preponderance of available information at the time a determination is made indicates that the particular consumer 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, having regard to the consumer's –
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> (a) financial means, prospects and obligations; and
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> (b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment".

Although the NCA does not require any negotiations in respect of consumers who are found to be over-indebted (*National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP) 317), debt counsellors in practice prefer to negotiate with credit providers in the hope of reaching a compromise with them, but also pursuant to their obligation in terms of section 86(5) "to participate in good faith in the review and any negotiations designed to result in responsible debt re-arrangement". However, should the parties not reach any agreement, the debt counsellor must bring an application to the magistrate's court in terms of section 87(1) for an order in terms of which the consumer is declared over-indebted and his or her debt obligations are restructured pursuant to the debt counsellor's proposal (s 86(7)(c) read with ss 86(8)(b) and 87(1)).

While a consumer is under debt review, or where a debt restructuring order applies to him or her and the consumer strictly complies with such order, the credit provider may not in terms of section 88(3) enforce any of its rights in terms of a credit agreement. The bar against enforcement of a credit agreement that is subject to a pending debt review is further entrenched in section 130(4)(c) which provides as follows:

> "In any proceedings contemplated in this section, if the court determines that –
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> (c) the credit agreement is subject to a pending debt review in terms of Part D of Chapter 4, the court may –
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> (i) adjourn the matter, pending a final determination of the debt review proceedings;

(ii) order the debt counsellor to report directly to the court, and thereafter make an order contemplated in section 85(b); or

(iii) if the credit agreement is the only credit agreement to which the consumer is a party, order the debt counsellor to discontinue the debt review proceedings, and make an order contemplated in section 85(b)."

Section 88(3) is furthermore subject to section 86(10) which 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 –
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> (a) the consumer;
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> (b) the debt counsellor; and
>
> (c) the National Credit Regulator,
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> at any time at least 60 business days after the date on which the consumer applied for the debt review."

Where a consumer is under debt review, section 129(1)(b) provides that a credit provider may not commence any legal proceedings to enforce a credit agreement before first providing notice to the consumer as contemplated in section 86(10).

However, a notice to terminate a debt review in terms of section 86(10) does not appear to be a dead-end for the consumer (Scholtz *Guide to the National Credit Act* (2008) para 11 3 3 3) as section 86(11) provides that a court may order a resumption of the debt review. Section 86(11) reads as follows:

> "If a credit provider who has given notice to terminate a review as contemplated in subsection (10) proceeds to enforce that agreement in terms of Part C of Chapter 6, the Magistrate's Court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances."

Apart from the remedy provided for by section 86 to consumers to voluntarily apply to a debt counsellor for a review of his or her debt obligations, section 85 provides over-indebted consumers with yet another opportunity for obtaining debt relief. Section 85 which is entitled "Court may declare and relieve over-indebtedness" provides as follows:

> "Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under the credit agreement is over-indebted, the court may –
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> (a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of section 86(7); or
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> (b) declare that the consumer is over-indebted, as determined in accordance with this Part, [Part D of Chapter 4 dealing with over-indebtedness and reckless credit] and make any order contemplated in section 87 to relieve the consumer's over-indebtedness."

This discussion focuses on the situation where a credit provider invokes his remedy of summary judgment in order to enforce a debt obligation under a credit agreement to which the NCA applies and the consumer opposes the summary judgment application by raising his or her over-indebtedness as a defence to the plaintiff's claim. It should be noted that, in the context of summary judgment proceedings, a consumer's over-indebtedness may be presented to court via different scenarios. In the first instance, a consumer who has not voluntarily applied for debt review in terms of section 86 prior to enforcement proceedings, may in his opposing affidavit use section 85 of the NCA as the basis to ask the court to deal with his over-indebtedness. However, it may also happen that the debtor in

his opposing affidavit, or merely as a point *in limine*, raises his over-indebtedness via the allegation that he was subject to a pending debt review which was never duly terminated pursuant to section 86(10) prior to enforcement. The third scenario occurs where the debtor during summary judgment proceedings raises his over-indebtedness in the context of a pending debt review that is alleged to have been unlawfully terminated pursuant to section 86(10) prior to enforcement of a credit agreement that was subject to such review. The discussion hereafter is based on the premises that the plaintiff-credit provider's application is correct in all respects and focuses on the defence raised by the debtor and how it should be dealt with procedurally with regard to the different scenarios that may be applicable.

2 Summary judgment

Summary judgment is a remedy that is to the avail of a plaintiff who has issued summons against a defendant for, *inter alia*, a liquidated amount of money in instances where the debtor enters a notice of intention to defend the claim, but the plaintiff believes that the debtor does not have a *bona fide* defence to such claim (High Court rule 32(1)(a)). This remedy, originating in English law, was designed to prevent a plaintiff's claim based upon certain causes of action from being delayed by what amounts to an abuse of the process of court (Van Loggerenberg *Erasmus Superior court practice* (1994 ff) Commentary to rule 32 B1-206). The summary judgment remedy enables the plaintiff to obtain judgment against the defendant at an early stage of the proceedings without the matter proceeding to trial and thus apparently without full observance of the *audi alteram partem* principle, given that "the doors of the court are closed" to the debtor at an early stage (*Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 5 SA 1 (SCA) 11C–G; Van Loggerenberg B1-206). It is for this reason that the summary judgment remedy has been regarded as extraordinary and stringent. However, the Supreme Court of Appeal in *Joob Joob Investments supra* pertinently remarked: "The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of his/her day in court."

The procedure for summary judgment entails that the plaintiff is confined to a standard supporting affidavit in which he must verify the cause of action and the amount claimed, if any; state that in his opinion there is no *bona fide* defence to the action and further state that the defendant has delivered notice of intention to defend solely for the purposes of delay (High Court rule 32(2)). A defendant against whom an application for summary judgment is brought may respond to such application in one of two ways: He may either give security to the plaintiff to the satisfaction of the registrar for any judgment, including costs, that may be given against him, alternatively, he may satisfy the court by affidavit, or with leave of the court, by means of oral evidence, that he does in fact have a *bona fide* defence to the plaintiff's claim (High Court rule 32(3)(a) and (b)).

In order to ward off summary judgment, the *bona fide* defence raised by the debtor has to be valid in law and not merely an inability to pay (*Desart v Townsend* 22 LR Ir 389; *Standard Bank of SA Ltd v Friedman* 1999 4 SA 928 (SCA) 938D–H). The defendant is required to set out fully the nature and grounds of the defence and the material facts relied upon for the defence (High Court rule 32(3)(b)). He is required to satisfy the court by affidavit of his defence but, as Van Loggerenberg indicates (B1-224), "'satisfy' does not mean 'prove'". Thus, while it is not incumbent upon the defendant to formulate his opposition to the

summary judgment application with the precision that would be required of a plea, nonetheless when he advances his contentions he must do so with a sufficient degree of clarity to enable the court to ascertain whether he has deposed to a defence which, if proved at trial, would constitute a good defence to the action (High Court rule 32(3)(b)). In *Breitenbach v Fiat SA (Edms) Bpk* 1976 2 SA 226 (T) 228 Colman J held as follows (see also *Maharaj v Barclays National Bank Ltd* 1976 1 SA 418 (A); *Tesven v South African Bank of Athens* 2000 1 SA 268 (SCA)):

> "It must be accepted that the sub-rule was not intended to demand the impossible. It cannot, therefore, be given its literal meaning when it requires the defendant to satisfy the Court of the *bona fides* of his defence. It will suffice, it seems to me, if the defendant swears to a defence, valid in law, in a manner which is not inherently and seriously unconvincing.
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> Another provision of the sub-rule which causes difficulty, is the requirement that in the defendant's affidavit the nature and grounds of his defence, and the material facts relied upon therefor, are to be disclosed 'fully'. A literal reading of that requirement would impose upon a defendant the duty of setting out in its affidavit the full details of all the evidence which he proposes to rely upon in resisting the plaintiff's claim at the trial. It is inconceivable, however, that the draftsman of the Rule intended to place that burden on the defendant. I respectfully agree . . . that the word 'fully' should not be given its literal meaning in Rule 32(3), and that no more is called for than this: that the statement of material facts be sufficiently full to persuade the Court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. What I would add, however, is that if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the Court to consider in relation to the requirement of *bona fides*."

The court in *Breitenbach v Fiat* (*supra* 227) further held that "*bona fides*" in rule 32(3)(b) cannot be given its literal meaning as the sub-rule does not require the defendant to establish his *bona fides*; it is the defence that must be *bona fide.* However, if it is apparent from his affidavit that the defendant is not *bona fide*, he will fail in his defence because in such a case his defence, too, cannot be *bona fide*. A defendant will therefore fail if it is clear from his affidavit that he is advancing a defence simply to delay the obtaining of a judgment to which the defendant well knows the plaintiff is justly entitled (Van Loggerenberg B1-224; *Skead v Swanepoel* 1949 4 SA 763 (T); *Van Eeden v Sasol Pensioenfonds* 1975 2 SA 167 (O)).

Where a defendant has properly given security in response to an application for summary judgment, the court has no discretion and must dismiss the application for summary judgment and grant the defendant leave to defend the action (High Court rule 32(7)). However, where the defendant has chosen to raise a defence to the plaintiff's claim the court has a discretion to grant summary judgment or not, depending on whether the defence qualifies as a *bona fide* defence. Once the court finds that the defendant has indeed disclosed a *bona fide* defence, it has no discretion to grant summary judgment and must of necessity dismiss the application for summary judgment and grant the defendant leave to defend the action (High Court rule 32(7)).

3 Over-indebtedness as a *bona fide* defence

The NCA has, however, now thrown a procedural curve ball at the legal fraternity by introducing the concept of "over-indebtedness" and its concomitant debt relief into the realm of civil litigation based on credit agreements that fall within

the scope of application of the Act. It now often happens that a defendant raises the issue at summary judgment stage that he is either over-indebted (thus unable to pay his credit agreement debt timeously) and wishes to access the debt review procedure envisaged by the NCA, or that he was subject to the debt review process prior to enforcement of the credit agreement and wants same to continue. The question consequently arises what the impact of over-indebtedness is on the summary judgment procedure.

It is submitted that a distinction should be drawn between the concept of "over-indebtedness", being the state of inability to timeously meet debt obligations arising from credit agreements governed by the NCA, and "debt review", being the procedural remedy that may be accessed to obtain debt relief in respect of such over-indebtedness. Over-indebtedness *per se* is not a defence on the merits in respect of a claim for payment of money (*Collett v Firstrand Bank Ltd* 2011 4 SA 508 (SCA) para 18; Scholtz para 12.16). Thus, it follows that over-indebtedness *per se* cannot be regarded as a *bona fide* defence to an application for summary judgment entitling a defendant who merely raises the issue of his over-indebtedness to have the summary judgment application dismissed. In essence it is submitted that over-indebtedness within the context of summary judgment can at the most be regarded as the discretionary and non-automatic gateway to a statutory staying mechanism which, if granted by a court, has a dilatory effect on the proceedings in which it is raised in the sense that the consumer is afforded an opportunity to obtain debt relief in the form of debt restructuring. If such debt restructuring order is eventually made it may effectively make the main proceedings instituted against the consumer redundant due thereto that as long as the debtor complies with the debt restructuring order no (further) enforcement may occur in respect of a credit agreement which is subject to such order (s 88(3) of the NCA). However, it should also be borne in mind that the granting of a debt restructuring order to an over-indebted consumer is discretionary and depends largely on the potential for viable economic debt restructuring (*Seyffert v Firstrand Bank Ltd* 2012 6 SA 581 (SCA) para 13). It may thus happen that an over-indebted consumer who goes through the process of debt review and is declared over-indebted may find himself at a dead end once it becomes clear that he will not be able to afford the instalments in respect of a reasonable economic repayment plan. It is thus submitted that even in a case where the defendant, during summary judgment proceedings, is afforded the opportunity to access the debt relief remedies provided by the NCA by virtue of his over-indebtedness, should it eventually transpire that his debt cannot be economically restructured, summary judgment ought then at such later stage, when the unfeasibility of debt restructuring becomes evident, be granted against him.

As indicated, the consumer's over-indebtedness may be presented to the court via different scenarios and each of these scenarios has to be addressed in a specific manner.

3 Different scenarios for raising over-indebtedness as a defence and how it should be dealt with procedurally

3 1 Section 85

A consumer who has not voluntarily applied for debt review under section 86 prior to enforcement proceedings may in his opposing affidavit use section 85 as the basis to request the court to deal with his over-indebtedness. Where a debtor raises his indebtedness for the first time in summary judgment proceedings

without at any prior stage having voluntarily applied for debt review, the court, as a sub-discretion within the context of the broader discretion in respect of granting summary judgment or not, may consider whether to refer the matter to a debt counsellor for debt review with the objective of an eventual debt restructuring order, alternatively, whether *suo motu* to declare the consumer over-indebted and rearrange his credit agreement debt (s 85(a) and (b) respectively).

At the stage where the court decides in terms of section 85(a) to refer the matter to a debt counsellor for debt review it will not be necessary for the defendant to actually prove his over-indebtedness as the question whether he is indeed over-indebted as alleged will be addressed during the debt counsellor's assessment of his debt situation (Van Heerden and Lötz "Over-indebtedness and the discretion of court to refer to debt counsellor – *Standard Bank of South Africa Ltd v Hales* 2010 *THRHR* 502; Kreuser "The application of section 85 of the National Credit Act in an application for summary judgment" 2012 *De Jure* 1 10). Where the matter is referred to a debt counsellor, and in view thereof that it has been held that over-indebtedness is not a defence on the merits, it would be appropriate for the court to merely postpone the summary judgment application pending the yet uncertain outcome of the debt review proceedings before the debt counsellor. It is submitted that the court can either postpone the proceedings *sine die,* alternatively it may follow the more prudent route of postponing the summary judgment proceedings to a specific date by which it also decrees that the debt review proceedings before the debt counsellor should be finalised. Should the debt counsellor find the defendant to be over-indebted and the court makes such a declaration and reschedules the defendant's credit agreement debt, the application for summary judgment should then be postponed *sine die* pending compliance by the defendant with the debt restructuring order. However, if the debt counsellor does not find the defendant over-indebted, or the defendant fails to consult a debt counsellor for purposes of debt review or the court eventually finds that although the consumer is over-indebted, his debt cannot be economically restructured, the court ought to, at this later stage, grant summary judgment against the defendant.

Whereas proof of actual over-indebtedness is not required before the court can make an order in terms of section 85(a), it is submitted that such proof of over-indebtedness is indeed required before the court can exercise its power in terms of section 85(b) to declare a consumer over-indebted. In those instances where the court, in accordance with its discretion in terms of section 85(b), decides to declare the consumer over-indebted and reschedule his debt, it should then upon making the rescheduling order also postpone the summary judgment application *sine die*, pending compliance by the defendant with the terms of the rescheduling order. It is submitted that in all instances where a summary judgment application is postponed in order to afford the defendant the debt relief opportunities provided by the NCA, the plaintiff should be allowed to approach the court on the same papers and that any amendment to the amount for which judgment is asked should be allowed to be made informally.

3 2 Pending debt review

Where the debtor in his opposing affidavit, or merely as a point *in limine*, raises his over-indebtedness via the allegation that he was subject to a pending debt review which was never duly terminated in accordance with section 86(10) prior to enforcement, section 130(4)(c) appears to be applicable. The gist of the matter

is that the NCA provides expressly that a credit agreement that is subject to a pending debt review has to be formally terminated before it may be enforced by a credit provider (s 86(10) read with s 129(1)(b)). Whilst a credit agreement is subject to a pending debt review and before it is duly terminated pursuant to a notice in terms of section 86(10), there is, as indicated, a moratorium against enforcement of that credit agreement (s 88(3)). The consequence of the aforesaid moratorium on enforcement is that a credit provider who seeks to enforce the agreement while the moratorium is in effect is seeking premature enforcement of his claim, contrary to a statutory bar which disallows a court to entertain his claim at all. In terms of the ordinary rules of civil procedure a defendant would in such instance be able to raise an exception to the plaintiff's claim on the basis of the failure to comply with a statutory pre-enforcement notice with the result that it lacks a completed cause of action (High Court rule 23). Ordinarily a plaintiff against whose particulars of claim an exception is upheld is afforded an opportunity to amend the particulars of claim in order to cure the defect complained of (Theophilopoulos *et al Fundamental principles of civil procedure* (2012) 197). However, where no notice to terminate a debt review was delivered prior to enforcement it will have the effect that if the exception is upheld, the plaintiff will not be able to amend his pleadings seeing that no or no proper section 86(10) notice was given. Thus, the exception will effectively dispose of the case because the plaintiff will have to withdraw his action and tender costs (*ibid*). However, the NCA in several instances contains its own novel set of procedural rules that deviate from the ordinary rules of civil procedure that prevail in the high courts and magistrates' courts. As indicated, the bar against enforcement of a credit agreement that is subject to a pending debt review (s 88(3)) is further entrenched in section 130(4)(c) of the NCA. It therefore appears that section 130(4)(c) as a *lex specialis* "overrides" or "trumps" the ordinary exception procedure afforded by the prevailing rules of civil procedure applicable in the high courts and magistrates' courts, which procedure ordinarily would have applied to the premature enforcement of an agreement absent compliance with a statutory pre-enforcement requirement such as the section 86(10) notice of termination.

A defendant who wishes to raise an exception to a plaintiff's particulars of claim has to do so within the time allowed for filing of a subsequent pleading. This means that *in casu* the defendant will have to raise the exception within 20 days after the delivery of the plaintiff's declaration, in the event of a simple summons, alternatively within 20 days of the delivery of the defendant's notice of intention to defend, in the case of a combined summons (High Court rule 23(1)). However, it often happens that the plaintiff serves an application for summary judgment on the defendant before the defendant raises an exception to the plaintiff's particulars of claim. Rule 32(3)(B) which deals with summary judgment does not require that a defendant who wishes to rely on the excipiability of a claim, had to have filed an exception in terms of rule 23 – he merely needs to base his opposition on the excipiability of the claim (Van Loggerenberg B1-224A). Should the defendant thus raise the plaintiff's non-compliance with section 86(10) prior to enforcement, the question arises whether such non-compliance affords the defendant a *bona fide* defence to the application for summary judgment.

It is submitted that non-compliance by the plaintiff with section 86(10) prior to enforcement of a credit agreement affords the defendant a procedural or technical *bona fide* defence which would ordinarily justify a court in dismissing an

application for summary judgment in view of the premature enforcement of the agreement whilst the section 88(3) moratorium on enforcement was still in effect. However, due thereto that the provisions of the NCA takes precedence over the ordinary rules of civil procedure, it appears that the procedural non-compliance with section 86(10) is not a basis for dismissal of summary judgment proceedings and that the court should either adjourn the matter or make one of the orders stated in section 130(4)(c)(i) or (ii). It is submitted that the courts will usually, in terms of section 130(4)(c)(i), order an adjournment of the summary judgment proceedings in the form of a postponement rather than merely letting the matter stand down, unless possibly where the relevant credit agreement is the consumer's only credit agreement and there are sufficient facts before the court to make a declaration of over-indebtedness and grant a debt restructuring order. Where the court declares the debtor over-indebted and reschedules his debt in accordance with section 130(4)(c)(ii) or (iii), it would thus mean that the summary judgment application should be postponed *sine die* with leave to approach the court on the same papers pending compliance by the debtor with the debt restructuring order. However, where the court in terms of section 130(4)(c) declares that the consumer is not over-indebted, the dilatory defence falls away and if the plaintiff's papers are otherwise in order and there is no other defence on the merits that is raised by the debtor, it is submitted that summary judgment ought to be granted in favour of the plaintiff-credit provider.

3 3 Unlawful termination

The third scenario occurs where the debtor during summary judgment proceedings raises his over-indebtedness in the context of a pending debt review that is alleged to have been unlawfully terminated pursuant to section 86(10) prior to enforcement of a credit agreement that was subject to such review.

Where a pending debt review is terminated pursuant to an apparently procedurally correct section 86(10) notice that complies with the requirements, contents and mode of delivery required by the Act, the situation is addressed by section 86(11) of the NCA. It has been held that the appropriate court to make a section 86(11) resumption order is the court in which the credit agreement is enforced (*Collett* para 17). Section 86(11) has the effect that debt review proceedings which have been terminated may resume with the eventual result that the debtor may or may not eventually be declared over-indebted and, if declared over-indebted, may obtain debt relief in the form of a debt restructuring order if such restructuring is economically feasible (see *Seyffert* para 13).

However, the question arises as to what the impact of the resumption of a debt review is on the enforcement proceedings that were instituted prior to a section 86(11) resumption order. Does such order invalidate or merely suspend the enforcement proceedings that were instituted after the "unlawful" section 86(10) notice? Section 86(11) does not state any specific grounds on which such resumption may occur, save to suggest that in an instance where a credit provider terminates a pending debt review in terms of section 86(10), a court has the discretion to order a resumption of the debt review once the credit provider proceeds to enforce that agreement. The court is given a wide discretion to order such resumption based on "any conditions" that it considers to be "just in the circumstances". It is thus possible that even in the case where such notice to terminate was procedurally valid in the sense that it was given after the appropriate number of days and to the correct parties, a court may still "undo" the termination

and order a resumption of the order "on conditions that it deems just in the circumstances". Obviously the circumstances will have to justify the conditions and as case law suggests (see *Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga* 2011 1 SA 374 (WCC) para 51; *Collett* paras 15 and 18). Such circumstances would usually be that the credit provider failed to comply with the duty regarding *bona fide* participation in a debt review (s 86(5)) and *bona fide* termination of such debt review.

When one has regard to the concept of "resumption" of legal proceedings, the word "resume", means to "begin again or continue after a pause" (http://bit.ly/1i8EMLd, accessed on 2013-08-12). However, section 86(11) itself is silent on the effect of a resumption order on enforcement proceedings that were instituted prior to the granting of the resumption order. This begs the question whether the effect of the resumption is that the debt review proceedings in scenario three are revived and the enforcement proceedings nullified or whether it is merely a case of the court in its discretion allowing the debt review to proceed due to the fact that it has been terminated contrary to the inherent notion of good faith which the court required in *Dunga* (para 15) read into section 86(10). If it is regarded that the debt review is revived and that such revival nullifies the termination in terms of section 86(10), it would ordinarily mean that a credit provider who has enforced a credit agreement in consequence of such notice of termination litigated prematurely. The essence of the argument would then be that because there was no valid termination of the debt review, the moratorium against enforcement was not lawfully lifted and the credit provider, due to his non-compliance with a statutory pre-enforcement notification, lacked a completed cause of action. One could then very well argue that such situation amounts to enforcing a credit agreement whilst a debt review in respect thereof was pending and that the court should revert to section 130(4)(c) and postpone the summary judgment proceedings and make the orders as suggested regarding scenario two above.

The interaction between section 86(11) and section 130(4)(c), and even section 85, is quite peculiar, if it was ever the legislature's intention that such interaction should be contemplated. Why would a legislature in a separate section of the Act give the court the power to order resumption of a terminated debt review and also the powers to refer a matter for debt review if it actually intended for both these matters to be procedurally dealt with under section 130(4)(c)? The legislature is not in the habit of duplication of provisions in legislation just for the mere sake of duplication. Therefore it is submitted that, having regard to the text of sections 130(4)(c) and 86(11) respectively, one may infer that section 130(4)(c) contemplates a situation where a consumer applied for debt review in respect of a credit agreement and the credit provider thereafter enforced such agreement without terminating the debt review pursuant to a notice in terms of section 86(10) or on the basis of a procedurally defective section 86(10) notice (ie prior to the lapse of the applicable time period or by delivering it to an incorrect party or incorrect address or in respect of an incorrect credit agreement). Section 86(11), on the other hand, targets the credit provider's failure to cooperate in the debt review and terminates it in good faith as the basis for a resumption order. Thus, it is submitted that it is not procedural defectiveness but lack of *bona fides* which grants access to the remedy provided for in section 86(11). Such lack of *bona fides* may not necessarily be that of the credit provider, it may even be that a court deems it just to order resumption of a debt

review that was procedurally lawfully terminated by a credit provider because the *debt counsellor* was not *bona fide* in conducting the debt review proceedings, such as in *Standard Bank Ltd v Kallides* (1061/2012) [2012] ZAWCHC 38 (2012-05-02)). In such instance section 130(4)(c) will clearly not be to the avail of the debtor who wishes to proceed with the debt review. Thus, it is submitted that section 86(11) caters for a different type of situation than section 130(4)(c).

The effect of a resumption order is that the debt review is allowed to proceed from the point where it was terminated, which could have been while the debt counsellor was still attending to the assessment of the debtor's state of over-indebtedness or while he was in the process of referring the matter to court or while the matter was still pending before the court. The resumed proceedings may or may not result in the consumer eventually being declared over-indebted and having his debt restructured. If eventually a declaration of over-indebtedness is made, and a debt restructuring order is granted by the court attending to the debt review proceedings, the consumer will be off the hook as long as he complies with the debt restructuring order. Its effect would then be to "suspend" the summary judgment proceedings indefinitely pending compliance with the restructuring order. However, if the debt review proceedings are for some or other reason not pursued any further by the consumer or the court eventually finds him or her not to be over-indebted or refuses to make a debt restructuring order because it is not economically feasible, the dilatory "defence" of over-indebtedness falls away, entitling the plaintiff-credit provider to summary judgment. The point to be made is that at the stage that the enforcement court makes a resumption order in terms of section 86(11), the outcome of the debt review proceedings which are allowed to resume is not certain and thus its effect on the enforcement proceedings is not certain. Thus, it is submitted that the most appropriate order that the court ought to make regarding summary judgment proceedings at the stage that section 86(11) is raised, is to postpone the summary judgment proceedings either *sine die* or to a specific date (as motivated above) if the court grants an order for the resumption of debt review proceedings.

The question that arises is whether the *mala fide* termination of a debt review in terms of section 86(10) (as envisaged in scenario three), as opposed to a mere allegation of over-indebtedness and a request to access the debt review process (as envisaged in scenario one), or of failure to procedurally comply with section 86(10) (as envisaged in scenario two), constitutes a *bona fide* defence on the basis of which an application for summary judgment may be dismissed (see the facts and decision in *Nedbank Ltd v Swartbooi* unreported case no 708/2012 (2012-10-23) (ECP). As indicated above, an over-indebted person is entitled to voluntarily apply for debt review. The effect of the debt review is that whilst such person is under debt review the credit agreement to which the debt review pertains cannot be enforced (s 88(3)). Thus, as opposed to merely alleging that he is over-indebted, which in itself has been held not to constitute a *bona fide* defence, a consumer who has already accessed the debt review process and is actually subject to a pending debt review (as envisaged in scenario two) has an added layer of protection afforded to him, namely, a statutory moratorium on enforcement (s 88(3)). It is therefore submitted that in the latter instance it is not the consumer's over-indebtedness, but actually this statutory moratorium on enforcement which affords him a *bona fide* (albeit technical) defence to summary judgment, should a credit provider attempt to enforce the credit agreement whilst it is subject to a pending debt review. It is further submitted that the *sui generis*

situation where a debt review is allowed to resume in terms of section 86(11) in instances where there has been proper procedural compliance with section 86(10) but lack of good faith by a *credit provider*, would thus also constitute a *bona fide* defence to an application for summary judgment, not because the consumer is over-indebted, but because of the lack of compliance with good faith as a statutory pre-enforcement requirement inherent in proper termination of debt review in terms of section 86(10) (*Dunga* para 15). However, where the resumption order is granted as a result of the lack of good faith compliance with the debt review procedure by the debt counsellor it is submitted that such lack of good faith by the *debt counsellor* would not ordinarily be able to be raised as a *bona fide* defence to summary judgment *vis-a-vis* the plaintiff-credit provider. However, the NCA at least appears to elevate such "excuse" to the level of a "technical dilatory defence" in the context of summary judgment as the resumption of the proceedings will trump the granting of summary judgment and the latter proceedings will have to be postponed. It is submitted that, in the context of scenarios two and three, the notion of a *bona fide* defence for purposes of summary judgment proceedings acquires a whole new meaning. Where a *bona fide* defence would ordinarily entitle a defendant to have summary judgment proceedings dismissed, this specific *bona fide* defence attracts its own procedural rules which merely require the summary judgment proceedings to be adjourned or postponed, not dismissed, pending the eventual outcome of the debt review proceedings and, thereafter, if a debt restructuring order is made, pending compliance with such order by the consumer. It is further submitted that procedurally the exercise of the *sui generis* discretion to order resumption of a previously terminated debt review in terms of section 86(11) should precede the exercise of the overriding discretion that the court has in summary judgment proceedings, as the first-mentioned discretion has a direct bearing on the exercise of the last-mentioned discretion, given that the granting of a section 86(11) order confirms the existence of the *sui generis bona fide* defence that a pending debt review was not participated in and not terminated in good faith.

4 Conclusion

As indicated, over-indebtedness *per se* is not a defence on the merits in respect of a claim for payment of money and can therefore not *per se* be regarded as a *bona fide* defence to an application for summary judgment, entitling a consumer who raises such over-indebtedness to have the summary judgment application dismissed. However, depending on the scenario in which the consumer's over-indebtedness is presented to court, failure by the credit provider to comply with aspects relating to participation in and termination of a debt review process may constitute a *bona fide* defence for summary judgment purposes. Where a consumer in his opposition to summary judgment relies on section 85 of the NCA as a basis to request the court to deal with his over-indebtedness, it is submitted that his alleged over-indebtedness would not *per se* constitute a *bona fide* defence for summary judgment purposes. However, if the court grants the consumer access to the debt review process it would have a dilatory effect on the summary judgment proceedings as it would cause such proceedings to be postponed pending the outcome of the debt review proceedings. If the consumer is eventually granted a debt restructuring order it may result in the further postponement of the summary judgment proceedings pending compliance with the debt restructuring order and may even lead to the summary judgment proceedings becoming redundant in the event of the consumer having fully complied with the debt

restructuring order. However, where the consumer raises his over-indebtedness via the allegation that he or she was subject to a pending debt review which was never duly terminated in accordance with the requirements of section 86(10) prior to enforcement, or where the termination was alleged to have been unlawfully terminated pursuant to section 86(10) by a credit provider who acted in bad faith and a resumption order in terms of section 86(11) is subsequently granted, it is submitted that this may indeed constitute a *bona fide* defence for summary judgment purposes. However, it should be noted that the NCA contains its own novel set of procedural rules that deviate from the ordinary rules of civil procedure which will not necessarily entitle the defendant-consumer to have the summary judgment proceedings dismissed.

It is important that our courts take note of the deviating procedures prescribed by the NCA in order that plaintiff credit providers would not unnecessarily be deprived of their summary judgment remedy in cases where a postponement or adjournment of the proceedings are the appropriate procedure to be followed.

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