NON-COMPLIANCE WITH TIME PERIODS – SHOULD THE DEBT REVIEW PROCEDURE LAPSE ONCE A REASONABLE TIME HAS EXPIRED?

Pelzer v Nedbank Limited
unreported case no 14160/09 (GNP)

1 Introduction

The application in *Pelzer v Nedbank Ltd* dealt with section 88(3) of the National Credit Act 34 of 2005 (NCA) which in essence precludes a credit provider from enforcing a credit agreement that is subject to debt review proceedings until certain events have occurred. Section 88(3) provides as follows:

> "Subject to section 86(9) and (10), a credit provider who receives . . . 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–
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> (a) the consumer is in default under the credit agreement; and
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> (b) one of the following has occurred:
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> (i) An event contemplated in subsection (1)(a) through (c); or
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> (ii) the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal."

The events referred to in subsection (3)(b)(i) above, are those mentioned in section 88(1)(a)–(c):

> "(a) The debt counsellor rejects the application and the prescribed time period for direct filing in terms of section 86(9) has expired without the consumer having so applied;
> (b) the court has determined that the consumer is not over-indebted, or has rejected a debt counsellor's proposal or the consumer's application; or
> (c) a court having made an order or the consumer and credit providers having made an agreement re-arranging the consumer's obligation, all the consumer's obligations under the credit agreement as re-arranged are fulfilled, unless the consumer fulfilled the obligations by way of a consolidation agreement."

In *Pelzer* the respondent-credit provider contended that the debt review procedure had lapsed because of non-compliance with prescribed time periods in terms of the regulations promulgated in terms of the NCA. In this regard it should be noted that the legislator has not provided any sanction for failure to comply with these time periods (cf Roestoff "Enforcement of a credit agreement where the consumer has applied for debt review in terms of the National Credit Act 34 of 2005" 2009 *Obiter* 430 432). The question according to the court (Goodey AJ) was therefore whether debt review proceedings can carry on indefinitely or whether it should lapse because of non-compliance with the prescribed time periods once a reasonable time has expired (para 1.2).

The facts in *Pelzer* are analysed and discussed below. In order to properly evaluate the court's decision a brief exposition of the practical course of events in the debt review process is then provided. Thereafter the court's decision is discussed and commented on, followed by our conclusion.

2 The facts

The applicant-consumer applied for the rescission of a judgment that was granted against him in favour of the respondent on 21 April 2009 (para 1.3). The applicant was indebted to the respondent in terms of a number of credit agreements to which the NCA applied (para 2.1).

On 12 July 2008 the applicant applied for debt review by completing the prescribed Form 16 in terms of the NCA. On the same day, the applicant's debt counsellor notified the respondent of the debt review application by way of the required Form 17.1 (paras 2.2–2.3). The applicant thus complied with regulation 24(2) insofar as it requires the debt counsellor to deliver the notice to all credit providers within five business days after receiving the application for debt review. In this regard the respondent contended that:

> "The application was delivered outside the stipulated period of five business days, as the Applicant had made the application for review on 12 July 2008 but the application was only delivered to the Respondent on 17 September 2008. The Respondent accordingly advised the Applicant's debt counsellor to withdraw the (late) application and to resubmit the Form 17.1 application within the prescribed time period. The Respondent also advised the debt counsellor that the notification was regarded as invalid and of no force and effect with regards to the credit agreements concluded with the Respondent. The Respondent and/or his debt counsellor did not withdraw the application" (para 5.1; court's emphasis).

The respondent's argument here, it is submitted, is unclear as the NCA or its regulations do not require the debt counsellor to deliver the debt review application (ie the required Form 16) to credit providers. It merely requires the debt

counsellor to *notify* all credit providers that are listed in the application by delivering a completed Form 17.1 to them (see s 86(4)(b) read together with reg 24(2)).

The applicant also averred that a further document, with the heading "Urgent Request for COB's" and which also had the Form 17.1 appearing on it, was transmitted by the debt counsellor to the respondent on 15 August 2008. The applicant argued that the respondent was erroneously under the impression that this document was the Form 17.1, whilst it was merely a request for a certificate of balance (COB) (paras 4.1–4.2).

On 14 September 2008 the said debt counsellor found the applicant to be over-indebted and informed all the credit providers including the respondent of this finding (para 2.4). The respondent argued that the debt counsellor did not comply with the prescribed time period, as regulation 24(6) requires the debt counsellor to make such determination within 30 business days after receiving the debt review application, while the debt counsellor made the determination 45 days from the date of the application for debt review (para 5.1).

The respondent also argued that the debt counsellor only issued the application for the re-arrangement of the applicant's debts as contemplated in section 86(7)(c) during March 2009. The respondent therefore contended that "the time taken, [did] not constitute a reasonable time" (para 5.2).

On 13 March 2009 the respondent issued summons against the applicant and eventually obtained default judgment against him as the applicant failed to give notice of his intention to defend (para 2.5). The applicant then applied for the rescission of the aforesaid judgment (para 2.6). The gist of the applicant's defence was that the respondent was in terms of section 88(3) precluded from instituting action against the applicant as the applicant had, prior to the institution of action, applied for debt review in terms of the NCA (paras 3.1 and 4.1). However, the respondent argued that the debt review procedure had lapsed (para 3.2), to which the applicant argued that the NCA or its regulations do not specifically provide for the lapsing of the procedure because of non-compliance with time limits (para 4.3).

3 The debt review process

The practical course of events in the debt review process and the prescribed time frames that the relevant parties must comply with, can be summarised as follows (cf Roestoff *et al* "The debt counselling process – closing the loopholes in the National Credit Act 34 of 2005" 2009 12(4) *PER* 247 251 ff for a detailed discussion of the debt review process):

(a) The first step in the process is when the consumer applies for debt review by completing Form 16 in terms of section 86(1) read together with regulation 24(1).

(b) Section 86(4)(b) read together with regulation 24(2) requires the debt counsellor to deliver a completed Form 17.1 within five days after receiving the debt review application to all the consumer's credit providers and every registered credit bureau notifying them of the consumer's application. In practice the debt counsellor does not physically send the Form 17.1 to credit bureaus but the details of the consumer and the status of the application are entered on to the *ncrdebthelp* website. This information is then automatically forwarded to all registered credit bureaus.

(c) In terms of regulation 24(3) a debt counsellor is obliged to verify the financial information that has been provided by the consumer on the Form 16 by *inter alia* contacting the relevant credit provider. In practice the request for verification, that is, the request for a so-called "certificate of balance" (COB), is usually incorporated in the Form 17.1 notice. Regulation 24(4) requires the credit provider to provide the COB within five business days calculated from the date of request for verification in terms of regulation 24(3). In this regard it should be noted that section 86(5)(a) obliges a credit provider to "comply with any reasonable requests by a debt counsellor to facilitate the evaluation of the consumer's state of indebtedness and the prospects for reasonable debt re-arrangement".

(d) The debt counsellor must then determine whether the consumer is over-indebted (s 86(6)). Regulation 24(6) requires that the determination be made within 30 business days after receiving the Form 16.

(e) After completion of the assessment in terms of section 86(6) the debt counsellor must submit a Form 17.2 within five business days to all credit providers and credit bureaus (reg 24(10)). Once again the Form 17.2 will not be sent to the credit bureaus, but the consumer's status will be updated on the *ncrdebthelp* website.

(f) If, as a result of the assessment conducted in terms of section 86(6), the consumer was found to be over-indebted (s 86(7)(c)), the debt counsellor will draft a proposal restructuring the consumer's debt obligations and submit it to all credit providers for their consideration. It is to be noted that the NCA provides for negotiations only in the event of a finding that the consumer is not over-indebted, but is experiencing, or is likely to experience difficulty satisfying all his or her obligations in time (cf s 86(7)(b)). The NCA therefore does not require negotiations in the case of over-indebted consumers (cf *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP) 317). However, in practice debt counsellors usually prefer to negotiate with credit providers in the hope of reaching a settlement with them. Negotiations are also attempted in accordance with the obligation of the consumer and credit providers in terms of section 86(5)(b) to "participate in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement".

(g) If the parties cannot come to an agreement, the debt counsellor, or the attorney acting on behalf of the debt counsellor, must then draft the court application and place the matter on the roll for hearing in terms of section 87 (cf s 86(8)(b)).

(h) In terms of section 86(10) a credit provider may terminate the debt review proceedings in terms of section 86 at any time at least 60 business days after the date on which the consumer applied for debt review, by giving notice in the prescribed manner to the consumer, debt counsellor and the NCR.

(i) Before the debt review matter will be referred to the court for hearing and generally as soon as the debt counsellor has drafted the debt restructuring proposal and submitted it to credit providers for their consideration, the debt counsellor will arrange for the consumer to make payments to a registered Payment Distribution Agency (PDA). PDAs are responsible for collecting payments from consumers and distributing them in accordance with the debt restructuring proposal or agreement to credit providers. At present, PDAs

are not regulated by the NCA or its regulations. However, the NCR has accredited PDAs and requires debt counsellors to make use of them as a condition to their registration. Debt counsellors are prohibited from collecting and distributing payments to credit providers once the consumer's debts have been restructured (see http://bit.ly/iJi8Ha).

(j) If the court grants an order restructuring the consumer's debt obligations, the debt counsellor must send a copy of the court order as well as a Form 17.2 to all credit providers advising them that a restructuring order has been issued, what the relevant case number is and which court granted the order.

(k) When all the consumer's debt obligations under every credit agreement that was subject to a debt rearrangement order or agreement have been repaid the debt counsellor must, in terms of regulation 27, issue a clearance certificate in Form 19. It will also be necessary to notify the credit bureaus of the consumer's discharge. Regulation 17 only allows credit bureaus to display information that a consumer is subject to debt restructuring until a clearance certificate has been issued. If this information is not removed the consumer will be unable to obtain further credit.

Before further discussion, it should be pointed out that the respondent-credit provider *in casu* was in terms of section 86(10) of the NCA entitled to terminate the section 86 debt review proceedings 60 business days after the date on which the consumer applied for the debt review, thus on 6 October 2008. It is submitted that after such termination the credit provider would have been entitled to proceed to enforce the agreement in terms of section 130(1)(a). Then the events set out in section 88(3) need not occur. However, it is not clear from the facts provided in the judgment whether the respondent terminated the debt review in terms of section 86(10) and if not, why the respondent did not utilise this remedy. The court also did not consider, or even refer to, the respondent's right to terminate in terms of section 86(10). Nonetheless, it is submitted that after the debt review matter has been referred to the Magistrate's Court for a hearing in terms of section 87, that is, when the court application has been served on the credit providers, termination in terms of section 86(10) is disallowed (see *Standard Bank of South Africa Ltd v Kruger* and *Standard Bank of South Africa Ltd v Pretorius* unreported case no 45438/09 and 39057/09 (GSJ); *SA Securitisation (Pty) Ltd v Matlala* unreported case no 6359/2010 (GSJ) but *contra SA Taxi Securitisation (Pty) Ltd v Nako and six others* unreported case no 19, 21, 22, 77, 89, 104 and 842/2010 (ECB)). Enforcement would then only be possible after any one of the relevant events set out in section 88(3) have occurred. From the facts provided in *Pelzer* it would appear that the matter had already been referred to the Magistrate's Court for a hearing in terms of section 87 when the respondent issued summons against the applicant. Consequently, termination in terms of section 86(10) was disallowed, and the question that was raised by the court as to whether "a debt review procedure can carry on indefinitely or whether it should lapse once a reasonable time has expired" (para 1.2), may, it is submitted, indeed be relevant.

4 The decision

In discussing the purpose of the NCA the court quoted and emphasised certain parts of the preamble to the NCA and section 3 of the NCA to show that the NCA, although enacted for the protection of consumers, still recognises the

rights and interests of credit providers (cf *Rossouw v First Rand Bank Ltd* (640/09) [2010] ZASCA 130 (30 Sept 2010) para 17). The court quoted the preamble to the NCA as follows (para 6.1 – court's emphasis):

> "To promote a fair and non-discriminatory market place for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information; to promote black economic empowerment and ownership within the consumer credit industry; to prohibit certain unfair credit and credit marketing practices; to promote responsible credit granting and **use** and for that purpose to prohibit reckless credit granting; to provide for debt reorganisation in cases of over-indebtedness…"

Relevant parts of section 3 of the NCA were quoted as follows (para 6.2 – court's emphasis):

> "The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a **fair**, transparent, competitive, **sustainable**, responsible, **efficient**, effective and accessible credit marketing [*sic*] industry, and to protect consumers, by–
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> (a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those that have historically been unable to access credit under sustainable market conditions . . .
>
> (c) promoting responsibility in a credit market by:
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> (i) encouraging **responsible borrowing**, **avoidance of over-indebtedness and fulfilment of financial obligations by consumers**; and
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> (ii) discouraging reckless credit granting by credit providers **and contractual default by consumers**;
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> (d) promoting equity in the credit market **by balancing the respective rights and responsibilities of credit providers and consumers . . .**
>
> (g) Addressing and preventing over-indebtedness of customers [*sic*], and providing mechanisms for resolving over-indebtedness based on the principle of **satisfaction by the consumer of all responsible financial obligations;**
>
> (h) Providing for a consistent and harmonised system of debt restructuring, **enforcement and judgment, which place priority on the eventual satisfaction of all responsible consumer obligations** under credit agreements."

With reference to the unreported judgment by Levenberg AJ in *SA Taxi Securitisation (Pty) Ltd v Mbatha* unreported case no 51330/09 (GSJ)); *SA Taxi Securitisation (Pty) Ltd v Molete* unreported case no 52948/09 (GSJ); *SA Taxi Securitisation (Pty) Ltd v Makhoba* unreported case no 53080/09 (GSJ)), the judgment by Masipa J in *Standard Bank of South Africa Ltd v Panayotts* 2009 3 SA 363 (W) 370 and *Firstrand Bank Ltd v Olivier* 2009 3 SA 353 (SE) (see paras 6.4–6.6), the court enunciated its viewpoint regarding the purpose of the NCA as follows (para 6.3 – court's emphasis):

> "In my opinion it is clear from the purpose of the act that a consumer who is over-indebted is granted a **"moratorium"** and is assisted to get his **"house in order"**. But his **liability to repay** does **not disappear**, neither is he entitled **to hang on to** the goods which are the subject matter of the agreement, whilst not paying. On the contrary, the goods must be sold to reduce his debt. At the heart of it all lies that this has to be done (where no time limits are prescribed) **within a reasonable time. It could never have been the intention of the legislature that the process can drag on forever and thus be abused**."

With regard to the court's observation regarding the selling of the goods it is not clear whether the court has taken into account the effect of section 88(3) of the NCA. Clearly, the selling of the goods which are the subject matter of the credit agreement could play a role in reducing the consumer's indebtedness. Therefore,

the prospect of selling the goods is indeed a factor that should be taken into consideration when the court has to determine the intention of the consumer to "participate in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement" (s 86(5)(b)) and has to decide whether to approve the debt counsellor's debt restructuring proposal in terms of section 87. The selling of the goods and the consequent reducing of indebtedness is furthermore also a factor to be taken into consideration when a consumer raises his over-indebtedness as a defence to an application for summary judgment and then counter-applies to the court for a declaration of over-indebtedness and a referral of the matter to a debt counsellor in terms of section 85 of the NCA (cf *Panayotts* 375). However, while a credit agreement is subject to debt review proceedings, that is, when the credit provider has received a notice in terms of section 86(4)(b)(i) (ie the Form 17.1), section 88(3) explicitly prohibits a credit provider to "exercise or enforce by litigation or other judicial process any *right* or *security*" until any of the events in section 88(3) have occurred. The credit provider may therefore not sell the goods to reduce the debt.

With regard to the court's statement that the consumer is not "entitled to hang on to the goods whilst not paying", it would appear that the court is under the impression that the consumer is on a payment holiday from the time he or she applies for debt review until the court grants or refuses an order restructuring the consumer's debt. In practice there is no payment holiday whilst consumers wait for their debt review applications to be heard in court. Already at the first consultation consumers are advised as to their responsibility to continue with interim payments until a court order has been made (cf Van Heerden in Scholtz (ed) *Guide to the National Credit Act* (2009)14-3ff; Roestoff *et al* 2009 *PER* 259). As pointed out above, the debt counsellor usually determines the instalment to be paid to the relevant PDA as soon as the debt restructuring proposal has been drafted and submitted to credit providers for their consideration. The first instalment is generally paid to the debt counsellor, the second to the attorney who attends to the court application and the third and subsequent instalments to the relevant credit providers.

With regard to the reasonable time principle, the court referred to Flemming (*Flemmings National Credit Act* (2010) 152–153 (para 6.7) discussing, with approval, Lamont J's judgment in *First Rand Bank v Smith* unreported case no 24208/08 (W) and concluded as follows (para 6.8 – court's emphasis): "[W]here no time/time limit is prescribed, the **reasonable time principle** should be applied. [The reasonable time principle is in any event well-established in our law]."

The court in *Smith* found that the debt counsellor *in casu*, by failing to refer the debt review matter to court in terms of section 86(8)(b), has enabled the consumer to prevent the credit provider from ever instituting action against the consumer. This, according to the court in *Smith*, is because a credit provider who receives notice of a debt review application may not institute action until any of the events set out in of section 88(3) have occurred (*Smith* paras 9–15). Accordingly, the court in *Smith* was of the opinion that there appears to be a *lacuna* in the Act and found that the notice of the debt review application would become ineffective to stay proceedings and that the process would lapse if it was not followed to its conclusion within a reasonable time (see *Smith* paras 15, 19, 22–24 and 27).

It is submitted that the court's decision in *Smith* is incorrect (see Roestoff 2009 *Obiter* 436ff). It is submitted that the reason for the credit provider in *Smith* not being able to institute action against the consumers, was the fact that the relevant credit provider did not proceed to terminate the debt review as provided for in section 86(10). In this regard it should be noted that the legislator has made the application of section 88(3) subject to section 86(10). Therefore, if a credit provider fails to proceed in terms of section 86(8), the credit provider may proceed to terminate the debt review process in terms of section 86(10) and continue to enforce its claim. Section 88(3) clearly does not apply in such an instance and any of the events set out in this section need not occur.

Be that as it may, the court in *Pelzer* concluded that a debt review procedure lapses when a reasonable time has expired if there was no compliance with time periods and accordingly dismissed the application for rescission of the default judgment with costs (para 8).

The court's dismissal of the application for rescission can be criticised with reference to the decision in *Mthanthi v Pepler* 1993 4 SA 368 (D) (cf also *Pugin v Pugin* 1963 1 SA 791 (W) 794*; Mudesi v Mosiga* 1927 TPD 150). In *Mthanthi* the defendant filed a plea outside the time limits provided for by the Magistrates' Courts Act 32 of 1944 and its regulations and default judgment was granted. The defendant brought an application for rescission of the judgment which the Magistrate's Court dismissed. The defendant appealed to the High Court. The High Court referred to the important principle that "a person who has entered appearance to defend should not be condemned without being heard" (*Mthanthi* 372). The court held that a magistrate considering an application for default judgment should generally not grant a judgment where there are documents in the court file indicating the defendant's intention to defend the action regardless of whether those documents have been lodged timeously. The NCA and its regulations contain similar time limits as prescribed by the Magistrates' Courts Act and its regulations and it is submitted that the principle applied in *Mthanthi* should apply *mutatis mutandis* to an application for debt review. Thus, a person who applied for debt review "should not be condemned without being heard".

5 Conclusion

In practice, delays in the debt review process are frequently caused by credit providers failing to provide COBs within the prescribed time period (Haupt *et al The debt counselling process: Challenges to consumers and the credit industry in general* (Report submitted by the UP Law Clinic to the National Credit Regulator in April 2009) 262 ff). It should also be noted that the determination of over-indebtedness within 30 business days after the debt review application as required in terms of regulation 24(6) is to a great extent dependent on the timeous delivery of the COB. Delays with regard to the drafting and issuing of court applications in terms of section 86(8)(b) are also often caused by credit providers not responding to debt restructuring proposals that were submitted to them for their consideration (cf Haupt *et al* 211 ff). It is not exactly clear from the judgment what the facts of the case were in this respect, but there are indications that the respondent-credit provider, rather than the consumer-applicant or his debt counsellor, caused the delay in the process *in casu*. The respondent probably did not respond to the initial request for a COB timeously, hence the need for sending a further "Urgent Request for COB's". It would therefore appear that the

respondent did not comply with its obligation in terms of section 86(5)(a) to enable the debt counsellor to determine the consumer's state of indebtedness within the prescribed time limit and accordingly also not with its good faith obligation in terms of section 86(5)(b). Therefore, if the respondent in fact prevented the debt counsellor and applicant-consumer from complying with the prescribed time periods, it would in our view be absurd to penalise the consumer and to hold that the debt review process has lapsed since a reasonable time has expired.

Where a delay in the process has indeed been caused by the intentional conduct of the consumer, it is submitted that a credit provider's remedy is contained in his right in terms of section 86(10) to terminate the debt review proceedings after 60 business days have lapsed, provided the debt review matter has not been referred to a court. However, where a matter (as was the case in *casu*) has already been referred to court, a credit provider will in cases of abuse of process by the consumer be left without a proper remedy. As explained above, this is because a credit provider may then only proceed to enforce its claim once any of the relevant events set out in section 88(3) have occurred. The NCA thus contains a *lacuna* in this regard and it is submitted that a court should in such instances have the power to hold that the debt review proceedings must lapse after expiry of a reasonable time. However, a clear abuse of the process by the consumer-applicant *in casu* is not evident from the facts provided in the judgment. The contrary rather appears to be true. In practice, credit providers are often to be blamed for delaying matters when they oppose debt review applications to court without valid grounds or when they serve opposing affidavits on the applicant-debt counsellor on the day of the hearing, causing the matter to be postponed and delayed. A reasonable time, it is submitted, depends on the circumstances of each case and in the context of the debt review process especially on the question as to whether the consumer or credit provider was responsible for a delay in the process. Other factors which should be taken into consideration are court recess times and possible backlogs with regard to the hearing of matters referred to court.

When the NCA is interpreted a purposive construction is called for (cf s 2(1); *ABSA Bank Ltd v De Villiers* [2008] JOL 22874 (C) para 27, Scholtz (ed) para 2.4) and we agree with the court's opinion that "it could never have been the intention of the legislature that the process can drag on forever and thus be abused" (para 6.3). However, it would appear that the court in its interpretation of the purpose of the NCA may have over-emphasised the importance of the rights and interests of credit providers and lost sight of the fact that the NCA has been introduced *mainly* for the protection of consumers (cf *Rossouw v First Rand Bank Ltd* para 17) and, as has been stated by Naidu AJ in *ABSA Bank Limited v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D) 516 "the Act has introduced innovative mechanisms and concepts directed *more* at the protection and in the interests of credit consumers than that of credit providers" (our emphasis).

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