IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A113/17

In the matter between:

LYDIA ADAMS HANS REINHARD PETTENBURGER-PEWALT	Applicant
and	
NICOLETTE VOSLOO	1st Respondent
HOMECHOICE (PTY)LTD	2nd Respondent
RAINBOW FINANCE (PTY) LTD	3rd Respondent
RCS CARDS (PTY) LTD	4th Respondent
WOOLWORTHS (PTY) LTD	5th Respondent
STANDARD BANK OF SOUTH AFRICA LTD	6th Respondent
FOSCHINI RETAIL GROUP (PTY) LTD	7th Respondent
ABSA BANK LIMITED	8th Respondent
AFRICAN BANK LIMITED	9th Respondent
NICOL DAVIS & ASSOCIATES	10th Respondent

JUDGMENT delivered on 23 October 2017

NDITA, J

[1] The crucial issue in this appeal is whether the Magistrate Court has the power to make an order rearranging an over indebted consumer's repayment obligations based upon the parties' agreed amended interest rate.

Factual Background

[2] The appellant brought an application to a debt counsellor for debt review in terms of Section 86(1), 86(7)(c) and 86 (8)(b) read together with Sections 85 and 87 of the National Credit Act 34 of 2005 ("the NCA")_and Rule 55 of the Magistrate's Court Act 32 of 1944. The Debt Counsellor, Hans Reinhard Pettenburser-Perwald, a registered Debt Counsellor, determined in terms of Section 86 (6) of the National Credit Act that the consumer was over-indebted and proceeded with an application to place the consumer under debt review. The application was set down to be heard on the 11th of February 2016. A payment restructuring proposal was sent by the Debt Counsellor to all the credit providers cited herein as the respondents. Some of them accepted the proposed monthly payments. The acceptance letters set out the outstanding amounts, the proposed instalments, the interest rates, monthly fees and the concession terms. The consent letters did not

only set out the proposed reduced instalment and adjusted concession term, but it also amended the interest rate to a lower rate. For example, Home Choice lowered their interest rate from 32.65% to 0%, Rainbow finance from 19.75% to 0%, Standard Bank from 22.60% to 17.55%, ABSA Bank from 20.25% to 0%, African Bank from 31% to 0% and Nicol Davis & Associates from 24% to 0%.

[3] The matter was served before the magistrate court, Cape Town, Ms Fredericks, but the court declined to grant the order in the light of the fact that various decisions have held that the magistrate's court, being a creature of statute, is not empowered to alter the contractual interest rate as that effectively changes the terms of the original agreement. It is so that a Magistrate's Court hearing a matter in terms of s 87 (1) of the National Credit Act, 34 of 2005 does not enjoy jurisdiction to vary (by reduction or otherwise) a contractually agreed interest rate determined by a credit agreement. Section 87(1) provides that:

"If a debt counsellor makes a proposal to the Magistrate's Court in terms of section 86 (8) *(b)* , or a consumer applies to the Magistrate's Court in terms of section 86 (9), the Magistrate's Court must conduct a hearing and, having regard to the proposal and

information before it and the consumer's financial means, prospects and obligations, may-

(a) reject the recommendation or application as the case may be; or

(b) make-

(i) an order declaring any credit agreement to be reckless, and an order contemplated in section 83 (2) or (3), if the Magistrate's Court concludes that the agreement is reckless;

(ii) an order re-arranging the consumer's obligations in any manner contemplated in section 86 (7) *(c)* (ii); or

(iii) both orders contemplated in subparagraph (i) and (ii)."

It is clear from the provisions of s 87(1) that the Magistrate's Court's powers to make orders in terms thereof are limited to those specifically mentioned in para (a) and (b). In addition to the statutory provisions, the magistrate relied on *First Rand Bank Ltd v Adams and Another* 2012 (4) SA 14 (WCC), where Davis J held that:

"But the 2% interest charge, so crucial to this proposal, falls outside of the Act for the reasons I have indicated, namely that there is no legislative basis to reduce the interest rate pursuant to such a proposal. A proposal can extend the time period for payment or the proposal can have a window in terms of which payments are not made, in order to give the consumer an opportunity to generate liquidity which will allow payments to

resume. However the proposal cannot be based on a reduction of the contracted interest rate. When this factor is taken into account, there is no proposal on the table which would alter the position from that which was rejected after an exchange of correspondence and, by implication, negotiations in terms of an offer and counter offer which took place in 2010 in terms of the letters to which I have already made reference."

[4] The approach of the courts to a unilateral reduction of interest by a debt counsellor in order to alleviate over indebtedness has been consistent throughout the various divisions. For example, Van Zyl J in *SA Taxi Securitization (Pty) Ltd v Lennard* (an unreported decision of the Eastern Cape High Court, Grahamstown, delivered on 21 October 2010) explained thus:

"[10] *I agree with the respondent's submission that in doing so the Magistrate acted outside his powers. An order envisaged by section 86 (7)(c)(ii) constitutes a variation of the terms of the credit agreement. Sub-paragraph (aa) of the said section in terms of which both the recommendation and the order was clearly made authorises the Court to extend the period of payment and reduce the amounts of each payment due "accordingly". It makes no reference to any other terms of the credit agreement. What sub-paragraph (aa) provides for is debt relief to an over-indebted consumer by extending the period of payment thereby resulting in a reduction of the payments without reducing the actual amount owing by him or her in terms of the relevant agreement. The wording thereof is clear and unambiguous and is in my view not capable of any other*

interpretation. It accordingly does not permit the Magistrates' Court to reduce the interest rate applicable to an agreement in order to provide debt relief to a consumer. (See Van Heerden Guide to the National Credit Act (Lexis Nexis) at para 11.3.3.2). It also follows that as the debt counsellor's scope for making a proposal as envisaged in section 86 (6)(c) is inextricably linked to the powers of the Magistrates' Court in section 87 of the Act, he or she cannot recommend what the said Court is not empowered to order."

In this court on 12 October 2016 in the matter of *Nedbank Limited v Jones and Others* 2017 (2) SA 473, Gamble J stated that:

"[18] As I have attempted to demonstrate, in this matter the magistrate did not reduce the interest rate to zero but he permanently fixed it at a level which will render the debt incapable of ever being settled by the Jones'. Adopting the reasoning in Norris, with which I fully agree, it follows that the order of the magistrate of 8 June 2010 was ultra vires and accordingly of no force and effect."

[5] Notwithstanding the clear statutory provisions, and the several dicta affirming the limitation of the magistrate's court, counsel for the appellant contended that where the parties have agreed to the lowered interest rate, there is no reason why the magistrate should not be empowered to make such agreements orders of the court. According to the argument, the NCA has not made specific provisions for when the parties have negotiated and agreed to a reduced interest rate, and as such there is a lacuna which must

be filled by the interpretation of the relevant section in line with the purpose of the NCA. Furthermore, so goes the argument, the matter at hand is distinguishable from the above matters, as in *casu*, the magistrate was not requested to act *ultra vires*, the reduction of the interest rate came through as a result of *bona fide* negotiations between the credit providers and the debt counsellor. In short, both parties consented to the reduction of the interest rates.

[6] When asked to provide authority for the contention advanced, Counsel stated that there are only two High Court orders that specifically dealt with the Magistrate Courts' power to make declaratory orders rearranging the Consumer's repayment obligations based upon the agreed amended interest rates. However, no reasons for the orders were given. Both orders emanate from the Gauteng Division of the High Court, and these are in *Van der Hoven Attorneys v NCR and Others,* Gauteng Division Case No.10981/15: and *M.C Rijkheer t/a Rijkheer & Partners and the National Credit Regulator*. In the latter matter, Jansen J gave an order to the following effect:

"It is declared that:

7.1 In an application to the Magistrates Court in terms of section 86 of the National Credit Act, Act 34 of 2005 (as amended) and in circumstances where the parties

reached an agreement in terms of which a credit provider respondent consents to an amended interest rate other than that provided to in the credit agreement concerned, the Magistrate may make an order rearranging the consumer's payment obligations based upon the agreed amended interest rates to give effect to the agreement between the parties".

[7] It is clear from the aforegoing, that in order to determine whether it is indeed permissible for the magistrate to make an order rearranging the consumer's debt based upon an agreed amended interest rate reached by the parties, the NCA must be examined. Counsel for the Appellant argued that a purposive interpretation of the NCA, read with the Debt Review Task Team Agreements, National Credit Regulator Guidelines, Proposed Debt Review Assessment Guidelines, Debt Review Court Application Guidelines unequivocally gives powers to the magistrate to make orders altering the interest rate where the parties have agreed thereto.

The approach to statutory interpretation

[8] The approach to statutory interpretation is restatedin *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 SCA at 603 - 604 as follows:

"[18] The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose for which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads insensible businesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context, it is to make a contract for the parties than the one they in fact made. 'The inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[9] I start by examining the purpose of the NCA. Section 2 provides that, the Act must be interpreted in a manner that gives effect to the purpose set out in section 3. Section 3 of the NCA provides thus:

*"**3. Purpose of Act.***—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 market and industry, and to protect consumers, by—

(a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;

(b) ensuring consistent treatment of different credit products and different credit providers;

(c) promoting responsibility in the credit market by—

(i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfillment of financial obligations by consumers; and

(ii) discouraging reckless credit granting by credit providers and contractual default by consumers;

(d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;

(e) addressing and correcting imbalances in negotiating power between consumers and credit providers by

(i) providing consumers with education about credit and consumer rights;

(ii) providing consumers with adequate disclosure of standardized information in order to make informed choices; and

(iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureau;

(f) improving consumer credit information and reporting and regulation of credit bureau;

(g) addressing and preventing over-indebtedness of consumers, 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 accessible system of consensual resolution of disputes arising from credit agreements; and

(i) *providing for a consistent and harmonized system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit* agreements*."*

The Supreme Court of Appeal in *Nedbank v The National Credit Regulator 2011 (3) SA 581* explained the approach that must be adopted when interpreting the NCA in the following manner:

"[2] The NCA must be interpreted in a manner that gives effect to these objects. Appropriate foreign and international law may be considered in construing the NCA. Unfortunately, the NCA cannot be described as the ‘best drafted Act of Parliament

which was ever passed, nor can the draftsman be said to have been blessed with the 'draftsmanship of a Chalmers'. Numerous drafting errors, untidy expressions and inconsistencies make its interpretation a particularly trying exercise. Indeed, these appeals demonstrate the numerous disputes that have arisen around the construction of the NCA. The interpretation of the NCA calls for a careful balancing of the competing interests sought to be protected, and not for a consideration of only the interests of either the consumer or the credit provider."

I have earlier indicated that it is clear from the provisions of s 87 (1) of the NCA that the magistrate court does not enjoy jurisdiction to vary (by reduction or otherwise) a contractually agreed interest rate determined by a credit agreement. However, the scheme of the NCA, and more specifically, s 3(h), in my view, amply demonstrates that the legislature intended for the consensual resolution of disputes. In my reasoning, even though no specific provision is made for the magistrate's court to make the orders such as in the matter at hand, it could not have been the intention of the legislature to prevent them from doing so. If it were, that would give rise to insensible results. This is so because it is not unbusinesslike for parties to agree on the terms that will regulate future business relations and be able to execute on such intentions. After all, s 86(5)(b) requires the parties to engage in meaningful, responsible and *bona fide* negotiations. It follows, as correctly submitted by counsel for the appellant, that where parties have entered into

responsible negotiations within the debt review process and reach agreements amending the contractual interest rates, in a manner that is not only satisfactory, but also to the benefit of all concerned parties, Magistrates do have the authority to confirm these agreements. In such circumstances, Magistrates are not acting ultra vires, but within the scope of their jurisdiction by giving effect to the agreements reached in the debt review process which falls within the ambit, spirit and purpose of the NCA.

[10] Counsel for the appellant referred to various tools of interpretation such as the National Credit Regulator Rules and Debt Review Guidelines. Although strictly speaking, such interpretive tools cannot *ex post facto* speak to the background for the purpose of the NCA and the background to its preparation and production; they do inform the court of the understanding of the Act at an operational level. I refer to same for the sake of completeness as I have already held that there is nothing *ultra vires* with the magistrate's endorsement of the parties' agreement to amend the contractual interest rate applicable in pursuance of a debt review arrangement that is satisfactory to all parties.

[11] The National Credit Regulator (NCR) has put in place measures whereby debt counsellors and credit providers, in a responsible and consensual manner can in the process of the debt review negotiate the consumers' contractual obligations. To this end, NCR CIRCULAR 15 of 2014 reads thus;

"Debt rearrangement proposals may be submitted to the credit providers via the Debt Counselling Rules System (DCRS) or outside of DCRS. The DCRS is based upon industry agreed rules and principles.

The DCRS is a set of standard rules agreed upon by credit providers that provide voluntary concessions by adjusting the contractual fees, interest rates and repayment terms on credit agreements that are restructured under debt counselling.

The NCR has noted that the system is not utilised optimally by the industry and would like to inform you that it recognizes the DCRS and encourages all credit providers and debt counsellors to apply these standard rules.

The NCR believes that application of the DCRS by all industry participants will positively impact the debt counselling landscape as more consensual agreements will be reached and consumers will save money on legal fees as matters will be referred to the National Consumer Tribunal for consent orders."

[12] In addition to the aforegoing, the NCR CIRCULAR 2 of 2015 of the Debt Review Task Team Manual outlines the Minimum Debt Counselling System Requirements and Principles of Debt Restructuring and recognises the voluntary concessions that may be made by creditors and provides that:

"Rules applied in the restructuring of consumer debt obligations are a critical success factor in the debt review process. Such rules, in order to succeed in the process have to:

1. Resolve the over-indebtedness situation within the parameters of the Act and any voluntary concessions agreed to by the credit providers;
2. Treat all credit providers and categories of credit agreements fairly and consistently in accordance with the Act;
3. Be applied in a manner that would guarantee the integrity of application and calculations in order to gain the trust and acceptance of credit providers; and
4. Generate proposals that are:
    a. Standardized to enable efficient and consistent processing; and
    b. Contain standardized data/information that allows efficient and consistent consideration of and responses to debt re-arrangement proposals by credit providers.

3.1.2 All credit providers must receive consistent treatment per credit agreement category under the rules in terms of the proposed restructuring of each agreement, in that:

a) the amount allocated to each credit agreement must be applied consistently to all credit agreements per credit agreement category and in accordance with the rules as defined in the proposal…..

b) any extension in the payment period must be applied proportionately to contractual repayment term…..

c) any payment interruption should equally and proportionately apply to all credit agreement in that category;

d) interest rate and fee reductions (if consented to by the credit providers) are to be applied consistently to all credit agreements……..”

Similarly, the National Credit Regulator in its guidelines in the Task Team Agreement states that. . .

1. ….

2. *To make provisions for fee and interest rate concessions by Credit Providers for qualifying Consumers. Although Courts do not have the discretion to reduce fees or interest rates these concessions indicate that the agreement between parties with regards to the repayment plan submitted to Court in line with the provisions of the Act in this regard. It is important to note that although a Court has no authority to amend*

interest rates and fees; this is not applicable when an agreement in writing is in place to amend the interest rate and fees. Where an agreement is in place, proof of agreement should be included in the Debt Review application and this agreement should be accepted by the Court. The reason for this is that, that agreement concluded between the parties should be confirmed by the Court.

Although the above provision unequivocally acknowledges the limitation of the magistrate's court with regard to amending the contractual interest rate, it adds a rider to the effect that where parties have agreed on an amended interest rate, the court should accept the agreement. It seems to me that these guidelines were developed because of the *lacuna* in the NCR.

In the **NCR CIRCULAR 1 OF 2017 – DEBT COUNSELLING RULES SYSTEM**:

"The DCRS is a set of standard rules agreed upon by the industry that provide voluntary concessions by exclusion of certain charges, adjusting the contractual fees, interest rates and repayment terms on credit agreements that are restructured under debt counselling. The objective of the DCRS is to enable the smooth negotiation and acceptance, thus improving the solve rate of proposals whilst addressing inconsistencies in debt review.

The NCR is in negotiation with several parties to manage and operate the DCRS on behalf of the NCR. Whilst this process is underway, the NCR expects the

credit provider industry to continue to adhere to the Task Team guidelines and offer concessions to consumers under debt review."

[13] It remains to be said that the NCR Guidelines and or Circulars or the Rules set out in the Task Team, are in line with the provisions of s 3(i) of the NCA which call for a consistent and harmonised system of debt restructuring.

Conclusion

[14] I have in this judgment held that a purposive interpretation of the NCA leads to the conclusion that the magistrate's court has jurisdiction to make orders re-arranging a consumer's debt based upon an agreed amended interest rate reached by the parties. It follows that the appellant's appeal must succeed. I am also inclined to grant the orders that had been declined by the magistrate.

[15] In the result, the following order will issue.

1. The appeal is upheld.

2. No order as to costs is made.

3. It is further declared that the First Respondent is over indebted as envisaged in section 79 of the NCA.

3.1 In terms of section 86 (11) of the NCA, all Credit Providers who have sent notices of termination of the debt review process in terms of section 86 (10) are directed to resume with the Debt Review.

3. Her obligations in terms of the credit agreements towards her credit providers must be rearranged in line with the parties' agreement as follows:

Credit	Reference	New Annual Interest	New Monthly Instalment	Balance as at date of COB	Estimated Period of Repayment
Rainbow Finance (Pty) Ltd	3298/006028/03	0.00%	R400.00	R15498.20	90
RCS Cards (Pty) Ltd	0005022190700320320	22.65%	R110.80	R 7 739.09	95
Woolworths (Pty) Ltd	4103740070104012	22.65%	R290.00	R26 624.43	127
Standard of South Africa Ltd	5120550202195283	17.55%	R190.00	R9199.13	89
Woolworths (Pty) Ltd	6007851104462847	21.55%	R250.00	R22 800.51	121

Foschini Retail group (Pty) Ltd	0010010001004837261	26.00%	R180.00	RR16815.53	112
Absa Bank Ltd	4550270139026012	0. 00%	R192.21	R14 971. 85	86
Woolworths (Pty) Ltd	6007850362569392	22.65%	R160.00	R14 999.52	109
African Bank Ltd	10199063001	0.00%	R1110.00	R100 870.60	90
RCS Cards (Pty) Ltd	0518020000318721906	21.00%	R130.00	R11 996.76	101
Nicol, Davis & Associates	ND289514	0.00%	R120.00	R11 125.04	87

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Ndita,J

I agree

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Holderness, AJ

For Appellant : Adv. Q Zimmermann

Instructing Attorney: K Armfield