

# SUMMARY OF THE JUDGMENT

## DEBT RE-ARRANGEMENT CANNOT AMEND INTEREST RATE

**Nedbank Limited v Jones and Others (24343/2015) [2016] ZAWCHC 139 (12 October 2016)**

*In a judgment with some twists, the Court confirmed that where over-indebted consumers are assisted by Magistrates' Courts to enter into debt re-arrangement plans, this may not include an adaptation of the agreed interest rate. In this instance the Magistrate erroneously did just that, and lowered the instalment amount, resulting in a debt that could never be paid off. The judgment was void, but what was the impact of the fact that the bank's application for rescission came five years after the Magistrate's order?*

The Judgment can be viewed [here](#).

### FACTS

In February 2010, Mr and Mrs Jones approached a debt counsellor who, after doing an investigation, suggested an application for debt review in the Magistrates' Court in terms of the National Credit Act (NCA). The application cited various creditors of the Jones', including Nedbank that held a mortgage bond over the property. (At the time, the loan agreement with Nedbank contemplated monthly repayments of R10 491 over 336 months and recorded the initial interest rate to be 10,9% per year. The rate was variable at the instance of the bank.)

The Magistrate granted leave to the debt counsellor to bring the application (as provided for in section 86 of the NCA) and subsequently found that the Jones' were over-indebted. An order for debt re-arrangement was made which included re-scheduling the bank's debt and the Magistrate ordered that the homeloan (the balance at that time in excess of R2,2m) was to be restructured so that the monthly instalment would be R4 007.06 and the interest rate would be fixed at 10.4% per year, while the repayment period was left open-ended, the instalment payable "till debt settled".

Nedbank challenged the order, the present matter only being launched five years after the order of the Magistrates' Court. It pointed out that at the time the rearrangement order was made, the contractual instalment was R17 343.75 per month and the interest rate 8,9% per year. The bank argued that the effect of the Magistrate's order was that that the consumer's obligation under the NCA would never be satisfied and that the re-scheduled monthly instalment will not even cover the monthly interest payable on the debt. The bank argued that the order of the Magistrate was void or alternatively fell to be rescinded because:

- The Magistrate was not empowered by the NCA to grant an order which varied the interest rate agreed upon, nor permitted to order that the rate be fixed indefinitely. It was also contrary to the intention of the NCA which anticipates full settlement of outstanding debt by a consumer.
- Liquidity requirements imposed by the South African Reserve Bank on commercial banks are in place to ensure the ongoing commercial viability of the banks. An order such as that granted by the Magistrate had a very negative impact on a bank's liquidity and unless proper procedures are followed in re-scheduling debt, the effect could be to inadvertently disturb a bank's liquidity by increasing its debt provisions beyond that known to the bank on a day-to-day basis. There are a plethora of such orders granted daily by magistrates countrywide which can seriously impact on the general liquidity of the lending industry and has the potential to jeopardise lending to all clients, from rich to poor and from the contractually compliant to the errant.

**HELD:*****Magistrate's powers to order rescheduling of the debt***

- The procedure for debt review is set out in sections 86 and 87 of the NCA. Briefly, it works as follows: Where a debtor qualifies for debt review, a debt counsellor is consulted and the latter prepares an application to court for appropriate relief. The debt counsellor may issue a proposal to the court recommending, firstly, that the relevant credit agreement is declared to be reckless credit. In addition, the counsellor may make certain recommendations, listed in section 86(7)(e)(ii), being:
  - “(ii) that one or more of the consumer's obligations be re-arranged by –
    - (aa) extending the period of the agreement and reducing the amount of each payment due accordingly;
    - (bb) postponing during a specified period the dates on which payments are due under the agreement;
    - (cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or
    - (dd) recalculating the consumer's obligations because of contraventions ...”
- The debt counsellor is then required to refer the matter to the Magistrates' Court with recommendation(s). In terms of section 87 the Magistrate must conduct a hearing on receipt of the recommendation and after considering the matter, in terms of section 87(1), 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 ...;*
- (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)."*

- From the foregoing, it can be seen that the structure of the NCA contemplates that the debt counsellor is required to procure the relevant information, collate it, evaluate the situation and advise the court as to the appropriate re-scheduling which best suits the debtor's needs. If the court is then satisfied with that recommendation, and decides to act under section 87(1)(b)(ii), it can only make an order which complies with one or more of the recommendations contained in the debt counsellor's report and, importantly, those recommendations can only be based on the provisions of section 86(7)(c)(ii): the court cannot make an order which does not incorporate a recommendation which does not comply with the criteria set out in section 86(7)(c)(ii).
- In the present matter it was clear that the rearranged payments would not satisfy the amount outstanding as at the date of restructuring. The effect of the re-arrangement order was that the Jones' would not meet all of their obligations. The order therefore did not meet the essential purposes of the NCA, which has as its aim "not only to protect consumers, but also to create a 'harmonised system of debt restructuring, enforcement and judgment', which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreement".
- Section 86(7)(c)(ii) further confirmed no power upon the Magistrates' Court to adapt the interest rate payable.
- It followed that the order of the Magistrate was *ultra vires* and accordingly of no force and effect.

***The appropriate steps to address the invalid re-arrangement order – review or declaratory relief?***

- The immediate problem that confronted the bank in seeking to have the order reviewed and set aside was the very lengthy delay of more than five years in bringing the application.
- One does not know what amount the debtors would have paid to the bank had a valid order been made, and what the effect thereof would have been on the amounts payable to their other creditors. Further, in light of the complaint that the re-structured monthly instalment did not even cover the interest component thereof, it followed that a significant amount of additional interest had accrued to the Jones' homeloan while

the bank had all the while remained relatively inactive in addressing the situation. Simply put, too much has transpired for a fair assessment to be made of the consequences and, in particular the prejudice, of reviewing the order at this stage.

- In considering whether the delay in the present matter should be condoned, the Court must also have regard to the fact that the parties have conducted themselves in accordance with the implementation of the order: the Jones' have paid less than they are contractually bound to do and the bank has received such payments under the court order, while the outstanding capital on the debt in question had continued to increase, given that not even the monthly interest instalment which the Jones' were required to pay under the credit agreement had been met. Therefore the review of the order at such a late stage would create a commercial nightmare for both parties and undoubtedly be prejudicial to the debtors. The calculation of what would have been due to the bank had the order not been made or had the debt otherwise been re-scheduled lawfully and the contract enforced in its original terms, will not be a simple exercise.
- For these reasons, an order for review would not be in the interests of justice and the application for condonation of the delay in bringing the review should fail.

#### **Declaratory order**

- The serial misinterpretation of sections 86 and 87 by both debt-counsellors and magistrates alike in practice warrants addressing by way of a declaratory order as follows:

*"A magistrate's court hearing a matter in terms of section 87 (1) of the NCA, does not enjoy jurisdiction to vary (by reduction or otherwise) a contractually agreed interest rate determined by a credit agreement, and any order containing such a provision is null and void.*

*A re-arrangement proposal in terms of section 86(7)(c) of the NCA that contemplates a monthly instalment which is less than the monthly interest which accrues on the outstanding balance, does not meet the purposes of the NCA. A re-arrangement order incorporating such a proposal is ultra vires the NCA and the Magistrate's Court has no jurisdiction to grant such an order."*

#### CONTACT US

■ CAPE TOWN  
Tel: 021 406 9100

■ SOMERSET MALL  
Tel: 021 850 6400

■ TYGER VALLEY  
Tel: 021 943 3800

■ FOURWAYS  
Tel: 010 001 2632

■ CLAREMONT  
Tel: 021 673 4700

■ STELLENBOSCH  
Tel: 021 001 1170

■ MENLYN  
Tel: 012 348 1682

■ CENTURION  
Tel: 012 001 1546

■ FISH HOEK  
Tel: 021 784 1580

■ BLOUBERG  
Tel: 021 521 4000

■ ILLOVO  
Tel: 011 219 6200

■ BEDFORDVIEW  
Tel: 011 453 0577