

26
May
2015

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Jansen

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 10918 / 2015

26 MAY 2015 BEFORE THE HONOURABLE JUSTICE JANSEN

VAN DER HOVEN ATTORNEYS

APPLICANT

AND

THE NATIONAL CREDIT REGULATOR

1ST RESPONDENT

**THE DEPARTEMENT OF JUSTICE AND
CONSITUTIONAL DEVELOPMENT**

REGISTRAR OF THE HIGH COURT OF
SOUTH AFRICA - GAUTENG DIVISION, PRETORIA
PRIVATE
PRETORIA 001
2015-05-26
J. JANSEN
COURT CLERK
SOUTH AFRICA

2ND RESPONDENT

THE BANKING ASSOCIATION OF SOUTH AFRICA

3RD RESPONDENT

THE DEBT COUNSELLORS ASSOCIATION

OF SOUTH AFRICA

4TH RESPONDENT

DRAFT ORDER

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A. The rule *nisi* issued under the above case number on 26 March 2015 is confirmed;

1. It is declared that:

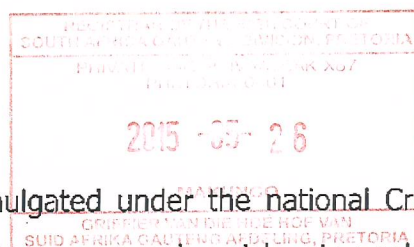
1.1 Rule 55 (1) (a) of the RULES REGULATING THE CONDUCT OF THE PROCEEDINGS OF THE MAGISTRATES' COURTS OF SOUTH AFRICA provides that: "Every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief".

1.2 Subject to the provisions of Rule 55 (1) (k) of the Magistrates' Court Rules, in an application in terms of Section 86 of the National Credit Act 34 of 2005, a Debt Counselor's presence is not required at the hearing of the application of his referral of his recommendations to a Magistrate's Court.

1.3 The physical presence of a Respondent (consumer in the application in terms of Section 86 of the National Credit Act 34 of 2005), is not required to be present at the hearing of an application in terms of section 86 of the National Credit Act 34 of 2005.

2. It is declared that:

2.1 Regulation 24 of the regulations promulgated under the national Credit Act 34 of 2005, provides that: "24.(1) A consumer who wishes to apply to a debt counselor to be declared over-indebted must: (a) submit to the debt counselor or a completed Form 16; **or** (b) provide the debt counselor with [the information as contained in sub paragraphs (i) to (viii)]".



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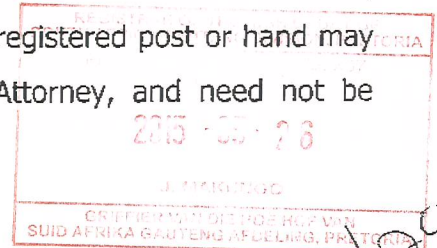
2.2 In an application to the Magistrates' Court in terms of Section 86 of the National Credit Act 34 of 2005, a Form 16 application is not a required annexure to the application as it is not a pre-requisite for a consumer to apply to be declared over-indebted.

3. It is declared that:

3.1 Rule 9 (3) (f) of the RULES REGULATING THE CONDUCT OF THE PROCEEDINGS OF THE MAGISTRATES' COURTS OF SOUTH AFRICA provides that: "9 (3) All process shall, subject to the provisions of this rule, be served upon the person affected thereby by delivery of a copy thereof in one or other of the following manners: (f) if the plaintiff or his or her authorised agent has given instructions in writing to the sheriff to serve by registered post, the process shall be so served: **Provided** that a debt counsellor who makes a referral to court in terms of section 86(7) (c) or 86(8)(b) of the National Credit Act may cause the referral to be served by registered post or by hand."

3.2 In an application in terms of section 86 of the National Credit Act 34 of 2005 to the Magistrates' Court, service of process by way of registered post or by hand may be effected by the Debt Counselor or his Attorney, and need not be caused by the Sheriff of Court.

3.3 In the event of an agreement between the interested parties to an application in terms of section 86 of the National Credit Act 34 of 2005, service of process by way of e-mail or fax or registered post or hand may be effected by the Debt Counselor or his Attorney, and need not be caused by the Sheriff of Court.



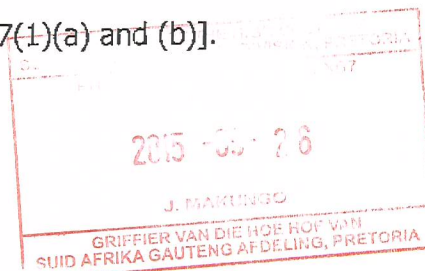
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4. It is declared that:

4.1 Section 86 (6) of the National Credit Act 34 of 2005 provides that: "A debt counsellor who has accepted an application in terms of this section must determine, in the prescribed manner and within the prescribed time- (a) whether the consumer appears to be over-indebted".

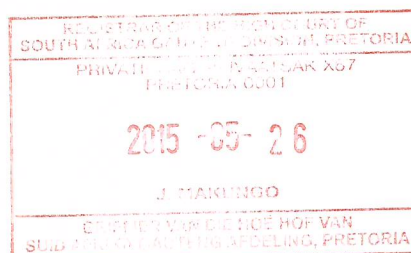
4.2 Section 79 of the National Credit Act 34 of 2005 provides that: "79. (1) A consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, having regard to that consumer's- (a) financial means, prospects and obligations; and (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. (2) When a determination is to be made whether a consumer is over-indebted or not, the person making that determination must apply the criteria set out in subsection (1) as they exist at the time the determination is being made.

4.3 Section 87 of the national Credit Act 34 of 2005 provides that: "87. (1) 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 [make an order contemplated in sections 87(1)(a) and (b)].



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- 4.4 The Magistrate who is to conduct the hearing of an application in terms of section 86 of the National Credit Act 34 of 2005, shall consider the confirmation of the debt counselor's determination of over-indebtedness on the available information to the debt counselor's disposal at the time of the debt counselor's determination. Should a Magistrate hearing the application confirm the debt counselor's determination of over-indebtedness, the magistrate may require further and/or updated information in the exercise of its powers in terms of the provisions of Section 87 of the national credit Act.
- 4.5 An application in terms of Section 86 of the national Credit Act 34 of 2005 to the Magistrates' Court may be brought and shall be considered even in circumstances where the consumer's initial application to the debt counselor to be declared over indebted was made longer than one year before the application in terms of section 86 of the National Credit Act 34 of 2005 to the Magistrates' Court is heard, subject thereto that the debt counselor may be requested to provide information to the Court indicating that he was actively involved in negotiations with at least one of the respondents to the application and/or upon presentation of updated information to enable the magistrate to exercise its powers as determined in section 87 of the National Credit Act 34 of 2005.
5. It is declared that:
- 5.1 The "best evidence" rule provides that "In the absence of an acceptable explanation for the unavailability of the original document, no evidence is ordinarily admissible to prove the contents thereof except the original document itself".



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5.2 In an application in terms of section 86 of the National Credit Act 34 of 2005, the debt counselor is to annex the document(s) required in substantiation of the relief sought. In circumstances where the debt counselor is not in possession of the original documents, but copies thereof, the debt counselor shall explain, under oath, why the original document is not in his possession or in whose possession he believes the document to be. Upon a satisfactory explanation, copies of original documents shall be admissible as evidence. Should the original document be in the possession of a consumer respondent, the consumer respondent can confirm the correctness of the debt counselor's explanation in a confirmatory affidavit to the application.

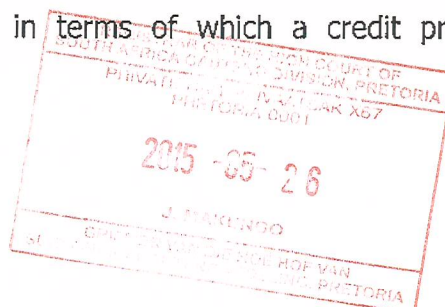
6. It is declared that:

6.1 Initiating process must, in terms of the Rules of Court, describe properly the parties to the litigation. Legal standing must appear from the description of the parties *ex facie* the initiating documents.

6.2 A Debt Counselor, when referring his recommendations to a Magistrate's Court in terms of Section 86 of The National Credit Act 34 of 2005, need not annex proof of registration as a Debt Counselor, nor proof of payment of renewal fees, subject thereto that the Debt Counselor attests to valid registration under Oath.

7. It is declared that:

7.1 In an application to the Magistrates' Court in terms of section 86 of the National Credit Act 34 of 2005, and in circumstances where the parties reach an agreement in terms of which a credit provider respondent



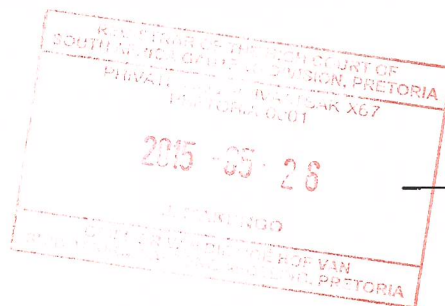
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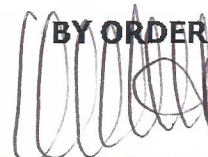
consents to an amended interest rate other than that provided for in the credit agreement concerned, the Magistrate may make an order re-arranging the consumer's payment obligations based upon the agreed amended interest rates to give effect to the agreement between the parties.

8. It is declared that:

8.1 Section 86 (4) (b) ii) of the National Credit Act 34 of 2005 provides that: "(4) On receipt of an application in terms of subsection (l), a debt counsellor must- (a) provide the consumer with proof of receipt of the application; notify in the prescribed manner and form (i) all credit providers that are listed in the application; and (ii) every registered credit bureau. Regulation 24 of the Regulations promulgated under the national Credit Act 34 of 2005 provides that: "24. (2) Within five business days after receiving an application for debt review in terms of section 86(1) of the Act, a debt counsellor must deliver a completed Form 17.1 to all credit providers that are listed in the application and every registered credit bureau".

8.2 A Debt Counselor has substantially complied with Section 86(4)(b)(ii) of the National Credit Act, read with Regulation 24(2) promulgated there under, once he has successfully uploaded the details of a consumer onto the National Credit Regulator's electronic Debt Help System (as nominal addressee for all registered credit bureaus).



BY ORDER


REGISTRAR

26/05/2015
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