Reportable

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No 14256/10

In the matter between:

WESBANK, a division of FIRSTRAND BANK LIMITED Plaintiff

and

DEON WINSTON PAPIER Defendant

and

THE NATIONAL CREDIT REGULATOR *Amicus curiae*

Court: TRAVERSO DJP, GRIESEL J and DLODLO J

Heard: 5 November 2010

Delivered: 1 February 2011

JUDGMENT

GRIESEL J:

[1] This is an opposed application for summary judgment arising from a credit agreement governed by the provisions of the National Credit Act.[1] Because some of the provisions of the Act have given rise to difficulties of interpretation and conflicting judgments in different courts,[2] the Judge President has directed that the present matter be heard by a full court.

[2] At the commencement of the hearing before us the National Credit Regulator ('NCR') applied for and was granted leave to intervene as *amicus curiae*. In this regard, the court is indebted to counsel for the NCR, as well as counsel for the parties, for the full and helpful arguments addressed to us, which assisted greatly in clarifying the issues.

Factual background

[3] The credit agreement in question was entered into on 27 March 2007 between the defendant, Mr Deon Winston Papier, as 'consumer', and the plaintiff, as 'credit provider'. It relates to the lease of a 2003 Mazda 6 motor vehicle. In terms of the agreement, the defendant was obliged to pay to the plaintiff an 'initial rental' of R13 157,89, followed by 53 consecutive rentals of R2 772,90 each, payable on the first day of each month, with a final instalment payable on 26 September 2011.

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[1] 34 of 2005 ('the Act'), date of commencement 1 June 2006.

[2] For a convenient reference to some of the more recent judgments, see *Firstrand Bank v Seyffert* 2010 (6) SA 429 (GSJ) paras 8 and 9. (Most of the unreported judgments referred to herein can be accessed at http://www.saflii.org/content/south-africa-index.)

[4] By September 2009 the defendant encountered financial difficulties and on 29 September 2009 he applied to a debt counsellor in Vredenburg for debt review in terms of s 86(1) of the Act. The debt counsellor, on 2 October 2009, sent notices as contemplated by s 86(4)(b)(i) of the Act to all the defendant's creditors, informing them of the defendant's application for debt review. This was followed, on 30 October 2009, by a further notice from the debt counsellor, informing all creditors that the defendant's application for debt review was successful; that the defendant was over-indebted as contemplated by s 79(1) of the Act; and that 'the debt obligations were in the process of being restructured'. This notice was accompanied by an 'instalment offer', proposing a rearrangement of the debts in question. The proposal entailed that an amount of R5 300 per month would be distributed on a *pro rata* basis among the defendant's creditors. This would mean, in the case of the debt owing to the plaintiff, that the latter would receive monthly instalments of R1 762,44, instead of R2 772,90 per month, as originally agreed.

[5] The plaintiff did not make a counter-proposal to the suggestions of the debt counsellor, nor did it respond at all to the debt counsellor's notices. The defendant thereupon proceeded to make monthly payments to the debt counsellor, which were distributed among the various creditors – including the plaintiff – in accordance with the earlier proposal.

[6] On 12 March 2010 the debt counsellor launched an application in the magistrate's court of Vredenburg, citing the defendant and his wife, together with their various creditors (including the plaintiff) as

respondents. The application is headed, somewhat misleadingly, 'Notice of Motion: Application by consumer to court for debt review in terms of section 86(10) and 86(11) of the National Credit Act 34 of 2005'. It is apparent from the relief sought, however, that what was intended was a proposal for re-arrangement, as contemplated by s 86(7)(c)(ii) of the Act. In the notice of motion, the respondents were informed that application would be made to the court on 11 June 2010, *inter alia*, for an order that the defendant and his wife are over-indebted as set out in s 79 of the Act; ordering that the defendant's 'debt obligations be restructured' in accordance with a proposal annexed to the papers; and ordering credit providers who had given notice to terminate the debt review process to resume the debt review in terms of s 86(11) of the Act.

[7] Exactly one week before the scheduled hearing, however, on 4 June 2010, the plaintiff's attorneys notified the defendant by registered post that the plaintiff terminates 'the pending debt review with regard to the above agreement as contemplated in s 86(10) of the Act'.[3] They further pointed out that the defendant was at that stage in arrears in the amount of R40 982,78 in respect of the credit agreement in question and that he had been in arrears for more than 20 business days. They accordingly demanded immediate payment of such arrears. The letter concluded as follows:

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[3] Notice of termination was simultanously given to the debt counsellor and the NCR, as required by s 86(10).

'Should you fail to (1) pay the arrears mentioned above in full; or alternatively (2) return the vehicle as contemplated in s 127 of the Act; within 10 business days of transmission of this letter, our client intends to cancel the agreement and to proceed to take legal action to enforce its rights in terms of the agreement.'

[8] On 29 June 2010 the plaintiff launched the present action, seeking to enforce the credit agreement. In its particulars of claim the plaintiff alleged that the debt review process had been terminated by the delivery of its notice in terms of s 86(10), more than 60 business days after the defendant's application for debt review, and that the defendant had been in default in terms of the agreement on the date when the said notice was delivered. The plaintiff further alleged as follows:

'12.5 The agreement is therefore not subject to pending debt review as contemplated in s 86 of the NCA as:

12.5.1 The defendant has not surrendered the vehicle to the plaintiff as contemplated in s 127 of the NCA;

12.5.2 There is no matter arising under the agreement and pending before the National Credit Tribunal that could result in an order affecting the issues to be determined by the court.

13. The matter is not before a Debt Counsellor, Alternative Dispute Resolution Agent, Consumer Court or the Ombud with jurisdiction.

13.1 The defendant has not:

13.1.1 agreed to a proposal made in terms of s129(1)(a) of the NCA or acted in good faith in fulfilment of such agreement as no such agreement has been reached;

13.1.2 complied with an agreed plan as contemplated in s129(1)(a) of the NCA as no such plan has been agreed; or

13.1.3 brought the payments under the credit agreement up to date, as contemplated in s129(1)(a) of the NCA.

13.2 More than 10 business days have passed since the delivery of the above notices in terms of s86(10) of the NCA;

13.3 The defendant has been default [*sic*] under the agreement for more than 20 business days.'

[9] The plaintiff accordingly asks for judgment for (a) confirmation of cancellation of the agreement; and (b) delivery of the goods to the plaintiff, together with costs. (The plaintiff also claims payment of damages, together with interest, but only prayers (a) and (b) are relevant for purposes of the present application for summary judgment, with the balance of the relief to stand over for later determination.)

[10] The defendant gave notice of his intention to oppose the claim, which prompted the present application for summary judgment. In his opposing affidavit, the defendant drew attention to the process followed by him and the debt counsellor, as outlined above. He also drew attention to the application that had been issued on 12 March 2010 and set down for hearing in the magistrate's court on 11 June 2010. The defendant accordingly pointed out that his application for debt re-arrangement had been issued and set down prior to the issue of summons by the plaintiff herein.

[11] The defendant also stated:

'Ek wil verder onder die Hof se aandag bring dat daar tydens die aanhoor van hierdie aansoek geargumenteer sal word dat in terme van die bepalings van art 86(11) van die Nasionale Kredietwet, ek die reg het om aansoek te doen vir die herlewing van my aansoek om skuldberading. Ek is meegedeel dat tesame met die liassering van my formele aansoek daar ook aansoek gedoen sal word vir die implimentering van die bepalings van art 86(11) van die Nasionale Kredietwet.'

[12] The crisp question raised by the defendant's opposing affidavit is whether it is competent for a credit provider to terminate a debt review process in terms of s 86(10) after an application has been lodged with a magistrate's court for an order restructuring a consumer's debts as envisaged in s 86(7)(c) of the Act but before an order has been made in terms of s 87(1). As will appear more fully below, this question has received different answers from different courts.

Discussion

[13] The Act is aimed at drastically restructuring the legal landscape insofar as consumer credit is concerned. One of its principal aims, as contained in the long title, is 'to promote a fair and non-discriminatory marketplace for access to consumer credit'. Another aim is 'to protect consumers', *inter alia*, by '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'.[4] In order to achieve the aims of the Act, it has limited a credit provider's right to enforce a credit agreement where a consumer defaults under the agreement. In a nutshell, the Act has drastically changed the traditional legal debt collection procedures.[5]

[14] It is ironic that a piece of legislation that was passed with such laudable intentions has become, within a few months after its promulgation, a 'fertile ground for litigation', as it was described in one of the plethora of cases in which its provisions were considered by the court.[6]

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[4] Sec 3(g).
[5] M Kelly-Louw *Consumer Credit* 5(1) Lawsa (2 ed, 2010) para 142.
[6] *SA Taxi Securitisation (Pty) Ltd v Nako & others* [2010] ZAECBHC 4 (8 June 2010) para 3 n 4 (per Kemp AJ).

Be that as it may, save to the extent as set out below, it is unnecessary for purposes of this judgment to undertake a comprehensive overview of the Act and the applicable regulations.[7]

[15] Of particular relevance to the present enquiry is Chapter 4, under the heading 'Consumer Credit Policy'. Part D of that chapter (ss 78–88) introduces the novel concepts of 'over-indebtedness and reckless credit' and makes elaborate provision for re-scheduling a consumer's debt payments where either of those situations pertains. The object of this part of the Act is to provide protection and assistance to an over-indebted consumer in an environment that encourages participation in good faith by both parties.[8] The mechanisms provided by the Act are contained in ss 85–88 and consist of debt review, on the one hand, and debt re-arrangement, on the other.[9]

[16] Subsection 86(10) 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—

(*a*) the consumer;

(*b*) the debt counsellor; and

(*c*) the National Credit Regulator,

at any time at least 60 business days after the date on which the consumer applied for the debt review.'

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[7] See in this regard J M Otto, *The National Credit Act Eplained* (LexisNexis, 2006); J W Scholtz (Ed) *Guide to the National Credit Act* (LexisNexis, 2008, loose leaf); Lawsa *op cit.*

[8] *Mercedes Benz Financial Services South Africa (Pty) Limited v Dunga* (9222/2010) [2010] ZAWCHC 208 (20 September 2010) para 24.

[9] For a useful synopsis of the relevant provisions, see *National Credit Regulator v Nedbank Ltd & others* 2009 (6) SA 295 (GNP) at 300F–302E.

[17] The subsection contains no limitation on a creditor's right to give notice of termination, save for the two jurisdictional requirements postulated, namely (a) the consumer must be in default under the credit agreement; and (b) at least 60 business days must have elapsed after the date on which the consumer applied for the debt review. In the present instance, it is common cause that both these requirements have been met: the defendant was already in default when he applied for debt review on 29 September 2009. On 4 June 2010, ie more than 60 business days later, the plaintiff gave the requisite notice in terms of s 86(10). Moreover, more than 10 days have elapsed after the plaintiff's notice before summons was issued, as required by s 130(1). The plaintiff, relying on a literal interpretation of s 86(10), accordingly submitted that it is entitled to enforce the terms of the credit agreement in question by claiming summary judgment.

[18] In support of its interpretation, the plaintiff relied, *inter alia*, on the judgment of Eksteen J in *Firstrand Bank Ltd v Evans*,[10] where it was held that 'the credit provider's rights to give notice in terms of s 86(10) and to legitimately terminate the debt review process continues until the magistrate's court has made an order as envisaged in s 87'.

[19] On the other hand, there is another line of cases, where the opposite view was taken and where it was held that it was not competent for a credit provider to give notice in terms of s 86(10) of the Act where

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[10] [2010] ZAECPEHC 55 (31 August 2010) para 20. A virtually identical judgment by the same learned judge was handed down two days later in *Firstrand Bank Ltd v Collett* [2010] ZAECGHC 75 (2 September 2010). See also *SA Taxi Securitisation (Pty) Ltd v Nako & others*, n 6 above; and the *Seyffert* case, n 2 above, where similar conclusions were reached.

the debt counsellor has already referred the debt review to the magistrate's court.[11]

[20] It would be an unduly onerous and tedious task to analyse and discuss individually the reasoning in each of the ever-growing number of judgments on the topic. Instead, I propose briefly to set out the reasons why I agree with the approach followed in the second line of cases regarding the interpretation of s 86(10).

[21] The provisions of s 86(10) appear, on the face of it, to be clear and unambiguous. However, as pointed out by Ngcobo J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*:[12]

'The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and un-ambiguous. Recently, in *Thoroughbred Breeders' Association v Price Waterhouse*,[13] the SCA has reminded us that:

> "The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the face of it to have a readily discernible meaning." '

[22] Having regard to the context in which they appear, it is clear to me that a literal interpretation of the provisions of s 86(10), read in isolation, would amount to a 'blinkered' approach which could easily

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[11] *Standard Bank of South Africa Limited v Kruger; Standard Bank of South Africa Limited v Pretorius* 2010 (4) SA 635 (GSJ) paras 13, 24 (per Kathree-Setiloane AJ). She subsequently reiterated these views in *SA Securitisation (Pty) Limited v Matlala* [2010] ZAGPJHC 70 (29 July 2010), where she specifically disagreed with the approach of Kemp AJ in *SA Taxi Securitisation v Nako, supra.* Other cases following the same approach include the judgments of Binns-Ward J in this Division in *Changing Tides 17 (Pty) Ltd NO v Erasmus & another, and two similar cases* [2009] ZAWCHC 175 (12 November 2009); and *Wesbank v Martin* [2010] ZAWCHC 173 (13 August 2010).

[12] 2004 (4) SA 490 (CC) para 90.

[13] 2001 (4) SA 551 (SCA) para 12.

lead to the wrong answer. Those provisions deal with one aspect of an elaborate process described in the heading to s 86 as *'Application for debt review'*. The process commences with an application by the consumer 'in the prescribed manner and form' to a debt counsellor to have the consumer declared over-indebted.[14] The debt counsellor is thereupon required to notify all credit providers listed in the application as well as every registered credit bureau.[15] The consumer and each credit provider must thereafter 'participate in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement'.[16] A debt counsellor must determine within 30 days whether the consumer appears to be over-indebted.[17]

[23] Should the debt counsellor determine that the consumer is *not* over-indebted, then the counsellor must provide the consumer with a 'letter of rejection' containing the prescribed information.[18] Among other things, the consumer must be advised of his right 'to approach the court . . . within 20 business days' for an order, *inter alia*, that he or she be declared over-indebted.[19]

[24] However, if the debt counsellor concludes that the consumer is indeed over-indebted, the procedure described in s 86(7)(c) must be followed. This means that the debt counsellor 'may issue a proposal' recommending that the magistrate's court make an order, *inter alia*, that one or more of the consumer's debts be 're-arranged' in one or more of a

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[14] Sec 86(1).
[15] Sec 86(4)(b).
[16] Sec 86(5)(b).
[17] Sec 86(6)(a), read with reg 24(6).
[18] Sec 86(7)(a), read with reg 25.
[19] Sec 86(9), read with reg 25(5).

number of specified ways.[20] (In the *National Credit Regulator* case, *supra*, these provisions were interpreted to mean that the debt counsellor *must* refer the matter to the magistrate's court,[21] which referral takes the form of an ordinary application regulated by Magistrates' Courts rule 55.[22])

[25] Thus, s 86(7)(c) sets in motion a 'debt re-arrangement by the court', as opposed to a 'voluntary re-arrangement' in terms of s 86(8)(a).[23] Unlike the position with regard to s 86(9), the Act as well as the regulations are silent as to the time period within which the debt counsellor may (must) issue the requisite 'proposal' in terms of s 86(7)(c). However, if one has regard to the context, then the answer to the question posed above becomes clear. The process of 'debt review' requires of the debt counsellor to determine, within 30 business days, whether or not a consumer is over-indebted.[24] If not, the debt counsellor must advise the consumer of his or her right 'to approach the court' within a further 20 business days for the necessary order.[25] This leads me to the conclusion that the period of 60 business days referred to in s 86(10) was introduced with the abovementioned timeframe in mind so as to allow the consumer and/or debt counsellor sufficient time to 'approach the court' for the necessary relief in terms of s 87.[26]

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[20] Sec 86(7)(c)(ii).
[21] At 304B–C and 307A–B.
[22] *Ibid* at 310C–D; 310H–311A; 320G–H.
[23] *Ibid* at 301E–302A.
[24] Reg 24(6).
[25] Reg 25(5).
[26] Cf *Martin's* case, *supra*, para 8. See also A Boraine & S Renke *Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005 (Part 2)*, 2008 *De Jure* 1 at p 4 n 147.

[26] Once a debt re-arrangement order has been granted, the consumer is protected from litigation by his or her creditors – at least for the time being.[27] But what about the situation where a debt re-arrangement order has been applied for but not yet granted, which is the problem that confronts us in this application? Given the fact that a consumer has a period of 50 business days, calculated from the date of his application to the debt counsellor, within which to 'approach' the magistrate's court for an order in terms of s 87, it could never have been contemplated that the rest of the process – including a hearing before the magistrate and a re-arrangement order in terms of s 87 – should all be finalised within the remaining ten business days. Clearly, in the majority of cases, this deadline would be unattainable. As Blignault J correctly observed in *Dunga's* case, *supra*:

'Experience has shown that the typical debt review takes longer than 60 business days, often much longer, before it results in an order by the Magistrate's Court in terms of section 87. By terminating the debt review after 60 business days the credit provider may be able to derail the entire debt review process by way of a single unilateral act, regardless of the reasonableness of the conduct of the consumer or his own conduct.'[28]

[27] It follows that, even where the consumer does everything 'by the book', there will inevitably be a large number of cases where the period of 60 days will have elapsed without an order as contemplated by s 87 having been obtained.

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[27] See s 130(4)(e).
[28] Para 26.

[28] On the interpretation advanced on behalf of the plaintiff herein, the position is quite simple: the credit provider would be entitled, in each case where a period of 60 days has elapsed without a re-arrangement order in terms of s 87 having been made, unilaterally 'to derail the entire debt review process'.

[29] In his opposition to this line of argument, the NCR, in his application to be joined as an *amicus curiae* herein, has placed evidence before the court indicating how some credit providers are circumventing and undermining the statutory process of debt review by following the literal interpretation advocated on behalf of the plaintiff herein. Thus, according to the NCR, some credit providers terminate the debt review process in terms of s 86(10) as soon as the period of 60 days has expired, even where a debt counsellor has already indicated (as here) that the application for debt review was successful; or where (as here) the consumer is making regular payments in terms of a proposal submitted to credit providers by the debt counsellor; or where (as here), a date for a hearing of the consumer's application for relief in terms of s 87 has already been obtained in the magistrate's court. Some credit providers obtain a postponement of the hearing of the application before the magistrate and immediately thereafter deliver a notice terminating the process, followed by the issue of summons in the High Court and an application for summary judgment. On the credit providers' interpretation, they may, and do, put an end to the debt review process even where the consumer and the debt counsellor have taken all necessary steps to invoke and implement the relevant provisions of the Act.

[30] I agree with the NCR that such conduct on the part of credit providers is inconsistent with the Act. In my view, this is a strong indicator that a literal interpretation should not be followed. It would be counter-productive and contrary to the whole purpose of the Act to allow a credit provider unilaterally to terminate the consumer's protection at the precise moment when he or she may need it the most. It would be like providing the consumer with an umbrella and then snatching it back the moment it starts raining. This approach would mean that only those consumers fortunate enough to apply for debt review at a favourable time or in a jurisdiction without a long backlog will succeed in having their debts re-arranged by the magistrate's court.

[31] The plaintiff's approach also tends to overlook the fact that in the present instance the application for debt review has found favour with the debt counsellor and may likewise have found favour with the magistrate, had it not been for the untimely notice of termination in terms of s 86(10).

[32] The plaintiff's interpretation further ignores the fact that the magistrate's court before which the application for re-arrangement is pending has become seized with the matter. In this regard, it is significant that s 86(10) does not require notice of termination to be given to the magistrate or to any of the other parties to the pending application. Thus, one may find the incongruous situation (on the plaintiff's interpretation) that the magistrate in question, having heard an application in terms of s 87, may be in the process of preparing a judgment or order, blissfully unaware of the fact that one of the respondents in the matter before the court has in the meantime unilaterally and extra-

judicially terminated the whole process simply by giving notice in terms of s 86(10). In the result, an existing judicial process becomes contingent upon the mere sending of a letter between private parties. In my view, this absurd result could not have been intended by the legislature.

[33] The NCR points to a further absurdity that results from a literal interpretation: by allowing termination of matters that have been referred to the magistrate's court for re-arrangement, this encourages premature enforcement in the High Court of credit agreements that were being reviewed in the magistrate's court. This will inevitably drive up the costs of litigation at the expense of those least able to afford it, as the present case illustrates.

[34] To sum up, applying a purposive approach to the relevant provisions, and having due regard to the context in which they appear, I am satisfied that, on a proper interpretation of subsec 86(10), the consumer is protected against enforcement proceedings by the credit provider, not only once a re-arrangement order has been made by a magistrate in terms of s 87, but also while proceedings for such an order are pending. The corollary is that delivery of a notice of termination by a credit provider in terms of s 86(10) is not competent once any of the steps referred to in ss 86(7)(c), 86(8) or 86(9) have been taken. Obviously this impediment will cease to exist, once a magistrate's court has dismissed the application for re-arrangement or the application has been withdrawn or abandoned.

[35] In the present case, the plaintiff purported to terminate the process of debt review a week before the application for an order in

terms of s 87 was due to be heard in the Vredenburg magistrate's court. In the light of the conclusion to which I have come above, it follows that such purported termination was invalid. It follows, further, that it is to that court that the parties should return in order to pursue their respective rights and remedies in terms of the credit agreement in question. At the hearing before the magistrate, the plaintiff will have adequate opportunity to state its attitude with regard to the application. I am accordingly of the view that the current action should be stayed so that the debt review process can take its course in the magistrate's court.

[36] In view of these conclusions, it follows that it is not necessary, for purposes of this case, to consider the provisions of subsec 86(11),[29] or to pronounce on the correctness or otherwise of the interpretation attached to those provisions in *Dunga's* case, *supra*.[30]

Conclusion

[37] For these reasons, an order is granted in the following terms:

(a) The application for summary judgment is stayed, pending a final determination of the proceedings referred to in para (b) below;

(b) It is ordered that the debt review that was pending in the magistrate's court for Vredenburg under Case No 1012/10 is to resume;

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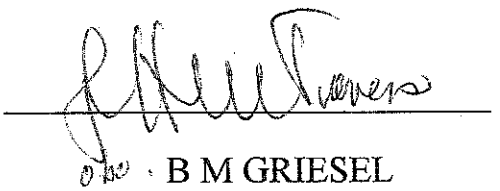
[29] Subsec 86(11) provides:
'If a credit provider who has given notice to terminate a review as contemplated in subsection (10) proceeds to enforce that agreement in terms of Part C of Chapter 6, the Magistrate's Court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances.'

[30] Paras 33–44 of the judgment.

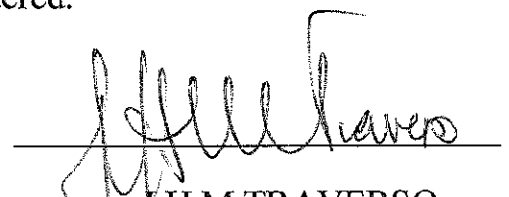
(c) **The clerk of the court is directed to set the above application down for hearing at the earliest available date, after due notice to the parties;**

(d) **The costs of the application for summary judgment shall stand over for later determination.**



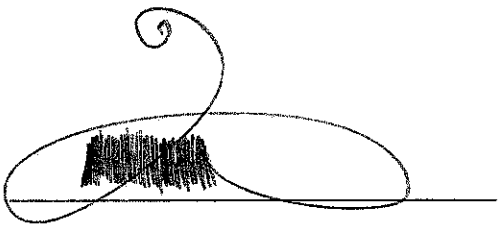
B M GRIESEL
Judge of the High Court

TRAVERSO DJP J: I agree. It is so ordered.



J H M TRAVERSO
Deputy Judge President

DLODLO J: I agree.



D V DLODLO
Judge of the High Court