



Debt Review: The Termination and Revival thereof

by

Montenique Hayward

Student Number: 28035764

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Supervisor: Professor Corlia van Heerden

University of Pretoria

Department of Mercantile Law

Faculty of Law



DECLARATION OF ORIGINALITY

I declare that this mini-dissertation is my original work and all sources of information from other authors have been acknowledged. I also declare that this mini-dissertation has never been submitted to any other institution. I hereby present this work in partial fulfilment for the award of the LLM Degree in Mercantile Law.

Montenique Hayward

October 2016

Pretoria

South Africa

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SUMMARY

The National Credit Act¹ has brought about significant changes to the South African credit market. Amongst these changes are the provisions that introduced concepts such as ‘over-indebtedness’ and ‘reckless credit’, as well as the provisions that implemented a new alternative debt relief measure into our law. Section 86 of the NCA introduced the debt review process in terms whereof an over-indebted consumer can voluntarily apply to a debt counsellor to be placed under debt review with regard to credit agreements that fall within the scope of application of the NCA.²

Upon receipt of a consumer application, a debt counsellor will proceed to conduct an assessment of the consumer’s financial means, prospects and obligations with the aim of ascertaining whether or not the consumer is indeed over-indebted. During this period of assessment, a moratorium becomes operative which restricts the right of credit providers with whom the consumer has a credit agreement, subject to debt review, to proceed with debt enforcement proceedings against the defaulting consumer. Only once the prescribed period of 60 business days has lapsed,³ but before the matter is filed at court, may the credit provider terminate the debt review and consequently proceed with debt enforcement proceedings.

Although the NCA affords credit providers the right to terminate a debt review this right is however not absolute, as the NCA also affords consumers with the opportunity to apply for

¹ The National Credit Act 34 of 2005, hereinafter referred to as “the NCA”.

² It is notable that the concept “credit agreement”, as governed by the NCA, concerns nearly every type of credit granting, with limited exceptions. See the Otto JM and Otto R-L (4th ed) *The National Credit Act Explained* Durban: LexisNexis Butterworths (2010) at 16, hereinafter referred to as “the *NCA Explained* (2016)”.

³ Calculated as from the date on which the consumer first applied for debt review.

the revival of the terminated debt review. Consequently, it will be up to the court hearing such an application for revival to make a ruling.

The legislature, however, failed to include into the NCA detailed procedural rules and guidelines in respect of the debt review process, more specifically in respect of the termination procedure. This oversight of procedural rules and guidelines by the legislature has proven to be very problematic and has resulted in a vast range of conflicting judgments by our courts.

This dissertation aims to analyse the procedural issues pertaining to the termination procedure, in its original and amended forms, as well as the reinstatement procedure. These issues will be discussed and inferences will be made. Recommendations will also be provided in the hope of contributing to streamlining the debt review process and in particular the termination and revival procedures.

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CHAPTER 1: INTRODUCTION TO THE NATIONAL CREDIT ACT AND THE DEBT REVIEW PROCESS

1.1. INTRODUCTION

On 10 March 2006, the National Credit Act⁴ was assented to by the President and, following a three phase implementation process, became fully operational on 1 June 2007.⁵ This, in turn, led to the replacement of the previous legislation in terms whereof the credit market was regulated, namely the Usury Act⁶ and the Credit Agreements Act.⁷

The ambit of the NCA and its purposes⁸ point towards the notion that the legislature intended for the NCA to fundamentally change the very essence by which credit is regulated in South Africa,⁹ by *inter alia* changing the way parties contract and enter into credit agreements¹⁰ and by requiring the utmost care and due diligence so as to guard against the negative

⁴ Act 34 of 2005, hereinafter referred to as “the NCA”. All references to sections and regulations hereinafter will be in accordance with the NCA, unless indicated otherwise.

⁵ The NCA was put into operation on 1 Jun 2006, 1 Sept 2006 and 1 Jun 2007. See GN 22, GG 28824, dated 11 May 2006.

⁶ Act 73 of 1968, hereinafter referred to as the “Usury Act”. See Otto JM and Otto R-L (4th ed) *The National Credit Act Explained* Durban: LexisNexis Butterworths (2010) at 3, hereinafter referred to as “the *NCA Explained* (2016)”.

⁷ Act 75 of 1980, hereinafter referred to as the “Credit Agreements Act”; see the *NCA Explained* (2016) at 3.

⁸ See s 3 of the NCA for an exhaustive list of the NCA’s purposes.

⁹ Notably, the previous legislation, in terms whereof the credit market was regulated, contained various prohibitions in respect of their application to credit agreements. The Credit Agreements Act only applied to credit agreements in terms of which the cash price did not exceed R 500 000.00, similarly the Usury Act was also restricted to credit agreements with a principal debt less than R 500 000.00. The NCA subsequently has a much wider field of application. In this regard, see the *NCA Explained* (2016) at 1, 4 and 5.

¹⁰ See the *NCA Explained* (2016) at 14 – 16 for a discussion on the life cycle of credit agreements.

consequences of credit.¹¹ As a consequence, the South African legislature has afforded South African credit consumers wider protection than what was previously the case.¹²

In order to achieve its purposes, the NCA makes provision for various mechanisms and measures by balancing the rights of credit providers¹³ and consumers¹⁴ and by implementing debt relief measures and sanctions in an endeavour to assist over-indebted consumers.¹⁵

One such new debt relief measure afforded to consumers by the NCA is the ‘debt review’ process.¹⁶ Debt review is accordingly aimed at providing over-indebted consumers with the opportunity of easing the burden of over-indebtedness. To some extent consumers are afforded a second chance at managing their debt responsibly.¹⁷

Whilst on the other side of the coin, we are faced with the restriction of credit providers’ enforcement rights against defaulting consumers. The NCA has implemented various provisions aimed at halting debt enforcement, in particular where a consumer is under active debt review to prevent credit providers from terminating the debt review under specific circumstances.

From the above scenario, one can easily err in assuming that the NCA is much more in favour of the defaulting consumer’s rights to continue with a credit agreement, as opposed to the credit provider’s right to enforce such credit agreement. Otto and Otto opine that the South

¹¹ For instance ‘over-indebtedness’; see s 78(3) and s 79(1) discussed in par 3.2 *infra*.

¹² See the *NCA Explained* (2016) at 4 – 5.

¹³ In respect of the rights afforded to credit providers by the NCA, See the *NCA Explained* (2016) at 85 – 87.

¹⁴ In respect of the rights afforded to consumers by the NCA, see the *NCA Explained* (2016) at 64 – 82.

¹⁵ Scholtz *et al* (6th ed) *Guide to the National Credit Act* Durban: LexisNexis Butterworths (2014) at par 11-1, hereinafter referred to as the “*Guide to the NCA* (2014)”.

¹⁶ See Part D of Ch 4 of the NCA, specifically ss 78 - 88.

¹⁷ See the *NCA Explained* (2016) at 68 and Ch 3 *infra*.

African legislature was far from generous in their creation of rights for credit providers in the NCA.¹⁸ However, such an assumption is in stark contrast with the purposes of the NCA, as set out in section 3 thereof. For purposes of this dissertation, the following purposes, as set out in section 3, are of importance:

- (c)(i) promoting responsibility in the credit market by – encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers;
- (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 consumers and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;
- (i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.

Accordingly, it can be deduced that the NCA is not aimed at providing a quick-fix for over-indebted consumers as the NCA quite clearly focuses on the eventual satisfaction of all obligations due to the credit provider by the consumer.¹⁹ This is further evidenced by the remark by the Supreme Court of Appeal²⁰ in *Collett v Firstrand Bank Limited*:²¹

The purpose of the debt review is not to relieve the consumer of his obligations, but to achieve either a voluntary debt re-arrangement or a debt re-arrangement by the Magistrate's Court.

¹⁸ See the *NCA Explained* (2016) at 85.

¹⁹ See s 3(g) of the NCA.

²⁰ Hereinafter referred to as the "SCA".

²¹ *Collett v Firstrand Bank Limited* 2011 (4) SA 508 (SCA) at par 10.

Thus, the NCA seeks to protect both credit providers and consumers by promoting a fair credit market wherein the respective rights and obligations of each are balanced and should therefore not be interpreted in a manner that would result in the elevation of consumer rights above those of credit providers.²²

For this reason, it is of utmost importance to determine and understand the intentions of the legislature with regard to the debt review process, as well as its application in practice. This will assist in effectively balancing the consumer's rights against those of the credit provider's during the debt review process and *vice versa*.

Certain elements of the NCA, specifically the debt review process, have been found to be inadequate and subject to much critique. Willis J aptly remarked in *Firststrand Bank Limited t/a First National Bank v Seyffert and Another and Similar Cases*²³ that “[a] court is forced to go round and round in loops from subsection to subsection, much like a dog chasing its tail”.²⁴ This is further evidenced by the various conflicting judgments concerning a credit provider's right to terminate a debt review application.

1.2. THE PURPOSE OF THIS DISSERTATION

The purpose of this dissertation is to provide an overview of the debt review process, as introduced by the NCA, and to particularly focus on the termination and revival procedures

²² See the *NCA Explained* (2016) at 8.

²³ 2010 (6) SA 429 (GSJ).

²⁴ *Firststrand Bank Limited t/a First National Bank v Seyffert and Another and Similar Cases* 2010 (6) SA 429 (GSJ) at par 10; see also *Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga* 2011 (1) SA 374 (WCC) at par 17 wherein Blignault AP stated that the NCA has “become notorious for its lack of clarity”.

related thereto, with special regard for the position prior to the National Credit Amendment Act,²⁵ as well as the position thereafter. Consideration will also be given to relevant case law.

1.3. PROBLEM STATEMENT

As mentioned above, the NCA has afforded over-indebted consumers a new debt relief measure in the form of debt review. Similarly, the NCA has prescribed various procedural rights that credit providers must comply with when faced with a defaulting consumer who is under debt review. One such right afforded to credit providers is the right to terminate the debt review process. This termination right is further limited to specific circumstances. On top of this is the fact that a consumer may very well be able to reinstate a terminated debt review, subject to certain conditions.

Subsequently, the objective of this dissertation is to focus on the requirements and procedural aspects credit providers must adhere to in order to lawfully terminate the debt review process, specifically after the debt review application has been referred to the magistrate's court for deliberation by the debt counsellor. Equally, the position of consumers with regard to the reinstatement of a terminated debt review will be considered. Accordingly, developments in case law and the impact of the NCAA will be reviewed and critically discussed so as to be able to respond to the questions of: when may a credit provider lawfully terminate a debt review after its referral to the magistrate's court? How does this right of termination weigh against the consumer's right of resumption?

²⁵ Act 19 of 2014, hereinafter referred to as "the NCAA". The NCAA was put into operation on 13 Mar 2015. GN 389, GG 37665, dated 19 May 2014.

1.4. DELINEATION AND LIMITATIONS

The reasons for over-indebtedness and the prevention thereof, by *inter alia* means of debt review, are closely related and important to the research problem and objectives. However, in order to maintain focus and to avoid a secondary chain of arguments, this research will focus on primarily the debt review process and its termination and reinstatement before the granting of a magistrate's court order and *not* on the termination thereof after the granting of a magistrate's court order.²⁶

1.5. METHODOLOGY

This dissertation encompasses a literature study of legislation, case law, books, journal articles, theses and reports. As was indicated above,²⁷ this dissertation is primarily a critical analysis of the debt review termination and reinstatement procedures as measured against trends in case law and legislation.²⁸

1.6. CHAPTER OVERVIEW

The dissertation comprises of the following chapters:

Chapter 1: provides a brief overview of the aim of the NCA, as well as addresses the purpose of this dissertation and the methodology applied. It also addresses the delineation and limitations in respect of this dissertation.

²⁶ In this regard see s 88(3); *Firststrand Bank Limited v Fillis & Fillis* 2010 (6) SA 565 (ECP); *Firststrand Bank Limited formerly known as First National Bank of Southern Africa Limited v Fester and Another* [2011] ZAWCHC 363; *ABSA Bank Limited v McEpieow* unreported case nr 19252/2012 (WC).

²⁷ See par 1.3 *supra*.

²⁸ See Ch 4 *infra*.

- Chapter 2: deals with the features of the NCA and provides an overview of the credit market prior to the commencement of the NCA, as well as the policy considerations that gave way to the drafting and implementation of the NCA.
- Chapter 3: deals with the procedural aspects of the debt review process, as well as provides an oversight of the various role players involved in the debt review process and their respective rights and obligations. Consideration is also given to the requirement of good faith ascribed by the NCA to each of the role players. The aim of this chapter is accordingly to provide perspective for the issues experienced during the termination and resumption of the debt review process, to be discussed in chapter 4.
- Chapter 4: focuses on the termination (section 86(10)) and resumption (section 86(11)) of the debt review process, in particular, the procedural issues experienced since the commencement of the NCA, as well as the impact of the NCAA and case law.
- Chapter 5: provides recommendations and conclusions in respect of the procedural issues identified in chapter 4 in terms of section 86(10) and section 86(11) of the NCA.

CHAPTER 2: THE NATIONAL CREDIT ACT²⁹

2.1. INTRODUCTION

Prior to the enactment of the NCA, the credit market in South Africa was regulated by various pieces of legislation.³⁰ These acts merely covered the contractual aspects of various credit agreement transactions which resulted in a lack of uniformity in the credit market.³¹ It was, therefore, evident that the South African credit market desperately required a single comprehensive credit act to address and regulate the credit market as a whole.

This led to the Department of Trade and Industry³² initiating a review process, by establishing the Technical Committee, during March 2002, in order to conduct a thorough review³³ of the existing legislation regulating the consumer credit market in South Africa.³⁴

2.2. THE REVIEW OF THE SOUTH AFRICAN CREDIT MARKET

As part of the Technical Committee's review, it referred to several other reports, *inter alia* the 1992 South African Law Commission's review of the Usury Act and the 1995 South African Law Commission's report on debt collection and other related matters.³⁵ It also

²⁹ For an overview of the NCA, see the *NCA Explained* (2016) at 13 – 14.

³⁰ See par 1.1 *supra*.

³¹ The Department of Trade and Industry South Africa *Credit Law Review: Summary of findings of the Technical Committee* (August 2003) at par iii of the Synopsis.

³² Hereinafter referred to as the "DTI".

³³ Also known as the Credit Law Review.

³⁴ The Department of Trade and Industry South Africa *Consumer Credit Law Reform: Policy Framework for Consumer Credit* (August 2004) at par 1.18, hereinafter referred to as "*Policy Framework*".

³⁵ *Policy Framework* at par 1.18.

referred to various research reports which were undertaken at its request.³⁶ In addition to the Technical Committee's review, it was tasked with proposing a new regulatory framework for consumer credit.³⁷

Accordingly, in October 2003 a detailed report documenting the weaknesses in the consumer credit market, as well as recommendations for new legislation and changes to the existing regulatory framework was published and handed to the DTI.³⁸

The DTI published the Policy Framework for Consumer Credit in August 2004. The DTI's Policy Framework drew attention to numerous impediments of the credit market which necessitated a major overhaul of the credit market and the regulation thereof. The DTI also stated that "[t]he credit market that developed over the last 40 years is inappropriate for the present and future political economic and social context of South Africa".³⁹

The post-1994 South African government has played an important role towards achieving economic transformation,⁴⁰ as the credit market was identified to be an industry that required regulation in order to unlock economic benefits and achieving equality.⁴¹

The South African credit market was further characterised by formal and informal markets. Kelly-Louw points out that the highly developed formal market served primarily the middle

³⁶ Kelly-Louw M "The prevention and alleviation of consumer over-indebtedness" 2008 *SA Merc LJ* 200 at 205 (hereinafter referred to as "Kelly-Louw (2008)"). See also Report for the *Credit Law Review* (2002); Credit Contract Disclosure and Associated Factors *Credit Law Review* (2002); Market Research Report *Credit Law Review* (2002); Cost, Volume and Allocation of Consumer Credit in South Africa *Credit Law Review* (2003).

³⁷ Policy Framework at par 1.18.

³⁸ Summary of Findings *Credit Law Review* (2003) Foreword; see also *Policy Framework* at par 1.19.

³⁹ Policy Framework at Ch 2.

⁴⁰ Policy Framework at par 1.12.

⁴¹ *Ibid.*

and high-income earners who were predominantly white consumers and large enterprises, which were serviced by banks and other financial institutions.⁴² On the other hand, the informal market was serviced by micro-lenders, loan sharks and pawnbrokers served the low-income and the previously disadvantaged consumers'.⁴³ Accordingly, a major inadequacy of the previous credit regime was that lower income consumers were not afforded equal access to the credit market.⁴⁴ Reputable credit providers, such as banks, were hesitant to provide affordable credit to lower income consumers,⁴⁵ *inter alia* due to the risk of non-payment. As a consequence, different consumers were afforded varying levels of protection which often led to the very poor having the least protection from regulation⁴⁶ since they were quite figuratively speaking thrown to the wolves, seeing that they were at the mercy of unscrupulous credit providers who implemented exorbitant interest rates and resorted to unlawful debt recovery methods.

The DTI's Policy Framework further highlighted that post-1994, over-indebtedness among credit consumers in South Africa grew significantly. Several reasons are cited for this occurrence, *inter alia* that previously disadvantaged consumers gained access to credit. This resulted in many consumers finding themselves over-indebted and with no available means to repay their debts.⁴⁷ The lack of adequate regulation of the credit market accordingly resulted in the industry spiralling out of control and growing rapidly year-on-year.⁴⁸ It became evident

⁴² See *Kelly-Louw* (2008) at 203. See also Stoop "South African consumer credit policy: Measures indirectly aimed at preventing consumer over-indebtedness" 2009 *SA Merc LJ* 365.

⁴³ *Ibid.*

⁴⁴ Policy Framework at par 2.3.

⁴⁵ Policy Framework at par 2.7.

⁴⁶ Policy Framework at par 2.11.

⁴⁷ *Kelly-Louw* (2008) at 204.

⁴⁸ Campbell J "The excessive cost of credit on small money loans under the National Credit Act 34 of 2005" 2007 *SA Merc LJ* 251 at 252.

that a dysfunctional credit market existed which was as a result of various problems in the consumer credit market, *inter alia*:⁴⁹

- credit providers deliberately overlooked a consumer's repayment ability;
- excessive soliciting of credit;
- exploitation of consumers by micro-lenders, intermediaries, debt administrators and debt collectors;
- fragmented and outdated consumer credit legislation;
- fragmented and outdated debt collection procedures contained in the Magistrates' Courts Act;⁵⁰
- the high cost of credit;
- ineffective consumer protection, especially for the predominantly lower income consumers;
- lack of access to credit;
- lack of penalties for non-compliance;
- lack of regulation of credit bureaux as the often held and provided faulty credit information; and
- reckless credit lending by credit providers.

⁴⁹ *Kelly-Louw* (2008) at 204.

⁵⁰ Act 32 of 1944.

The DTI consequently identified that there was a need to provide consumers facing a debt spiral, as a result of the above, with an intermediary debt relief mechanism to turn to, as opposed to more extreme debt relief measures such as debt administration and sequestration.⁵¹

2.3. EXISTING DEBT RELIEF MEASURES PRIOR TO THE PROMULGATION OF THE NATIONAL CREDIT ACT

Prior to the promulgation of the NCA, South African consumers had two debt relief procedures available to them when they found themselves to be over-indebted, namely sequestration⁵² and administration.⁵³

Hereafter follows a short discussion on each of these aforementioned existing debt relief procedures in an effort to provide context to the legislature's motivation for creating and implementing the debt review process by means of the NCA.⁵⁴

⁵¹ Policy Framework at par 6.10.

⁵² As provided for in terms of the Insolvency Act, 24 of 1936 (hereinafter referred to as the '*Insolvency Act*').

⁵³ As provided for in terms of s 74 of the Magistrates' Court Act, 32 of 1944 (hereinafter referred to as the '*MCA*'). In *Bafana Finance Mabopane v Makwakwa and Another* 2006 (4) SA 581 (SCA) at par 583 the SCA confirmed that the administration procedure is in fact a debt relief measure.

⁵⁴ See ch 3 *infra*.

2.3.1. THE SEQUESTRATION PROCEDURE⁵⁵

The sequestration procedure is regulated by the Insolvency Act and has as its main objective the regulation of the sequestration procedure by providing for an orderly and fair distribution of assets aimed primarily at for the advantage of the credit providers of the consumer debtor's insolvent estate.⁵⁶ The Insolvency Act subsequently makes provision for two types of sequestration procedures, namely: voluntary sequestration⁵⁷ and compulsory sequestration.⁵⁸

Accordingly, the sequestration of an insolvent consumer debtor can be initiated by either a creditor,⁵⁹ the consumer debtor himself,⁶⁰ otherwise by a friend of the consumer debtor.⁶¹

⁵⁵ For a detailed discussion on the Sequestration Procedure see Coetzee H A *Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa* LLD thesis, University of Pretoria (2015), hereinafter referred to as "Coetzee (2015)". See also Boraine A, Van Heerden C and Roestoff M "A comparison between formal debt administration and debt review – the pros and cons of these measures and suggestions for law reform (Part 1)" 2012 De Jure 80, hereinafter referred to as "Boraine *et al* (Part 1)", and Boraine A, Van Heerden C and Roestoff M "A comparison between formal debt administration and debt review – the pros and cons of these measures and suggestions for law reform (Part 2)" 2012 De Jure 254, hereinafter referred to as "Boraine *et al* (Part 2)".

⁵⁶ See Coetzee (2015) at 107.

⁵⁷ See s 3(1) of the Insolvency Act, which reads:

"An insolvent debtor or his agent or a person entrusted with the administration of the estate of a deceased insolvent debtor or of an insolvent debtor who is incapable of managing his own affairs, may petition the court for the acceptance of the surrender of the debtor's estate for the benefit of his creditors."

⁵⁸ See s 9(1) of the Insolvency Act, which reads:

"A creditor (or his agent) who has a liquidated claim for not less than fifty pounds, or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than one hundred pounds against a debtor who has committed an act of insolvency, or is insolvent, may petition the court for the sequestration of the estate of the debtor."

⁵⁹ Referred to as a 'compulsory sequestration'. In terms of s 9(1) of the Insolvency Act, in order for a creditor to succeed with his petition to the court for the compulsory sequestration of the consumer's estate, the creditor must have a liquidated claim and the consumer debtor must have either committed an act of insolvency (as provided for in s 8 of the Insolvency Act) or be insolvent.

When faced with the decision of whether or not the sequestration is to the advantage of the consumer's creditors, the court⁶² must decide to either accept⁶³ or reject⁶⁴ the surrender of the consumer debtor's estate. The "to the advantage of the creditor" is the decisive factor

⁶⁰ Referred to as a 'voluntary surrender'. In terms of s 3 of the Insolvency Act, in order for a consumer debtor to be successful with the voluntary surrender of his estate, it is required that the consumer (debtor) must be insolvent, such sequestration must be to the advantage of the consumer's creditors and the consumer debtor must own property of sufficient value that can be realised in order to foot the costs, that are payable out of the residue of the estate, of the sequestration (see s 6(1) of the Insolvency Act). Accordingly, a consumer debtor can be deemed to be too poor to be sequestrated if he does not own property, if any at all, that is of sufficient value to pay all of the costs of the sequestration in terms of the Insolvency Act. In this regard see Mwape BM *An Analysis of Section 86(10) of the National Credit Act No. 32 of 2005* LLM dissertation, University of Cape Town (2015), hereinafter referred to as "Mwape (2015)", at 31 - 32. See also Boraine *et al* (Part 1) at 81, wherein it is submitted by Boraine *et al* that the sequestration procedure is not readily available.

⁶¹ Referred to as a 'friendly sequestration'. A friendly sequestration is similar to a compulsory sequestration, however instead of the application being brought by a creditor, the application is instead brought by a friend or relative of the consumer debtor who also has a claim against the consumer debtor. In respect of a discussion of friendly sequestrations, see Evans RG and Haskins ML "Friendly sequestrations and the advantage of creditors" 1990 *SA Merc LJ* 246.

⁶² It is also important to note that only the high court has the necessary jurisdiction to grant a sequestration order as it affects the status of a natural person; see S 149(1)(a) and (b) read with the definition of 'Court' in s 2 of the Insolvency Act. See also Boraine *et al* (Part 1) at 81 wherein it is submitted that the sequestration is a drastic debt relief measure. See also the *Guide to the NCA* (2014) at par 11.7.

⁶³ See s 6(1) of the Insolvency Act, which reads:

"If the court is satisfied that the provisions of section four have been complied with, that the estate of the debtor in question is insolvent, that he owns realizable property of a sufficient value to defray all costs of the sequestration which will in terms of this Act be payable out of the free residue of his estate and that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may accept the surrender of the debtor's estate and make an order sequestrating that estate."

⁶⁴ See s 6(2) of the Insolvency Act, which reads:

"If the court does not accept the surrender or if the notice of surrender is withdrawn in terms of section seven, or if the petitioner fails to make the application for the acceptance of the surrender of the debtor's estate before the expiration of a period of fourteen days as from the date specified in the notice of surrender, as the date upon which application will be made to the court for the acceptance of the surrender of the debtor's estate, the notice of surrender shall lapse and if a *curator bonis* was appointed, the estate shall be restored to the debtor as soon as the Master is satisfied that sufficient provision has been made for the payment of all costs incurred under subsection (2) of section five."

however it proposes practical difficulties insofar as the funds that will be available for distribution can only be determined once the consumer debtor's assets⁶⁵ have been sold.⁶⁶ Subsequently, the court's acceptance of the surrendering of a consumer debtor's estate will be judged on a case by case basis.⁶⁷

Should the court proceed to accept the surrender of the consumer debtor's estate, albeit, in terms of a compulsory, voluntary or friendly sequestration, the effect thereof will be that the consumer debtor will *inter alia* loses control of his estate and his status will change.⁶⁸ The insolvent consumer debtor's estate will vest in the Master of the High Court and subsequently a trustee will be appointed to manage the estate.⁶⁹

Consequently, should a consumer debtor's estate be sequestrated in that an advantage for the creditors can be shown and that the consumer debtor own property of sufficient value to cover the costs of the sequestration, then it is submitted that a significant amount of the consumer debtor's debt could be written off, if not all.⁷⁰

⁶⁵ It is important to mention that the consumer debtor's assets would include their residential property and any other assets that the consumer debtor owns, including motor vehicles. See Coetzee (2015).

⁶⁶ For a discussion on the determination difficulties faced by the court in determining the amount that will be available for distribution, see Mwape (2015) at 31.

⁶⁷ Mwape (2015) at 31.

⁶⁸ See ss 20 and 21 of the Insolvency Act in respect of the effect on sequestration on *inter alia* the insolvent consumer debtor's property and that of the insolvent consumer debtor's spouse's property. In addition hereto, s 23 of the Insolvency Act is also of vital importance as it sets out the insolvent debtor consumer's rights and obligations during his sequestration period, which *inter alia* entails that the insolvent consumer debtor is not entitled to dispose of any of property belonging to his insolvent estate, nor is he allowed to hold various offices, for example being a member of the national assembly. In this regard, also see Nagel CJ (ed) (4th ed) *Commercial Law* Durban: LexisNexis (2011) at 522 – 523 for the effects of sequestration and the authorities cited there. See also Coetzee (2015) at 108.

⁶⁹ See Mwape (2015) at 32.

⁷⁰ *Ibid.*

Accordingly, once the sequestration has run its course, the insolvent consumer debtor is afforded the opportunity to start anew by means of rehabilitation, however, the sequestration as a whole is still plagued with the social stigma of insolvency.⁷¹

2.3.2. *THE ADMINISTRATION PROCEDURE: SECTION 74 OF THE MAGISTRATES' COURTS ACT 32 OF 1944*

Section 74 of the Magistrates' Courts Act⁷² provides for the administration procedure whereby a consumer debtor may apply to a magistrate's court to be placed under administration. The effect hereof is that, should such application for administration be successful, the consumer debtor's creditors will be compelled to accept the rearrangement of the debts owed to them by the consumer debtor.⁷³ Boraine defines the administration procedure as a debt relief measure afforded to consumers, who are experiencing financial distress, whereby such consumers may approach a court for a statutory order rescheduling their debt.⁷⁴

Unlike the sequestration procedure, which is regulated by an entire act,⁷⁵ the administration procedure is merely regulated by section 74 of the MCA.⁷⁶ The administration procedure is

⁷¹ See s 124 of the Insolvency Act; see also Mwape (2015) at 32 and Steyn L "Sink or Swim? Debt Review's Ambivalent "Lifeline" — A Second Sequel to "... A Tale of Two Judgments "Nedbank v Andrews (240/2011) 2011 ZAECPHC 29 (10 May 2011); *Firstrand Bank Ltd v Evans* 2011 4 SA 597 (KZD) and *Firstrand Bank Ltd v Janse Van Rensburg* 2012 2 All SA 186 (ECP)" 2012 *PER* 190.

⁷² 32 of 1944, hereinafter referred to as the "MCA".

⁷³ See Boraine *et al* (Part 1) at 81.

⁷⁴ Boraine A "Some thoughts on the reform of administration orders and related issues" 2003 *De Jure* 217 – 218.

⁷⁵ In terms of the Insolvency Act.

⁷⁶ Similar to that of the debt review process, which is regulated by s 86 of the NCA.

also aimed at smaller estates⁷⁷ which do not exceed the amount, currently R 50 000.00,⁷⁸ as determined by the Minister from time to time in the Government Gazette.⁷⁹

Accordingly, the administration procedure is available to regular income earning consumer debtors who are unable to meet their financial obligations and/ or judgments taken against them and who don't own property of sufficient value to satisfy such financial obligations and/or judgments.⁸⁰

In terms of section 74E(1) of the MCA an administrator is appointed to take control of the consumer debtor's finances and to administer the payment of the consumer debtor's debts to his creditors.⁸¹ The administrator is tasked with collecting the payments to be made in terms of the administration order concerned and keeping an up to date list of all payments and funds received by the administrator from or on behalf of the consumer debtor.⁸² The administrator must also, subject to section 74L of the MCA, distribute the payments to the creditors *pro rata* at least once every three months, unless it has been agreed or ordered otherwise.⁸³

When a court is faced with an application for administration, the court⁸⁴ is entitled to question the consumer debtor in respect of his assets and liabilities, current and future income which

⁷⁷ *Bafana Finance Mabopane v Makwakwa and Another* 2006 (4) SA 581 (SCA) at par 587 – 588; this is also as opposed to the debt review process which has no such monetary ceilings.

⁷⁸ See GN 217, GG 37477, dated 27 March 2014. See also *Jacobs v African Bank Limited* 2006 (5) SA 21 (T), *Di Mata v Firstrand Bank Limited* 2002 (6) SA 506 (W) and *Boraine et al* (Part 1) at 83.

⁷⁹ S 74(b) of the MCA.

⁸⁰ S 74(1)(a) of the MCA. See Mwape (2015) at 27.

⁸¹ See Mwape (2015) at 27.

⁸² S 74J(1) of the MCA.

⁸³ S 74J(1) of the MCA. In addition hereto, the administrator is entitled to deduct his necessary expenses and remuneration, that does not exceed 12.5 percent of the received monies, as well as a portion of the received monies to make provision for if the consumer debtor defaults or disappears in terms of s 74L of the MCA.

⁸⁴ Or any creditor and/ or legal representative.

includes his spouse's income, standard of living and possibilities of economising as well as any other relevant information.⁸⁵ With due regard to the aforementioned information, the court will be able to determine what weekly or monthly amounts will be payable.⁸⁶

Accordingly, the administration procedure has been submitted to be a modified form of the sequestration procedure,⁸⁷ in that the administration procedure is more appropriate for smaller estates where the costs associated with the sequestration procedure would drain the estate.⁸⁸ Moreover, the administration procedure does not require that an advantage be shown for the consumer debtor's creditors.⁸⁹

Astonishingly, the administration procedure does not include the consumer debtor's payment obligations due *in futuro*.⁹⁰ It is therefore submitted that an administration order does not take into account the full extent of the consumer debtor's financial circumstances.⁹¹ It is further submitted that the promising benefits of the administration procedure is negated by the fact that the consumer debtor will still be burdened by the responsibility of paying such *in futuro* obligations when they become due.⁹²

⁸⁵ S 74B, more specifically s 74B(1)(e)(i) – (iv), of the MCA. See also Mwape (2015) at 28.

⁸⁶ S 74C of the MCA.

⁸⁷ See Boraine *et al* (Part 1) at 83 as well as the cited authority.

⁸⁸ See Boraine *et al* (Part 1) at 84.

⁸⁹ *Ibid.*

⁹⁰ See s 74C(2)(e) of the MCA; Boraine *et al* (Part 1) at 83; Mwape (2015) at 28.

⁹¹ *Ibid.*

⁹² See Boraine *et al* (Part 1) at 83; Mwape (2015) at 28.

2.3.3. *CONCLUDING REMARKS IN RESPECT OF EXISTING DEBT RELIEF MEASURES
PRIOR TO THE PROMULGATION OF THE NATIONAL CREDIT ACT*

The sequestration and administration procedures are both viable debt relief measures, however, as can be seen from the above both procedures have their own advantages and drawbacks.

The sequestration procedure is invasive insofar as it has far reaching effects in that sequestration *inter alia* affects the status of an insolvent debtor consumer, the debtor consumer is prohibited from holding certain offices and the debtor consumer loses control of his estate. Furthermore, the sequestration procedure is only available to consumer debtors whose estate can show that there is an advantage for the consumer debtor's creditors and as such a consumer debtor can be found to be too poor to be sequestrated. But despite these drawbacks, the consumer debtor is afforded the opportunity to start anew by means of rehabilitation. It is, therefore, regrettable that a social stigma is attached to the insolvency procedure and that proving advantage for creditors still plays such a big role when faced with the advantage of a clean financial slate.⁹³

On the other hand, the administration procedure affords consumer debtors with small estates, who do not qualify for sequestration, the opportunity to alleviate their financial burden by applying for administration.⁹⁴ However, as was submitted above, the administration procedure in itself fails to achieve discharge of the consumer debtor's financial burden as it

⁹³ See par 2.3.1. *supra*.

⁹⁴ See Boraine *et al* at 92.

does not provide for a discharge after a certain number of years of payment and also fails to address *in futuro* obligations.⁹⁵

From the above, it is evident that there was a great need to afford overburdened consumer debtors with a debt relief measure that alleviates their financial burden by addressing current and *in futuro* obligations, while not affecting their status and allowing them to retain control of their estate and which, it is submitted, does not essentially necessitate the sale of the consumer debtor's assets, including his home, in order to alleviate their financial burden.

2.4. SCOPE OF APPLICATION OF THE NATIONAL CREDIT ACT IN RESPECT OF THE DEBT REVIEW PROCESS

The NCA makes provision, in Schedule 3 item 4 thereof, for the extent to which the NCA applies to credit agreements that were entered into prior to the commencement of the NCA.

Item 4(1) provides that all agreements that would have been subject to the provisions of the NCA, had they been entered into after the commencement of the NCA, will be subject to the NCA.

Item 4(2) provides that the application of the NCA in respect of the aforementioned credit agreements is, however, limited. For purposes of this dissertation, it is important to note that Chapter 4 Part D applies to pre-existing agreements only insofar as it does not concern reckless credit.⁹⁶ Accordingly, pre-existing agreements can be included in debt review

⁹⁵ See par 2.3.2. *supra*.

⁹⁶ Reckless credit falls beyond the scope of this dissertation, for more information on reckless credit see *inter alia* par 11.1, 11.2 and 11.5 of the *Guide to the NCA* (2014); see also Boraine A and van Heerden C "Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005" 2010 THRHR 650, Van Heerden C and Boraine A "The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005" 2011 *De Jure* 44, Van Heerden C and Renke S "Perspectives on the South

Continued on next page...

applications provided *inter alia* that the pre-existing agreement would have been subject to the provisions of the NCA as provided for in item 4(1).

A discussion of the type of credit agreements recognised and regulated by the provisions of the NCA, however, falls beyond the scope of this dissertation.⁹⁷

2.5. CONCLUSION

In this chapter, attention was given to the policy considerations which led to the drafting and commencement of the NCA, as well as the existing debt relief measures which were previously only available to over-indebted consumers. Some aspects of the DTI's Policy Framework were also discussed to provide context in support of the implementation of the debt review process. Lastly, it was also established that pre-existing credit agreements can be included in a debt review application, the effects of which will be discussed in detail in the chapters to follow.

African Responsible Lending Regime and the Duty to Conduct Pre-Agreement Assessment as a Responsible Lending Practice” 2015 Insol 68.

⁹⁷ For more information on the types of credit agreements recognised and regulated by the provisions of the NCA see the *NCA Explained* (2016) at ch 3 and more specifically the schematic illustration on 35 thereof.

CHAPTER 3: THE DEBT REVIEW PROCESS AS INTRODUCED BY THE NATIONAL CREDIT ACT

3.1. INTRODUCTION

As mentioned in Chapter 1, debt review⁹⁸ is a new debt relief measure introduced by the NCA, aimed at alleviating the consumer's burden of over-indebtedness. The prevalent over-indebtedness amongst South African consumers today is a manifestation of the need for credit to satisfy basic needs and wants. The direness of the financial situation of many South Africans, as well as the need for effective debt relief measures, is further evident from the National Credit Regulator Credit Bureaux Monitor First Quarter (March 2016).⁹⁹ As per the report, credit bureaux had records of 23.88 million credit active consumers¹⁰⁰ of which 40.00% (9.552 million)¹⁰¹ had impaired records.¹⁰²

In addition, the debt review process focuses on the principle of “eventual satisfaction”¹⁰³ of all the consumer's responsible financial obligations due to a credit provider in terms of a credit agreement. The principle of “eventual satisfaction” in respect of debt review is achieved by

⁹⁸ The debt review process is also referred to in practice as ‘debt counselling’.

⁹⁹ Credit Bureau Monitor – First Quarter (March 2016). Available at <http://www.ncr.org.za/documents/Press%20releases%202016/CBM%20data%20Q22007%20-%20Q12016.pdf> [Accessed on 4 August 2016].

¹⁰⁰ Credit Bureau Monitor – First Quarter (March 2016) 1.

¹⁰¹ Credit Bureau Monitor – First Quarter (March 2016) 3.

¹⁰² Credit Bureau Monitor – First Quarter (March 2016) 18. A consumer is regarded as having an “impaired record” where his or her record reflects three or more payments, alternatively months, in arrears or where an “adverse listing”, judgment or administration order is reflected.

¹⁰³ See s 3(i).

means of restructuring the consumer's financial obligations in terms of either section 86(7)(c)¹⁰⁴ or section 86(8)(b)¹⁰⁵ of the NCA.

Accordingly, an over-indebted consumer can apply to a debt counsellor¹⁰⁶ for debt review, in terms of section 86 of the NCA,¹⁰⁷ in order to protect himself against and restrict a credit

¹⁰⁴ “If, as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably concludes that – the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate’s Court make either or both of the following orders–

- (i) that one or more of the consumer’s credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless; and
- (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 of Part A or B of Chapter 5, or Part A of Chapter 6.”

¹⁰⁵ “If a debt counsellor makes a recommendation in terms of subsection (7)(b) and– if paragraph (a) does not apply, the debt counsellor must refer the matter to the Magistrate’s Court with the recommendation.”

¹⁰⁶ A “debt counsellor” is a relatively new occupation, introduced by the NCA in 2007, with the aim of providing over-indebted consumers with assistance by means of reviewing the consumer’s indebtedness and making restructuring recommendations in an effort to help over-indebted consumers escape their over-indebtedness. See par 3.5.2 *infra* in respect the debt counsellor registration requirements imposed by the NCA.

¹⁰⁷ To be read with the National Credit Regulations, 2006 (GN 713, GG 28864, dated 31 May 2006), hereinafter referred to as ‘the Regulations (2006)’; Ch 3 Part D; Debt Counselling Regulations, 2012 (GN R362, GG 35327, dated 10 May 2012). See also Roestoff M *et al* “The debt counselling process: Closing the loopholes in the National Credit Act 34 of 2005” 2009 *PER* 247 for a detailed discussion on the debt review process. See also the Credit Industry Forum *Task Team* Agreement. Available at <http://www.ncr.org.za/documents/pages/circulars/jan2015/Debt%20Review%20Task%20Team%20Agreements.pdf> [Accessed on 4 August 2016].

provider from proceeding with debt enforcement because section 88(3)¹⁰⁸ of the NCA provides for an *ex lege* moratorium on a credit provider's right to enforce a debt whilst a debt review application is still pending, subject to certain conditions to be discussed hereunder.

This Chapter will provide an overview of the debt review process, as well as discuss the most important role players.¹⁰⁹

3.2. WHEN IS A CONSUMER ELIGIBLE TO APPLY FOR DEBT REVIEW?

In order for a consumer to become eligible to apply for and be placed under debt review, the consumer has to either be over-indebted¹¹⁰ or likely to experience difficulties in the payment of his credit agreement debt in the near future.¹¹¹

Accordingly, with due consideration to the provisions of section 79(1) of the NCA, a consumer would typically be deemed to be over-indebted if the consumer is unable to satisfy

¹⁰⁸ “Subject to section 86(9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or 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-

- (a) the consumer is in default under the credit agreement; and
- (b) one of the following has occurred:
 - (i) An event contemplated in subsection (1)(a) through (c); or
 - (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.”

¹⁰⁹ It is important to note that there are two other role players also involved in the debt review process, namely the National Credit Regulator (hereinafter referred to “the NCR”) and the Payment Distribution Agencies (hereinafter referred to as the “PDA”). An in-depth discussion of these two role players is beyond the scope of this dissertation, however it is important to note that NCR is the watchdog of the credit market whereas the PDA only becomes involved once a debt re-arrangement agreement is reached or an order to that effect is granted by either the magistrate's court or the National Consumer Tribunal (hereinafter referred to as the “Tribunal”). With regard to the NCR's functions, see Vessio M “What does the National Credit Regulator regulate?” (2008) *SA Merc LJ* 227. See further *Nedbank Limited v Thompson* 2014 (5) SA 399 (GJ) in respect of the appointment of PDAs. See also the *NCA Explained* (2016) at 39 – 43 and 48.

¹¹⁰ See s 86(7)(c).

¹¹¹ See s 86(7)(b).

all of his financial obligations arising from credit agreements.¹¹² Section 79(1) reads as follows:

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.

Subsequently, consideration should not only be given to the consumer's current financial obligations, but also to the consumer's future financial obligations.¹¹³ In addition, a consumer's financial means is not merely limited to his income, but also includes his assets as well as that of any adult person sharing the consumer's common household.¹¹⁴

As a consequence, when assessing a consumer's application for debt review the debt counsellor must take into consideration all of the above when compiling a payment proposal which is to be presented to the court.¹¹⁵

¹¹² See Ch 1; the test for over-indebtedness is set out in s 79.

¹¹³ See s 78(3)(a).

¹¹⁴ See s 78(3)(b). This would also include the consumer's adult dependents, children and parents, should they reside in the same common household. See further *Standard Bank of South Africa (Pty) Limited v Panayiotts* [2009] ZAGPHC 22.

¹¹⁵ See Reg 23A of the National Credit Regulations, 2006; see also Renke S "Die nuwe bekostigbaarheidsassessering-regulasies ingevolge die Nasionale Kredietwet 34 van 2005 van naderby beskou" 2015 *LitNet Akademies* 12(2).

3.3. AGREEMENTS WHICH CAN FORM PART OF THE DEBT REVIEW PROCESS

The NCA is solely applicable to credit agreements, as defined in the NCA.¹¹⁶ The NCA further stipulates certain exemptions and limitations.¹¹⁷ Accordingly, even if a credit agreement falls within the definition of one of the credit agreements, as defined in the NCA, there may be instances where such credit agreements will not be subject to the provisions of the NCA.

It is therefore of utmost importance to understand when a credit agreement is subject to the provisions of the NCA, as this will impact which credit agreements can form part of the debt review process.

Consequently, when a credit agreement does not fall within the scope of the NCA then that credit agreement cannot form part of the debt review process and as a consequence, the consumer will not be entitled to the protection afforded by the NCA.

It is important to note that the parties to a credit agreement may not under any circumstances agree to exclude the NCA's application to that specific credit agreement.¹¹⁸ However, parties to a credit agreement, which falls outside the scope of application of the NCA, may agree to incorporate specific provisions of the NCA, in terms of the principles of incorporation by reference, however such incorporation will only be applicable *inter partes*.¹¹⁹

¹¹⁶ See the *NCA Explained* (2016) at Ch 3; See also Stoop PN "Kritiese evaluasie van die toepassingsveld van die National Credit Act" 2008 *De Jure* 352.

¹¹⁷ See ss 4 – 7 of the NCA.

¹¹⁸ See s 90(2)(b) which sets out unlawful provisions contained in credit agreements.

¹¹⁹ See *First National Bank – A Division of Firstrand Bank Limited v Clear Creek Trading 12 (Pty) Limited* [2015] ZASCA 6 wherein the SCA upheld an appeal by FNB against an order of the HC, where the HC declared that the provisions of the NCA were applicable, by agreement, between the parties to a contract, to which the NCA would not ordinarily not apply.

3.4. STAGES OF THE DEBT REVIEW PROCESS

For purposes of this dissertation, the debt review process is divided into 5 key stages, namely:

- Stage 1: The Application to the debt counsellor
- Stage 2: The Assessment
- Stage 3: Formulation of Proposal and Termination Period
- Stage 4: The Application filed with Magistrate's Court
- Stage 5: Granted Debt Re- Arrangement Order

A discussion for each of these stages follows hereunder.

3.4.1. STAGE 1: THE APPLICATION TO THE DEBT COUNSELLOR

Section 86, read with regulation 24, regulates the debt review application process. It provides that a consumer must complete and submit a Form 16 to the debt counsellor for assessment. The debt counsellor is entitled to ask that the consumer pay an application fee, in terms of section 86(3)(a) of the NCA,¹²⁰ and must subsequently provide the consumer with proof that the application has been received.¹²¹ In addition, the debt counsellor must notify all credit providers and the credit bureaux by means of a Form 17.1 within 5 business days,¹²² as from the date on which the consumer first applied for debt review.¹²³

¹²⁰ Currently this fee is set at R 50.00 per debt review application. See sch 2 of the regulations. Notice should also be taken of s 86(3)(b) which prohibits a debt counsellor from accepting such application fees from credit providers.

¹²¹ See s 86(4).

¹²² Reg 24(2).

¹²³ In terms of reg 24(5), the Form 17.1 must be sent by fax, registered mail or e-mail.

Upon receipt of the notification that a debt review application has been lodged, the consumer and the credit providers are obliged to act in good faith¹²⁴ by complying with all *reasonable* requests by the debt counsellor, in terms of section 86(5)(a), so that the debt counsellor can effectively evaluate the consumer's state of indebtedness and the prospects of responsible debt re-arrangement.

3.4.2. STAGE 2: THE ASSESSMENT

Once the debt counsellor has notified the credit providers of the consumer's debt review application, the debt counsellor has 30 business days, as from the date on which the consumer applied for debt review, to finalise his assessment so as to determine whether or not the consumer appears to be over-indebted.¹²⁵

Upon completion of his assessment, the debt counsellor must notify all of the credit providers, as well as the credit bureaux, by delivering a Form 17.2 within 5 business days.¹²⁶

In terms of section 86(7) of the NCA, a debt counsellor's assessment can result in one of the following three outcomes, namely:

- a) That the consumer is not over-indebted, whereupon the debt counsellor must reject the consumer's application,¹²⁷

¹²⁴ S 86(5)(b); see par 3.6 *infra*.

¹²⁵ Reg 24(6).

¹²⁶ Reg 24(10).

¹²⁷ S 86(7)(a). In terms of reg 25, a debt counsellor who rejects a consumer's debt review application, then the debt counsellor is obliged to provide the consumer with letter of rejection. Reg 25 further prescribes the content of such letter of rejection. In such instances, the consumer is entitled, with leave of the magistrate's court, to apply directly for an order declaring the consumer over-indebted in terms of s 86(9). Reg 26 further prescribes that such an application must be brought within 20 business days, as from the date on which the debt counsellor provided the letter of rejection, subject to an extension in terms of reg 26(2).

- b) That the consumer is not over-indebted, but is experiencing or is likely to experience difficulty in satisfying all of his obligations timeously, whereupon the debt counsellor may propose that the consumer and the credit providers enter into a voluntary debt re-arrangement plan;¹²⁸ or
- c) That the consumer is indeed over-indebted,¹²⁹ whereupon the debt counsellor may formulate and issue a proposal.¹³⁰

3.4.3. STAGE 3: FORMULATION OF PROPOSAL AND TERMINATION PERIOD

As stated above, the third possible outcome is where the debt counsellor determines that the consumer is indeed over-indebted.

The debt counsellor will accordingly proceed to issue a proposal recommending that the magistrate's court make one or both of the following orders:¹³¹

- a) Declare the credit agreements which have been found to be reckless, as such;¹³²
- b) Declare that the consumer's obligations be re-arranged as follows:¹³³
 - (aa) extending the period of repayment and reduce the repayment amounts;
 - (bb) postponing the dates of repayment for specified periods;
 - (cc) extending the period of repayment and postponing the dates of repayment for specified periods; or
 - (dd) as a result of contraventions of either Part A¹³⁴ or B¹³⁵ of Chapter 5, or Part A of Chapter 6, that the consumer's obligations be recalculated.

¹²⁸ S 86(7)(b). See also *National Credit Regulator v Nedbank Limited and Others* 2009 (6) SA 295 (GNP) at par 301.

¹²⁹ S 86(7)(c).

¹³⁰ This third outcome is most relevant to this dissertation.

¹³¹ See s 86(7)(c)(i) and (ii).

¹³² S 86(7)(c)(i).

¹³³ S 86(7)(c)(ii).

Subsequently, an order by a magistrate's court, in terms of the above, has been referred to by the court in *National Credit Regulator v Nedbank Limited and Others*¹³⁶ as 'a rearrangement by the court'.

It has further been noted by van Heerden that it has become practice for debt counsellors to first approach credit providers with voluntary proposals prior to referring the proposal to the magistrate's court for an order in terms of section 86(7)(c)(i) and/ or (ii).¹³⁷

3.4.4. STAGE 4: THE APPLICATION FILED WITH MAGISTRATE'S COURT

The debt counsellor must, upon finalisation of his determination, refer his proposal to a magistrate's court. This referral must take the form of an application, in accordance with rule 55 of the Magistrates' Court Rules.¹³⁸ The NCA affords the magistrate's court with limited powers in respect of re-arranging a consumer's obligations, in terms of section 87(1)¹³⁹ thereof, and additionally the magistrate's court's powers of debt re-arrangement are limited to the instances listed in section 86(7)(c) of the NCA which *inter alia* provide that the

¹³⁴ Ss 89 – 91. These sections deal with unlawful agreements and provisions.

¹³⁵ Ss 92 – 99. These sections deal with disclosure, form and effect of credit agreements.

¹³⁶ 2009 (6) SA 295 (GNP) at 302.

¹³⁷ See *Guide to the NCA* (2014) at par 11.3.3.2.

¹³⁸ In terms of reg 2 of the Debt Counselling Regulations, 2012.

¹³⁹ "(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–

(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)."

magistrate's court may either extend the repayment term or reduce the monthly instalment and/ or both.¹⁴⁰ Surprisingly, section 86(7)(c) of the NCA does not afford the magistrate's court with the power to reduce contractual interest rates, despite this being done in practice, and subsequently this oversight has not yet been remedied by the South African legislature.¹⁴¹

3.4.5. STAGE 5: GRANTED DEBT RE- ARRANGEMENT ORDER

Once a magistrate's court or the Tribunal grants a debt re-arrangement order, the consumer will be prohibited from entering into new credit agreements. Thus, should the consumer, regardless of this prohibition, enter into a new credit agreement, then such a credit agreement may not form part of any subsequent debt review application.¹⁴²

The consequences for a credit provider, who has entered into a new credit agreement¹⁴³ with a consumer that is under court ordered debt review (or a Tribunal consent order), is more dire than the consequences for the consumer insofar as such new credit agreement may be declared as reckless credit.¹⁴⁴ Van Heerden opines that the effect hereof is that a new category of reckless credit is created in addition to the three types identified in section 80 of the NCA. As a consequence, it is submitted by Van Heerden that the same dreaded consequences of reckless credit will also apply when a credit provider contravenes the prohibition set out in section 88(4) of the NCA.¹⁴⁵

¹⁴⁰ See par 3.4.3. *supra*.

¹⁴¹ With regard to the magistrate's court's powers in respect of re-arranging contractual interest rates, see *Nedbank Limited v Norris and Others* 2016 (3) SA 568 (ECP); *SA Taxi Securitisation (Pty) Ltd v Lennard* 2012 (2) SA 456 (ECG); *Firststrand Bank Limited and Another v Barnard and Another* [2015] ZAGPPHC 1109.

¹⁴² See s 88(1) & (5).

¹⁴³ With the exception of a consolidation loan.

¹⁴⁴ See *Guide to the NCA* (2014) at 11-68.

¹⁴⁵ See *Guide to the NCA* (2014) at 11-68 to 11-69.

It is submitted that the wording of section 88(4) of the NCA, however, points toward the court having discretion in declaring such new credit agreements as reckless.

3.5. IMPORTANT ROLE PLAYERS INVOLVED IN THE DEBT REVIEW PROCESS

The following three role players are involved in the debt review process:

- The Consumer;
- The Debt Counsellor; and
- The Credit Provider.

Herein follows a short discussion of each role player.

3.5.1. *THE CONSUMER*¹⁴⁶

For purposes of the NCA, a ‘consumer’ is defined in section 1 thereof to include the following:

- (a) the party to whom goods or services are sold under a discount transaction, incidental credit agreement or instalment agreement;
- (b) the party to whom money is paid, or credit granted, under a pawn transaction;
- (c) the party to whom credit is granted under a credit facility;
- (d) the mortgagor under a mortgage agreement;
- (e) the borrower under a secured loan;
- (f) the lessee under a lease;

¹⁴⁶ See the *NCA Explained* (2016) at 63.

- (g) the guarantor under a credit guarantee; or
- (h) the party to whom or at whose direction money is advanced or credit granted under any other credit agreement.

In the context of debt review, the consumer is the party who initiates the debt review process by applying to the debt counsellor to be placed under debt review due to being over-indebted and not be able to afford his monthly obligations that are due in terms of credit agreements entered into with credit providers.

As indicated above, only a consumer who is a natural person¹⁴⁷ is allowed to apply for debt review.¹⁴⁸

3.5.2. THE DEBT COUNSELLOR¹⁴⁹

The debt counsellor acts an intermediary between the credit provider and the consumer during the debt review process. A debt counsellor, therefore, acts a neutral functionary whose duty is to assist the magistrate's court in determining whether or not a consumer is indeed over-indebted as well as in which manner the consumer's debt should be re-structured.¹⁵⁰

¹⁴⁷ Notably, the NCA failed to give a definition of a 'natural person'. The NCA did however include a definition for a 'juristic person' in s 1 thereof, which reads "...includes a partnership, association or other body of persons, corporate or unincorporated, or a trust if–

- (a) there are three or more individual trustees; or
- (b) the trustee is itself a juristic person,

but does not include a stokvel.”

It can therefore be deduced that a trust with one or two individual trustees will be deemed to be a natural person. Arguably, such a trust will be eligible to apply for debt review. See the *NCA Explained* (2016) at 17.

¹⁴⁸ See s 78(1); as a result a juristic person is excluded from applying for debt review.

¹⁴⁹ See the *NCA Explained* (2016) at 43.

¹⁵⁰ See *Nedbank Limited and Others v National Credit Regulator and Another* 2011 (3) SA 581 (SCA); *Firstrand Bank Limited and Another v Barnard and Another* [2015] ZAGPPHC 1109 (11 August 2015).

Regulation 1 defines a ‘debt counsellor’ as meaning ‘a neutral person who is registered in terms of section 44 of the NCA offering a service of debt counselling’.¹⁵¹

The NCA prescribes certain requirements which a person must comply with in order to be eligible for registration as a debt counsellor. These requirements are set out in section 44 and regulation 10 of the NCA, which *inter alia* requires the following:

- Only a natural person, subject to certain exclusions, can register as a debt counsellor;¹⁵²
- The natural person must comply with listed education,¹⁵³ experience¹⁵⁴ and competency requirements;¹⁵⁵
- A natural person holding the office of a debt counsellor must be registered with the NCR.¹⁵⁶

Once a natural person is registered as a debt counsellor, he must annually renew his registration as well as pay an annual registration fee to the NCR¹⁵⁷ and furthermore assist the NCR in compiling data related to the credit industry by submitting annual compliance reports and statistical forms.¹⁵⁸

¹⁵¹ ‘Debt counselling’ is defined in reg 1 as meaning the performance of the functions listed in section 86 of the NCA.

¹⁵² See s 44(1) and s 46(2) to (4).

¹⁵³ See reg 10; the natural person must have at least a grade 12 certificate.

¹⁵⁴ See reg 10; the natural person must have at least 2 years of working experience in certain fields.

¹⁵⁵ See reg 10; the natural person must complete an NCR approved course.

¹⁵⁶ See s 44(3)(a).

¹⁵⁷ See reg 10 and sch 2 of the regulations.

¹⁵⁸ See reg 69; by means of submitting Forms 41 and 42.

3.5.3. *THE CREDIT PROVIDER*¹⁵⁹

For purposes of the NCA, a ‘credit provider’ is defined in section 1 thereof to include the following:

- (a) the party who supplies goods or services under a discount transaction, incidental credit agreement or instalment agreement;
- (b) the party who advances money or credit under a pawn transaction;
- (c) the party who extends credit under a credit facility;
- (d) the mortgagee under a mortgage agreement;
- (e) the lender under a secured loan;
- (f) the lessor under a lease;
- (g) the party to whom an assurance or promise is made under a credit agreement;
- (h) the party who advances money or credit to another under any other agreement; or
- (i) any other person who acquires the rights of a credit provider under a credit agreement after it has been entered into.

A credit provider is the party that provides consumers with credit. Thus, a credit provider is an important role player during the debt review process as its credit agreements are affected by the debt review process as well as by any consequent debt re-arrangement order. Furthermore, during the debt review process, the credit provider’s right to enforcing its debts in terms of a credit agreement is restricted, subject to certain requirements and guidelines.¹⁶⁰

¹⁵⁹ See the *NCA Explained* (2016) at 64.

¹⁶⁰ See s 88(3) in this regard; see also par 3.1 *supra*.

3.6. THE REQUIREMENT OF GOOD FAITH BETWEEN THE ROLE PLAYERS

Section 86(5)(b) of the NCA provides that the consumer and each credit provider must “participate in good faith” during the debt review process.¹⁶¹ The consumer and relevant credit providers are as a result obliged to cooperate with the debt counsellor in order to enable the debt counsellor to facilitate the evaluation of the consumer’s over-indebtedness and the prospects of debt re-arrangement.¹⁶²

The NCA, however, failed to expressly extend this duty, to participate in good faith, to debt counsellors as well. Fortunately, the courts came to the rescue by extending this duty to debt counsellors. One such case is *Firstrand Bank Ltd v Mvelase*¹⁶³ wherein the court remarked that the undue and unexplained delay in finalising a debt review application is indicative of bad faith on the part of the debt counsellor and/ or the consumer. In addition, it was held by the court in *Motor Finance Corporation v Jan Joubert*¹⁶⁴ that a debt counsellor has a duty to act in good faith and to present to court accurate and credible information insofar as to enable the court and credit providers to accurately assess whether or not the consumer is indeed over-indebted.¹⁶⁵

The Constitutional Court held in *Ferris and Another v Firstrand Bank Limited and Another*¹⁶⁶ that the good faith requirement only becomes irrelevant when a debt review order is granted. A further consideration is that the Supreme Court of Appeal held in *Collett v Firstrand Bank*

¹⁶¹ S 86(5). See further the *Guide to the NCA* (2014) at par 11.3.3.2.

¹⁶² See *Guide to the NCA* (2014) at 11-24.

¹⁶³ 2011 (1) SA 470 (KZP).

¹⁶⁴ 2013 JDR 1912 (GNP) at par 27.

¹⁶⁵ See *Guide to the NCA* (2014) at 11-26 to 11-27.

¹⁶⁶ 2014 (3) SA 39 (CC) at par 46.

*Limited*¹⁶⁷ that the duty to negotiate does not terminate after the debt counsellor has referred his proposal to the magistrate's court.

The good faith requirement is, therefore, a reciprocal duty placed on the consumer, debt counsellor and relevant credit providers to engage meaningfully during the debt review process and any negotiations entered into during such time, up until a debt review order is granted.¹⁶⁸

Subsequently, it is submitted by Van Heerden that the good faith requirement imposed upon the three key role players would call for a credit provider to respond to a debt counsellor's debt restructuring proposal, regardless of whether it is economically feasible or not, by advising whether it would be willing to accept the debt restructuring proposal or not, alternatively to present the debt counsellor with a counter proposal. In turn, when a credit provider fails to respond to the debt counsellor's debt restructuring proposal, the consumer and/ or debt counsellor should take it upon themselves to engage with the credit provider in an effort to reach agreement on the terms of the debt restructuring proposal, alternatively to inform the credit provider that its failure to respond to the debt counsellor's debt restructuring proposal is in contravention of the good faith requirement imposed, by section 86(5) of the NCA, upon the credit provider.¹⁶⁹

¹⁶⁷ *Collett v Firstrand Bank Limited* 2011 (4) SA 508 (SCA) at par 516.

¹⁶⁸ See *SA Taxi Securitisation (Pty) Limited v Ndobela* [2011] ZAGPJHC of 15 March 2011 at par 22.

¹⁶⁹ See *Guide to the NCA* (2014) at 11-26.

3.6.1. *CONSEQUENCES OF A CREDIT PROVIDER'S FAILURE TO PARTICIPATE IN GOOD FAITH*

With specific regard to the consequences of a credit provider's failure to participate in good faith during the debt review process, there are varying judgments.

On the one hand, we have judgments that held that the NCA does not sanction such failure,¹⁷⁰ whilst on the other hand some courts read in a sanction for a credit provider's non-compliance.¹⁷¹ Particularly it has been held that non-compliance by the credit provider with the good faith obligation may impact on the validity of a termination of debt review and may be taken into consideration by the court when deciding whether to allow the resumption of a previously terminated debt review in terms of section 86(11).¹⁷² The courts have even gone as far as holding that it is implied in section 86(10) that provides for termination of debt review

¹⁷⁰ See *SA Taxi Securitisation (Pty) Limited v Mbatha*; *SA Taxi Securitisation (Pty) Limited v Molete*; *SA Taxi Securitisation (Pty) Limited v Makhoba* 2011 (1) SA 310 (GSJ) at par 322 wherein the court held that the credit provider's right to terminate a debt review is not dependent upon its obligation to act in good faith.

¹⁷¹ See *FirstRand Bank Limited v Raheman and Another* 2012 (3) SA 418 (KZD) at para 421 – 422 where the defendants raised the issue that the credit provider's failure to respond to their debt counsellor's proposal was reckless and that a punitive cost order should be given against the credit provider. It was agreed by Mokgohloa J that s 85 requires good faith from both parties during the debt review process and stated that should a credit provider fail in acting in good faith then the court may, upon request by the consumer, order that the debt review resume. The judge found that the credit provider's failure to act in good faith was reckless, but was of the opinion that it was not to such an extent to warrant a punitive cost order against it. From this, it can be surmised that the courts are of the opinion that a punitive costs order may be awarded as a consequence during such circumstances. See also *Mercedes Benz Financial Services South Africa (Pty) Limited v Dunga* 2011 (1) SA 374 (WCC) at par 379 where the court found it necessary to expand the ambit of s 86(10) by reading in to it that it is not prudent for a credit provider to terminate a debt review when it had failed to participate in good faith.

¹⁷² In *Collett v Firstrand Bank Limited* 2011 (4) SA 508 (SCA) at par 15, Malan JA stated that the credit provider's right to terminate the debt review in terms of s 86(10) is balanced by the consumer and/ or debt counsellor's right to the resumption thereof in terms of s 86(11). It was further held by Malan JA, at par 15, that when a court is faced with balancing s 86(10) and 86 (11), the credit provider's manner of participation during the review and any negotiations in terms of s 86(5)(a) and 85(5)(b) will be relevant.

that such termination can only be valid if the credit provider participated in good faith in the debt review process.¹⁷³ It is submitted that in such instances, the courts should have due regard for the matter as a whole, as opposed to solely focusing on the credit provider's actions or the lack thereof, as the case may be. The courts should *inter alia* consider, that had the credit provider acted in good faith, would the outcome have been different insofar as pertaining to the credit provider's right to terminate the debt review in terms of section 86(10) of the NCA? Should the court find that, had the credit provider acted in good faith, the debt counsellor's actions would still have resulted in the termination of the debt review then it would be unfair to invalidate any subsequent section 86(10) terminations due to a lack of good faith participation on the credit provider's part. Subsequently, it is submitted that by refusing to validate a section 86(10) termination due to the lack of good faith participation of the credit provider, the court would be condoning the debt counsellor's lack of good faith participation whilst punishing the credit provider for the same omission.

Subsequently, whether or not a credit provider has complied with the good faith requirement has to be determined by means of an enquiry into the facts of the specific matter.¹⁷⁴

3.6.2. *CONSEQUENCES OF A CONSUMER'S FAILURE TO PARTICIPATE IN GOOD FAITH*

As stated above, the consumer is required to provide the debt counsellor with various documents and information in terms of section 86, read with regulation 24.

¹⁷³ See *Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga* 2011 (1) SA 374 (WCC) at par 15. Furthermore, it was held by Bignault AP that he would not consider a credit provider's termination whilst the consumer acts in good faith at par 51.

¹⁷⁴ See further the *Guide to the NCA* (2014) at par 11.3.3.2.

Wallis J in *BMW Financial Services (SA) (Pty) Limited v Donkin*¹⁷⁵ stated that non-compliance with regulation 24(1)(b)¹⁷⁶ does not constitute a valid application for debt review, as the information required by the specific regulation is essential to enable the debt counsellor to verify the consumer's information.¹⁷⁷

Accordingly, a consumer's good faith in the context of debt review is measured against the timely provision of the information listed in section 86, read with regulation 24, which will inevitably ensure that the consumer enjoys the debt relief protection as afforded by the NCA.

3.6.3. *CONSEQUENCES OF A DEBT COUNSELLOR'S FAILURE TO PARTICIPATE IN GOOD FAITH*

A debt counsellor must act in good faith in the manner in which he conducts the entire debt review process. This includes the formulation of the debt repayment proposal, which must be economically viable.¹⁷⁸

It has been held that cost orders may be granted against debt counsellors in exceptional cases when they have acted in bad faith.¹⁷⁹ Accordingly, it was held by the court in *Absa Bank Limited and Others v Robb*¹⁸⁰ that a costs order would serve an important purpose of cautioning a debt counsellor to properly act in accordance with the provisions of the NCA, the Regulations and the NCR's guidelines before proceeding to set down a debt review

¹⁷⁵ *BMW Financial Services (SA) (Pty) Limited v Donkin* 2009 (6) SA 63 (KZD).

¹⁷⁶ Req 24(1)(b) requires consumers to provide the debt counsellor with information relating to personal information, income, monthly expenses and so forth.

¹⁷⁷ *BMW Financial Services (SA) (Pty) Limited v Donkin* 2009 (6) SA 63 (KZD) at para 17 – 18.

¹⁷⁸ *Firststrand Bank Limited t/a First National Bank v Seyffert and Another and Similar Cases* 2010 (6) SA 429 (GSJ) at par 16.

¹⁷⁹ *National Credit Regulator v Nedbank Limited and Others* 2009 (6) SA 295 (GNP) at prayer 1.5.

¹⁸⁰ [2013] 3 ALL SA 322 (GSJ).

application in court.¹⁸¹ The court further held¹⁸² that the above caution would also help to maintain the efficient administration of justice and protect the interests of both consumers¹⁸³ and credit providers.¹⁸⁴ Boruchowitz J concluded that the court's discretion to award costs against a debt counsellor is not merely limited to a withdrawn debt review application, as occurred in this case, but rather extends to circumstances where the debt counsellor acts improperly or with *mala fides* in the discharge of his statutory obligations.¹⁸⁵

Recently, the Tuchten J in *Firstrand Bank Limited and Another v Barnard and Another*¹⁸⁶ also awarded an adverse costs order against the debt counsellor for not only the court *a quo* but also for the appeal as a result of the exceptional circumstances that were present,¹⁸⁷ *inter alia* a repayment proposal that was "fatally irrational".¹⁸⁸

Accordingly, a debt counsellor's good faith is measured against the proper conduct and discharge of his statutory obligations in terms of the provisions of the NCA, Regulations and the NCR's guidelines. However, it is stressed that the discretion lies with the courts' in these instances to award a costs order against a debt counsellor.¹⁸⁹

¹⁸¹ *Absa Bank Limited and Others v Robb* [2013] 3 ALL SA 322 (GSJ) at par 26.

¹⁸² *Absa Bank Limited and Others v Robb* [2013] 3 ALL SA 322 (GSJ) at par 27.

¹⁸³ As consumers can be assured that an application for debt review will only be brought on their behalf once there are reasonable grounds for concluding that they are indeed over-indebted.

¹⁸⁴ As credit providers can be assured that only reasonably meritorious applications for debt review will be pursued by debt counsellors.

¹⁸⁵ *Absa Bank Limited and Others v Robb* [2013] 3 ALL SA 322 (GSJ) at par 28.

¹⁸⁶ [2015] ZAGPPHC 1109 (11 August 2015).

¹⁸⁷ See *Firstrand Bank Limited and Another v Barnard and Another* [2015] ZAGPPHC 1109 (11 August 2015) at par 47.

¹⁸⁸ See *Firstrand Bank Limited and Another v Barnard and Another* [2015] ZAGPPHC 1109 (11 August 2015) at par 45.

¹⁸⁹ Notably, Tuchten J, in *Firstrand Bank Limited and Another v Barnard and Another* [2015] ZAGPPHC 1109 (11 August 2015) at par 45 and 46, disagreed with Boruchowitz J, in *Absa Bank Limited and Others v*

Continued on next page...

3.7. CONCLUSION

An over-indebted consumer is afforded the opportunity to voluntarily apply for debt review in terms of section 86 thereof. Thus, the re-arrangement of the consumer's debt gives the consumer a reprieve from debt enforcement proceedings in that the consumer's debts are settled over a longer period of time and ultimately leads to the eventual satisfaction of all responsible debt.

In order for the debt review process to be successful, all of the role players are required to participate in the process in good faith. Accordingly, by allowing the consumer to settle his debts over a longer period of time, at a reduced monthly payment, and reduced interest rate if the credit provider has consented thereto, the debt review process ensures that the credit provider will eventually receive full payment.

The debt review process, therefore, serves the interests of both the consumer and the credit providers, as opposed to the costly route of debt enforcement proceedings, seeing that debt review provides for debt relief to the consumer, for example, by extending the period over which repayment has to occur but still has as its ultimate objective the eventual satisfaction of the consumer's debt owed to the credit provider.

Robb [2013] 3 ALL SA 322 (GSJ), insofar as that Tuchten J believes that a debt counsellor who acts in good faith by withdrawing a debt review application when he comes to the conclusion that the debt review is no longer viable should not be ordered to pay the costs.

CHAPTER 4: THE TERMINATION AND REVIVAL OF THE DEBT REVIEW PROCESS IN TERMS OF THE NATIONAL CREDIT ACT

4.1. INTRODUCTION

As stated above, before a credit provider is able to take steps to enforce a credit agreement that is included under a pending debt review process, the credit provider must first terminate the debt review for that specific credit agreement in terms of section 86(10) of the NCA.¹⁹⁰ The termination in terms of section 86(10) can only happen once at least 60 business days have lapsed since the date on which the consumer first applied for debt review¹⁹¹ unless the application for debt review has already been filed in a magistrate's court or the Tribunal.¹⁹² In addition, the NCA also prescribes that at least 10 business days should have lapsed since the delivery of the section 86(10) notice.¹⁹³

Upon closer inspection of section 86(10), it is evident that the legislature failed to set out specific grounds for the termination of the debt review process therein. Section 86(10) merely provides that a credit provider may terminate the debt review process when the consumer is in default with a credit agreement that is being reviewed in terms of section 86 of the NCA. Furthermore, the termination in terms of section 86(10) may only be done after at least 60 business days has lapsed since the date on which the consumer first applied for debt review in terms of section 86(1) of the NCA.

¹⁹⁰ See s 88(3).

¹⁹¹ See s 86(10)(a).

¹⁹² See s 86(10)(b).

¹⁹³ See s 130(1)(a).

Section 86(10) therefore affords a debt counsellor with at least 60 business days to fulfil his duties in terms of section 86, as opposed to the 30 business days during which the debt review has to be conducted, as set out in section 86(6), read with regulation 24(6). It has been submitted that it appears that it is the legislature's intention that the debt counsellor should finalise his assessment and make a determination within 30 business days,¹⁹⁴ as from the date on which the consumer first applied for the debt review, and that the debt counsellor must refer the debt review application to the magistrate's court or Tribunal during the remaining 30 business days.¹⁹⁵

Accordingly, the section 86(10) termination notice is in terms of section 129(1)(b) of the NCA and case law a necessary first step before the credit provider is able to proceed with enforcement proceedings.¹⁹⁶

Notice of the section 86(10) termination has to be given to the consumer, the debt counsellor and the National Credit Regulator.¹⁹⁷ Notably, section 86(10) refers to the credit provider having to give notice of the termination to the relevant parties *in the prescribed manner*, however, no such manner has been prescribed in the NCA.¹⁹⁸

¹⁹⁴ As provided for by s 86(6), read with reg 24(6).

¹⁹⁵ *Changing Tides 17 (Pty) Limited NO v Erasmus and Another, Changing Tides 17 (Pty) Limited NO v Cleophas and Another, Changing Tides 17 (Pty) Limited NO v Frederick and Another* (18153/09, 14229/09, 11973/09) [2009] ZAWCHC 175, hereinafter referred to as "*Changing Tides 17 (Pty) Limited v Erasmus*", at par 30, where the court stated "my summary of the relevant provisions above makes it clear that a debt review conducted strictly in accordance with the regulations should, within a period of 60 business days, have resulted in either a rejection of the debt review application, or the institution of an application by the debt counsellor to the magistrate's court in terms of either s 86(7)(c) or s 86(8)(b) of the NCA."

¹⁹⁶ See *Absa Bank Limited v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D) at par 519E.

¹⁹⁷ See s 86(10)(a).

¹⁹⁸ See discussion in par 4.2.3.1 *infra* with regard to the delivery of s 86(10) notices.

Care should also be had for the provisions of section 129(2) of the NCA which provides that the provisions of section 129(1) do not apply “does not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order.” Accordingly, credit providers must ensure that they deliver the correct notice to the consumer at the right time, as it is thus clear that the erroneous termination of the debt review would result in the ensuing enforcement proceedings being premature and unlawful.¹⁹⁹

On the other hand, section 86(11) which provides for the resumption of a terminated debt review, acts as the balance between the rights of credit providers and consumers during the debt review process. However, the section 86(11) procedure has not been without its own difficulties since its introduction by the NCA.

This Chapter will entail a full discussion of the issues experienced in respect of both the termination and the revival procedures.

4.2. THE TERMINATION OF THE DEBT REVIEW PROCESS IN TERMS OF SECTION 86(10) OF THE NATIONAL CREDIT ACT

The NCA balances the consumer’s right to apply for debt review by affording credit providers with the right to terminate the debt review process, in terms of section 86(10) of the NCA, if the consumer defaults during the process.

It was held by the court, in *Changing Tides 17 (Pty) Limited v Erasmus*,²⁰⁰ that a section 86(10) termination notice serves the following function:²⁰¹

¹⁹⁹ See *SA Taxi Securitisation (Pty) Limited v Booii*, unreported ECG case nr 4077/2009 at par 36 Plasket J confirmed that where a debt review has not been properly terminated in accordance with section 86(10), any summons issued will be premature.

²⁰⁰ [2010] JOL 25358 (WCC).

- It enables the credit provider to insist that the debt counsellor act timeously;
- It affords the debt counsellor with a specific time wherein to complete his assessment, failing which, the credit provider will be entitled to proceed with enforcement proceedings;
- It affords the NCR the opportunity to monitor the debt review system; and
- It enables the consumer or debt counsellor the opportunity to bring an urgent application to oppose the termination of the debt review process.

In terms of section 129(1)(b) of the NCA, prior to taking steps to enforce a credit agreement, a credit provider must first follow the termination procedure set out in section 86(10) of the NCA as described above. Notably, the legislature failed to prescribe a format for a section 86(10)-notice,²⁰² as well as a prescribed format for a section 129(1)(a)-notice, despite the fact that prescribing forms for these two very important pre-agreement notices would have significantly prevented some of the procedural difficulties resulting from lack of proper information as to their content.²⁰³

Section 86(10) of the NCA accordingly affords credit providers with the right to terminate a pending debt review application in order to clear the way for enforcement proceedings. This termination procedure is not absolute, as it is only available during a limited window of time, as well as only under very specific circumstances.

²⁰¹ *Changing Tides 17 (Pty) Limited v Erasmus* [2010] JOL 25358 (WCC) at par 29.

²⁰² See *Guide to the NCA* (2014) at 11-40 for a recommended format for a section 86(10)-notice.

²⁰³ See *Guide to the NCA* (2014) at 12-40 to 12-41 for a recommended format for a section 129(1)(a)-notice.

Subsequently, a credit provider, acting in good faith²⁰⁴, may terminate a pending debt review at least 60 business days, as from the date on which the consumer first applied for debt review and further only when the consumer is in default.

4.2.1. *THE SECTION 86(10) TERMINATION PROCEDURE*

The termination procedure, in terms of section 86(10), has been plagued with uncertainty since the commencement of the NCA. Notably, one of the prevalent practical issues related to the termination procedure was the question of: up to which stage a credit provider would still be able to exercise its right to terminate the debt review process? Thus, this oversight by the legislature has resulted in much controversy, both academically and in practice.

To follow is a discussion on the positions both before and after the NCA, with specific reference to case law and academic authority.

4.2.1.1. *SECTION 86(10) IN TERMS OF THE NATIONAL CREDIT ACT – PRIOR TO THE NATIONAL CREDIT AMENDMENT ACT*

Section 86(10) of the NCA, prior to its amendment, read 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 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.”

²⁰⁴ Although the section 86(10) does not use this phrase the Court in *Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga* 2011 (1) SA 374 (WCC) held that it was implied into the right of termination contained in section 86(10).

Prior to the amendment of section 86(10) of the NCA, by the NCA, the section did not provide a limited window of termination wherein a credit provider must timeously act in order to validly terminate a debt review application. The pre-amendment section 86(10) merely required at least 60 business days to have lapsed since the consumer first applied to the debt counsellor for debt review. Accordingly, the pre-amendment section 86(10) did not prescribe a cut-off date for a credit provider's termination right, unlike the recently amended section 86(10).

Prior to the amendment of the NCA, and more specifically section 86(10), case law and academics were on opposite sides of the fence on whether a debt review process could be terminated once the debt counsellor has already referred his determination to the magistrate's court with his recommendation, in terms of section 86(7)(c) or 86(8)(b), but before the matter is actually heard by the court in terms of section 87.

The courts were accordingly faced with answering the question whether the 60 business day period referred to in section 86(10) must either be interpreted to give the credit provider a right to terminate the debt review process as a matter of course upon the lapsing of the 60 business days, as from the date on which the consumer first applied for the debt review, provided the credit provider is able to prove that it complied with the requirements set by section 86(10),²⁰⁵ alternatively section 86(10) must be interpreted to limit the period, during which the credit provider can exercise its right to terminate the debt review process, to when the credit agreement is being reviewed in terms of section 86.

The progression of the courts' approach to the aforementioned interpretations appears from the judgments to be discussed hereunder.

²⁰⁵ Namely, that the consumer is in default and that the 60 business days has lapsed, as calculated from the date on which the consumer first applied for debt review.

In *Standard Bank of South Africa Limited v Kruger; Standard Bank of South Africa Limited v Pretorius*²⁰⁶ the court held that once a debt counsellor has lodged an application, within 60 business days as from the date on which the consumer first applied for debt review, to a magistrate's court for purposes of debt restructuring, the credit provider may not terminate the debt review in terms of section 86(10) in spite of the fact that the application for restructuring has not yet been heard by the court within the aforesaid 60 business day period. The court based its opinion on the premise that termination in terms of section 86(10) is only competent in respect of the actual debt review process conducted by the debt counsellor and that the referral to court in terms of section 86(8)(b) for hearing, in terms section 87, falls outside the ambit of such termination.²⁰⁷ The court also referred to section 129(2) of the NCA, which provides that section 129(1) of the NCA, which *inter alia* requires the delivery of a section 86(10) termination notice prior to proceeding with enforcement steps, does not apply to a credit agreement that is subject to a debt restructuring order or to proceedings in a court that could result in such an order and indicated that a referral to court by a debt counsellor falls within the latter category, thus concluding that a section 86(10) termination notice would be incompetent once the debt counsellor has referred the application to court.²⁰⁸ Kathree-Setiloane AJ further stated: "I am of the view that any contrary interpretation in terms of which a credit provider would be entitled to terminate the debt review process after a period of 60 day, despite it having been referred to a Magistrate's court, would lead to an absurdity in that any delay by any party to such application, any delay occasioned at the instance of the

²⁰⁶ 2010 (4) SA 635 (GSJ).

²⁰⁷ *Standard Bank of South Africa Limited v Kruger; Standard Bank of South Africa Limited v Pretorius* 2010 (4) SA 635 (GSJ) at para 13 – 14.

²⁰⁸ *Standard Bank of South Africa Limited v Kruger; Standard Bank of South Africa Limited v Pretorius* 2010 (4) SA 635 (GSJ) at par 26.

court or even any delay to unforeseen circumstances would deprive the consumer of the opportunity to have that matter properly determined by that court.”²⁰⁹

The court in the matter of *SA Taxi Securitisation (Pty) Limited v Nako and Others*²¹⁰, however, reached a different conclusion to the court in *Standard Bank of South Africa Limited v Kruger; Standard Bank of South Africa Limited v Pretorius*.²¹¹ The court held that section 129(2) does not preclude a credit provider from instituting legal proceedings once the debt counsellor has referred a matter for hearing to the magistrate’s court, which could result in a debt restructuring order. The court further held that section 129(2) of the NCA merely renders a provision in a notice recommending a consumer to refer the matter to a debt counsellor as redundant, as the matter has already been referred to a debt counsellor.²¹² Kemp AJ proceeded to criticise the *Standard Bank of South Africa Limited v Kruger; Standard Bank of South Africa Limited v Pretorius*²¹³ judgment on the basis that section 87 is dependent upon a proposal in terms of section 86 and that to argue that the phrase “that is being reviewed in terms of this section” in section 86(10) refers only to a debt review application still being assessed by a debt counsellor is short-sighted.²¹⁴ He additionally stated that the argument put forth in *Standard Bank of South Africa Limited v Kruger; Standard Bank of South Africa Limited v Pretorius*²¹⁵ also loses sight of the protection afforded by section 86(11) with specific reference to the phrase “hearing the matter” contained therein. The court subsequently held that it would have been unnecessary for the legislature to include the

²⁰⁹ *Standard Bank of South Africa Limited v Kruger; Standard Bank of South Africa Limited v Pretorius* 2010 (4) SA 635 (GSJ) at par 15.

²¹⁰ [2010] ZAEBHC 4 (8 June 2010).

²¹¹ 2010 (4) SA 635 (GSJ).

²¹² *SA Taxi Securitisation (Pty) Limited v Nako and Others* [2010] ZAEBHC 4 (8 June 2010) at par 10.

²¹³ 2010 (4) SA 635 (GSJ).

²¹⁴ *SA Taxi Securitisation (Pty) Limited v Nako and Others* [2010] ZAEBHC 4 (8 June 2010) at par 42.

²¹⁵ 2010 (4) SA 635 (GSJ).

phrase “hearing the matter” in section 86(11) if the court in *Standard Bank of South Africa Limited v Kruger; Standard Bank of South Africa Limited v Pretorius*²¹⁶ was correct in its approach. Consequently, should the approach by the court in *Standard Bank of South Africa Limited v Kruger; Standard Bank of South Africa Limited v Pretorius*²¹⁷ to section 86(10) be followed then it would mean that there would be no matter pending before that court.²¹⁸ Thus, the court in *SA Taxi Securitisation (Pty) Limited v Nako and Others*²¹⁹ held that the ‘court’ referred to in section 86(11) signifies the court hearing the debt review application in terms of section 87.

In *SA Taxi Securitisation (Pty) Limited v Matlala*²²⁰, however, disagreed with the court’s interpretation of the phrase “hearing the matter” in terms of section 86(11) in *SA Taxi Securitisation (Pty) Limited v Nako and Others*.²²¹ The court held that the phrase refers to the court which is enforcing the credit agreement and not the court in which the debt review application is pending.²²² In addition, Kathree-Setiloane AJ held that the service of a notice of motion on the credit provider, and not the mere issuing thereof at court, would constitute a referral to the magistrate’s court for purposes of sections 86(7)(c) and 86(8)(b).²²³

The conflicting views of Kathree-Setiloane AJ and Kemp AJ in the matters *Standard Bank of South Africa Limited v Kruger; Standard Bank of South Africa Limited v Pretorius*,²²⁴ *Nako*

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

²¹⁸ *SA Taxi Securitisation (Pty) Limited v Nako and Others* [2010] ZAEBHC 4 (8 June 2010) at par 43.

²¹⁹ [2010] ZAEBHC 4 (8 June 2010).

²²⁰ [2010] ZAGPJH 70 (29 July 2010).

²²¹ [2010] ZAEBHC 4 (8 June 2010).

²²² *SA Taxi Securitisation (Pty) Limited v Matlala* [2010] ZAGPJH 70 (29 July 2010) at par 9.

²²³ *SA Taxi Securitisation (Pty) Limited v Matlala* [2010] ZAGPJH 70 (29 July 2010) at par 14.

²²⁴ 2010 (4) SA 635 (GSJ).

and *SA Taxi Securitisation (Pty) Limited v Matlala*²²⁵ were considered by Eksteen J in the matter *Firststrand Bank Limited v Evans*.²²⁶ Eksteen J indicated that the role of the debt counsellor, in terms of section 86 of the NCA, does not end once the matter is referred to the magistrate's court. Reason being, the debt review process only comes to a close once a final debt restructuring order is made by the magistrate's court in terms of section 87.²²⁷ Accordingly, Eksteen J was of the opinion that it would be more plausible to interpret the phrase "that is being reviewed in terms of this section" as a means to distinguish between the various processes referred to in sections 83, 85 and 86.²²⁸ He further went on to state that he could not find anything in the structure of section 86 which indicates an intention on the part of the legislature to limit the right of a credit provider, as afforded by section 86(10), up until the debt counsellor has referred the debt review application to the magistrate's court.²²⁹ Eksteen J subsequently concluded that a credit provider's right to terminate, in terms of section 86(10), continues up until the magistrate's court has restructured the consumer's debt in terms of section 87.²³⁰ The court also held that the phrase "the court hearing the matter" refers to the magistrate's court hearing the debt review application in terms of section 87.²³¹ Accordingly, it was concluded by the court that a consumer is not prejudiced by the credit provider's right to terminate the debt review process in terms of section 86(10), as the

²²⁵ [2010] ZAGPJH 70 (29 July 2010).

²²⁶ [2010] ZAECPEHC 55.

²²⁷ *Firststrand Bank Limited v Evans* [2010] ZAECPEHC 55 at para 18 – 19. Eksteen J based his opinion on the matter *National Credit Regulator v Nedbank Limited and Others* 2009 (6) SA 295 (GNP).

²²⁸ *Firststrand Bank Limited v Evans* [2010] ZAECPEHC 55 at par 20.

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ *Firststrand Bank Limited v Evans* [2010] ZAECPEHC 55 at par 25.

consumer's rights are fully protected by the provisions of section 86(11).²³² Eksteen J further remarked that the credit provider's right to terminate is not absolute as a termination would be inappropriate if the debt review application had already been referred to the magistrate's court.²³³

As a result of the continuation of conflicting judgments pertaining to the termination of the debt review process in terms of section 86(10) of the NCA, a full bench of the Western Cape High Court was directed to deal with the issue in *Wesbank Limited v Papier*.²³⁴ The court held section 86(10) cannot be read in isolation,²³⁵ due to the fact that even where a consumer has complied with all of the requirements expected of him, there will still be instances where the 60 business days have lapsed without an order in terms of section 87 having been made.²³⁶ A termination at this stage was described by the court as a means that would "derail the entire debt review process".²³⁷ The court, therefore, held that upon a proper interpretation of section 86(10), the consumer will be protected against enforcement proceedings by the credit provider whilst the matter is still pending before the magistrate's court.²³⁸ The court concluded the delivery of a section 86(10) termination notice by the credit provider is not competent once any steps, in terms of either sections 86(7)(c), 86(8)(b) or 86(9), have been taken.²³⁹

²³² *Firststrand Bank Limited v Evans* [2010] ZAECPEHC 55 at par 30. The court further held that it is not necessary for the credit provider to give notice to the magistrate's court, where the debt review application is pending, of the termination of the debt review in terms of section 86(10).

²³³ *Firststrand Bank Limited v Evans* [2010] ZAECPEHC 55 at par 30.

²³⁴ 2011 (2) SA 395 (WCC).

²³⁵ *Wesbank Limited v Papier* 2011 (2) SA 395 (WCC) at par 22.

²³⁶ *Wesbank Limited v Papier* 2011 (2) SA 395 (WCC) at par 29.

²³⁷ *Ibid.*

²³⁸ *Wesbank Limited v Papier* 2011 (2) SA 395 (WCC) at par 34.

²³⁹ *Ibid.*

Subsequently, the SCA held in *Collett v Firstrand Bank Limited*²⁴⁰ that the court in *Wesbank Limited v Papier*²⁴¹ followed a too narrow approach. The SCA further held that section 86(10) must not be read in isolation from the other provisions of the NCA, in particular, section 86(11) which provides for the revival of a terminated debt review.²⁴² It indicated that the debt counsellor's participation during the debt review process continues even after a restructuring order by a magistrate's court, in terms of section 87, has been granted.²⁴³ Subsequently, the SCA found that a credit provider's right to deliver a section 86(10) termination notice persists until a section 87 order is granted by the magistrate's court,²⁴⁴ as this right is balanced by the provisions of section 86(11) of the NCA.²⁴⁵

Albeit for a brief period, the *Collett v Firstrand Bank Limited*²⁴⁶ judgment accordingly resolved the question under the original section 86(10) prior to its amendment, of up to which stage of the debt review process a credit provider will still have the right to deliver a section 86(10) termination notice.

4.2.1.2. SECTION 86(10) AS AMENDED BY THE NATIONAL CREDIT AMENDMENT ACT

It would appear that the legislature was not satisfied with the manner in which the court in the *Collett v Firstrand Bank Limited*²⁴⁷ matter addressed the question of up to which stage a credit provider is still entitled to exercise its termination rights in terms of section 86(10) of

²⁴⁰ 2011 (4) SA 508 (SCA).

²⁴¹ 2011 (2) SA 395 (WCC).

²⁴² *Collett v Firstrand Bank Limited* 2011 (4) SA 508 (SCA) at par 9.

²⁴³ *Collett v Firstrand Bank Limited* 2011 (4) SA 508 (SCA) at par 11.

²⁴⁴ *Ibid.*

²⁴⁵ *Collett v Firstrand Bank Limited* 2011 (4) SA 508 (SCA) at par 15.

²⁴⁶ 2011 (4) SA 508 (SCA).

²⁴⁷ *Ibid.*

the NCA. Accordingly, since the insertion of section 86(10)(b),²⁴⁸ the position as set out in the *Collett v Firstrand Bank Limited*²⁴⁹ matter is no longer relevant.

The amended section 86(10)(b) reads as follows:

No credit provider may terminate an application for debt review lodged in terms of this Act, if such application for review has already been filed in a court or in the Tribunal.

Consequently, the newly inserted section 86(10)(b) recognises the fact that debt review applications are rarely finalised within the initial 60 business days, as envisioned by section 86(10).

The legislature's attempt to remedy the issues experienced in practice, pertaining to the termination procedure, has however led to a new can of worms being opened as certain problematic aspects have been identified since the insertion of section 86(10)(b).

Firstly, the interpretation of section 86(10)(b) is problematic insofar as it is not clear what the legislature's intention is with the use of the word "filed" therein. Neither the NCA and the NCAA, nor the Magistrates' Court Act²⁵⁰ and the Superior Courts Act²⁵¹ define what is meant by an application being "filed" in a court. However, according to the Reader's Digest Universal Dictionary, the word 'filed' can be defined as "[t]o enter (a legal document, for example) on public record or official record".²⁵² It is therefore submitted that the same meaning should be ascribed to 'filed' as was done to 'referred' and that these two words ought to be used interchangeably. Accordingly, the service of a notice of motion on the credit

²⁴⁸ S 26(b) of the NCAA.

²⁴⁹ 2011 (4) SA 508 (SCA).

²⁵⁰ Act 32 of 1944, as amended.

²⁵¹ Act 10 of 2013.

²⁵² Reader's Digest (1st ed) *Universal Dictionary* Great Britain: William Collins Sons & Co. Ltd (1987) at 571.

provider, and not the mere issuing thereof at court, would appease the ‘filed’ requirement in terms of section 86(10)(b).

Another irregularity pertaining to section 86(10)(b) that can be identified, is the fact that section 86(10)(b) refers to a debt review application being ‘filed’ in the Tribunal. This however is in direct conflict with the provisions of section 86(8)(a) which provides that only if the debt counsellor’s proposal has been accepted and consented to by the consumer and each of the credit provider, then the debt counsellor must file it as a consent order in terms of section 138 of the NCA. Accordingly, the NCA does not afford the Tribunal with the necessary authority to hear debt review applications, in terms of section 86(7)(c), and as such, the Tribunal will not be faced with a debt review application that has been terminated in terms of section 86(10).

The amended section 86(10) consequently results in the credit provider being left without any recourse against a defaulting consumer, once the debt review application has been filed at the magistrate’s court for hearing and an order in terms of section 87, in instances where there is no real intention to proceed with the debt review application.²⁵³

In this regard, it has been remarked by Van Heerden and Coetzee²⁵⁴ that in practice the court process is abused by debt counsellors and consumers in that they fail to set the matter down at court timeously, thereby securing the consumer a payment holiday. They further observed, and I support their observation, that the legislature should have foreseen the occurrence of

²⁵³ See Roestoff M “Termination of debt review in terms of Section 86(10) of the National Credit Act and the right of a credit provider to enforce its claim” 2010 *Obiter* 782 at 792, hereinafter referred to as “Roestoff (2010)”.

²⁵⁴ Van Heerden C and Coetzee H “Perspectives on the termination of debt review in terms of section 86(10) of the National Credit Act 34 of 2005” 2011 *PER* 37, hereinafter referred to as “Van Heerden and Coetzee (2011)”, at 21.

this practice and should, therefore, have had incorporated an appropriate remedy into the NCA to guard against such blatant abuse.

It is however submitted that this is not an isolated situation, as instances of failure to set the matter down for hearing also occurs subsequent to the matter having been on the court roll in the past and subsequently it was either postponed *sine die* or removed from the court roll.

With regard to the above, it is noted that where a matter has been adjourned or postponed *sine die*, the Magistrates' Court Rules²⁵⁵ provide that any party to that application may by delivery of a notice of reinstatement set down the application for further hearing.²⁵⁶ Accordingly, it is submitted that the credit provider can, in its capacity as a respondent to the matter, set the application down once again and seek that the court dismiss the debt review application. It is further submitted that it would be prudent for the credit provider and/ or its legal representative to depose to an affidavit wherein the following is set out in support of their prayer for dismissal, namely: the time that has lapsed since the previous court appearance, reasons for the postponement, their attempts to contact the debt counsellor in order to establish when the matter will be re-enrolled again, as well as submissions and proof of whether or not the consumer has been paying in accordance with the debt counsellor's debt re-structuring proposal and lastly whether such proposal is reasonable and economically viable.

In instances where the matter was not postponed *sine die*, it would seem that the only other remedy available to the credit provider would be to terminate the debt review process in accordance with the provisions of section 86(10) of the NCA, if applicable. It has been subsequently submitted by Van Heerden that it would appear that the debt review process can

²⁵⁵ GN R740, GG 33487, dated 23 August 2010; hereinafter referred to as the "MCR".

²⁵⁶ See Rule 31(2) of the MCR.

only be terminated in accordance with the provisions of section 86(10).²⁵⁷ This view is further sustained by *Coetzee and Another v Nedbank Limited*²⁵⁸ wherein the court held that the debt review process does not terminate by the effluxion of time.

In addition hereto, the credit provider may also report the debt counsellor's *mala fide* actions, be it the intentional delay or lack of intention to proceed with the debt review application, to the NCR to make use of the remedy of deregistering the *mala fide* debt counsellor,²⁵⁹ if so proved and ordered by the relevant authority.

Additionally, the NCA has not afforded debt counsellors with the powers to merely withdraw a debt review application.²⁶⁰ The court in *Rougier v Nedbank Limited*²⁶¹ held that any withdrawal by a debt counsellor would subsequently be *ultra vires* and accordingly a credit provider would only be able to proceed with enforcement proceedings in terms of section 86(10).²⁶²

It is however very unsatisfactory that a debt review can only be terminated in accordance with section 86(10) and one can thus agree with Roestoff who suggested that the NCA be amended to make provision for the debt review application to lapse automatically if it is not brought to a conclusion within a reasonable period.²⁶³

²⁵⁷ *Guide to the NCA* (2014) at par 11.3.3.3.

²⁵⁸ 2011 (2) SA 372 (KZD) at par 15.

²⁵⁹ Van Heerden and Coetzee (2011) at 21.

²⁶⁰ See *Rougier v Nedbank Limited* [2013] ZAGPJHC 119 at par 12. For a contrary perspective, see *Mercedes Benz Financial Services (South Africa) (Pty) Limited v Holtzhausen* [2012] ZAWCHC 382.

²⁶¹ [2013] ZAGPJHC 119.

²⁶² *Rougier v Nedbank Limited* [2013] ZAGPJHC 119 at para 13 – 17.

²⁶³ See Roestoff (2010) at 792.

4.2.2. *POSSIBLE REASONS FOR A CREDIT PROVIDER TO TERMINATE THE DEBT REVIEW PROCESS*

Van Heerden and Coetzee²⁶⁴ identified the following possible reasons for a credit provider to terminate the debt review process in terms of section 86(10):

- Where the consumer has failed to provide sufficient information, as required in terms of section 86, read with regulation 24, to the debt counsellor. The court held in *BMW Financial Services (SA) (Pty) Limited v Donkin*²⁶⁵ that the consumer's failure to provide the debt counsellor with sufficient information will result in the debt counsellor not being able to conduct his assessment within the period envisaged by section 86, read with regulation 24, and accordingly the credit provider will terminate the debt review process in terms of section 86(10) due to a lack of progress.²⁶⁶
- The debt counsellor's failure to deliver the Form 17.1²⁶⁷ to the credit providers will result in the credit providers being unaware of the consumer's debt review status and accordingly, should the consumer default, then the credit provider may proceed with debt enforcement proceedings. Such failure by the debt counsellor will further lead to unnecessary legal costs. The court may subsequently refer the matter back to the debt counsellor to first attend to the consumer's over-indebtedness.²⁶⁸

²⁶⁴ Van Heerden and Coetzee (2011) at 56.

²⁶⁵ 2009 (6) SA 63 (KZD).

²⁶⁶ *BMW Financial Services (SA) (Pty) Limited v Donkin* 2009 (6) SA 63 (KZD) at para 17 – 18.

²⁶⁷ See par 3.4.1 above for the purpose of Form 17.1.

²⁶⁸ See s 130(4)(c), which provides:

“In any proceedings contemplated in this section, if the court determines that– the credit agreement is subject to a pending debt review in terms of Part D of Chapter 4, the court may–

- (i) adjourn the matter, pending a final determination of the debt review proceedings;

Continued on next page...

- The debt counsellor's failure to deliver the Form 17.2²⁶⁹ to the credit provider, or where the debt counsellor fails to refer his recommendations to the magistrate's court, could result in the credit provider merely waiting for the 60 business days to pass and then to proceed to terminate the debt review process in terms of section 86(10).
- Where the debt counsellor, or his appointed attorney, fails to serve the notice of motion on the credit provider, it will result in the credit provider being unaware that the matter has been referred to the magistrate's court and accordingly the credit provider can, upon the lapsing of the 60 business day period, proceed to terminate the debt review process in terms of section 86(10).
- Where the debt counsellor provides a debt repayment proposal that is not economically viable then it has been accepted by our courts that a credit provider can proceed to terminate the debt review process in terms of section 86(10) as it is under no obligation to accept a proposal that is not economically viable.²⁷⁰

In addition to the instances identified by Van Heerden and Coetzee above, it is submitted that a credit provider may also seek to terminate the debt review process where:

- The consumer has failed to make payments, if any, in accordance with the debt counsellor's debt re-structuring proposal since applying for debt review; and

-
- (ii) order the debt counsellor to report directly to the court, and thereafter make an order contemplated in section 85(b); or
 - (iii) if the credit agreement is the only credit agreement to which the consumer is a party, order the debt counsellor to discontinue the debt review proceedings, and make an order contemplated in section 85(b);"

²⁶⁹ See par 3.4.2 *supra* for the purpose of the Form 17.2.

²⁷⁰ See *Collett v Firstrand Bank Limited* 2011 (4) SA 508 (SCA) at par 16.

- The debt counsellor has unilaterally reduced the contractual interest rate²⁷¹ of the credit agreement for purposes of the debt review, this would be especially so in instances of a mortgage or an instalment agreement.

With regard to the debt counsellor's unilateral reduction of the contractual interest rate, it is submitted that section 86(7)(c)(ii) of the NCA²⁷² does not confer upon the magistrate's court the power to order the unilateral reduction of a contractually agreed interest rate. It was consequently held by Goosen J in *Nedbank Limited v Norris and Others*²⁷³ that a magistrate's court, when hearing a matter in terms of s 87(1) of the NCA, does not have the necessary jurisdiction to reduce a contractually agreed interest rate and subsequently such an order of unilateral reduction of the contractual interest rate would be *ultra vires*.²⁷⁴

²⁷¹ See *Guide to the NCA* (2014) at 11-34. See also *SA Taxi Securitisation (Pty) Ltd v Lennard* 2012 (2) SA 456 (ECG) wherein the court held that "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" and consequently ordered that that magistrate had acted *ultra vires* and ordered that the debt review order, which unilaterally reduced the contractual interest rates, be set aside at par 10 and 11. Judge Magardie in the matter of *Firststrand Bank Limited and Another v Barnard and Another* [2015] ZAGPPHC 1109.

²⁷² See par 3.1. *supra*.

²⁷³ 2016 (3) SA 568 (ECP).

²⁷⁴ See *Guide to the NCA* (2014) at 11-34. See also *Nedbank Limited v Norris and Others* 2016 (3) SA 568 (ECP); *SA Taxi Securitisation (Pty) Ltd v Lennard* 2012 (2) SA 456 (ECG); *Firststrand Bank Limited and Another v Barnard and Another* [2015] ZAGPPHC 1109.

4.2.3. *OTHER ISSUES RELATING TO THE SECTION 86(10) TERMINATION PROCEDURE*

Other problematic issues relating to section 86(10) have also been identified:

- Method of Delivery for the Section 86(10) Termination Notice; and
- Section 130(1)(a): 10 Business Day Waiting Period.

A short discussion of each is to follow hereafter.

4.2.3.1. *METHOD OF DELIVERY FOR THE SECTION 86(10) TERMINATION NOTICE*

Although a discussion of section 129(1)(a) of the NCA is beyond the scope of this dissertation one needs to refer back, for purposes of contextualising the discussion below, to section 129(2) of the NCA that requires delivery of a section 129(1)(a)-notice (where the consumer is not under debt review) alternatively delivery of a section 86(10)-notice (where the consumer is subject to a pending debt review) before a credit provider may approach a court to enforce a credit agreement. Thus a section 129(1)(a) notice and also a section 86(10)-notice qualify as pre-enforcement notices and , it is submitted they also qualify as legal notices. Despite the importance of these notices the legislature, however, failed to prescribe the method of delivery for both the section 86(10) and the section 129(1)(a) notices. This oversight has resulted in numerous judgments, specifically in respect of section 129(1)(a) notices, aimed at resolving the issues experienced as a result of the oversight.²⁷⁵

²⁷⁵ For a detailed overview, see *Guide to the NCA* (2014) at par 12; see also the *NCA Explained* (2016) at ch 9.

The issue regarding delivery of a section 129(1)(a)-notice was subsequently settled authoritatively in *Sebola v Standard Bank of South Africa Limited*²⁷⁶ where it was held by the Constitutional Court that a credit provider who wishes to proceed with enforcement proceedings must prove to the court that the section 129(1)(a)-notice had been delivered to the defaulting consumer.²⁷⁷ In addition, the court held that in instances of unopposed matters and where the credit provider has posted the section 129(1)(a)-notice, it would constitute delivery if the credit provider can prove that the section 129(1)(a)-notice had been sent per registered post to the consumer's address and that the section 129(1)(a)-notice had reached the correct post office.²⁷⁸ It was further held that should a consumer allege that he did not receive the section 129(1)(a)-notice, then the court must investigate the allegation. Should it be found that the section 129(1)(a)-notice did indeed not reach the consumer, then the court must adjourn the matter in terms of section 130(4)(b) of the NCA and order the steps that the credit provider must follow before resuming with the matter.²⁷⁹ It is however submitted by Coetzee that the *Sebola v Standard Bank of South Africa Limited*²⁸⁰ decision had created legal uncertainty insofar as it creates the situation whereby consumers fail to collect the section 129(1)(a)-notice from their post office upon receipt of the notification from the post office.²⁸¹

²⁷⁶ 2012 (5) SA 142 (CC).

²⁷⁷ *Sebola v Standard Bank of South Africa Limited* 2012 (5) SA 142 (CC) at 168.

²⁷⁸ The decision by *Sebola v Standard Bank of South Africa Limited* 2012 (5) SA 142 (CC) had led to legal uncertainty.

²⁷⁹ See the *NCA Explained* (2016) at 120 – 121; Coetzee (2015) at 213.

²⁸⁰ 2012 (5) SA 142 (CC).

²⁸¹ See the *NCA Explained* (2016) at 121. See also *Nedbank Limited v Binneman* 2012 (5) SA 569 (WCC); *ABSA Bank Limited v Mkhize and Another* 2014 (5) SA 16 (SCA); *ABSA Bank Limited v Petersen* 2013 (1) SA 481 (WCC); *Balkind v ABSA Bank Limited in re: ABSA Bank Limited v Ilifu Trading 172 CC and Others* 2013 (2) SA 486 (ECG); *Standard Bank of South Africa Limited v Van Vuuren and Several Other Matters* [2013] ZAGPJHC 16; *Absa Bank Limited v Mkhize and Another* [2012] ZAKZDHC 38; *Kubyana v Standard Bank of South Africa Limited* 2014 (3) SA 56 (CC).

It was subsequently held in *Mocwane v Standard Bank of South Africa Limited*²⁸² that the delivery method for a section 129(1)(a) notice, as dealt with in *Standard Bank of South Africa Limited v Sebola*,²⁸³ also applies to the delivery of a section 86(10) notice. Accordingly, a consumer will have the opportunity to elect the manner of delivery as contemplated in sections 65(2)²⁸⁴ and 96(1).²⁸⁵ It should be noted that subsequent to the judgment in *Standard Bank of South Africa Limited v Sebola*²⁸⁶ the National Credit Amendment Act amended section 129 by introducing subsections 129(5) to (7) that specifically provides for how delivery of the section 129(1)(a)-notice should occur. No amendment to section 86(10), specifically providing for delivery thereof, was done hence the method for delivery of a

²⁸² [2014] ZANCHC 2.

²⁸³ 2012 (5) SA 142 (CC) at par 25.

²⁸⁴ “If no method has been prescribed for the delivery of a particular document to a consumer, the person required to deliver that document must–

- (a) make the document available to the consumer through one or more of the following mechanisms–
 - (i) in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer’s expense, or by ordinary mail;
 - (ii) by fax;
 - (iii) by email; or
 - (iv) by printable web-page; and
- (b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a).”

²⁸⁵ “Whenever a party to a credit agreement is required or wishes to give legal notice to the other party for any purpose contemplated in the agreement, this Act or any other law, the party giving notice must deliver that notice to the other party at–

- (a) the address of that other party as set out in the agreement, unless paragraph (b) applies; or
- (b) the address most recently provided by the recipient in accordance with subsection (2).”

²⁸⁶ 2012 (5) SA 142 (CC).

section 86(10)-notice is still governed by section 65(2) read with section 96 and 168 of the NCA.²⁸⁷

Thus, the credit provider must abide by the method of delivery selected by the consumer and send the notice to the address provided by the consumer, as per the original credit agreement, or alternatively to any updated address provided by the consumer.²⁸⁸

In light of the decision in *Mocwane v Standard Bank of South Africa Limited*,²⁸⁹ that the delivery method for a section 129(1)(a) notice, as dealt with in *Standard Bank of South Africa Limited v Sebola*²⁹⁰ also applies to the delivery of a section 86(10)-notice, it is submitted that the stringent requirements imposed by the *Standard Bank of South Africa Limited v Sebola*²⁹¹ are excessive in terms of giving notice to a consumer of the termination of their debt review application since the NCA requires that the section 86(10)-notice be given to not only the consumer but also his debt counsellor and the NCR.²⁹² It is therefore submitted that the credit provider should not bear such a burdensome onus to prove that it had taken the necessary steps to bring the section 86(10)-notice to the consumer's attention, as well as proving that the section 86(10)-notice had been sent to the correct post office along with the registered post receipt to prove that the section 86(10)-notice had indeed been sent per registered post.

²⁸⁷ See *Wesbank v Jogee* [2012] ZAKZDHC 2 wherein the court held that the same proof of delivery for a section 129(1)(a) notice, as prescribed by the court in *Rossouw and Another v Firstrand Bank Limited* 2010 (6) SA 439 (SCA), is to be extended to the delivery of a section 86(10) notice.

²⁸⁸ See s 96(2), which reads “[a] party to a credit agreement may change their address by delivering to the other party a written notice of the new address by hand, registered mail, or electronic mail, if that other party has provided an email address.”

²⁸⁹ [2014] ZANHC 2.

²⁹⁰ 2012 (5) SA 142 (CC).

²⁹¹ *Ibid.*

²⁹² S 86(10)(a) of the NCA.

It is further submitted that in view of the fact that the NCA requires that the section 86(10)-notice be sent to the consumer's debt counsellor as well,²⁹³ the probability of the consumer becoming aware of the section 86(10)-notice is in all likelihood assured.²⁹⁴ The debt counsellor and the credit provider had undeniably been in contact since the beginning of the consumer's application for debt review, *inter alia* the service of the Form 17.1 and Form 17.2 on the credit provider by the debt counsellor and the service of the certificate of balance on the debt counsellor by the credit provider. For that reason, it is submitted that more weight should be ascribed to the section 86(10)-notice being delivered to the debt counsellor, as the consumer's designated representative, as opposed to the consumer himself.

Accordingly, it is submitted that delivery of the section 86(10)-notice should be by means of both registered mail and electronic mail and that the section 86(10)-notice is to be sent to the consumer, debt counsellor and the NCR. In this way, two traceable delivery methods are used concurrently which will reinforce the credit provider's submission that the section 86(10)-notice had been delivered to the consumer and debt counsellor.²⁹⁵ These submissions in addition to the aforementioned submission, in that more weight should be ascribed to the section 86(10)-notice being delivered to the debt counsellor, as opposed to the consumer himself, will also aid in avoiding unnecessary postponements as a result of allegations of non-receipt by the consumer.

²⁹³ *Ibid.*

²⁹⁴ See *Mocwane v Standard Bank of South Africa Limited* [2014] ZANCHC 2 at par 27.

²⁹⁵ As well as to the NCR.

4.2.3.2. SECTION 130(1)(A): 10 BUSINESS DAY WAITING PERIOD

When a credit provider wishes to proceed with enforcement steps against a defaulting consumer, sections 86(10) and 129(1)(b) must be read together with section 130(1)(a) of the NCA. Section 130(1)(a) *inter alia* provides that a credit provider may only approach a court to enforce a credit agreement upon the lapsing of at least 10 business days since the delivery of a notice either in terms of section 86(10) or section 129(1). The purpose of the 10 business day waiting period in respect of section 86(10) is unclear, as neither section 86(10) nor section 130(1)(a) prescribe what should occur during this period. Van Heerden is of the opinion that a *lacuna* exists in this regard as neither section 86(10) nor section 130(1) provide any indication of the legislature's intentions in respect of the 10 business day provision in section 130(1)(a), nor is it evident whether a duty is placed upon the consumer, or the debt counsellor, to take any specific steps during this period.²⁹⁶

The courts have also been unable to provide clarity in this regard, as a number of divergent judgments have been delivered thus far. One such judgment is *Firststrand Bank Limited v Martin*,²⁹⁷ wherein Binns-Ward J held that the effect of the section 86(10) termination notice is in fact not *ipso facto* to terminate the debt review process, but instead to afford a period of notice, as contemplated in section 130(1)(a). Once this so-called notice period has lapsed, then the credit provider will be entitled to proceed with enforcement proceedings.

The legislature, however, failed to remedy this *lacuna*, insofar as indicating what is to occur during the 10 business days, by means of the NCA. Subsequently, the uncertainty in respect of the purpose of 10 business days delay bears forth. As will be seen, from the discussion in

²⁹⁶ See the *Guide to the NCA* (2014) at par 11.3.

²⁹⁷ 2012 (3) SA 600 (WCC). See also *Changing Tides 17 (Pty) Limited v Erasmus* [2010] JOL 25358 (WCC).

paragraph 4.3.2. below, this *lacuna* created by section 130(1)(a), also impacts on the section 86(11) revival process.

4.2.4. CONSEQUENCES OF A VALID AND AN INVALID TERMINATION IN TERMS OF SECTION 86(10)

In instances where the section 86(10)-notice is valid, then the credit provider will be entitled to proceed with enforcement proceedings. Subsequently, it has been held by the court in *Firststrand Bank Limited t/a Honda Finance v Owens*²⁹⁸ that the credit provider need not send a section 129(1)(a)-notice subsequent to sending the section 86(10)-notice.

On the other hand, in instances where the section 86(10)-notice is invalid, as a result of *inter alia* not being delivered correctly or due to being delivered after the debt review application having been filed at court,²⁹⁹ it is submitted that the credit provider will not be entitled to proceed with enforcement proceedings and subsequently the consumer's debt review will persist. Accordingly, should a credit provider's section 86(10)-notice be invalid, which results in the debt review application still being before a debt counsellor, and the credit provider subsequently approaches the court, then in terms of section 130(4)(b) of the NCA³⁰⁰

²⁹⁸ 2013 (2) SA 325 (SCA).

²⁹⁹ Subsequent to the amendment of s 86(10) by the NCA.

³⁰⁰ See *Standard Bank of South Africa Limited v Rockhill* 2010 (5) SA 252 (GSJ) wherein the court held that s 130(4)(b) envisages proceedings resuming once the court has made an appropriate order. The court in *Standard Bank of South Africa Limited v Rockhill* further disagreed with the decision of the court in *Standard Bank of South Africa Limited v Van Vuuren* 2009 (5) SA 557 (T), wherein it was held that non-compliance on the part of the credit provider with section 129 can be used as a defence by a defendant and accordingly the defendant will be entitled to leave to defend the matter as the "court's hands are tied" and the court must adhere and act in accordance with the provisions of s 130(4)(b). See further *Guide to the NCA* (2014) at 12-68 and the authorities listed there.

the court is not entitled to rule on the matter and is obliged to make an order setting out the steps that the credit provider must complete before resuming the matter.³⁰¹

It is therefore submitted that credit providers must take great care in ensuring that they follow the provisions of section 86(10) of the NCA so as to ensure that they deliver a valid section 86(10)-notice to facilitate the debt enforcement proceedings against a defaulting consumer.

4.3. THE REVIVAL OF THE DEBT REVIEW PROCESS IN TERMS OF SECTION 86(11) OF THE NATIONAL CREDIT ACT

As stated above, a credit provider's right to terminate the debt review process in terms of section 86(10) is balanced by a consumer's right to revive the debt review process in terms of section 86(11).³⁰² Section 86(11) therefore acts as a safeguard against instances where a credit provider unjustly terminated the debt review process, due to *inter alia* having failed to participate during the debt review process in good faith. Thus, section 86(11) assists in giving effect to the NCA's objective to *inter alia* balance the rights of both consumers and credit providers.³⁰³

Section 86(11) initially provided that the "magistrate's court hearing the matter" has the authority to order that the terminated debt review resume on any conditions that the magistrate's court deems just under those circumstances. However, the NCA amended section 86(11) by deleting "magistrate's". Thus, section 86(11) now provides that the "court

³⁰¹ See the *Guide to the NCA* (2014) at 12-67.

³⁰² See par 4.2.1.1. *supra*. See also *Nedbank Limited v van der Westhuizen* [2014] ZAGPJHC 255 (5 June 2014).

³⁰³ See s 3(d); par 1.1. *supra*.

hearing the matter” has the necessary authority to order the resumption of the debt review process.³⁰⁴

In addition, section 86(11) affords the court with a wide discretion to order the resumption of the debt review process “on any conditions that the court considers to be just in the circumstances”.

4.3.1. SECTION 86(11) REVIVAL PROCEDURE

The section 86(11) procedure, like the section 86(10) procedure, has also not been without its challenges. Prior to its amendment, section 86(11) was plagued with uncertainty in respect of which court had to be approached with an application for an order in terms of section 86(11), as well as when such an application could be made.³⁰⁵

The court in *Changing Tides 17 (Pty) Limited v Scholtz*³⁰⁶ held that only the magistrate’s court hearing the debt review application, in terms of section 86(7)(c), can be approached for an order in terms of section 86(11) as it ought to have sufficient information before it in order to deliver judgment on such an application.³⁰⁷

An opposing view was held by the court in *Standard Bank of South Africa Limited v Kruger; Standard Bank of South Africa Limited v Pretorius*³⁰⁸, wherein the court stated that the ‘court’ referred to in terms of section 86(11) is, in fact, the enforcement court and not the magistrate’s court hearing the debt review application.

³⁰⁴ S 26(b) of the NCA.

³⁰⁵ See the *Guide to the NCA* (2014) at par 11.3.3.4.

³⁰⁶ [2010] JOL 24981 (ECP).

³⁰⁷ See also *Firststrand Bank Limited v Martin* 2012 (3) SA 600 (WCC).

³⁰⁸ 2010 (4) SA 635 (GSJ).

The uncertainty at long last ended, when the SCA in *Collett v Firstrand Bank Limited*³⁰⁹ held that the ‘court’ referred to in terms of section 86(11) is indeed the enforcement court. As a result, the SCA held that such a ‘court’ would encompass the magistrate’s court as well as the high court.

4.3.2. OTHER ISSUES RELATING TO THE SECTION 86(11) PROCEDURE

Similar to that of section 86(10), the 10 business day waiting period prescribed by section 130(1)(a) also impacts the application of section 86(11). Consequently, the *lacuna* that exists in respect of section 130(1)(a) causes uncertainty as to when a section 86(11) application should be brought once a section 86(10) termination notice has been received.

The court in *Erasmus* held that a section 86(11) application should without further ado be brought within 10 business days as from the date on which a section 86(10) termination notice was received.³¹⁰ However, Van Heerden aptly remarked that from the wording of section 86(11), in particular, the words “proceeds to enforce”, it would appear that section 86(11) only becomes available once the credit provider proceeds to enforce the credit agreement.³¹¹ Thus, an application, in terms of section 86(11), brought prior to enforcement proceedings by a credit provider would, in essence, be premature.

As mentioned earlier,³¹² the legislature, unfortunately, failed to remedy the 10 business day *lacuna* enclosed within the provisions of section 130(1)(a) and as a consequence uncertainty still reigns in what may be a very important period of the debt review process. Reason being, once a credit agreement is terminated, the credit provider is able to proceed with enforcement

³⁰⁹ 2011 (4) SA 508 (SCA).

³¹⁰ *Changing Tides 17 (Pty) Limited v Erasmus* [2010] JOL 25358 (WCC) at par 32.

³¹¹ *Guide to the NCA* (2014) at par 11.3.3.4.

³¹² See par 4.2.3.2. *supra*.

and this would mean that if the credit agreement, were, for instance, a mortgage agreement, then the consumer would inevitably lose his home.

Another point of concern pertains to the discretion afforded to the court hearing the section 86(11) application. This ‘discretion’ further amplifies the chasm of uncertainty, in respect of the termination and resumption of the debt review process, as there will be no consistency amongst the judgments handed down in response to section 86(11) applications. The court in *Changing Tides 17 (Pty) Limited v Scholtz and Another*³¹³ held that in order to exercise its discretion in respect of a section 86(11) application, it must have consideration for *inter alia* the consumer’s income, monthly commitments, required living expenses, and so forth.³¹⁴ In addition, the court in *Wesbank a division of Firstrand Bank Limited v Schroder: In re: Stoltz v Wesbank a division of Firstrand Bank Limited and Another*³¹⁵ held that a court, which is considering a section 86(11) application, must also take into consideration whether or not the credit provider had participated in good faith during the debt review process. The court in *Collett v Firstrand Bank Limited*³¹⁶, did not lay down guidelines with respect to what would constitute good faith, however, the court did remark that if a credit provider fails to participate in good faith during the debt review process, then the resumption of the process may very well be ordered, unless it can be proven by the credit provider that the debt counsellor’s proposal is not economically viable.³¹⁷

³¹³ [2010] ZAECPEHC 3.

³¹⁴ *Changing Tides 17 (Pty) Limited v Scholtz and Another* [2010] ZAECPEHC 3 at par 32.

³¹⁵ [2012] ZAECCELLC 1. See also *Changing Tides 17 (Pty) Limited v Parish and Another* [2013] ZAWCHC 175.

³¹⁶ 2011 (4) SA 508 (SCA).

³¹⁷ *Wesbank a division of Firstrand Bank Limited v Schroder: In re: Stoltz v Wesbank a division of Firstrand Bank Limited and Another* [2012] ZAECCELLC 1 at par 15. See also *Van Rooyen and Jordaan: In re: Standard Bank of South Africa Limited v Jordaan* [2013] ZAGPPHC 383.

Another point of concern pertains to whether or not a credit provider can once more terminate a previously resumed debt review. Arguably, with consideration to the amendment of section 86(10), a credit provider would still be entitled to terminate a previously resumed debt review, provided the debt counsellor has not yet filed the debt review application in the magistrate's court.³¹⁸ In anticipation of a subsequent termination, it is submitted that the credit provider should carry a greater *onus* to prove that it has actively participated in good faith during the debt review process and that the debt counsellor has failed to bring the debt review process to a close. Consideration should accordingly be had for the time that has lapsed since the resumption of the debt review as well as compliance with the conditions set by the court in accordance with section 86(11). In light of neither section 86(10), nor section 86(11) providing any insight into this question, the position presently remains open to debate.

4.4. CONCLUSION

From the above, it is evident that the debt review process, in particular, the termination and resumption thereof, has been plagued with problems since its introduction by the NCA in 2007. In this regard, the decision by the Supreme Court of Appeal in *Seyffert v Firstrand Bank Limited*³¹⁹ should be applauded in that it was held that a court should refrain from ordering the resumption of a debt review application, in terms of section 86(11), if the debt review process and termination procedure has already been followed.³²⁰

However, like any new 'fad', teething problems are to be expected nonetheless the legislature's failure to address and remedy these problems not only exasperates the problems but also contributes to the animosity between debt counsellors and credit providers.

³¹⁸ See par 4.2.1.2 *supra*.

³¹⁹ 2012 (6) SA 581 (SCA).

³²⁰ See the *NCA Explained* (2016) at 115.

Subsequently, this distorts the balance that the NCA strives to achieve and ultimately impacts the consumer negatively.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1. RECOMMENDATIONS

In a perfect world, the debt review process would idealistically not be to the detriment of either the consumer, or the credit provider. However, this is merely a pipedream. Realistically, it should, therefore, be sought to protect over-indebted consumers, whilst affording credit providers with a modicum of control in respect of debt review applications that are not progressing in order to protect their interests.

This right of termination afforded to credit providers in terms of section 86(10), of the NCA, has however been the subject of much apprehension since its introduction. The following problems have been identified in respect of the debt review termination procedure:

- The amendment of section 86(10) and the subsequent insertion of section 86(10)(b) has resulted in a new set of problems sprouting forth in respect of the cut-off date for terminations and what is subsequently meant by ‘file’.
- Subsequent to the insertion of section 86(10)(b), it becomes apparent that there is an obvious lack of recourse available to credit providers in instances where debt counsellors have referred the debt review application to the magistrate’s court, but subsequently, has no intention of seeing such application through.
- The provisions of section 130(1)(a) has created a *lacuna* in our law in respect of what the legislature intended what should occur within the 10 business day restriction.
- No format has been prescribed for a section 86(10)-notice by the NCA.

- No delivery method has been prescribed for a section 86(10) notice, despite being equivalent to a section 129(1)(a) notice, as a pre-enforcement notice.
- No specific guidelines has been prescribed in the NCA on how courts are to interpret and apply the requirement of good faith in respect of section 86(10).
- There is no clarity on the sanctions that can be imposed, should a party, specifically a credit provider, fail to comply with the provisions of section 86(10).

Therefore, with due regard to the problems identified in respect of the termination of debt review, the following is recommended:

5.1.1. AMENDING SECTION 86(10) AND SECTION 86(11)

It is recommended that section 86(10) should be amended once more insofar as removing the 60 business days contained in section 86(10)(a) and incorporating a provision which stipulates that the credit provider may deliver a section 86(10) termination notice when:

- the debt review process becomes dormant for a period of no less than 3 months; and/
or
- the interest rates have been unilaterally reduced below the contractual interest rate;³²¹
and/ or
- the proposed repayment terms are unreasonable; and/ or
- the proposed instalments are objectively viewed, not economically viable.

³²¹ See Guide to the NCA (2014) at 11-34. See also *Nedbank Limited v Norris and Others* 2016 (3) SA 568 (ECP); *SA Taxi Securitisation (Pty) Ltd v Lennard* 2012 (2) SA 456 (ECG); *Firststrand Bank Limited and Another v Barnard and Another* [2015] ZAGPPHC 1109. See also par 4.2.2. *supra*.

As a balance to the proposed amendment to the provisions of section 86(10), it is recommended that section 86(11) of the NCA should also be amended to provide the debt counsellor with possible recourse pursuant to receiving a section 86(10)-notice, but only under limited circumstances. Thus, if the debt counsellor can show contrary to the credit providers allegations, that *inter alia* the debt review process has not become dormant for a period of more than 3 months or that he has not reduced the contractual interest rates unilaterally, then the credit provider's termination would have been untimely and subsequently the debt review process will continue.

5.1.1.1. DORMANCY

The proposed amendment of section 86(10) should further provide clarity in respect of how a period of dormancy can be identified, *inter alia* under the following circumstances:

- The debt counsellor has failed to deliver the Form 17.2 to the respective credit providers;
- The debt counsellor has failed to issue the application at the relevant magistrate's court;
- The debt counsellor has failed to re-enrol the application at the relevant magistrate's court subsequent to the matter being removed from the roll or postponed *sine die* previously.

Section 86(11) should, therefore, be amended insofar as affording a debt counsellor the opportunity to prove that the debt review application is not dormant as he has been actively involved in negotiations with one or more of the respective credit providers during the 3 month period. In support hereof, I refer to the declaratory order by the High Court in *Van der*

Hoven Attorneys v The National Credit Regulator and Others.³²² In this matter, the court relied on a one year period, as opposed to the proposed 3 month period, however, the notion remains the same. The debt review process cannot be allowed to lie dormant for an excessive period of time. Accordingly, the onus should be placed on the debt counsellor to prove that the debt review application is in fact not dormant and that he has been actively involved in negotiations during the preceding 3 months.

5.1.1.2. UNILATERAL REDUCTION OF INTEREST RATES

In respect of the unilateral interest rate reduction³²³ below that of the contractual interest rate, it is recommended that the amendment should incorporate a provision similar to that of section 1 of the Prescribed Rate of Interest Act³²⁴ wherein it is prescribed that the rate of interest for purposes of the debt review proposal is the repurchase rate (also known as the repo rate), as determined by the South African Reserve Bank, plus 3,5 percent per annum.

Section 86(11) should be amended to include two exceptions in respect of the reduction of the contractual interest rate, firstly in instances where the contractual interest rate is less than the aforementioned determination, the interest rate is to remain the same and finally in instances where the credit provider expressly in writing consented to the reduction of the interest rate below both the contractual interest rate as well as below the aforementioned determination.

³²² *Van der Hoven Attorneys v The National Credit Regulator and Others*, unreported (10918/2015) ZAGPHC (26 May 2015) at par 4.5.

³²³ See para 3.4.4. and 4.2.2. *supra*.

³²⁴ 55 of 1975, as amended by the Judicial Matters Amendment Act 24 of 2015.

5.1.1.3. *UNREASONABLE REPAYMENT PERIODS AND UNECONOMICAL INSTALMENTS*

The proposed amendment to section 86(10) should further incorporate unreasonable repayment periods and uneconomical instalments as grounds for termination. It is important to reiterate that the NCA is not aimed at merely alleviating the consumer's over-indebtedness, but also to assist the consumer in eventually satisfying all of his obligations due to the credit provider.³²⁵

It is therefore recommended that insofar as reasonable repayment periods are concerned, the following proposed grounds should be included in the amendment for consideration by the court:

- The remaining period of the original credit agreement;
- The type of credit agreement (for example a mortgage agreement);
- Whether the credit agreement is secured or unsecured;
- The age of the consumer(s);
- The period of time available until the consumer(s) are to retire; and
- Possible depreciation of the subject matter of the credit agreement (for example a motor vehicle purchased in terms of an instalment agreement).

These proposed grounds of consideration are, however, subjective and subsequently will be made subject to the court's determination. In addition, sufficient guidance should be provided in the amendment insofar as what is reasonable and economical.

³²⁵ S 3(i) of the NCA.

Arguably, a secured credit agreement whereby the value of the subject matter (i.e. a motor vehicle) depreciates³²⁶ daily must be repaid sooner as opposed to a secured credit agreement whereby the value of the subject matter (i.e. a residential property) appreciates.

The risk for the credit provider in the latter instance is much less when the repayment period is longer, as the credit agreement is secured by the value of the property, as opposed to a depreciating asset, such as a motor vehicle.

Another important aspect which should not be lost sight of is the consumer's age and period until retirement in instances where the repayment period is longer. It is debatable whether or not it would be reasonable for both the consumer and the credit provider to accept a proposal of repayment for a mortgage agreement that extends the repayment period for 10 years, however at the time of such extension, the consumer is already 61 years old and is to retire within 4 years. In these instances, regard should be had for whether or not the consumer has a pension allowance that will be able to cover the mortgage payments for the remainder of the debt review period.

Lastly, the provisions of section 71 of the NCA, as amended by section 21 of the NCAA, should also be taken into consideration when considering the reasonableness of repayment periods. Section 71 of the NCA, as amended, now allows for a debt counsellor to issue a consumer with a clearance certificate either once all of the consumer's obligations in terms of the debt re-arrangement order has been satisfied³²⁷ alternatively when only a mortgage agreement or any other long term agreement³²⁸ are the only credit agreements still

³²⁶ See *ABSA Bank Limited v Walker* [2014] ZAWCHC 92.

³²⁷ S 71(1)(a) of the NCA.

³²⁸ S 71(1)(b)(i)(aa) – (bb) of the NCA.

outstanding³²⁹ provided that the consumer has demonstrated the financial ability to satisfy the future obligations³³⁰ in terms of such agreements and that there are no arrears.³³¹

In respect of economical payments, it is recommended that the following should be included in the proposed amendment for consideration by the court:

- The ratio between the original contractual amount and the proposed amount.

In this regard, it argued that a proposed amount which is excessively less than the original contractual amount would not be economical.

With due consideration to the above, it is evident that in this regard it would entail a threefold consideration and that neither interest rates, nor repayment periods and amounts can be considered in isolation.

A termination on these grounds will subsequently be balanced by a proposed amendment to section 86(11), insofar as placing the onus on the debt counsellor to prove to the court that his proposal will lead to the satisfaction of the consumer's responsible obligations within a reasonable time and that the payments are economical and that the interest rates have not been unilaterally reduced.

The remarks of the court in *Collett v Firstrand Bank Limited*³³² should further be borne in mind in this regard, as it was held that where a credit provider can show on good grounds that the debt counsellor's proposal will not lead to the satisfaction the consumer's responsible

³²⁹ S 71(1)(b)(iii) of the NCA.

³³⁰ S 71(1)(b)(i) of the NCA.

³³¹ S 71(1)(b)(ii) of the NCA.

³³² 2011 (4) SA 508 (SCA).

obligations, then the court hearing the section 86(11) proposal deny the application for resumption.³³³

5.1.1.4. ADDITIONAL IMPACTS BY THE PROPOSED AMENDMENT TO SECTION 86(10)

The recommended amendment, read together with section 130(1)(a), with specific reference to the 10 business days prescribed therein, would, therefore, find application, in that upon receipt of the termination notice, the debt counsellor will have 10 business days wherein to take the necessary steps to further the debt review application.

Although, it should be borne in mind that care should be taken to protect against debt counsellors that will only take sufficient steps, upon the receipt of a termination notice, to temporarily stave off enforcement by credit providers. Hence, the termination ground in respect of the 3 month's dormancy period will be available to the credit provider continually. As such, the court should have regard for instances where the debt counsellor has allowed the debt review application to become dormant on more than one occasion without satisfactory proof as to why.

Accordingly, it is therefore recommended that section 86(10)(b) in its current state should be deleted and a new provision should be inserted which prescribes the aforementioned grounds for termination.

³³³ *Collett v Firstrand Bank Limited* 2011 (4) SA 508 (SCA) at par 15.

5.1.2. *PROPOSED RE-STRUCTURE OF THE AMENDMENTS TO SECTION 86(10) AND SECTION 86(11)*

With due consideration to the above, it is therefore recommended that section 86(10) and section 86(11) should be amended to read as follows:

5.1.2.1. *SECTION 86(10)*

- (a) A credit provider may in respect of a credit agreement that is being reviewed in terms of this section proceed to deliver a section 86(10) termination notice to:
 - (i) the consumer;
 - (ii) the debt counsellor; and
 - (iii) the National Credit Regulator.

- (b) The notice contemplated in subsection (a) must be delivered to the debt counsellor, consumer and the National Credit Regulator by means of:
 - (i) registered mail; and
 - (ii) electronic mail.

- (c) The notice contemplated in subsection (a) may be delivered when one of the following events have occurred:
 - (i) The consumer has defaulted in respect of the debt counsellor's proposed repayments; and/ or

- (ii) The debt counsellor has unilaterally reduced the interest rate of the original credit agreement insofar as the proposed interest rate is lower than the minimum repurchase rate, as determined by the South African Reserve Bank, plus 3,5 percent per annum to the exclusion of:
 - (aa) the interest rate of the original credit agreement is less than the interest rate determination contemplated in subsection (c)(ii); or
 - (bb) the credit provider has expressly consented in writing to the reduction of the interest rate.
- (iii) The debt counsellor's proposed repayment period is unreasonable with due consideration to the following:
 - (aa) the remaining period of the original credit agreement;
 - (bb) the type of credit agreement;
 - (cc) whether the credit agreement is secured or unsecured;
 - (dd) the age of the consumer(s);
 - (ee) the period of time available until the consumer(s) are to retire; and
 - (ff) the possible depreciation of the subject matter of the credit agreement.

- (iv) The debt counsellor's proposed repayment amounts are not economically viable with due consideration to the ratio between the original contractual amount and the proposed amount; or
- (v) The debt review process has become dormant for a period of no less than 3 months whereby the debt counsellor has:
 - (aa) failed to deliver a Form 17.2 to the respective credit providers;
 - (bb) failed to issue the application at the relevant magistrate's court; or
 - (cc) failed to re-enrol the application at the relevant magistrate's court subsequent to the matter being removed from the roll or postponed *sine die* previously.

5.1.2.2. SECTION 86(11)

- (a) When a credit provider has given notice to terminate a review as contemplated in subsection (10), the debt counsellor will have 10 business days, as from the date of receipt of the termination notice as contemplated in subsection (10), to inform the credit provider of the contrary and to provide sufficient documentary proof to that effect.
- (b) Where a credit provider proceeds to enforce that agreement in terms of Part C of Chapter 6 and the debt counsellor had provided reasons

to the contrary, as contemplated in subsection 11(a), the credit provider must show on good grounds that:

- (i) the debt counsellor's proposal will not lead to the eventual satisfaction of the responsible obligations due to the credit provider; or
 - (ii) the debt counsellor unilaterally reduced the interest rate; or
 - (iii) the debt counsellor's proposed repayment term is unreasonable; or
 - (iv) the debt counsellor's proposed repayment amount is not economically viable; or
 - (v) that the debt counsellor has not been actively involved in the debt review process for a period of no less than 3 months'.
- (c) The court hearing the enforcement proceedings may subsequently hear an urgent application by the debt counsellor that the debt review process must resume.
- (d) The enforcement court hearing such an application for the resumption of the debt review, as contemplated in subsection (11)(c), may order that the debt review process resume if the court is satisfied that:
- (i) that the debt counsellor had satisfactorily discharged the onus as contemplated in subsection (11)(a);
 - (ii) that the credit provider had not discharged the onus as contemplated in subsection 11(b); and

- (iii) that the debt counsellor has not acted *mala fide* by allowing the debt review application to be frequently terminated, on grounds as contemplated in subsection (10).

5.1.3. *PROPOSED SECTION 86(10) TERMINATION NOTICE WITH CONSIDERATION TO THE PROPOSED AMENDMENTS*

It is submitted, with consideration to the proposed amendments, that a standard section 86(10) termination notice should form part of the NCA's prescribed forms.³³⁴ In this way, there would be no room for any uncertainty amongst any of the role players, as well as the courts.

Therefore, the following format for such prescribed notice is recommended:

Form 17.T (Termination of Debt Review)

Credit Provider's Name
Registered Credit Provider, Registration Number NCRCP 0000

To: Name of Consumer
Identity Number of Consumer
Physical/ Postal Address of Consumer
Email Address of Consumer

To: Name of Debt Counsellor
Registration Number: NCRDC 000
Physical/ Postal Address of Debt Counsellor
Email Address of Consumer

And to: The National Credit Regulator
Email Address of The National Credit Regulator

Date: _____

SECTION 86(10) TERMINATION NOTICE BY "CREDIT PROVIDER'S NAME"

Account Number: _____

³³⁴ As contained in sch 1 of the Regulations (2006).

Account Type: _____

This notice serves to notify you that the debt review in respect of the aforementioned account has been terminated in terms of section 86(10) due to: (Select the appropriate option(s))

- a) The consumer has defaulted in respect of the debt counsellor's proposed repayments;
- b) The debt counsellor has unilaterally reduced the interest rate of the original credit agreement insofar as the proposed interest rate is lower than _____%, which is the minimum repurchase rate, as determined by the South African Reserve Bank, plus 3,5 percent per annum;
- c) The debt counsellor's proposed repayment period, with due consideration to provisions of section 86(10)(c)(iii), is unreasonable;
- d) The debt counsellor's proposed repayment amounts are not economically viable, with due consideration to the ratio between the original contractual amount and the proposed amount;
- e) The debt review process has become dormant for a period of no less than 3 months whereby the debt counsellor has:
 - a. failed to deliver a Form 17.2;
 - b. failed to issue the application at the relevant magistrate's court;
 - c. failed to re-enrol the application at the relevant magistrate's court subsequent to the matter being removed from the roll or postponed *sine die* previously.

Take further notice that you have 10 business days, as from date of receipt hereof, to make contact with our offices and to provide sufficient documentary proof to the contrary of the grounds for termination selected herein.

Take further notice that should no response be received within the aforementioned 10 business days, or where documentary proof is insufficient to stay the termination, then enforcement proceedings will proceed.

Signed at _____ on this _____ day of _____ 20____.

Signature of Authorised Person

Designation

Credit Provider's Name

5.2. CONCLUSIONS

The NCA has introduced the debt review process in an effort to alleviate the burden of over-indebtedness experienced by South African consumers. The NCA further aims to regulate the relationship between consumers and credit providers and as a result, has introduced ‘debt counsellors’ to act as intermediaries between consumers and credit providers. Participation in good faith, by all parties involved, consequently forms an integral part of the debt process.

The debt review process, and in particular the termination and resumption thereof, is a fastidious debt relief measure. Against the backdrop of rampant over-indebtedness amongst South African consumers, the debt review process aims to enable consumers to retain their assets, whilst at the same time preventing credit providers from enforcing their enforcement rights.

However, despite the restrictions placed on credit providers’ enforcement rights, the NCA, in an effort to balance the respective rights of consumers and credit providers, affords credit providers with an opportunity to terminate the debt review process under certain circumstances.

The aforesaid proposed amendment to section 86(10) is much more onerous, than the present section 86(10), for the credit provider insofar as the credit provider must develop a system to: effectively monitor debt review applications in order to *inter alia* accurately capture the debt counsellor’s proposed repayments, identify defaults in respect of such proposed repayments and reductions in the original interest rate, be able to calculate the reasonableness of repayments periods (with due consideration to certain factors), be able to calculate the reasonableness and economical viability of repayment amounts and finally be able to monitor debt review applications that have been dormant for a period of no less than 3 months.

In turn, the proposed amendment to section 86(11) will also place an onus upon debt counsellors to ensure that they respond, with the necessary documentary proof, within the prescribed 10 business days upon receipt of the Form 17.T (termination of debt review notice), but more importantly a duty is placed upon the debt counsellor to actively drive the debt review application so as for the application not to be dormant for a period of 3 months or more.

As a consequence, the aforementioned proposed amendments to section 86(10) and 86(11) places a greater responsibility and duty upon both the credit provider and debt counsellor, than the present section 86(10) and (11) as amended by the NCA, to ensure the eventual finalisation of the debt review application within a reasonable period, whilst providing that the rights of the credit providers and debt counsellors are balanced.

It is therefore submitted that these proposed amendments will with anticipation remove the uncertainties the courts and all parties concerned have experienced thus far and subsequently will result in legal certainty. A debt relief regime that is balanced and certain will be to the advantage of consumers, debt counsellors and credit providers thereby achieving to the purposes of the NCA insofar as providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.³³⁵

Word count: 25 985

³³⁵ S 3(i) of the NCA.

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