

The debt review process and the right to terminate:

A tale of the National Credit Act

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Chapter 1

Introduction

1.1. Background information

The National Credit Act¹ was assented to by the President on 10 March 2006. The Act applies to credit agreements. It however excludes from its application some of the agreements which at first sight seem to be regulated by the Act. The Act amongst others excludes the following from its application, credit agreements entered into by consumers who are:

- a) organs of state;²
- b) juristic persons with asset values and/or an annual turnover of R 1 million or more³; and
- c) juristic persons with an asset value of less than R 1 million but who have entered into a large agreement.⁴

Other agreements that are not regarded as credit agreements in terms of the Act are:

- a) insurance policy agreements;⁵
- b) agreements for credit extended by an insurer to maintain the payment of premiums;⁶
- c) leases of immovable property;⁷ and
- d) transactions between stokvel members.⁸

This projects a message that the Act is aimed at protecting only those consumers who without the Act would be in inferior positions where credit agreements are concerned.

According to Crowther, credit is defined as “the deferment of payment for goods and/or services, against a promise that interests will be payable”.⁹ The NCA also refers to a credit agreement as an agreement where payment has been deferred with interests and/or other costs are payable.¹⁰ The factoring of interests and/or other costs therefore becomes a material aspect of a credit agreement. The other requirement that would inform the application of the Act is that the parties have to deal at arms’ length.¹¹ In *Beets v Swanepoel*¹² the court held that there has to be a distance between the parties to a credit agreement and that they should not be natural persons in a familial relationship whilst dependent on each other. This is because persons who have a non distant relationship may

¹ Act 34 of 2005 (hereafter referred to as the Act).

² S4(1)(a)(iii).

³ S4(1)(a)(i).

⁴ A large agreement is an agreement which either involves a mortgage and/or any other credit transaction (except a pawn transaction) or a credit guarantee, and the principal debt under that transaction or guarantee falls at or above R 250, 000.

⁵ S8(2)(a).

⁶ *Ibid.*

⁷ S8(2)(b).

⁸ S8(2)(c).

⁹ The Report of the Committee *Consumer Credit*, chaired by Lord Crowther volume 1 CMND 4596 London (1971) at p 1.

¹⁰ S8(3).

¹¹ S4(2)(b)(iii).

¹² *Beets v Swanepoel* [2010] JOL 26422 (NC).

not endeavour to take advantage of each other through a credit transaction, for example they may not factor in charges and/or levy interests. The primary reason the Act would not apply to such agreements is because the Act does not have to protect such parties from each other.¹³

In terms of section 8(1) the Act applies to the following forms of credit agreements:

- A credit facility;
- A credit transaction;
- A credit guarantee; and/or
- A combination thereof.

The Act aims to promote non-discriminatory treatment of consumers, together with the consistent treatment of credit products and credit providers.¹⁴ The Act protects both parties to a credit agreement on an equal basis. The promotion of equity in the credit market is expressly provided for in the Act. The Act strives to reach such equity by endeavouring to strike a balance between the rights of a consumer and those of a credit provider.¹⁵

Furthermore, the Act purports to discourage reckless credit granting¹⁶ and over-indebtedness of consumers¹⁷ and to ensure eventual satisfaction of all parties to a credit agreement.¹⁸ The mechanism employed by the Act to ensure the foregoing, is through the provision of a debt review process for consumers in which a credit debt may be restructured or payment thereof rescheduled, to allow a consumer to repay a credit provider in a more manageable manner.¹⁹ The debt review process affords an opportunity to an over-indebted consumer to remedy such a consumer's situation. Credit providers have also been afforded a right to enforce credit agreements in the event that consumers do not perform in terms of credit agreements, debt restructuring or payment rescheduling agreements. The Act also prohibits the granting of reckless credit²⁰, the implication of the section on reckless credit granting, conveys a message that the Act does not only strive to prevent over-indebtedness, but to also assist already over-indebted consumers.²¹

1.2. The protection of consumers and its objectives

The primary objective of the Act is to ensure that a consumer is protected from procedurally unfair practices and that a credit provider is compelled to conduct itself in a manner that would not

¹³ S4 (2) (b) lists parties to a credit agreement who will be regarded as not dealing at arm's length. See also *Beets v Swanepoel* at par 5.

¹⁴ S3(b).

¹⁵ The inference may be drawn from the reading of s3(d).

¹⁶ S3(c)(ii).

¹⁷ S3(c)(i).

¹⁸ Hence the introduction of s86 which deals with over-indebtedness and section(s) 80(1)(a) and (b). See also van Heerden and Coetzee "Perspectives on the Termination of Debt Review in Terms of Section 86(10) of the National Credit Act 34 of 2005" at p1, where it was said that the National Credit Act aims to prevent over-indebtedness and to also solve over-indebtedness through a consumer fulfilling his obligations under a credit agreement.

¹⁹ This may be achieved through the recalculation of a consumer's obligations, the extension of the credit period and /or the deferment of payment of any due monies pending the ability of a consumer to pay. See s86(7)(c)(i), 86(c)(ii)(aa),(bb),(cc) and (dd).

²⁰ S80.

²¹ S3(g).

undermine the provisions of the Act.²² A credit provider has also been awarded rights by the Act. The rights have been awarded because consumers tend to breach contractual obligations²³ and secondly, to uphold the equity principle between the parties to a credit agreement.²⁴

Campbell is of the opinion that the Act is aimed at protecting the rights of the consumer and that:

for every right it gives a consumer the Act places a corresponding duty on the credit provider that is party to a credit agreement with that consumer.²⁵

The opposite is also true that the intention of the legislator was to give a corresponding duty to a consumer for every right given to a credit provider.

1.3. The problem statement

One of the rights that the Act has bestowed on a consumer is a right to debt review where a consumer is over-indebted. A credit provider has procedural rights with regards to a debt review process. One of the rights is to terminate the debt review process under certain circumstances. The purpose of this dissertation is to critically analyse, engage into a discussion and explain how a debt review process may be terminated and when it may be terminated by credit providers. The question more specifically relates to the process after it has been referred to a Magistrate's Court. Recent case law will be reviewed and critically discussed to respond to the question of the termination of a debt review process after its referral to a Magistrates Court.

1.4. The purpose of the study and its significance

The primary purpose of this dissertation is to respond to the question on when a credit provider may terminate a debt review process. The question was a contentious issue that was recently vigorously debated in case law.

1.5. Method and structure of the dissertation

Recent judgements on the topic will be studied and explained in a manner that would realise a purposive interpretation of the National Credit Act. In this academic exercise a number of materials produced on debt review processes will also be discussed, reviewed and critically analysed. These will be articles and textbooks authored on the subject matter in favour and/or against delivered judgements.

Chapter 2

The Chapter will provide an overview of the rights the Act has afforded a consumer and the rights given to a credit provider. Focus will be placed on a consumer's right to apply for debt review and a credit provider's right to terminate the process.

²² See ss 80, 86 and 129 amongst others which aim to ensure that consumers are not granted credit recklessly and that proper process is followed before debt enforcement.

²³ See also Otto (2008) p 84 where it is said that consumers do at times neglect their contractual obligations.

²⁴ S3(d).

²⁵ Scholtz, Otto, van Zyl, van Heerden and Campbell (hereafter Scholtz *et al*) (2010) par 6.1.

Chapter 3

The Chapter will provide a discussion of the debt review process and the credit provider's right to terminate the process. Reference will be made to cases only insofar as the cases serve to clarify points.

Chapter 4

In this Chapter an overview of the interplay between a right to debt review and the credit provider's right to enforce a credit agreement will be given.

Chapter 5

In this Chapter cases where the termination of a debt review process was considered will be discussed.

Chapter 6

In this chapter general conclusions will be made in view of principles from cases and opinions of different authors.

Interpretation:

1. Reference to the Act refers to the National Credit Act 34 of 2005, unless otherwise stated;
2. Reference to the Regulations refers to regulations to the National Credit Act 34 of 2005, unless otherwise stated;
3. Reference to a singular incorporates a reference to the plural and *vice versa*; and
4. Reference to one gender incorporates a reference to the other and *vice versa*.

Chapter 2

The consumer's and credit provider's rights in terms of the NCA

2.1 Introduction

In the first chapter the structure of this dissertation was outlined. The background to the National Credit Act¹ was also given, together with a brief introduction of the Act with emphasis placed on the objectives of the Act. In chapter 2 an overview of the rights the Act has afforded consumers and rights given to credit providers will be discussed.

2.2. The rights provided by the National Credit Act

The Act aims to promote the development of an accessible credit market,² to promote a responsible credit market,³ to promote equity in the credit market⁴ and to ensure that there is consistent treatment of products and consumers by a credit provider.⁵ It is also intended by the Act to curb the provision of credit to consumers who are or will not be in a position to defray all costs that are related to that credit agreement.⁶ A credit provider who grants credit to a consumer without conducting an assessment whether a consumer will be able to satisfy its obligations under that credit agreement may be said to have granted reckless credit. In order to achieve its purpose, the Act in chapter 4 outlines the general rights that a consumer or a credit provider may enjoy.

2.2.1 Credit provider' rights

The Act affords rights to credit providers. Credit providers may repossess goods where a credit agreement has been cancelled.⁷ The right allows a credit provider to protect its interests in cases where a consumer has defaulted. The rights that a credit provider has result from contracts and case law. Some of the other rights that a credit provider has are as follows:

- to cancel a credit agreement if a consumer has defaulted;⁸
- a right to payment or the acceleration of payment;⁹ and
- a right to factor in default charges where a consumer has performed in a non-satisfactory manner or has defaulted on a credit agreement.¹⁰

2.2.2 General consumer rights

A consumer has a right to apply for credit.¹¹ A credit provider may only refuse the application based on reasonable commercial grounds.¹² Campbell is of the opinion that the Act does not place an onus

¹ The National Credit Act 34 of 2005 (hereafter referred to as the Act).

² S3(a).

³ S3(c)(i) and (ii).

⁴ S3(d).

⁵ S3(b).

⁶ S80(1)(a) and (b)

⁷ S131.

⁸ S123(2).

⁹ Boraine and Renke (hereafter Boraine *et al*) (2007) *De Jure* at p 224.

¹⁰ S101(1)(g).

¹¹ S60(1).

¹² S60(2).

on the credit provider to approve every application for credit.¹³ The view held by Campbell seems plausible because the Act does not provide that a credit provider has to grant credit to every applicant.¹⁴ One of the reasons is that a credit provider needs to consider commercial aspects that may result in the event that such credit is granted.¹⁵ A refusal to grant credit must however, be consistent with the credit provider's risk management and underwriting practices.¹⁶

The Act aims to discourage unfair discrimination of a consumer by giving guidance in instances where credit may be refused.¹⁷ A credit provider is prevented from refusing to grant credit to a consumer on arbitrary grounds. If a prospective consumer is denied credit on a ground not listed in the Act,¹⁸ the refusal may amount to a direct or indirect form of discrimination.¹⁹

A consumer may request reasons for the refusal of credit and a credit provider is obliged to provide the reasons for:

- refusing to enter into a credit agreement with the consumer;²⁰
- granting a lower credit limit or reducing the limit,²¹
- refusing to increase a credit limit upon a consumer's request;²² and
- not renewing an expiring credit card and/or credit facility.²³

A consumer has a right to access and challenge credit records and information.²⁴ A consumer also has a right to be informed by a credit provider prior to his name being forwarded to a credit bureau.²⁵ These rights ensure that a consumer remains informed and has access to any material information that will allow the consumer to protect its rights.

The use of certain languages at times may bar effective communication of messages. The barrier is particularly realised when one considers the possibilities that a majority of consumers understand only one language. It therefore becomes necessary for consumers to elect a preferred language. The Act as one of the rights also allows a consumer to be informed in one of the official languages that they understand and/or prefer to the extent that it is reasonable to expect a credit provider to produce documents using that language.²⁶

¹³ Scholtz, Otto, van Zyl, van Heerden and Campbell Guide to the National Credit Act (2010 update) at par 6.22.

¹⁴ S60(3).

¹⁵ S60(2).

¹⁶ *Ibid.*

¹⁷ S61(1).

¹⁸ S60(2) and (3).

¹⁹ See s61(1) qualified by s9(3) of the Constitution of the Republic of South Africa Act 108 of 1996 read together with the Prevention of Unfair Discrimination Act 4 of 2000.

²⁰ S62(1)(a).

²¹ S62(1)(b).

²² S62(1)(c).

²³ S62(1)(d).

²⁴ See ss 72 and 66(1) which provides that credit providers are precluded by the Act from victimising a consumer who has exercised or intend to exercise its rights. The victimisation may unfold through an act of discrimination or penalties being arbitrarily imposed on a consumer.

²⁵ S72(1)(a).

²⁶ S63(1).

The right to be communicated to in a language of choice has to be qualified. Credit providers are in terms of the Act only expected to use a consumer's chosen language if a credit provider in view of any prevalent circumstances, is in a position to grant the request.²⁷ When determining whether it is reasonable to expect a credit provider to deliver a document that has been prepared in a language a consumer has elected, one has to consider the general public the credit provider caters for, expenses involved, the practicality of the use of such a language by a credit provider and regional circumstances.²⁸

A consumer has also been given a right to rescind a contract,²⁹ to terminate³⁰ or settle³¹ an agreement,³² to make early payments³³ and to surrender goods³⁴ that are the subject of a credit agreement.³⁵ The right(s) to rescind, terminate, settle, surrender goods or to make early payments are aimed at responding to a need for a consumer to relieve itself of burdensome credit terms and/or commitments such a consumer is no longer in a position to satisfy.

The right to rescind an agreement allows consumers to cancel agreements after careful consideration, where a credit agreement was entered into at any place other than the registered business address of the credit provider.³⁶ The right to rescind an agreement is one of the most important rights that have been bestowed upon consumers. The right to rescind an agreement is sometimes referred to as a cooling off right. This right may only be exercised within 5 (five) days after a consumer has entered into a credit agreement.³⁷ The intention to rescind has to be communicated in writing.³⁸

The consumer may also terminate a credit agreement where the consumer entered into such an agreement after forced marketing or after a consumer was pressurised to enter into that credit agreement.³⁹ Furthermore a consumer may terminate the agreement if there was an exertion of influence by a credit provider or its agent. The practice of using small print for terms and conditions is no longer allowed.⁴⁰ Consumers may terminate credit agreements if the terms and conditions of such an agreement were not properly explained to the consumer.⁴¹

The right to rescind and settle enables a consumer who is no longer in a position to satisfy credit obligations, to terminate such an credit agreement within a shorter period than that agreed upon in

²⁷ *Ibid.*

²⁸ S63(6).

²⁹ S121 read together with reg 37.

³⁰ S122.

³¹ S125.

³² A consumer in terms of s125 may only settle a large agreement after a notice has been provided to a credit provider. The notice must communicate the intention of the consumer to settle the agreement. This requirement is informed by the fact that credit providers lose interests if and when a credit agreement is settled prior to the natural expiration of the agreement. In large agreements monies to be lost may be very significant.

³³ S126 provides that a consumer may pay more monies in installments than what is provided in the agreement.

³⁴ S127.

³⁵ In terms of s127(5)(a) when a credit provider sells an asset that has been surrendered he is merely entitled to proceeds equalling monies due from a consumer. Any excess amounts should be paid back to the consumer.

³⁶ S121(2)(a).

³⁷ *Ibid.*

³⁸ *Ibid.* See also reg37.

³⁹ S75(1) and (3) disallow marketing practices where consumers are harassed to purchase items.

⁴⁰ See Scholtz, Otto, van Zyl, van Heerden and Campbell (hereafter Scholtz *et al*) (2010) at par 7.6. See also reg 22(1) which sets out how the documentation must be set out.

⁴¹ See also the Report of the Committee *Consumer Credit* (1971) 1 to understand that South African consumer legislation is in line with other foreign legislation.

the credit agreement⁴² or to reschedule payments. Consumers who make early payments or rescind agreements mitigate the effects of interest charges.⁴³ Credit providers have in the past compelled consumers to remain bound by credit agreements they are no longer in a position to satisfy. The Act allows consumers to cancel contracts that are not advantageous to the consumer. The increase in the number of over-indebted consumers and the increased suffering by consumers from reckless credit granting may be minimised through an effective use of these rights.

Lastly, the Act gives a consumer a right to apply for debt review.⁴⁴ A consumer may only have its debts reviewed after a debt counsellor has found such a consumer to be over-indebted. The Act gives a credit provider may terminate the debt review process.⁴⁵ The credit provider's right to enforce a credit agreement and the debt review process cannot run concurrently.⁴⁶ Prior to terminating the process a credit provider has to meet certain requirements. The credit provider must first issue a notice of default prior to the enforcement of a credit agreement.⁴⁷ In the notice the credit provider must inform a consumer who has defaulted of a right to approach a court, a debt counsellor, an ombud with jurisdiction, an Alternative Dispute Resolution (ADR) agent, a consumer court and/or submit a plan to bring the debt to an acceptable situation.⁴⁸ If a consumer did not act on the notice or fails to respond positively, a credit provider may then institute legal proceedings to enforce a credit agreement. A credit provider has to adhere to specified timelines,⁴⁹ when the credit provider intends to enforce credit agreements. The consumer must also not have applied for debt review when the credit provider plans to enforce a credit agreement.⁵⁰ The debt review process and its termination will be discussed in detail in the following chapter as they are an integral part of this dissertation.

3. Conclusion

In this chapter some of the rights the Act gives to consumers and credit providers were discussed. The rights were discussed to provide context on the aims of the Act. It is clear from the above-mentioned rights that the Act strives to balance the rights between a consumer and a credit provider. The intended balance does to a certain extent achieve parity of status between parties to a credit agreement. The reason credit providers and consumers have been granted rights that serve to limit the application of the other party's rights; it is that their respective rights ensure fair and equally satisfying agreements. This parity in right(s) proffering is more evident when one looks at sections 86, 129 and 130 which will be discussed in detail in the chapter below.

⁴² S126(1).

⁴³ S126(3).

⁴⁴ S86(1).

⁴⁵ S86(10).

⁴⁶ See ss 86(2), 86(10), 88 and 129(2).

⁴⁷ S129.

⁴⁸ S129(1)(a).

⁴⁹ S130(1)(a).

⁵⁰ S130(4)(d).

Chapter 3

The debt review process

3.1 Introduction

In the previous chapter an overview of rights the National Credit Act¹ has given to consumers and credit providers was provided. In this chapter the debt review process and the credit provider's right to terminate the process will be discussed. The debt review process is discussed in a separate chapter because it is an important part of this dissertation.

3.2 A consumer's right to a debt review process and a credit provider's right to terminate

3.2.1 Debt review process

Debt review is a process aimed at alleviating a consumer's credit burden. It also allows a consumer to avoid debt enforcement, whilst in the process of debt counselling. The debt review process is applied for by a consumer who is over-indebted. The inclusion of a debt review process comes as result of a need for the legislature to intervene in order to assist consumers who are over-indebted. The debt review process is one of the mechanisms introduced by the Act to assist over-indebted consumers. Debt review enables consumers to resolve over-indebtedness through satisfying financial obligations. Through debt review a consumer gets to honour its credit commitments, albeit in a delayed manner.

The debt review process is provided for in section 86 of the Act. A consumer has to apply for debt review by giving a debt counsellor a completed form 16.² After form 16 has been completed and delivered to the debt counsellor, the debt counsellor must notify the credit provider and credit bureaux that a consumer has applied for debt review. The debt counsellor must inform credit bureaux and the credit provider using form 17.1. The counsellor has to inform the credit provider and credit bureaux within five days after a consumer has provided a completed form 16.³ The debt counsellor must thereafter study responses from the credit provider and credit bureaux if any and then make a determination whether a consumer is over-indebted or not.⁴

If a consumer is found to be over-indebted, the debt counsellor must first ascertain if any of the credit that was given to the consumer was reckless.⁵ If one of the credit agreements was a subject of reckless credit granting, a debt counsellor may apply for that credit to be declared reckless credit.⁶ If none of the credit was granted recklessly the debt counsellor must provide the credit provider and credit bureaux with form 17.2, within five days after the debt counsellor has determined that the consumer is over-indebted.⁷ The debt counsellor must then submit a proposal to the Magistrate's Court that a consumer be declared over-indebted.⁸

¹ National Credit Act 34 of 2005 (hereafter the Act).

² S86(1) read with reg 24(1). Form 16 must be accompanied by a copy of a consumer's identity document, a list of living expenses and proof of income, *etcetera*.

³ S86(4) read together with reg 24(2).

⁴ Reg 24(3) and (4).

⁵ Reg 24(10).

⁶ S87(1)(b)(i).

⁷ Reg 24(11).

⁸ S86(7)(c).

A consumer has to be declared over-indebted before it can be eligible for debt review. A consumer is said to be over-indebted if after an assessment into its affairs, a consumer is found not to be able to meet its financial commitments in a timely manner.⁹ The assessment takes into account the consumer's commitments or a credit agreement where a consumer has defaulted. In terms of regulation 24(7) the assessment conducted to determine whether a consumer is over-indebted is done by comparing a consumer's net income, monthly commitments and living expenses.

If after the monthly commitments and the living expenses have been deducted from the net income of a consumer and a positive balance is left, the consumer is found not to be over-indebted. The application for debt review should be rejected if a consumer is not over-indebted.¹⁰ If a consumer is not over-indebted but there are prospects of such a consumer experiencing problems in the foreseeable future, the debt counsellor may recommend that a consumer and the credit provider enter into a plan to re-arrange the consumer's obligations.¹¹ If the consumer and the credit provider agree to re-arrange the obligations the debt counsellor must record the agreement and then file such an agreement as a consent order.¹² Courts have to provide judicial oversight over debt re-arrangement agreements, hence a need for consent orders.

When it is determined whether a consumer is over-indebted, regard is had to a consumer's financial means, the consumer's prospects where the future generation of income is concerned, the consumer's obligations under existing credit agreements¹³ and possibilities of a consumer satisfying its credit commitments in a timely manner,¹⁴ taking into account such a consumer's repayment history.¹⁵ The assessment whether a consumer is over-indebted or not is conducted by a debt counsellor who must then apply to a Magistrates Court to have a consumer declared over-indebted. A debt review process may only be instituted where a credit provider has not taken steps to enforce the credit agreement(s).¹⁶

A court has powers to refer a matter to a debt counsellor where a consumer is thought to be over-indebted when a credit agreement is being considered in court proceedings. The court may then refer the matter directly to a debt counsellor or declare the consumer over-indebted.¹⁷ The consumer's credit obligations may then be re-arranged if such a consumer qualifies for debt review.¹⁸ The debt restructuring includes but is not limited to a proposal to reduce the monetary amount of monthly instalments by extending the period of the agreement¹⁹ and/or by postponing the dates on which payment is due.²⁰ A consumer's obligations may also be recalculated as part of the debt restructuring process.²¹

⁹ S79(1).

¹⁰ S86(7)(a).

¹¹ S86(7)(b).

¹² See ss86(7)(b), 138(1)(a) and 86(8)(a).

¹³ S79(1)(a).

¹⁴ S79(1)(b).

¹⁵ S79(1)(a) and 79(1)(b).

¹⁶ S86(2).

¹⁷ S85(b).

¹⁸ S87(1)(b)(ii).

¹⁹ S86(c)(ii)(aa).

²⁰ S86(c)(ii)(cc).

²¹ In terms of Another possibility of a debt restructuring may be to recalculate the consumer's obligations. This is provided for in s86(7)(c)(ii)(dd). See also Renke, Roestoff and Haupt (hereafter Renke *et al*) (2007) 248.

3.2.2 Debt enforcement procedure

A credit provider has a right to enforce a credit agreement if a consumer is in default.²² The right is however only available to a credit provider if a consumer has not taken steps to apply for debt review.²³ If the agreement was an instalment sale agreement, for secured loans and/or a lease agreement an additional requirement is that the consumer must still have the goods in its possession before a credit provider may enforce a credit agreement.²⁴ A credit provider may only enforce a credit agreement if 20 business days²⁵ have lapsed since the default by a consumer and at least 10 days²⁶ have passed after a notice drawing the default to the attention of the consumer, was issued by the credit provider.

A credit provider must first issue a section 129(1)(a) notice before it can enforce a credit agreement.²⁷ The notice serves to inform a consumer about ways with which the default may be remedied. The consumer must be advised by the credit provider that such a consumer may approach a debt counsellor, an alternative dispute resolution agent, an ombud with jurisdiction or a consumer court, in order to resolve a dispute or to formulate a debt re-arrangement or debt rescheduling plan to remedy the default.²⁸ The information must be in a section 129(1)(a) notice. A consumer through a section 129(1)(a) notice is afforded an opportunity to submit a proposal to the credit provider which will inform the credit provider how such a consumer intends to make the default good. Through this notice the consumer is given an opportunity to show how it will satisfy its credit obligations where the agreement is concerned.

The notice can be seen as the last warning to a consumer before debt enforcement. The notice may be incorporated into a letter of demand²⁹ and such a notice must not be issued merely to comply with formalities. In *Standard Bank v Maharaj*³⁰ the court held that a credit provider must not reproduce the wording of section 129(1)(a), but is not expected to do more than to encapsulate the importance of the provision in the notice.³¹ The notice should inform a consumer that it has defaulted and that it may remedy the default, failing which a credit provider may enforce the agreement.³²

In essence what the court meant was that in the notice, a credit provider has to inform the consumer that the consumer has defaulted and what the consumer should do to avoid debt enforcement. The notice has to be in a manner that a consumer understands. The content has to cover what section 129(1)(a) aims to achieve. It should serve the purpose the credit provider intends to achieve in view of any prevalent circumstances.

²² S130.

²³ S130(3)(a).

²⁴ S130(1)(c).

²⁵ S130(1).

²⁶ S130(1)(a).

²⁷ S130(1).

²⁸ S129(1)(a).

²⁹ van Heerden and Boraine (hereafter van Heerden *et al*) (2011) 51.

³⁰ *Standard Bank v Maharaj* (2010) JOL 26042.

³¹ *Id* at par 13.

³² *BMW v Mulaudzi* 2009 (3) SA 348 (BPD) 351 D-F.

3.3 The explanation of debt review process and the credit provider's right to terminate

A credit provider may terminate the debt review process if the consumer is in default under the credit agreement being reviewed using the debt review process.³³ A credit provider has to first give notice that it intends to terminate debt review. The notice may only be given 60 days after the consumer had applied for debt review.³⁴ A credit provider is prevented from enforcing a credit agreement where a consumer has applied for debt review unless one of the following applies:

- The debt counsellor in view of any prevalent circumstances has not referred the application for debt review on time;
- The debt review process was applied for in a manner that is inconsistent with the Act and / or essential information which would enable the courts to make informed decisions on the level of indebtedness of a consumer had not been provided by the consumer.³⁵ The information to be provided must include amongst other things the copy of the consumer's identity document, a breakdown of the consumer's income and so forth;³⁶
- The consumer commits itself to further credit agreements after a debt review process has been initiated;
- The application for debt review was abandoned;
- The application for debt review was rejected;
- The consumer was found not to be over indebted by a Magistrate's Court;
- The consumer is in default of the debt re-arrangement agreement; and / or
- The consumer was in default on that credit agreement and 60 business days have elapsed after the consumer had applied for debt review.³⁷

A credit provider has to issue a section 129(1)(a) notice before it may enforce a credit agreement. If a credit provider enforces a credit agreement after a consumer had applied for debt review or has approached one of the persons listed under section 129(1)(a), the credit provider does not have to issue a section 129(1)(a) notice informing the consumer of persons or bodies that may be approached to assist in remedying the default.³⁸ According to Boraïne and Renke³⁹ where the debt review is in progress a credit provider does not have to issue a section 129(1)(a) notice and the credit provider may approach the court to enforce the credit agreement where the consumer is in default after a section 86(10) notice was provided.

³³ S86(10).

³⁴ Scholtz, Otto, van Zyl, van Heerden and Campbell(hereafter Scholtz *et al*) (2010) 11 – 15.

³⁵ In *BMW Financial Services v Donkin* 2009 6 SA 63 (KZD) at paragraph 18, the court held that where a consumer had not materially complied with section 86(1) and regulation 24; in that information that is necessary to determine the level of indebtedness of a consumer had not been provided the debt review process will not be said to have been initiated.

³⁶ Reg 24(1)(a)(b)(c), (d) and s86(10).

³⁷ *Wesbank v Papier* (Unreported case no 14256/10(WCC)) at par 17.

³⁸ *Taxi securitization v Nako* at par 35, the court held that a credit provider is absolved from issuing a s129(1)(a) notice where a consumer has taken steps to approach one of the persons a section 129(1)(a) notice serves to inform a consumer about.

³⁹ Boraïne and Renke (Part 2) (2008) 5.

It is not clear when exactly a credit provider is prevented from enforcing credit agreements. The question would be whether a credit provider can only enforce the agreement where a debt counsellor has started with the review of the consumer's level of indebtedness or where the matter has already been referred to a court for consideration. In *Firststrand Bank Ltd t/a Wesbank v Sewsunker*⁴⁰ the court stayed debt enforcement proceedings by the credit provider before the proposal for debt review was referred to a court.⁴¹ In the case the defendant had applied for debt review and the debt counsellor prepared a proposal for the re-arrangement of obligations which was sent to credit providers.

The plaintiff served a section 86(10) notice terminating the debt review and had immediately applied for summary judgment against the defendant. The court held that –

*“the issue was whether a credit provider can use a section 86(10) notice to terminate a debt review that has been referred to the magistrate’s court, or is the notice only applicable during the period that the matter is being reviewed by the debt counsellor”.*⁴²

The judgment means that a credit provider may not enforce a credit agreement even when the re-arrangement proposal has not been considered by the court. If there are justifiable grounds for the delay or the court believes it is necessary to stay the enforcement, the court may refuse the enforcement. The interpretation of section 86(10) must however be used sparingly to mean that a credit provider may not enforce a credit agreement where the debt counsellor is acting expeditiously and the 60 day period has not expired.⁴³

The debt review process and the termination thereof have as discussed above presented a number of uncertainties with regards to the interpretation of the relevant provisions. The interpretations have to a lesser or greater extent been confined to the debate(s) whether a credit provider may terminate a debt review process and also when the credit provider may terminate the process, where it is found that the credit provider may terminate.

3.4 The practical application of section(s) 86(10) and 130 of the Act

The interpretation of section 86(10) and 130 has been a bone of contention particularly with regards to the question whether a debt review process may be terminated by a credit provider and when such a termination if possible may be effected. The courts have in a number of cases harboured differing opinions on the interpretation of the sections. Various authors have also expressed their opinions on the question whether debt-review may be terminated. It has been decided that credit providers may terminate the debt review process and the Act also allows credit providers to terminate the process. Therefore the remaining question is when such a termination may be allowed.

According to van Heerden⁴⁴ in terms of section 86(10) a credit provider may give notice to terminate a debt review process only 60 days after a consumer had applied for debt review and only when that

⁴⁰ *Firststrand Ltd t/a Wesbank v Sewsunker* [2011] JOL 26982 (KZP).

⁴¹ *Id* at par 25.

⁴² *Ibid.*

⁴³ In *Firststrand v Sewsunker*, the 60 day period had not elapsed at the time the credit provider made attempts to enforce the credit agreement.

⁴⁴ Scholtz *et al* (2010) at 11 – 15.

consumer has defaulted. According to some authors and certain decided cases a credit provider may give notice terminating debt review even when the credit agreement is still being reviewed by either a court or a debt counsellor, but where the 60 day period has lapsed without an order declaring the consumer over indebted; or where the consumer commits to further credit obligations whilst under debt review. The implication is that a debt counsellor and a consumer only have 60 days to secure an order declaring a consumer over-indebted to ward-off debt enforcement, where a consumer has defaulted on the credit agreement. If a consumer had not defaulted on a credit agreement a credit provider may not exercise the right.⁴⁵

The credit provider's right to terminate debt review in terms of section 86(10) is where exercised appropriately an effective tool. As it ensures that a credit provider is able to terminate the debt review process where a consumer has applied for debt review merely to delay credit enforcement by a credit provider, to frustrate a credit provider or with any other *mala fide* intention. However it will be concerning where a credit provider may terminate the debt review merely because the consumer has defaulted and the 60 days have elapsed, but where there was a genuine cause of delay which was beyond both the consumer and a debt counsellor. It seems inappropriate for a credit provider to exercise the right to terminate the review in that instance. One of the examples where there could be a genuine delay is where there is a backlog of cases at the Magistrate's Court, which means setting down a court date for hearing within 60 days would be difficult.

In *Standard Bank v Kruger*⁴⁶ it was held that the termination of a debt review by a credit provider in terms of section 86(10) is not competent where a debt counsellor has already referred their reviews with recommendations to the Magistrate's Court for consideration.⁴⁷ The reasoning behind this decision was that according judge Kathree-Setiloane if a credit provider is allowed to terminate a debt review process merely because the 60 days has elapsed, it will be problematic as Magistrate Courts may not at times be able to hear the matter within the 60 days due to the plethora of cases they have to consider.

Furthermore judge Kathree-Setiloane was of the opinion that where the application for an order declaring a consumer over-indebted had been referred to the magistrate court and may result in a restructuring or re-arranging order the notice to terminate the process would be incompetent.⁴⁸ The judge believed that regard should be had to prevailing circumstances where the 60 day period had lapsed as the purpose and the object of the Act must be observed at all times. For example the prevention of over-indebtedness or enforcement of a credit agreement where the default may be remedied using a more mutually beneficial approach. It is understood why the judge had formed the view, as there is a need to always consider the purpose and aims of the Act when a matter involving the provisions of the Act is discussed.

The Act aims to address and prevent over-indebtedness through the provision of means that will enable a consumer to resolve over-indebtedness. Therefore the expiration of a period a debt counsellor has to determine if a consumer is over-indebted and to also apply to a court to have a consumer declared over-indebted may at times seem too simple a hurdle to surmount for a credit provider prior to debt enforcement. As mentioned above the delays could have been as a result of

⁴⁵ S88(3) provides that a credit provider may not enforce a credit agreement until a consumer has defaulted.

⁴⁶ *Standard Bank v Kruger* (unreported case number 45438/09 (GSJ)).

⁴⁷ *Id* at paragraph 24.

⁴⁸ *Id* at paragraph 26.

the backlog of cases at the Magistrate's Court where a matter has to be set down for a hearing or because there are other justifiable grounds for the delays.

Renke *et al*⁴⁹ are in agreement with the interpretation that a credit provider may terminate a debt review process where a consumer is in default under a credit agreement that is subject to a debt review process. They however, believe that the consumer must have defaulted and applied for debt review 60 days before the enforcement. But Renke *et al* share Kathree-Setiloane's sentiments that the 60 day period within which a debt counsellor is allowed to complete a debt review process is too brief. When one considers the fact that the 60 day period does not run from the date the matter was referred to the Magistrate's Court, but the date starts to run on the date a debt counsellor was approached.

At times one will find that the matter is only referred to the court a few days before the expiry of the 60 day period because of justifiable grounds. A research report that was prepared by the Law Clinic of the University of Pretoria⁵⁰ also provides that the 60 day period allowed for the declaration of a consumer as over-indebted is insufficient. The period within which a debt counsellor has to make a proposal to a Magistrate's Court should according to the report start from the date the credit provider has given a debt counsellor any requested information.

It is important to note when a debt review process was applied for, firstly, so that it can be understood when a credit provider may terminate the debt review process and then enforce the credit agreement. Secondly because the commencement dates of the debt review process brings a moratorium on debt enforcement. The moratorium allows a consumer an opportunity to be declared over-indebted so that its credit obligations may be re-arranged where such a consumer is found to be over-indebted.

The application for a debt review process will only give rise to a moratorium on debt enforcement where the consumer has applied and submitted adequate information or documentation to the debt counsellor, credit provider(s) and the court. In terms of regulation 24 a consumer has to apply to a debt counsellor to be declared over-indebted by submitting a completed form 16. The form 16 lists the information that is required for a consumer's affairs to be evaluated accordingly. In *BMW Financial Services v Donkin* it was held that the information to be submitted must enable a debt counsellor or a court to make an informed decision on the extent of a consumer's level of indebtedness.⁵¹

In essence this means that the submission of information as required by form 16 is necessary for a debt review process to commence. It was held by the court in the *Donkin* case, that section 86(1) read together with regulation 24(1) only require sufficient compliance. Sufficient compliance means the provision of information that will enable the debt counsellor or a court to make an informed decision, accompanied by a declaration to commit to a debt review process.⁵² If sufficient information together with the declaration to commit to a debt review process is not provided then a debt review process according to the court would have not been applied for.

⁴⁹ Renke, Roestoff and Haupt (hereafter Renke *et al*) (2007) 261.

⁵⁰ Haupt, Roestoff and Erasmus (2009).

⁵¹ *BMW Financial Services (SA) (Pty) Ltd v Donkin 2009 (6) SA 63 (KZP)* at par 18.

⁵² *Ibid.*

The court in the *Donkin* case is correct as a consumer has to provide sufficient information to allow a debt counsellor to fairly assess the level of indebtedness. The view is also held by van Heerden and Coetzee who are of the opinion that an effective debt review process is said to have been applied for only where sufficient documentation has been furnished.⁵³ The view seems to be correct because when one also considers section 87(1) which provides that the Magistrate's Court must have regard to the "*consumer's financial means, prospects and obligations*". The Magistrate may only be able to have regard and to make a proper assessment where sufficient information or documentation was submitted. The documentation or information that will constitute sufficient information or documentation would be the identity number, income of the consumer, a list of living expenses of the consumer and the consumer's obligations, *etcetera*.

It is understood why this information and documentation is deemed as being sufficient. It is largely because it allows a debt counsellor or a court to ascertain the level of indebtedness of a consumer. For example in the absence of the information on the income of a consumer it can never be determined with certainty whether a consumer is indeed over indebted or not. The same may be stated with the absence of the identity number of a consumer. The identity number allows credit providers to access the information of a consumer possessed by credit bureaux and to state with a level of certainty what the debt owed by a consumer is and what are the payment patterns of such a consumer. A consumer has to provide sufficient information to avoid debt enforcement and to be considered as having applied for debt review. Some of the interpretational difficulties on when debt review may be terminated still persist. Cases on the termination of debt review continued to be instituted.

3.5 Conclusion

In this chapter the right to debt review and a credit provider's right to terminate the debt review process were discussed. Focus was placed on an explanation of a consumer's right to a debt review process and a credit provider's right to terminate the process. The commencement of a debt review process was also considered in this chapter.

In the following chapter the interplay between the right to debt review and a credit provider's right to terminate the process will be discussed.

⁵³ Van Heerden and Coetzee (2010) 756.

Chapter 4

The interplay between the right to debt review and the termination of the process

4.1 Introduction

In the previous chapter the debt review process and a credit provider's right to terminate the process were discussed in detail and also when the debt review process commences. In this chapter emphasis will be placed on the interplay between the consumer's right to apply for a debt review process and the credit provider's right to terminate the process provided for in the National Credit Act.¹

4.2 The interplay between section 86(10), 129 and 130 of the National Credit Act

There is an interplay between section(s) 86(10) and 129 of the Act. The interplay assists in the efficiency of the Act when the relevant provisions² of the Act are exercised accordingly. These sections deal with the right(s) to debt review, the right to the drawing of a default to a consumer's attention and the credit provider's right to enforce a credit agreement. If a consumer has defaulted on a credit agreement, a credit provider may enforce such a credit agreement. However, a credit provider has to comply with section 129(1)(a) and 130 prior to enforcing a credit agreement, as there are prerequisites before enforcement. In terms of section 130 a credit provider may only enforce a credit agreement if a consumer has not initiated a debt review process.

According to the National Credit Act, a credit provider may not within a 60 day period after a consumer has applied for debt review, enforce a credit agreement.³ The reason is that a consumer has to be afforded an opportunity to attempt to resolve a dispute using mechanisms that will ensure mutual satisfaction of the parties to a credit agreement or to develop or agree with a credit provider on a debt repayment plan. The plan may be agreed upon after negotiations. A consumer may also apply for debt-restructuring which may be secured after an application for debt review. A consumer may not apply for a debt review process where a credit provider has taken steps to enforce that credit agreement.⁴

The debt review process prevents a credit provider from enforcing a credit agreement for at least 60 business days.⁵ The process also precludes a consumer from engaging into further credit.⁶ A credit provider is however, not prevented from enforcing a credit agreement if the enforcement was instituted before a consumer applied for debt review. It is of utmost importance for one to distinguish between situations where a consumer has applied for debt review and when a consumer has not. Drawing the distinction is important because the date on which the review was initiated will inform the ability and/or an inability of a credit provider to enforce a credit agreement.

¹ National Credit Act 34 of 2005 (hereafter the Act).

² S86(10), 129 and 130.

³ S86(10) see also Scholtz, Otto, van Zyl, van Heerden and Campbell (hereafter Scholtz *et al*) (2008) 11.3.3.2.

⁴ S86(2).

⁵ S86(10).

⁶ S88(1).

4.3 The extent of the interplay between the credit provider's rights and those of the consumer

The National Credit Act is an instrument aimed at limiting the effects of some of the challenges that its predecessors⁷ the Usury Act,⁸ Credit Agreements Act⁹ and the Hire-Purchase Act¹⁰ were not able to address. Some of the examples of the provisions the National Credit Act contains which assist consumers, are the debt review process aimed at assisting an over-indebted consumer and the assistance to a consumer who has been granted reckless credit. Scholtz¹¹ said that the Act:

“is a far reaching piece of legislation which forms part of a raft of contemporaneous legislation or proposed legislation aimed at protecting consumers...”

Whilst the Act affords protection to a consumer it also balances the rights of all parties to a credit agreement as discussed earlier. Therefore rights that are given to a party correspond to a duty bestowed upon the other. This creates a balance in the rights and duties between parties to a credit agreement.¹²

The balance is reflected in a number of provisions of the Act. However for the purposes of this dissertation, section 3(g) and (i) are the most relevant examples of the parity principle espoused by the Act. The Act amongst other things aims to -

“promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers.” And these are achieved through, *“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.”*¹³

In terms of section 3(i) the Act also intends to achieve its purposes of –

“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.”

A proper reading of section 3(g) and (i) of the Act makes it clear that the Act strives to achieve mutual satisfaction of all parties to a credit agreement without placing any preference on either of the parties. The consumer is expected to satisfy all obligations under a credit agreement. A credit provider has been given a right to enforce a credit agreement where a consumer does not make reasonable efforts to satisfy obligations emanating from the credit agreement.

⁷ Scholtz *et al* (2008) 2.1.

⁸ Act 37 of 1926.

⁹ Act 75 of 1980.

¹⁰ Act 36 of 1942.

¹¹ Scholtz *et al* (2010) 2-1.

¹² Otto (2008) 49.

¹³ S3(g).

The right of the credit provider to enforce a credit agreement may only be exercised sparingly. The interplay between section 86(10), 129(1)(a) and 130 of the Act is one of the most fundamental elements of the Act. The interplay serves to ensure that there is a -

*“consistent and harmonised system of debt restructuring, enforcement and judgment.... and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations.”*¹⁴

The interplay between section 86(2) and section 130(3)(c)(i) serves to balance the rights of the parties to a credit agreement. Consumers may only have access to a debt review process where such consumers have applied for a debt review process in a manner provided for in section 86 and regulation 24. A credit provider may only enforce a credit agreement where such a credit provider has properly followed procedures set out in section 129, 130 and the regulations. A credit provider has to deliver a section 129(1)(a) notice before it can initiate debt enforcement proceedings. A credit provider also has to comply to section 86(2) in that a consumer must not have approached one of the persons listed under section 129(1)(a).

The interplay between section 86(10), 129(1)(a) and 130 in light of case law, requires a proper satisfaction and strict adherence to certain requirements before it may be realised effectively. A section 129(1)(a) notice must be sent where a consumer has not applied for debt review and a section 86(10) notice where a consumer has applied for debt review and 60 days have passed since the application. Debt enforcement may not be instituted prior to the expiry of the 60 day period after a debt review process was applied for by the consumer.

The Act provides that a credit provider may give notice to a consumer, a debt counsellor and the National Credit Regulator (NCR) that it intends to terminate a debt review process; “at any time at least 60 business days after the date on which the consumer applied for debt review” if a consumer is in default under the credit agreements being reviewed.¹⁵ Different judgments and authors present differing opinions on the implication of the provision and the termination of the debt review process by a credit provider.¹⁶

4.4 The interplay between a consumer’s right to a debt review process and a credit provider’s right to terminate the process (Case law)

The cases where the sections relevant to the interplay were considered had presented differing opinions on the operation of the interplay. However in almost all the cases the interplay was found to exist. The principles which emanated from the cases are summarised as follows:

- a) In *Standard Bank v Kruger*¹⁷ the court held that a credit provider has to give a section 129(1)(a) notice prior to enforcing a credit agreement.¹⁸ The debt review process may also only be terminated once a debt counsellor had failed to expeditiously apply for an order for debt restructuring.¹⁹ Furthermore, the court had indicated that when it is determined if the debt

¹⁴ The interplay is in line with section 3(g) of the Act.

¹⁵ S86(10).

¹⁶ S86(10)(c).

¹⁷ *Standard Bank v Kruger (Unreported) SGJ case no 45438/2009.*

¹⁸ *Standard Bank v Kruger at par 28.*

¹⁹ *Id at par 26.*

review process has to be terminated, regard should be had to circumstances that may or had prevailed from time to time to ascertain if the debt counsellor is or has acted expeditiously.²⁰ Courts must not be quick to dismiss an application for debt review or allow a credit provider to enforce a credit agreement merely because 60 days have passed since the application for debt review was made. It was stated that a court must also look at the reasons that have militated against the prompt finalisation of the process. The most important aspect that was decided was that once a matter has been referred to a Magistrate's Court a credit provider may not terminate the debt review process. In such instances section 86(10) may not be used to terminate the debt review process;

- b) In *BMW Financial Services v Donkin*²¹ it was held that an application for debt review may only delay the enforcement of a credit agreement, where debt review was applied for in a manner prescribed by the Act read together with regulations thereto.²² What this means is that, the presented information must allow the debt counsellor, credit providers and the court to make informed decisions on the level of indebtedness of a consumer. The information that is required is but not limited to, a copy of the identity document, the pay sheets and information on all credit obligations, *etcetera*;
- c) In *Taxi Securitization v Nako* the court held that a credit provider does not have to issue a section 129(1)(a) notice drawing the default to the attention of the consumer, where such a consumer has taken steps anticipated by section 129(1)(a) or has approached one of the persons listed under the section.²³ This is because the consumer would already be informed of her options therefore for a credit provider to reiterate the information would be a futile exercise. The aim of the notice is to inform the consumer that it has defaulted and to inform a consumer about available options a consumer may elect from, to relieve itself of the credit obligations in a tolerable manner. Thirdly, to allow the consumer to satisfy credit obligations in a less burdensome manner. The court alluded to the possibility of a credit provider terminating debt review process at any time before a magistrates has granted orders declaring consumers to be over-indebted;²⁴ and
- d) In *Wesbank v Papier* a full bench held that prior to a credit provider enforcing a credit agreement the consumer must have been in default and 60 days must have elapsed after such a consumer had applied for debt review.²⁵ The court held that a credit provider may not terminate a debt review process once it has been referred to a Magistrate's Court.

It is clear that the High Court judgments contradict each other. In *Kruger* and *Papier* it was held that a debt review may not be terminated once it has been referred to a Magistrate's Court. In the *Nako* case the opposite was held after a consumer had already applied for debt review.

4.5 National Credit Regulator v Nedbank and others

The case of the *National Credit Regulator v Nedbank Ltd and others* aimed to clarify interpretational difficulties of the Act. It is understood that the case may not be that relevant to this dissertation,

²⁰ *Id* at par 21.

²¹ *BMW Financial Services v Donkin 2009 (6) SA 63 (KZN)*.

²² *BMW Financial Services v Donkin* at par 18.

²³ *Taxi Securitization v Nako* at par 34.

²⁴ *Id* at par 45.

²⁵ *Id* at par 17.

however even when it is not too relevant, the case is worth mentioning insofar as it refers to the debt review process and the circumstances in which the review may be terminated. The case gives an indication of how the interplay is viewed in practice and how the interplay unfolds. The National Credit Regulator instituted an action seeking a declaratory order that will clarify interpretational difficulties experienced by persons who deal with the Act in practice. The orders sought related to the concept of over-indebtedness and reckless credit granting. Most of the orders focused on the question of over-indebtedness. The case will only be discussed insofar as it deals with the orders that relate to over-indebtedness. Firstly, this is because the provision of the Act that deals with over-indebtedness as stated in the *National Credit Regulator v Nedbank Ltd* case causes most of the practical problems. Secondly because there is a great need to give a perspective on the debt review process.

The court stated that a debt counsellor must after having notified a credit provider listed in the application and after such a counsellor has gathered the necessary information refer a recommendation to a Magistrate's Court to have a consumer declared over-indebted.²⁶ The debt counsellor must according to the court "*determine, in the prescribed manner and within the prescribed time.... whether the consumer appears to be over indebted*"²⁷ as provided for under section 86(7)(c). The court further said there are three possible findings that a debt counsellor may make, which are that a debt counsellor may find that a consumer is not over-indebted,²⁸ that the consumer is not over-indebted but may experience difficulties in the near future or that the consumer is over-indebted. It is the last possible finding that is to be discussed at length. If a debt counsellor has found that the consumer is over-indebted the debt counsellor may recommend to a magistrate's court that "*one or more of the consumer's obligations be re-arranged*" by issuing a proposal to the court.²⁹ The court to which the matter is referred must act as per section 87(1) which provides that:

"if a debt counsellor makes a proposal to the Magistrate's Court or a consumer applies to the Magistrate's Court the Magistrate's Court must conduct a hearing and, having regard to the proposal and information before it on the consumer's financial means, prospects and obligations, may (sic) [with] 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)

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

(iii)"

²⁶ *Id* at 509.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Id* at 510.

The court was of the opinion that referring debt review matters to a Magistrate's Court ensures that there is judicial oversight over these processes. The oversight may only be provided where a hearing was conducted.³⁰ According to the court the oversight is a judicial role magistrates have to play and not an administrative role as it was previously thought. The court found that a matter referred to a court under section 86(8)(b) and section 86(7)(c) of the Act –

*“is an application within the meaning of the Magistrate's Court Act of 1944 and the Rules of the Magistrate's Courts and falls to be treated as such in terms of Rule 55 of the Rules”.*³¹

There are a number of things that may be gained from this judgment. Firstly, a magistrate has to conduct a hearing where a consumer is over indebted in a bid to making an order declaring the consumer over-indebted. When making the declaration the court offers judicial oversight. The oversight is necessary in ensuring that the tenets of the Act are adhered to. If a magistrate does not have sight of the necessary documentation and does not get to hear the matter, a consumer may not be able to secure judicial assurance that a credit provider will not renege on the commitment to allow a consumer to have its debts re-arranged. Secondly, the court held that an application for debt review is an application as per the procedure of the Magistrate's Court. Therefore any referral to a court under section 86(8)(b) or 86(7)(c) becomes *sub judice* which would mean that only a court may make a decision on the way forward.³² The implication of this judgment is that a credit provider must then not be allowed to terminate a debt review process after a matter was referred to a Magistrate's Court. The credit provider may however, terminate the process if the court finds the consumer not to be over-indebted, that the consumer has engaged into further credit commitments even whilst the review is pending and the consumer withdraws the application, *etcetera*.

4.6 BMW Financial Services and Donkin

The *Donkin*³³ case provides an indication of what documents are required before the interplay may come into existence or what would constitute the initiation of a debt review process. In *Donkin* the parties entered into an instalment sale agreement for a vehicle. The defendant committed herself for an amount of R 385,791.00. The debt amount was payable over a period of fifty nine (59) months. There was a residual value of R 110,086.40 to be paid at the end of the contract period. The defendant had agreed to pay a monthly instalment of R 4,656.01. The defendant fell into arrears due to irregular payments.³⁴

In September 2007 the defendant had only made eight (8) payments. In some instances the defendant had paid less than the agreed instalment amount. The plaintiff notified the defendant of the default, and also requested the defendant to remedy the default. The notice was provided in terms of section 129(1)(a). The defendant did not respond to the notice and the plaintiff subsequently cancelled the agreement on 11 September 2008. The plaintiff approached a court seeking the following orders:

- An order for the delivery of the vehicle;

³⁰ *Id* at 513.

³¹ *Id* at 518.

³² *Id* at 522.

³³ *BMW Financial Services (SA) (Pty) Ltd v Donkin 2009 6 SA 63 (KZD)*.

³⁴ The defendant was in arrears for an amount of R 37, 243.73 after making irregular payments for a number of months.

- An order confirming that the credit agreement was terminated lawfully;
- An order that the defendant pay the difference between the credit debt and the market value or the selling price of the vehicle (whichever was greater); and
- An order compelling the defendant to pay interests and any other default costs.

The consumer opposed the application alleging that it had approached a debt counsellor on 25 November 2008. The consumer alleged that it was found to be 60% over-indebted and upon being advised of the debt review process the consumer had made an appointment, with the debt counsellor to apply for debt review. The consumer alleged that on the day of the appointment form 16 was completed and that credit providers and credit bureaux were informed by the debt counsellor that the consumer had applied for debt review.

The consumer further alleged that none of the credit providers responded to the information that the consumer applied for debt review. The consumer stated that the credit providers did not even respond to the debt restructuring proposal, proposed by the debt counsellor. Lastly, the defendant alleged that the debt counsellor had already set the matter down at a Magistrate's Court for a debt review proposal to be considered. The defendant did not however when applying for debt review, submit its pay sheet, a copy of its identity document and other essential documentation.

The plaintiff alleged that it cancelled the agreement in terms of section 123, which allows a credit provider to terminate a credit agreement in the event that a consumer defaults. The plaintiff continued to aver that it had already instituted proceedings at the time the defendant approached the Magistrate's Court. Therefore the application for debt review was prohibited in terms of section 86(2), according to the plaintiff.

The court was of the opinion that sections 86(2) and 130(3)(c)(i) were meant to curtail overlaps between debt review and the enforcement of a credit agreement.³⁵ Section 86(2) provides that an application debt review:

*“may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under the credit agreement has proceeded to take the steps contemplated in section 129 to enforce the credit agreement”.*³⁶

Whilst section 130(3)(c)(i) provides that:

“despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that –

(a)...

(b)...

(c)... the credit provider has not approached the court –

³⁵ *BMW Financial Services v Donkin* at par 11.

³⁶ *Ibid.*

(i) *during the time that the was before a debt counsellor, dispute resolution agent, consumer court or the ombud with jurisdiction;...*”

According to the court a debt review process will only stay the enforcement of a credit agreement if it was properly applied for, in terms of regulation 24(1)(a), 24(1)(b) 24(1)(c) and 24(1)(d). The regulation informs a consumer and a debt counsellor about required documentation and information when they apply for debt review.

The court further held that, the regulation also provides that a consumer has to declare and undertake to commit to debt restructuring³⁷ before a debt review process will be deemed to have been initiated.³⁸ The court found in favour of the plaintiff because information that had to be submitted in terms of regulation 24 had not been submitted. It may be seen from the above that it is not enough for a consumer to show an interest in applying for debt review. The consumer has to perform certain actions to qualify for protection under section 130(3)(c)(i).

The submission of minimum information and documentation is necessary for a debt review process to be existent, according to van Heerden and Coetzee.³⁹ The submitted information must allow debt counsellors and courts to make informed decisions about the level of a consumer’s indebtedness. It would appear that the application for debt review may be treated as though it was not made where the minimum information and documentation was not submitted.⁴⁰

4.7 Conclusion

The interplay between the right to debt review and the ability to terminate the review process were discussed. In the next chapter cases where debt review was discussed will be looked at and their decisions will be discussed. The decisions in the cases will also be compared against each other. The cases to be discussed will also be used to highlight the interplay between s129, 86(10) and 130.

³⁷ Reg24(1)(b)(vi).

³⁸ *BMW Financial Services v Donkin* at par 18.

³⁹ van Heerden, and Coetzee (2010) 766.

⁴⁰ *Id* at 766.

Chapter 5

A discussion of the cases on the termination of the debt review process

5.1 Introduction

In chapter 4 the right to debt review and the termination provided for in the National Credit Act⁴¹ were discussed. The rights were discussed with emphasis placed on the interplay between a consumer's right to debt review and a credit provider's right to enforce a credit agreement. In this Chapter there will be a discussion on cases that related to the debt review process and a credit provider's right to enforce a credit agreement.

There are a number of cases dealing with the debt review process and the credit provider's right to enforce a credit agreement, however in this chapter only the cases containing the best arguments of the rights will be discussed. The cases that will be discussed will also be used to draw interplay between the right to debt review and the right to enforce a credit agreement. Below cases and opinions that have presented conflicting interpretations of the sections dealing with debt review will be reviewed and discussed together with opinions by various authors.

5.2 Standard Bank v Kruger

In *Standard Bank v Kruger*⁴² a credit provider had applied for summary judgement for a debt secured by a mortgage bond. At the time the summary judgment was applied for, the respondent had already applied for debt review and the application had already been referred to a Magistrate's Court. The respondent in its defence against the application submitted that the matter was *sub judice* and that only a court can terminate the debt review process. The respondent had also alleged that the actions of the applicant were in contravention of section 130 of the Act, because an application for debt review was brought within 60 days.

The court found that the purpose of the Act is to promote and protect a consumer and should therefore be interpreted as such. Furthermore the court was of the opinion that a debt review process may only be terminated if a debt counsellor had not referred the matter to a Magistrate's Court within the specified period of time⁴³ in light of the circumstances that may prevail from time to time.⁴⁴ The court also said where there are reasonable delays, debt review processes should not be terminated by a credit provider.⁴⁵ The implication of the decision is that courts must not agree to terminate debt review processes when there are reasonable delays before the process is finalised.

5.3 SA Taxi Securitization (Pty) Ltd v Nako and others

*SA Taxi Securitisation (Pty) Ltd v Nako and others*⁴⁶ is an example of another case where the interplay was considered by the court. The case provides a perspective on the question in this dissertation about the credit provider's right to terminate the debt review process and whether the credit provider can terminate the process after referral to the Magistrate's Court. Respondents were

⁴¹ National Credit Act 34 of 2005 (hereafter the Act).

⁴² *Standard Bank v Kruger* (unreported case number 45438/09 (GSJ)).

⁴³ The court relied in *Standard Bank of South Africa Ltd v Pretorius* (unreported case number 39057/09 (GSJ) at paragraph 24 and 26, where the court held that a credit provider may not terminate a debt review process once s86(8)(b) and 87 are applicable.

⁴⁴ *Standard Bank v Kruger* at par 21.

⁴⁵ *Ibid.*

⁴⁶ *SA Taxi Securitization (Pty) Ltd v Nako and others case no(s): 19, 21, 22, 77, 89, 104 and 842 (2010).*

joined in the case because the facts of their respective cases were to a large extent similar. The applicant had brought applications for summary judgments against the respondents. The court had to determine whether a debt review process had been terminated in a valid manner and whether reference of a proposal by a debt counsellor to a Magistrate Court as provided for in section 87 had limited the rights of a credit provider to enforce a credit agreement.

The application for summary judgments was opposed by all the respondents. The applicants had financed vehicles that were bought by the respondents and the respondents accounts were in arrears. At the time the application was made by the applicant the respondents had applied for debt review. The 60 day period⁴⁷ debt counsellors are given to refer debt review proposals to a court had lapsed. The applicant had already cancelled the agreements and had applied to a court seeking confirmation of the cancellation and the return of the vehicles. It also submitted a claim for damages and costs as per attorney-client scale.

The respondents entered appearances to defend, in which they alleged that credit was extended recklessly and should therefore be suspended. The respondents never indicated the extent of the suspension and what was to be done with the vehicles if such agreements were suspended. At the time the applicant issued summons, the respondents' proposals for debt review were pending before a Magistrate Court. Furthermore, all the respondents save for one had disputed receipt of a section 129(1)(a) notice drawing their attention to the default and informing them of persons they may approach to mitigate the risk of debt enforcement. The applicant had also not alleged in the particulars of claim and the affidavit supporting its application for summary judgement whether it had issued a section 129(1)(a) notice to the respondents.

The court had to determine if the debt review process had already been initiated at the time the agreements were enforced.⁴⁸ The court had to ascertain if a debt review process was terminated in a valid manner and whether the proposal to the magistrate as per section 87(1) limited the exercise of a credit provider's right to enforce a credit agreement. The other determination the court had to make was whether the respondents were entitled to an order setting aside or suspending the agreements.

The court held that a credit provider does not have to issue a section 129(1)(a) notice where a consumer had already referred the credit agreement to a party listed under section 129(1)(a).⁴⁹ The court relied on section 129(2) which provides that -

"Subsection (1) 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."

The court also relied on the decision in *the Changing Tides* case⁵⁰ where it was held that:

"...In the ordinary case it would be inappropriate for a credit provider to give notice in terms of the provision if a relevant application was already pending before a magistrates' court and being prosecuted with reasonable efficiency."⁵¹

⁴⁷ S86(1).

⁴⁸ A section 80(1)(a) assessment was never conducted by the applicant.

⁴⁹ *SA Taxi Securitization v Nako* at par 35.

⁵⁰ *Changing Tides 17 (Pty) Ltd NO v Erasmus and another; Changing Tides 17 (Pty) Ltd NO v Cleophas and another; Changing Tides 17 (Pty) Ltd NO v Frederick and another (WCC) unreported case no. 18153/09, 12 November 2009.*

The court further relied on the *Changing Tides* case where it was said that the -

“... evident purpose of the notice by a credit provider in terms of s86(10) of the NCA is to enable the consumer and/or the debt counsellor to urgently bring an application to a magistrate in terms of s86(7)(c), or 86(8)(b) if that has not by then already been done, alternatively, if such an application is already pending, to approach the magistrate for an order in terms of s86(11) of the NCA that the debt review should be resumed. I can conceive of no other reason for the requirement in terms of s130(1)(a) of the NCA that at least 10 business days must have elapsed after notice to the consumer as contemplated in terms of 86(1) before a credit provider may institute proceedings for the enforcement of a credit agreement.”⁵²

The court based on the above held that the plaintiff was not supposed to issue a section 129(1)(a) notice. The reason was that the respondents were already informed of what the notice would have conveyed to them. The court also held that the credit provider was justified to terminate the debt review processes.

The principle that is presented by the judgement is that a credit provider should not be expected by the courts to comply with section 129(1)(a), by issuing a notice drawing the attention of a default to a consumer and informing the consumer of persons that may be approached where such a consumer has already approached one of such persons. The principle must not be interpreted to exclude the possibility that the court would have refused the termination of the debt review process, where the debt review process had been completed expeditiously.

5.4 Wesbank v Papier

In *Wesbank v Papier*⁵³ the court had to decide on an opposed application for summary judgment. The application was heard by the full bench. The plaintiff and the defendant entered into a credit agreement in March 2007 for the lease of a vehicle. The defendant experienced financial difficulties in September 2009 and thereafter applied for debt review. The debt counsellor sent out notices to the credit providers informing the credit providers about the application for debt review. On 30 October 2009 the debt counsellor informed credit providers that the defendant’s application for debt review was successful. The credit providers were also informed that the respondent’s obligations were to be restructured as the defendant was over-indebted in terms of section 79. The notices that were sent to credit providers were delivered together with instalment offers that contained proposed revised payment terms. As there was no response from the plaintiff and some of the credit providers, the defendant proceeded to pay monthly instalments that were proposed in the instalment offer.

On 12 March 2010 an application was made by the defendant’s debt counsellor to the Magistrates Court, the relief sought was an order declaring the consumer over-indebted, to have debts re-arranged and to prevent credit providers from terminating the debt review process. The plaintiff had nonetheless notified the defendant that it had terminated the debt review process. The plaintiff had advised that the debt review was terminated as a result of the defendant having been in arrears for over 20 business days. The plaintiff had also demanded immediate satisfaction of the credit debt

⁵¹ *Changing Tides v Erasmus and others* at par 30.

⁵² *Id* at par 32.

⁵³ *Wesbank v Papier* (Unreported Case No 14256/10 (WCC)).

through an application for summary judgment. In the application the plaintiff sought confirmation that the credit agreement has been cancelled and the delivery of the leased vehicle with costs. The defendant responded by alleging that the application for debt review had been made before debt enforcement and that the matter was set down.

The court had to decide whether a credit provider may terminate a debt review process after a consumer had lodged an application to the court for an order declaring such a consumer to be over-indebted. The plaintiff had relied on the interpretation of section 86(10) that a credit provider may terminate debt review processes after giving a notice to a consumer. The court did consider the matter in light of section 86(10) which provides that:

“if a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to –

- (a) the consumer;*
- (b) the debt counsellor; and*
- (c) the National Credit Regulator,*

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

The court held that in terms of section 86(10) two requirements have to be satisfied by a credit provider before a credit agreement may be enforced.⁵⁴ Firstly, a consumer has to have been in default under the credit agreement that is under review. Secondly, 60 days must have elapsed after a consumer applied for debt review. It was found to be common cause by the court that both the requirements listed under section 86(10) were met.⁵⁵ The consumer was in default and the notice to terminate a debt review was delivered 60 days after the application for debt review was made. Furthermore the plaintiff had issued summons ten days after it had indicated its intention to terminate the debt review process as required by section 130(1).

The court however, decided that the Act and regulations thereto must not be seen as too prescriptive on the timeframes within which debt counsellors are expected to issue proposals in terms of section 86(7)(c).⁵⁶ The court was of the opinion that when one has regard to regulation 24(6), it becomes clear that a debt counsellor has only 30 days to make a determination whether a consumer is over-indebted or not.⁵⁷ The court also went on to state that once the re-arrangement order has been granted a consumer is protected from litigation;⁵⁸ this is because –

“it would be counter-productive to the whole purpose of the Act to allow a credit provider unilaterally to terminate the consumer’s protection at the precise moment when he or she may need it the most”.⁵⁹

⁵⁴ *Wesbank v Papier* at par 17.

⁵⁵ *Id.*

⁵⁶ *Wesbank v Papier* at par 36.

⁵⁷ *Ibid* at par 25.

⁵⁸ *Ibid* at par 26.

⁵⁹ *Ibid* at par 30.

The court used an analogy that where a consumer is deprived of the protection –

“it would be like providing the consumer with an umbrella and then snatching it back the moment it starts raining”.⁶⁰

It was held by the court that a credit provider is not competent to file a notice terminating a debt review process in terms of section 86(10), once steps referred to under section 86(7)(c), 86(8) and 86(9) have been taken.⁶¹ The reason is that the protection of a consumer who has taken steps to have debts restructured, will only cease to exist where the magistrate has refused the application for debt review, where such an application was withdrawn or where it has been abandoned.⁶²

5.5 Collet v Firststrand

The Collet⁶³ case is the leading case on the termination of debt review process. In the Collet case a number of issues on the termination of debt review were clarified and decided upon. In the *Collet* case the appellant had defaulted on a credit agreement and all amounts became due and payable. The appellant applied for debt review, of which he was later advised had become successful, as he was found to be over-indebted by the debt counsellor. None of the credit providers accepted the proposal for debt re-arrangement prepared by a debt counsellor. Despite all of that the debt counsellor referred the matter to the Magistrate’s Court for consideration and for an order declaring the consumer to be over-indebted. The 60 day period within which an application for debt review had to be made prior to a credit provider exercising its rights as provided for in the Act had lapsed at the time or just after the matter was referred to a Magistrate’s Court. The respondent terminated the debt review process because 60 days had lapsed after a consumer had applied for debt review. Further to that the respondent had instituted an application for summary judgment. The debt counsellor had subsequently requested that the terminated debt review be re-instated. The court therefore had to decide whether a credit provider may terminate such a debt review process.

The appellant in its affidavit opposing the application for summary judgment merely challenged the ability of the respondent to institute an application for summary judgment. The appellant did not however challenge the merits of the case. In the court *a quo*⁶⁴ the court held that a credit provider may terminate a debt review process even after the matter was referred to a court. The court mentioned that context was given with regards to delays in the *Wesbank v Papier* case. In the case the court stated that regard must be had to the objects of the Act when the 60 day period has elapsed. The objects are *“to protect and assist over-indebted consumers in an environment that encourages participation in good faith”*. Therefore in the opinion of the court in the current matter the 60 day period may not be sufficient when one takes into consideration that the court also has to make an order within those 60 days. The court in its decision however, agreed with the presiding officer in the court *a quo* who said:⁶⁵

“I am unable to find anything in the structure of section 86 or of the Act in its entirety which is indicative of the intention on the part of the legislature to limit the right of a credit provider under section 86(10) to the process prior to the

⁶⁰ *Id.*

⁶¹ *Ibid* at par 34.

⁶² *Ibid.*

⁶³ *Collet v Firststrand (766/2010) [2011] ZASCA 78 (27 May 2011).*

⁶⁴ *National Credit Regulator v Nedbank Ltd & others 2009 (6) SA 295 (GNP) at 313C – D.*

⁶⁵ *National Credit Regulator v Nedbank 2009 (4) at par 11.*

*reference to the Magistrate's Court. On the contrary I consider that the credit provider's rights to give notice in terms of section 86(10) continues until the Magistrate's Court has made an order as envisaged in section 87".*⁶⁶

The view is contrary to that in *Wesbank v Papier* where the court held that a credit provider forfeits the right to terminate a debt review process where the application had been sent to court.⁶⁷ In the *Wesbank v Papier* case the court was of the opinion that the 60 day period was introduced to allow the consumer and the debt counsellor sufficient time to prepare the necessary documentation and the information required for the court to consider debt-re-arrangement. The *Collet v Firstrand* case had harboured a different opinion where the forfeiture was concerned. The court believed that a credit provider is only precluded from terminating and then enforcing a credit agreement where a consumer has not defaulted.⁶⁸ If a consumer has defaulted, the credit provider may only terminate the debt review or enforce the credit agreement if the 60 day period has elapsed.⁶⁹ It is agreed that these two requirements are necessary to ensure that a debt counsellor and a consumer either act in good faith or they do not delay the debt review process unnecessarily.

5.6 Conclusion

Chapter 5 has provided a view of how the right to debt review and a credit provider's right to enforce a credit agreement have been dealt with by different courts. The cases were also used to show how the interplay between the rights was applied in various courts. In Chapter 5 a summary of clarity emanating from case law was discussed and compared to academic documents on debt review and its termination. The arguments of the appellate division on whether a debt review process may be terminated once referred to a Magistrate's Court was also considered. In the next chapter the manner in which the debt review process must and can be terminated will also be suggested.

⁶⁶ National Credit Regulator v Nedbank Ltd and Others 2009 (6) SA 295 (GNP) at 313 C-D at par 18.

⁶⁷ *Wesbank v Papier* at par 7.

⁶⁸ *Collet v Firstrand* at par 12.

⁶⁹ *Ibid.*

Chapter 6

General conclusions

6.1 Introduction

Chapter 5 provided a practical application of principles from cases, sections of the National Credit Act¹ and views by academic writers on the debt review process and the termination thereof. In chapter 5 the way debt review processes may be terminated will be suggested with reference to case law, articles, textbooks and sections of the Act on the topic.

In this Chapter various arguments by courts and academic writers will be evaluated. It will be argued that the implication of section 86(10) of the National Credit Act, is that a credit provider may not give notice to terminate a debt review process to the parties listed under this section within 60 (sixty) days after a consumer has applied for a debt review process,² even when such a consumer has defaulted on the agreements being reviewed. However, only where a consumer and a debt counsellor had acted expeditiously, efficiently or where there are justifiable grounds for the delays. A view on a section 129(1)(a) notice will also be presented.

6.2 The view on a section 129(1)(a) notice

It would be prudent to first give an opinion on the issuing of a section 129(1)(a) notice. The credit provider's indeed have to deliver a section 129(1)(a) notice to a consumer drawing the default to the attention of the consumer. A credit provider who has not issued a section 129(1)(a) notice must be precluded from enforcing a credit agreement. In *ABSA v Prochaska t/a Bianca Cara Interiors*³ the court correctly held that:

*“The credit provider is also precluded, by the provisions of s129(1)(b), from commencing any legal proceedings before first providing notice to the consumer, as contemplated by s86 (10)....”*⁴

The section 129(1)(a) notice is important as it informs a consumer of an alternative dispute resolution and “a plan to bring payments under the agreement to date”. The notice is according to the *Changing Tides* case preliminary to debt restructuring.⁵ Case law has advised that credit providers have to issue a section 129(1)(a) notice prior to debt enforcement. The notice will not be necessary where a consumer has taken steps to approach persons the notice would have advised the consumer to approach. The same was held in the *Taxi Securitisation v Nako*⁶ case. Since the issuing of a section 129(1)(a) notice prior to enforcement is now somewhat entrenched into our law there is no further need to discuss the topic further.

¹ National Credit Act 34 of 2005 (hereafter referred to as the Act).

² S86(10).

³ *Absa v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 D.

⁴ *Id* at par 28 -31.

⁵ *Changing Tides 17 (Pty) Ltd NO v Erasmus and another; Changing Tides 17 (Pty) Ltd NO v Cleophas and another; Changing Tides 17 (Pty) Ltd NO v Frederick and another (WCC) unreported case no. 18153/09, 12 November 2009* at par 30.

⁶ *Taxi Securitization v Nako and others* 19,21,22,77,89,104 and 842 (2010).

6.3 A perspective on the termination of a debt review process

The 60 day period provided for in the Act was meant to ensure that debt counsellors act efficiently and expeditiously with the application for debt review. In the *Changing Tide* case the court also stated that debt counsellors must act with expedition.⁷ It is suggested that the period was only intended to encompass the referral to a court within the period; but not the declaration of a consumer as over-indebted by the court. If the declaration through an order to be made by a court is also accommodated in the period, most of the cases referred to Magistrate's Courts will not be able to achieve the objects of the Act. One of the objects of the Act is to alleviate a consumer's credit burdens through debt re-arrangement.

The court in *Standard Bank v Kruger*⁸ held that the 60 day period commences on the day the consumer submitted an application to the debt counsellor.⁹ The interpretation will be counter-productive if consideration by the court forms part of the actions to be undertaken within the period. Once consumers are fully aware of the right to apply for debt review there will be a greater backlog of cases and the referral to courts will only be responded to at an even slower rate. The adverse consequences will be borne by a consumer who will see the debt review processes being terminated because of the expiry of the 60 day period and the enforcement of a credit agreement thereafter.

It is proposed that the termination of debt review processes and debt enforcement not be terminated after a proposal was referred by a debt counsellor to a Magistrate's Court, irrespective of whether the 60 day period has lapsed or not. However this should be exercised sparingly and only where the consumer and the debt counsellor have acted expeditiously to discourage unnecessary delays. Debt counsellors as a general rule should also have at least referred the proposal to a court within the 60 day period for consideration for a credit provider to be prevented from enforcing a credit agreement.

In *Firststrand Bank Ltd v Evans*¹⁰ it was held that the –

*“credit provider's rights to give notice in terms of s86(10) and to legitimately terminate the debt review process continues until the magistrate's court has made an order envisaged in s87”.*¹¹

It is suggested that the courts must use their discretion when considering the termination of debt review process. Courts must not readily allow a credit provider to exercise its right to enforce, regard must be had to any prevalent circumstances as held in *Wesbank v Papier* and *Standard Bank v Kruger*.

Roestoff¹² is also of the opinion that the –

⁷ *Ibid.*

⁸ *Standard Bank v Kruger* (unreported case number 45438/09 (GSJ)).

⁹ *Id* at par 7.

¹⁰ *Firststrand Bank Ltd v Evans* [2010] ZAECPHC 55 (31 August 2010).

¹¹ *Id* at par 20.

¹² Roestoff (2010)789 (my emphasis).

“court’s interpretation of section 86(10) that a notice to terminate in terms of section 86 (10) is not competent where a debt review matter has already been referred to the Magistrate’s Court for determination should be accepted”.

This interpretation according to Roestoff gives effect to the purpose of the Act. Furthermore Roestoff believes that *“debt enforcement of a credit agreement is disallowed whilst debt review proceedings in terms of section 86 or 87 are still pending”*. The view is correct and a credit provider must only be allowed to terminate the debt review process and then enforce a credit agreement where the consumer had delayed unreasonably or has instituted the review process merely to delay the enforcement of a credit agreement. A credit provider may also terminate the debt review process where a consumer was found not to be over-indebted, where the application for debt review was abandoned or rejected by the court.

In exceptional cases and in light of circumstances that have prevailed the credit provider must also be prevented from terminating and then enforcing a credit agreement even before a proposal was referred to the Magistrate’s Court. In *Firststrand Ltd t/a Wesbank v Sewsunker*¹³ the court also alluded to a need for the enforcement to be stayed even before referral to a court.¹⁴ The credit provider must be prevented where there are justifiable grounds for delays or where a court believes there are possibilities of a consumer being declared to be over-indebted had the proposal been considered. The approach is in line with the purposive interpretation of the Act, the purposes of which are, according to section 3 (g) to address and prevent over-indebtedness of consumers, and provide mechanisms for *“resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations”*. The Act aims to prevent over-indebtedness and to solve over-indebtedness through a consumer fulfilling its obligations. It is submitted that the Act when interpreted in a purposive manner, credit providers should not be allowed to terminate debt review processes. The reason is that the Act does not only aim to prevent over-indebtedness but to also afford consumers with opportunities to remedy defaults and to relieve themselves of over-indebtedness.

If there are justifiable grounds for delays courts must exercise their discretion by not allowing a credit provider to terminate a debt review process. Consumers may never be allowed to apply for debt review after a credit provider has enforced a credit agreement, unless a court decides otherwise. Credit providers must then be precluded from terminating and enforcing credit agreements after an application for debt review and a proposal from a debt counsellor have been referred to a Magistrate’s Court. Firstly, since the matter becomes *sub judice* after it has been referred to the Magistrate’s Court credit providers must not be allowed to terminate the debt review process and secondly, because consumers who are willing to remedy defaults must be given an opportunity to do so, irrespective of whether the 60 days period consumers have been given to have themselves declared over-indebted by the court, has lapsed or not.

Terminating a debt review process after referral to a court must be prevented by section 130 of the Act where reasonable efforts were made by a consumer and a debt counsellor to satisfy the consumer’s credit obligations. The legislator must insert a caveat that provides for exceptional cases,

¹³ *Firststrand Ltd t/a Wesbank v Sewsunker* [2011] JOL 26982 (KZP).

¹⁴ *Id* at par 25.

because the purpose of the Act in general and those listed under section 3(g) in particular must be taken into consideration at all times.

Courts must also re-instate terminated debt review process where this will benefit a consumer and possibly satisfy the expectations of all parties to a credit agreement. The ability to resume terminated debt reviews by the courts as per section 86(11) is a good tool to ensuring that consumers who are over-indebted are protected, to achieve the object of the Act. However, this protection is not enough. Courts need to always promote the purpose of the Act where a consumer and a debt counsellor have acted in good faith, expeditiously or where there are justifiable grounds for the delays.

6.4 Conclusion

It is perhaps important to conclude by quoting the presiding officer in *Changing Tides* case a better picture was painted when it was stated that –

“... the object of the provisions of s86(10) cannot be to permit a credit provider carte blanche, without good reason, to negate the operation and the effect of a debt review process instigated in terms of section 86(10).”

In the *Nako* case it was stated that where the debt review was expedited efficiently a credit provider may not terminate the review process. The *Papier* case held that –

“... it would be counter-productive to the whole purpose of the Act to allow a credit provider unilaterally to terminate the consumer’s protection at the time precise moment when he or she needs it the most.”¹⁵

In *Papier* it was said that allowing a credit provider to unilaterally terminate the protection will be like *“offering an umbrella to a consumer and taking it away when it starts raining”*.¹⁶ Terminating the debt review where a consumer is over-indebted or where there are prospects that such a consumer will be declared by the court as over-indebted is indeed like taking the umbrella away when it starts raining and such could not have been the intention of the legislator.

The interplay between section 129 (1)(a), 86(10) and 130 of the Act must always be considered. How the interplay manifests itself in a practical sense should be that a credit provider must not be allowed to enforce a credit agreement where such a credit provider had not issued a section 129(1)(a) notice drawing the default to the attention of the consumer. Where the consumer has taken steps to apply for debt review and / or where 60 days have not elapsed after a consumer had applied for debt review.

¹⁵ *Wesbank v Papier* at par 30.

¹⁶ *Ibid.*

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