

**WEIGHING THE RIGHTS OF CONSUMERS AGAINST CREDIT PROVIDERS –
ASPECTS OF DEBT REVIEW**

by

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Summary

The influence of the Nation Credit Act should not be underestimated as it has shifted the focus from contractual freedom between parties to protecting consumers. The Act changed the entire approach when contracting parties enter into credit agreements from initially doing so spontaneously, to now contracting with the utmost care whilst taking the protection of consumers into account.

The Act provides specific protection for consumers by enabling those who seek debt relief measures, to apply for a debt review order to restructure their debt by means of a court order or negotiation talks with credit providers. Although protection of consumers is much needed in today's economic climate the reality of the matter is that a valid agreement came into being between the consumer and the credit provider and by protecting the consumer and not enabling the credit provider to enforce its rights against a consumer brings an imbalance in the contractual relationship between the two parties.

This dissertation focuses on the balancing of rights between the consumer and credit provider in the event where the consumer applies for debt review and the credit provider terminates the debt review in order to enforce the agreement. Initially two schools of thought, with contradicting viewpoints, were formed with regards to this issue by means of case law and addressed the question whether the consumer or the credit provider's rights should be the determining factor when it comes to the enforcement of a credit agreement. The Supreme Court Appeal gave legal certainty on how the rights of the two parties need to be balanced by focussing on procedural correctness, good faith and honouring the agreement between the parties and giving absolute discretion to the courts in weighing the parties' rights and bringing them into balance.

Debt review is an improvement on previous debt relief measures in South Africa and especially in today's economic climate the debt review procedure enables consumers to financially survive over-indebtedness, however, the relief brought to consumers by the debt review process is not absolute as credit providers' rights need to be taken into account to balance the financial relationship between the two parties and will always have to take into account that a valid agreement came into being between a credit provider and consumer. Although the Act assists consumers

who find themselves in an over-indebted situation by possible restructuring of obligations, the credit provider's rights will have to be taken into account.

Although protection of the consumer is priority section 3(d) of the Act states that one of the purposes of the Act is to promote equity in the credit market between the credit provider and consumer and balancing their respective rights and responsibilities. Only by means of balancing the rights of consumers and credit provider's we will establish a sound credit market.

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WEIGHING THE RIGHTS OF CONSUMERS AGAINST CREDIT PROVIDERS – ASPECTS OF DEBT REVIEW

1 Introduction

The National Credit Act¹ (herein after referred to as “the Act”) replaced the Credit Agreements Act² and the Usury Act³ in June 2007, and applies to specific defined credit agreements⁴ in South Africa. The influence of the Act must not be underestimated. It has shifted the focus from contractual freedom between parties to protecting consumers from credit providers, and in essence protecting consumers from themselves. The Act changed the entire approach of contracting parties entering into credit agreements from initially doing so spontaneously, to now contracting with the utmost care due to the negative consequences credit providers are faced with.

The purposes of the Act are, *inter alia*, to

- (a) promote responsibility in the credit market by encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers;⁵
- (b) discourage reckless credit-granting by credit providers and contractual default by consumers;⁶
- (c) address and prevent over-indebtedness of consumers, and provide mechanisms for resolving over-indebtedness based on the principle of satisfaction of all financial obligations by consumers;⁷
- (d) promote equity in the credit market between the credit provider and consumer and balancing their respective rights and responsibilities.⁸

¹ Act 34 of 2005.

² Act 75 of 1980.

³ Act 73 of 1968.

⁴ S 4.

⁵ S 3(c)(i).

⁶ S 3(c)(ii).

⁷ S 3(g).

⁸ S 3(d).

To achieve these goals, different measures have been built into the Act that are aimed at preventing reckless credit-granting by the implementation of certain sanctions and debt relief measures to assist over-indebted consumers.⁹ The Act places a heavy burden on credit providers when contracting with consumers through strict regulations and provisions that the credit provider must adhere to in order to ensure the protection of consumers. The Act also provides a consumer with a new remedy known as debt review that provides an over-indebted consumer the option to apply for an order of court to reschedule his debt payments, to lighten the burden of over-commitment and to enable the debtor to adhere to his contractual obligations by completing the credit agreement over time as initially envisioned.

The credit provider's right to enforce a credit agreement has been severely limited and numerous provisions have been implemented by the Act to pause and limit the procedure of debt enforcement, specifically the credit provider's right to terminate debt review. It seems as if the scale is tipped in favour of over-indebted consumers when dealing with credit agreements by allowing a consumer time to weigh his options and plan a possible solution for his over-indebtedness. Debtors are however under the impression that they can manage their way out of their contractual liabilities by applying for debt review, and then demand protection from the Act when they so choose. This is in fact a grave misunderstanding of the Act and its goal to promote regulated credit to consumers. Although the Act provides consumers with debt review as a remedy on paper, it is important to determine the true nature of the remedy as the legislator intended it, and to understand its application in practice when the rights of a consumer that is under debt review are weighed against the rights of a credit provider to enforce a credit agreement.

Although the focus has shifted from the *pacta servanda sunt*-principle to the protection of consumers, the Act still has strict provisions as to when a debtor may apply for debt review, when and if such an order will be granted, and the role the credit provider's rights will play when it terminates a debt review. The question must be asked if the rights of both the credit provider and the consumer will be balanced when a credit provider terminates a debt review that has been referred to the Magistrate's Court.

⁹ Van Heerden in Scholtz (3rd ed) Guide to the National Credit Act (2008 – loose leaf) par 11-1.

The objective of this research will focus on the requirements consumers must adhere to in order to apply for debt review, the detailed process to be followed and if and when the debt review process may be lawfully terminated by a credit provider according to current case law. The question must be asked if the remedy provided to consumers is at the expense of financial institution's growth. It is evident that debt review is a heavy burden on both the economy and the financial prospects of credit providers. The rights of consumers under debt review and the credit provider's right to terminate debt review will be weighed against each other to determine if a balance can be found and what the future holds for both parties if these rights are not balanced.

The dissertation is structured in seven paragraphs to meet its objectives:

- (a) Paragraph two will refer to the application field of the Act, to determine what agreements will constitute a credit agreement because the Act only applies to agreements that classify as credit agreements. With specific regard to debt review as remedy, it is important to determine which credit agreements are applicable to debt review and therefore determine if the consumer will receive protection from the Act.
- (b) Paragraph three will give a brief overview of the debt review process in terms of the Act, referring to the requirements to be met by a consumer to apply for debt review, the process of application, and the rights and obligations that rest on a consumer when such an order is granted.
- (c) Paragraph four will address the rights of credit providers from a theoretical point of view, and determine when they may terminate a debt review process to enforce a credit agreement.
- (d) Paragraph five will focus on South African case law that addresses the interplay between the rights of over indebted consumers and the rights of credit providers, and how the courts weigh the two against each other.
- (e) Paragraph six will address the balancing of the consumer and credit provider's rights by comparing the two different schools of thought as established in the *Standard Bank v Kruger*- and *Taxi Securitisation v Nako*-case. Additional arguments will also be provided proving that the balancing of these rights is of the utmost importance.
- (f) Paragraph seven will give a conclusion of the above mentioned.

2 The National Credit Act: Field of application

2.1 General

Before discussing the application for the debt review process it is of the utmost importance to firstly determine when the Act finds application and when the remedy of debt review will be available to an over-indebted consumer. The Act defines credit agreements very specifically and sets out specific criteria as to when the Act will apply to which credit agreements. The Act further distinguishes between natural and juristic persons, and states that the debt review procedure is only available to natural persons. Thus, if the Act does not apply, the remedies cannot be used.

2.2 Credit agreements defined in terms of the Act

2.2.1 Definition of a Credit Agreement

As a general rule, the Act applies to specific credit agreements that were concluded or have an effect in the Republic, between a consumer and a credit provider dealing at arm's length.¹⁰ An agreement will be seen as a credit agreement in terms of the Act if it is a credit facility, a credit transaction, a credit guarantee or a combination of the aforementioned.¹¹

The Act has however been quite specific in defining each of the above mentioned concepts making it very clear which agreement will in fact be seen as a credit agreement.

If an agreement¹² is a credit facility, it entails that a

“(a) credit provider undertakes to

(i) supply goods or services and/or pay an amount or amounts, as determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and

(ii) either to

¹⁰ S 4(1).

¹¹ S 8(1).

¹² Irrespective of the agreement's form, this entails a credit agreement may be concluded orally or in writing – s 8(2).

- (aa) defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of an amount contemplated un subparagraph (i); or
 - (bb) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in subsection (i); and
- (b) any charge, fee or interest, is payable to the credit provider in respect of
- (i) any amount deferred as contemplated in paragraph (a)(ii)(aa); or
 - (ii) any amount billed as contemplated in paragraph (a)(ii)(bb) and not paid within the time provided in the agreement.¹³

The above mentioned definition of a credit facility refers to a contract of sale and purchase of movable goods on credit. The Act also includes money-lending transactions¹⁴ in its definition of a credit facility. The following agreements constitute credit transactions:

- (a) A pawn transaction.¹⁵
- (b) A discount transaction.¹⁶
- (c) An incidental credit agreement¹⁷, subject to the fact that the agreement will only be deemed an incidental credit agreement after the consumer has been in default for a period of 20 business days and a fee, charge or interest has been levied, or the higher of the initial quoted prices became applicable.¹⁸

¹³ S 8(3).

¹⁴ The Act applies to all forms of money-lending as long as it constitutes the lending of money and repayment thereof including interest and certain fees. Renke, Roestof and Haupt "The National Credit Act: New Parameters for the Granting of Credit in South Africa" 2007 *Obiter*, explains that money transactions include money loans in the most basic sense of the word and it also includes credit cards, personal loans, overdrawn cheque accounts *etc.*

¹⁵ A pawn transaction, irrespective of form, is an agreement wherein one party provides money or grants credit to the other party and in return takes possession of certain goods as security for the monies advanced. In cases where repayment of the money or grants are not made on the date as determined, the party in possession of those goods will be able to sell those goods and keep the profit to make up for his losses – s 1.

¹⁶ A discount transaction is an agreement, irrespective of form, that provides goods or services to a consumer over a period of time. Two prices are initially quoted for the services of which the lower price is applicable until a certain date. If the consumer does not complete payments by that time the higher price will be payable as the new monthly instalment for the services – s 1.

¹⁷ An incidental credit agreement, irrespective of its form, refers to goods and services that were either provided to the consumer on account or over a period of time. In the event where the consumer did not make payment as determined by the contract on a certain date or within a certain period, and a fee, charge or interest was levied, such an agreement becomes an incidental credit agreement. Another example is where two prices were initially quoted and the higher of the two becomes applicable if the consumer does not make payments within the determined period of time or date. In such a case the agreement becomes an incidental credit agreement – s 1.

¹⁸ S 5(2).

- (d) An instalment agreement.¹⁹
- (e) A mortgage agreement.²⁰
- (f) A secured loan.²¹
- (g) A lease agreement.²²
- (h) Any other agreement that does not fall within the definition of a credit facility or credit guarantee, but that does refer to payment of an amount owed by one person to another to which a fee, charge or interest is applicable in terms of the agreement or deferred amount.

In addition to the above mentioned credit agreements, two new categories of credit agreements are mentioned in the Act, namely “developmental credit agreements”²³ and “public interest credit agreements”.²⁴ Two characteristics are applicable to all the above mentioned credit agreements. The first is that the consumer is obligated to repay:

- (a) The amount borrowed or part thereof.
- (b) Costs or part thereof (with regards to goods and services).
- (c) Any deferred payment.

The second characteristic is that a fee, charge or interest is levied on the agreements.

¹⁹ An instalment agreement refers to the sale of movable property to which payment is deferred and payable over a certain period of time; the consumer obtains possession and use of the movable property once he receives it; ownership may pass only when payments are made in full or immediately, depending on the terms and conditions to the contract where a credit provider will protect its right to re-possess the property in the event where the consumer does not make payments as agreed; or where a fee, charge or interest is applicable to the agreement which is payable to the credit provider – s 1.

²⁰ A mortgage agreement is applicable to immovable property. In this case a consumer pledges the immovable property as security to the credit provider – s 1.

²¹ A secured loan, irrespective of form, refers to a person who advances another with money or grants credit to a person. The lender/granter in turn, receives a cession of a title of movable property or any other form of security against a thing of more or less the same value as the amount lent or granted. Instalment agreements are excluded from the definition of a mortgage agreement – s 1.

²² A lease agreement refers to temporary possession of immovable property for the consumer’s use for a predetermined amount. Charges, fees and interest can be levied against such a consumer who does not make payments as agreed. Ownership can pass to the consumer at the end of the term, depending on the conditions set out in the agreement – s 1.

²³ Subject to specific conditions, the definition includes educational loans; loans for the development of small businesses and low-income housing financing *etc.* – s 10.

²⁴ Specifically regarding natural disasters and related circumstances, the Minister may declare agreements to be defined as public interest credit agreements for the benefit of the public – s 11.

It is of the utmost importance to clearly determine what agreements will constitute a credit agreement because the Act only applies to agreements that classify as credit agreements. With specific regard to debt review as remedy, it is important to determine which credit agreements are applicable to debt review and therefore determine if the consumer will receive protection from the Act. The Act however has specific exclusions which will be addressed next.

2.3 Exclusions from the Act

As previously mentioned,²⁵ the Act only applies to credit agreements where the parties are dealing at arm's length and the Act will therefore not apply in the following instances:

- (a) A shareholder loan or other credit agreements between a juristic person²⁶ that is acting as the consumer, and a person representing the juristic person, who has controlling interest in the juristic person as the credit provider.
- (b) A loan to a shareholder or other credit agreement between a juristic person as a credit provider, and a person that has controlling interest in the juristic person as a consumer.²⁷
- (c) A credit agreement between natural persons that are in a family-relationship and who are dependent or co-dependant on each other.²⁸
- (d) Any other agreement where the parties are dependent on each other.

The Act goes further and determines that in the event where the state or any organ of state is a consumer with regards to a credit agreement, the Act and its principles and conditions will not apply.²⁹ The Act also does not find application in the event

²⁵ See par 2.2.1 above.

²⁶ A juristic person is defined by the Act as a partnership, an association or another body of persons which is part of a corporate structure or not, also including a trust if there are three or more individual trustees or in the event where a trustee itself is a juristic person. A stokvel is however explicitly excluded from this definition – s 1.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ S 4(1)(a)(ii) – (iii).

where the Reserve Bank of South Africa acts as the credit provider³⁰ or in the event where the credit provider is located outside of the borders of South Africa.³¹

The Act excludes certain juristic persons whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons,³² at the time when entering into the credit agreement³³ equals or exceeds R1million.³⁴ A further classification is made between large,³⁵ intermediate,³⁶ and small³⁷ agreements. In the event where a juristic person, whose asset value or annual turnover value at the time of entering into the agreement is below R1million, the Act will not find application.³⁸ With regards to small and intermediate agreements where the consumer is a juristic person has an asset value or annual turnover of less than R1million, the Act will only find limited application.³⁹

In the event where a cheque⁴⁰ is given as payment for goods and services, and payment of the cheque is refused, the debt that is still owed to the seller does not constitute a credit agreement and therefore the Act will not be applicable.⁴¹ Furthermore, the following agreements are explicitly excluded from the Act as they do not constitute credit agreements:

- (a) Insurance policies.⁴²
- (b) A lease of immovable property.⁴³

³⁰ S 4(1)(c).

³¹ S 4(1)(d).

³² Related juristic persons refer to a company or person that has control over another company, in part or in full – s 4(2)(d).

³³ This refers to the value at the time when the juristic person enters into the agreement – s (4)(2)(a).

³⁴ S 4(1)(a)(i) read with the Threshold Regulations, 2006.

³⁵ Refers to mortgage agreements or any other credit agreement, excluding pawn transactions, with a principle debt of R250 000 or above – s 9(4).

³⁶ Refers to a credit agreement where a credit facility with a limit above R15 000 or any other credit agreement, excluding pawn- and mortgage transactions, with a principal debt above R15 000 and under R250 000 – s 9(3).

³⁷ Refers to a pawn transaction, a credit facility with a credit limit below R15 000, any other credit agreement with a principle debt under R15 000, excluding mortgage agreements – s 9(2).

³⁸ S 4(1)(b).

³⁹ S 6.

⁴⁰ Or a similar form of payment.

⁴¹ S 4(5)(a). Same can be said for transactions where a seller accepts payment for goods and services from a buyer by means of a credit facility (eg, credit cards) in terms of which a third party (eg, financial institution) provides the credit. In the event where the third party refuses payment, the outstanding credit amount does not constitute a credit agreement.

⁴² In the event where the insurer provides credit to the insured to make premium payments, same will not constitute a credit agreement – s 8(2)(a).

⁴³ S 8(2)(b).

(c) An agreement between a stokvel⁴⁴ with its own specific rules.⁴⁵

The Act finds limited application in certain agreements,⁴⁶ for example only certain consumers may apply for debt review and be protected by the Act in the event where such a consumer is found to be over-indebted. Therefore it is of the important that every agreement should be deciphered and specifically defined to determine the application of the Act, if any. It can be concluded that, except for specific exclusions in full or in part, the Act applies to all credit agreements and after establishing that the Act does find application a consumer can obtain the protection of the Act. The procedure a consumer must follow to apply for debt review to obtain protection from the Act, if such a consumer is found to be over-indebted, will now be addressed.

⁴⁴ A formal or informal rotating financial scheme which consist of two or more persons who have pledged mutual support to the others belonging to the scheme. A capital amount is raised from each member of the stokvel by means of subscription and can be lent to the members on credit. The members can also share in the profit of the scheme and take part in the nomination of management of the scheme. The stokvel has its own specific rules and regulations that protect all its members.

⁴⁵ S 8(2)(c).

⁴⁶ Part D of the Act finds in some circumstances none or only limited application. Part D does not apply to credit agreements to which a juristic person is a party. Therefore, no juristic persons may apply for debt review – S 78(1). Furthermore, reckless credit and suspension of credit do not apply to the following agreements: a school or student loan, an emergency loan, a public interest credit agreement, a pawn transaction, an incidental credit agreement or a temporary increase in the credit limit under a credit facility – S 78(2).

3 A brief overview of the debt review process in terms of the National Credit Act

3 1 General

Debt review is a new concept to South Africa and credit legislation, and has had extensive consequences for consumers and credit providers alike. The process for a consumer to apply for debt review is a detailed one with many requirements and time frames that have to be adhered to. It is important that consumers familiarise themselves with the requirements to apply for debt review, as the consequences of non-compliance with the provisions and regulations of the Act will have dire repercussions.

3 2 Application of the Act in terms of debt review

The Act is clear as to which credit agreements it applies and which not, as previously mentioned,⁴⁷ and therefore, if the Act does not apply to a certain credit agreement, such an agreement cannot become part of an application for debt review and a consumer cannot rely on the protection of the Act for that specific agreement. It is therefore important that a debt counsellor determine if the Act is applicable to all the credit agreements that the consumer wants to place under debt review before he starts the application for debt review process which we will now discuss in detail.

3 3 Determining a consumer's over-indebtedness

A consumer is over-indebted if at a specific time, he is or will be unable to meet his financial obligations as required by the credit agreements he entered into.⁴⁸ Section 86(1) of the Act provides that a consumer may apply, with the assistance of a debt counsellor in the prescribed manner and form, to be declared over-indebted. Over-indebtedness is determined according to

⁴⁷ See par 2 2 1 above.

⁴⁸ S 79(1).

- (a) financial means, prospects and obligations,⁴⁹
- (b) probable tendency to timely satisfy all the obligations a consumer has under the credit agreements to which he is a party.⁵⁰

Take note that over-indebtedness does not only refer to a consumer's current inability to meet his financial obligations, but also the future possibility of meeting these responsibilities.⁵¹ After determining a consumer's financial means and prospects one must determine his financial obligations to establish if he is over-indebted or not. In order to determine the consumer's financial obligations, the value of the credit facility and/or the value of any credit guarantee will be the settlement value of that credit agreement. The settlement value of the applicable agreement indicates the total amount still payable to the credit provider by the consumer, and this amount will be used by the debt counsellor in his application for debt review for the consumer when determining a consumer's obligations.

In *Standard Bank of South Africa Ltd v Panayiotts*⁵² the court made it clear that a person's financial means does not only include income and expenses, but also all other forms of assets and liabilities. The reference to "prospects" not only includes prospects of improvements to a consumer's financial position, but also includes the liquidating of assets.⁵³ In *BMW Financial Services SA (Pty) Ltd v Donkin*⁵⁴ the court confirmed that debt review not only applies to a consumer's inability to meet monthly or occasional obligations regarding credit agreements, but it also applies to a situation where a consumer needs to settle a lump sum that has become payable.⁵⁵

It is clear that the Act includes all possible forms of income that a consumer has a right to receive and limits his obligations to agreements that are defined as credit

⁴⁹ A consumer's financial means, prospects and obligations includes: (a) income that the consumer has a right to receive regardless of its oftenest or origin; (b) the income of any other adult person within the consumer's immediate family or household with whom the insured shares his mutual income and financial obligations; (c) in the event where the consumer entered into a credit agreement for commercial purposes, the future revenue flow of that agreement will also form part of a consumer's financial means, prospects and obligations – s 78(3).

⁵⁰ S 79(1)(b).

⁵¹ S 79(1).

⁵² 2009 (3) SA 363 (W).

⁵³ 2009 (3) SA 363 (W) 366 E – F.

⁵⁴ 2009 (6) SA 63 (KZD).

⁵⁵ Van Heerden in Scholtz (ed) para 11.3.

agreements in terms of the Act and case law, as mentioned above.⁵⁶ It is therefore important for a debt counsellor to make sure that the correct financial statistics are used to determine whether a consumer is over-indebted. After determining the income and obligations of the consumer, the procedure for applying for a debt review starts that will now be discussed.

3 4 Process to follow in order to be placed under debt review

A consumer may apply for debt review by completing a Form 16, and a fee may be recovered by the debt counsellor from the consumer for this application.⁵⁷ A debt counsellor must then provide the consumer with proof of receipt of the application and notify all credit providers listed in the application, as well as every registered credit bureau in South Africa that the consumer is applying for debt review.⁵⁸ Notification to all of the relevant parties should be made within five business days⁵⁹ from when application was made to the debt counsellor by providing the relevant parties with a Form 17.1 via fax, registered mail or email.⁶⁰

The debt counsellor must verify the information provided to him by means of requesting documentary proof from the consumer. The debt counsellor must then contact the relevant credit provider, which is a party to a credit agreement with the consumer, to confirm the credit agreement and settlement amount, as well as the consumer's employer to confirm the consumer's salary.⁶¹ In the event that a credit provider fails to provide the debt counsellor with the correct information within five business days after it was requested, the debt counsellor may accept the information provided by the consumer as being correct.⁶²

⁵⁶ See par 2 2 1 above.

⁵⁷ S 86(3).

⁵⁸ S 86(4).

⁵⁹ Reg 24(2).

⁶⁰ Reg 24(5).

⁶¹ Reg 24(3).

⁶² Reg (4).

The debt counsellor must now do an assessment on the consumer and determine whether the consumer appears to be over-indebted or not,⁶³ this assessment must be done within thirty business days from date of application.⁶⁴

If the result of the assessment reasonably concludes that the consumer is

- (a) not over-indebted, the application must be rejected⁶⁵ and all credit providers and registered credit bureaus must be provided with a letter of rejection confirming the latter;⁶⁶ or
- (b) not over-indebted, but is finding, or is likely to find it problematic to satisfy his financial obligations, the debt counsellor may recommend that the consumer and the respective credit providers voluntarily attempt to come to a debt re-arrangement;⁶⁷ or
- (c) over-indebted, the debt counsellor compiles a proposal recommending that the Magistrate's Court make one or both of the following orders:
 - 1. One or more of the consumer's credit agreements be declared to be reckless credit if the debt counsellor has concluded that those agreements appear to be reckless; and/or
 - 2. One or more of the consumer's obligations be re-arranged.⁶⁸

Further hereto, the debt counsellor must send a Form 17.2 to all relevant credit providers and registered bureaus within five business days from date of this determination.⁶⁹ In the event where the consumer is found to be over-indebted the debt counsellor must issue a proposal recommending that the Magistrate's Court should restructure the consumer's debt.⁷⁰ The Magistrate's Court will conduct a hearing regarding the consumer's financial means, prospects and obligations

⁶³ S 86(6)(a).

⁶⁴ Reg 24(6).

⁶⁵ S 86(7)(a).

⁶⁶ Reg 25.

⁶⁷ S 86(7)(b).

⁶⁸ This is done by extending the period of the agreement and reducing the amount of each payment due accordingly; postponing during a specified period the dates on which payments are due under the agreement; extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement or recalculating the consumer's obligations because of an unlawful agreement or a disclosure, form and effect of credit agreement violation or a violation of collection and repayment practices - s 86(7)(c)(i)-(ii).

⁶⁹ Reg 24(10).

⁷⁰ S 86(7)(c).

together with the proposal as submitted by the debt counsellor, and make an order⁷¹ accordingly. Following the court's order, the debt counsellor must notify the relevant credit providers and credit bureaus thereof.⁷² A clearance certificate must be issued to the consumer by the debt counsellor if the consumer has fully satisfied all the debt obligations under every credit agreement that was subject to the debt re-arrangement order or agreement, in accordance with that order or agreement.⁷³

3.5 Effect of debt review or a re-arrangement order or agreement

By filing an application for debt review, the consumer may thereafter not conclude any other credit agreements with a credit provider⁷⁴ until one of the following takes place:

- (a) The debt counsellor rejects the consumer's application for debt review⁷⁵ and the consumer fails to obtain leave from the Magistrate's Court within the prescribed time period to file an application directly to the court.⁷⁶
- (b) The court determined that the consumer is not over-indebted and the proposal by the debt counsellor to restructure the consumer's debts is rejected.⁷⁷
- (c) The consumer fulfils his obligations in terms of all his credit agreements.⁷⁸

It is clear that when a consumer has filed an application for debt review one of the conditions mentioned above needs to be fulfilled before a consumer will be able to apply for credit again.

⁷¹ In this instance the court may make an order rejecting the application; declaring that any of the agreements applicable to the proposal constitutes reckless credit; re-arrangement of the consumer's obligations or both of the last mentioned – s 87(1).

⁷² Form 17.2 as prescribed form according to Schedule 1 of the Act.

⁷³ Sec 71 read with reg 27.

⁷⁴ Excluding consolidation agreements – s 88(1).

⁷⁵ S 88(1)(a).

⁷⁶ S 86(9).

⁷⁷ S 88(1)(b).

⁷⁸ This refers to a consumer that fulfils all his obligations in terms of a court order or where the consumer and the credit provider have agreed to a re-arrangement of debt, unless the consumer fulfils his obligations by means of a consolidated agreement.

3 6 Commencement of debt review

3 6 1 General

The Act provides that a consumer may not apply for debt review in the event where a credit provider has already proceeded to take legal steps to enforce a specific credit agreement against the consumer.⁷⁹ It is therefore important to clarify when the debt review process commences and what requirements should be met by both the consumer and the debt counsellor to prove that a valid application for debt review was submitted.

3 6 2 The importance of a commencement date

In the *BMW Financial Services (SA) (Pty) Ltd v Donkin*⁸⁰ case multiple questions were addressed including a confirmation as to when exactly a debt review starts. In this case the credit provider was of the opinion that they have already instituted action against the consumer to enforce the agreement and therefore the alleged application for debt review was invalid. In what follows herewith, a detailed look at the merits of the case, focussing on what information is required to bring a valid application for debt review.

3 6 2 1 Facts

In this case the defendant defaulted on numerous payments, and after notice was delivered to the defendant in terms of section 129 and no response was received from the defendant, the plaintiff took legal steps as provided for in the Act. The agreement was cancelled on 11 September 2008 and summons was issued on 25 November 2008 by the plaintiff to confirm the cancellation of the credit agreement between itself and the defendant, delivery of its asset (a vehicle) and payment of the difference between the outstanding amount and the greater of the vehicle's market value or selling price, interest and cost of suit. The defendant filed a notice of

⁷⁹ S 86(2).

⁸⁰ 2009 (6) SA 63 (KZD) 63.

intention to defend, where after the plaintiff brought an application for summary judgement which was refused and the matter was placed on the expedited roll.

The defendant confirmed that she contacted a debt counsellor on 25 November 2008 and provided him with her identity number, physical and postal addresses, telephone numbers, and the name of her employer, where after the debt counsellor confirmed to her that she was about 60% over-indebted. A meeting was scheduled for 4 December 2008 on which date the defendant was to submit the relevant documentation to complete that application for debt review. Only on 18 December 2008 did the debt counsellor notify all relevant parties of the defendant's application for debt review.

3 6 2 2 Judgment

Legal steps were taken on 25 November 2008 by the plaintiff. Although the defendant contacted the debt counsellor on 25 November 2008, no valid application for debt review was brought until 4 December 2008, therefore the plaintiff was entitled to cancel the contract and this specific credit agreement did therefore not form part of the debt review process.

3 6 2 3 Ratio

Although the consumer gave some of the required information to the debt counsellor, the court stated that regulation 24(1)(b) states clearly what information is required to bring a valid application for debt review. All of the following must be provided to a debt counsellor to bring a valid application for debt review:

- (a) A completed Form 16.
- (b) Or the following information:
 - (i) Personal details.⁸¹

⁸¹ This includes a consumer's name (initials and surnames); identity number (if the consumer does not have an identity number, the passport number and date of birth); postal and physical addresses; and contact details.

- (ii) All income, inclusive of employment income and other sources of income.⁸²
 - (iii) Monthly expenses.⁸³
 - (iv) A list of all debts, stating the monthly commitment, the total outstanding balance, the original amount and the amount in arrears (if applicable).⁸⁴
 - (v) All living expenses.⁸⁵
 - (vi) A declaration and undertaking to commit to the debt restructuring.
 - (vii) A consent that credit bureaus checks may be done.
 - (viii) Confirmation that the information is true and correct.
- (c) Submit the documents specified in Form 16.
- (d) Payment of the debt counsellor's fee, if any.

The court stated that the required information as mentioned above will be captured on Form 16, but it further requires the consumer to attach proof of income and a certificate of balance of all debt obligations so that the debt counsellor may verify the information. Wallis J confirmed that the information as mentioned above is essential in applying for a debt review, and non-compliance therewith does not constitute a valid application for debt review. The information provided by the consumer must clearly identify the consumer and confirm his or her entire financial position before the application will be valid.⁸⁶

The information that the defendant provided telephonically to the debt counsellor on 25 November 2008 was essential information to identify the defendant, however the

⁸² All forms of income must be specified.

⁸³ This includes, but is not limited to taxes; unemployment insurance fund; pensions; medical aid; insurance; court orders; and or any other expenses.

⁸⁴ This includes, but is not limited to home loans; furniture retail; clothing retails; personal loans; credit cards; overdrafts; educational loans; business loans; car finances and leases; sureties signed and any other form of debts.

⁸⁵ This includes, but is not limited to groceries; utilities and continuous services; school fees; transport costs and any other form of living expense.

⁸⁶ 2009 (6) SA 63 (KZD) 17 – 18.

financial position of the consumer could not be established at all and therefore no valid application was made by the defendant on 25 November 2008. The defendant only complied with regulation 24(1)(b) on 4 December 2008, more than five days after the initial telecommunication between her and the debt counsellor.

It is vital that both the debt counsellor and the consumer are aware of what the requirements are to bring a valid application for debt review. If there is non-compliance specifically with regulation 24(1)(b), the application for debt review does not come into being and the effect of such non-compliance can have dire repercussions for the consumer. The protection that the Act gives consumers is then unfortunately not available to that consumer.

3.7 Conclusion

A valid application for debt review firstly protects a consumer by buying him some time. From the date of application for debt review, a credit provider cannot institute legal action for a 60 business day period. During this time a debt counsellor can prove a consumer's over-indebtedness, apply to the Magistrate's Court, and propose to restructure a consumer's debt or declare certain agreements as reckless credit. In effect the consumer calls a time out and he can now determine which options are available to him and from which options he will benefit most.

Secondly, the Act gives a credit provider the option to terminate⁸⁷ debt review, but the Act also makes it very clear that if the credit provider terminates a debt review the matter can be referred back to court to make a final decision.⁸⁸ The consumer still finds protection in the fact that the courts will have the last say before a credit provider enforces a credit agreement. The question that we now have to answer is to what extent the Act protects a consumer and when can a credit provider terminate this protection to enforce the agreement that the consumer willingly entered into. The rights and obligations of the credit provider with regards to the enforcement of a credit agreement by terminating a consumer's debt review will now be discussed.

⁸⁷ S 86(10).

⁸⁸ S 86(11).

4 Termination of the debt review process and enforcement of credit agreements

4.1 General

A credit provider may still enforce a credit agreement even if such an agreement forms part of a debt review. Section 86(10) of the Act gives a credit provider the right to terminate a debt review in the case where a consumer is in default of his payments.⁸⁹ The requirements to be met by a credit provider to terminate a debt review will now be discussed.

4.2 Requirements prior to termination of debt review

Where a consumer has defaulted under a credit agreement, the credit provider cannot enforce the agreement before he has not brought the default to the attention of the consumer.⁹⁰ The notice, referred to as a section 129(1)(b) notice, serves as a written notification to the consumer that he is in default of the credit agreement and that the credit provider is now taking the first step to enforce the credit agreement.⁹¹ In the event where a credit provider has notified the consumer of his enforcement of the credit agreement, a consumer can then no longer apply for debt review for that specific agreement, although he can still apply for debt review with regard to other credit agreements where the credit provider has not yet taken steps to enforce them.⁹²

A further requirement that has to be met by the credit provider, and read together with section 129(1)(b) of the Act, is section 130, which provides that a credit provider may only enforce a credit agreement if the consumer has been in default for about twenty business days⁹³ and the notice of default must be delivered to the consumer within at least ten business days prior to the enforcement.⁹⁴ If the credit provider does not meet these requirements and adhere to the prescribed timelines as the Act

⁸⁹ No other provisions or regulations that are mentioned in the Act refer to the termination of a debt review.

⁹⁰ S 129(1)(b).

⁹¹ The court made it clear in the *Nedbank v National Credit Regulator and Another* unreported SCA case no. 662/2009 and 500/2010, par 14 that section 129(1)(a) forms part of “taking legal steps to enforce a credit agreement” and therefore, once a consumer has received this notification the applicable agreement cannot be referred to a debt counsellor for debt review purposes as at that stage, it can be said, it is too late.

⁹² Van Heerden in Scholtz (ed) at par 11.3.3.2(f).

⁹³ S 130(1).

⁹⁴ With regards to a section 86(9) notice and a section 129(1) notice – s 130(1)(a).

provides, a credit agreement on which a consumer has defaulted cannot be enforced.

With reference to the termination of a debt review by a credit provider, section 129(1)(b) states that in the event where a debt review is still in process in terms of section 86 of the Act, the credit provider has a right in terms of section 86(10) to terminate the debt review and enforce the agreement by giving written notice to the consumer of his

- (a) default in terms of the credit agreement;
- (b) the termination of the debt review by the credit provider;
- (c) the enforcement of the credit agreement by the credit provider.

The notice procedure, be it section 129(1)(b) or section 86(10), is the first step⁹⁵ the credit provider must take before he proceeds with the litigation procedure to enforce a credit agreement.⁹⁶

4.3 Termination of debt review

Section 86(10) states the following:

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

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

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

Apart from section 86(10), the Act has no other requirements for the credit provider to meet in order to terminate a debt review. The four main requirements can be summarized as follows:

- (a) The consumer must have defaulted on payment under the credit agreement.
- (b) Such an agreement must currently be under the debt review process.

⁹⁵ *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512.

⁹⁶ This refers to a credit provider issuing summons against the consumer. It is however important to mention that a summons will be prematurely issued if the notice in terms of section 129(1)(b) or 86(10) was not delivered to the consumer as the Act provides.

- (c) Termination may only be issued after 60 business days have elapsed since the application for debt review was brought.
- (d) Notice of the termination must be given in the prescribed manner and to the relevant parties as mentioned above.

It appears that a debt review does not automatically prescribe after a specific time or event, and that pending debt review can in fact be terminated in terms of section 86(10).⁹⁷

It appears further that the Act does not prescribe or specify in what manner the credit provider should give notice to the consumer of the termination of debt review. It is however submitted that notice of termination should take the following format:

“To: The consumer (address)

To: The debt counsellor (address)

And To: The National Credit Regulator (address)

Notice to terminate Debt Review in terms of section 86(10) of the National Credit Act 34 of 2005

Take notice that (Credit Provider) hereby gives notice to terminate the debt review in respect of (credit agreement account number) which application for debt review was made on (date). It is recorded that the consumer is in default with his obligations under the credit agreement and that at least 60 business days had elapsed since the date on which application for debt review was made. Further, note that the credit provider will be entitled to institute enforcement steps on the lapse of 10 business days after delivery of this notice.

Credit Provider (contact details).”⁹⁸

Even though the credit provider has the right to terminate a debt review it does not necessarily bring the debt review process to a halt. The consumer may still receive debt relief in terms of section 86(11).

4 4 Reinstatement of a debt review

In the event where a credit provider gave notice to terminate the debt review and proceeds to enforce that agreement as contemplated in Part C of Chapter 6, the Act provides that the Magistrate’s Court hearing the matter may order that the debt review be reinstated if the court finds it reasonable and just to do so. The court can

⁹⁷ Van Heerden in Scholtz (ed) at par 11.3.3.2(f).

⁹⁸ Van Heerden in Scholtz (ed) at par 11.3.3.3.

reinstate the debt review on any condition it deems fit.⁹⁹ Section 86(11) serves as a safety net for consumers. In the event of a credit provider terminating the debt review, the court can still evaluate the merits of the case and make an appropriate order to either enforce the credit agreement as envisioned by the credit provider, or to resume the debt review.

4.5 Instances that may influence termination of a pending debt review

According to Van Heerden and Coetzee¹⁰⁰ certain instances may occur that may influence the termination of debt review:

- (a) Insufficient information is supplied to the debt counsellor.¹⁰¹
- (b) Form 17.1¹⁰² is not delivered as required.¹⁰³
- (c) Form 17.2¹⁰⁴ is not delivered as required.¹⁰⁵
- (d) The debt counsellor did not make any recommendation to the Magistrate's Court after determining whether the consumer is over-indebted or not.¹⁰⁶
- (e) The proposal compiled by the debt counsellor turns negative.¹⁰⁷

⁹⁹ S 86(11).

¹⁰⁰ 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" 2011 PER 56.

¹⁰¹ As confirmed in *BMW Financial Services (Pty) Ltd v Donkin* 2009 (6) SA (KZD) at 73-74 the court made it clear that by not providing the debt counsellor with sufficient information it can influence the calculation of 60 business days. Therefore, if a consumer does not provide the debt counsellor with the required information as determined by the court in the last mentioned case, a consumer will not receive the protection of the Act.

¹⁰² Refers to the notification to all credit providers and registered credit bureau's confirming that the consumer has applied for debt review.

¹⁰³ A debt counsellor must notify all the relevant parties within five days after a consumer has applied for debt review. In the event where a credit provider does not receive notice of the application for debt review and issues a section 129(1)(b) to enforce the credit agreement while the consumer is in fact under debt review, it can cause unnecessary legal costs to determine whether the notification was in fact given to the credit provider, and further the court will be in a position to refer the case to first attend to the consumer's over-indebtedness.

¹⁰⁴ Refers to the notification to all credit providers and registered credit bureau's confirming the determination the debt counsellor has made regarding the consumer's over-indebtedness.

¹⁰⁵ If the credit provider never receives the debt counsellor's determination regarding the consumer's over-indebtedness, the credit provider can wait for the 60 business day period to elapse and terminate the debt review accordingly.

¹⁰⁶ In the event where the debt counsellor does not give notice to the credit provider that the matter has been referred to the Magistrate's Court, the credit provider must wait for the 60 business day period to lapse and thereafter he may terminate the debt review and enforce the credit agreement.

(f) Other related problems.¹⁰⁸

The above mentioned factors will play a determining role when a credit provider terminates a debt review to enforce a credit agreement and the Magistrate's Court need to evaluate all the merits, the court will take same into account. These factors will serve as support to justify the credit provider's termination of the debt review.

4 6 When can a credit provider terminate a debt review – legislative provisions

The Act provides that in the event where a credit provider receives notification of court proceedings relating to reckless credit,¹⁰⁹ allegations of over-indebtedness¹¹⁰ or an application for debt review,¹¹¹ he may not institute legal action¹¹² to enforce that credit agreement until¹¹³

- (a) notice was properly given to the consumer in terms of section 129(1)(b) or section 86(10);
- (b) the consumer defaulted on payments under the credit agreement;¹¹⁴
and
- (c) either one of the following has occurred:
 - (i) An event contemplated in subsection 88(1)(a) to (c);¹¹⁵ or
 - (ii) The consumer defaults on a re-arranged agreement as agreed to by himself and the credit provider, or with regards to an order by a court or the Tribunal.¹¹⁶

¹⁰⁷ In some cases the proposal compiled by the debt counsellor turns negative. Such a negative offer does not constitute a valid proposal, as one of the objectives of the Act is to ensure that a consumer will eventually satisfy all of his obligations. A negative proposal does not correlate with this objective at all.

¹⁰⁸ Refers to any form of abuse of the process. 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" 2011 PER 60 mentions the following: the number of times a consumer may apply for debt review is not limited; can a consumer who's debt review was terminated but no enforcement actions have been taken, apply for debt review afresh etc.

¹⁰⁹ S 83.

¹¹⁰ Includes any proceedings where a credit agreement is being considered and the consumer under that agreement alleges that he is over-indebted – s 85.

¹¹¹ S 86(4)(b)(i).

¹¹² By instituting legal action or any other judicial process any right or security – s 88(3).

¹¹³ S 88(3).

¹¹⁴ S 88(3)(a).

¹¹⁵ The debt counsellor rejects the consumer's application for debt review and the consumer fails to obtain leave from the Magistrate's Court within the prescribed time period to file an application directly to the court; the court determined that the consumer is not over-indebted and that the proposal by the debt counsellor to restructure the consumer's debts is rejected; the consumer fulfils his obligations in terms of all his credit agreements.

Section 88(3) of the Act provides that a credit provider can only enforce a credit agreement if one of the above mentioned instances occurs. The question must be asked whether a credit provider can still terminate the debt review if a debt counsellor received an application for debt review, determined that the consumer is in fact over-indebted, made a recommendation to the Magistrate's Court and awaits the matter to be heard by court, the question must be asked if a credit provider can still terminate the debt review when all of the above is applicable. The court was forced to give clarity on this issue and questions relating thereto.¹¹⁷

¹¹⁶ S 88(3)(b)(ii).

¹¹⁷ Case law was divided on the question whether a debt review can be terminated once a debt counsellor made his determination and referred the matter to the Magistrate's Court with a valid recommendation, but before the matter is actually heard - Van Heerden in Scholtz (ed) par 11.3.3.3.

5 Termination of a debt review after it has been referred to the Magistrate's Court

5 1 General

Although the Act has certain provisions on when a credit provider may enforce a credit agreement, there is only one condition applicable to when a credit provider may terminate a debt review. Section 86(10) states that a credit provider can only terminate after the 60 day period has expired.

After the 60 business day period has expired and the debt counsellor has made a determination whether the consumer is in fact over-indebted or not; the matter was referred to the Magistrate's Court with the required recommendations by the debt counsellor and the parties are awaiting the matter to be heard by the court, the question remains whether the credit provider may at that stage still terminate the debt review and enforce the credit agreement.¹¹⁸ Hereafter this issue will be addressed by referring to relevant case law where two schools of thought (that had contradicting views on the matter) were formed. The Supreme Court of Appeal assessed both of these schools of thought and finally settled the matter clarifying the court's stance thereon in 2011.

5 2 Debt review may not be terminated once referred to the Magistrate's Court

5 2 1 *Standard Bank v Kruger*¹¹⁹ ; *Standard Bank v Pretorius*

5 2 1 1 Facts

This matter involves an application for summary judgment between Standard Bank of South Africa Limited (herein after referred to as "the applicant") and W H Kruger and T L Pretorius (herein after referred to as "the respondents"). The applicant granted a loan to the respective respondents and registered mortgage bonds against the title deeds of the respective properties.¹²⁰

¹¹⁸ 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" 2011 PER 60 - 61.

¹¹⁹ 2010 JOL (GSJ).

¹²⁰ 2010 JOL (GSJ) at par 1 and 2.

Both the applications needed to specifically address the proper interpretation of section 86(10) of the Act and whether a credit provider may terminate a debt review after a debt counsellor has referred the matter with recommendations to the Magistrate's Court for consideration.

The applicant had terminated the respective debt reviews of the respondents in terms of section 86(10) due to their initial defaults in terms of the respective mortgage bonds. Both respondents admitted their indebtedness to the applicant as alleged by die applicant in the summonses received by the respondents. However, both respondents raised the same defences by stating that they were over-indebted and therefore referred the matter to a debt counsellor. It was common cause that the respondents referred the matter to the respective debt counsellors prior to the legal action that was instituted against them.¹²¹

The applicant terminated the respective debt reviews as prescribed by the Act, due to the fact that the respondents defaulted on the payments in terms of the mortgage bond. The respondents denied that the termination of their respective debt reviews was lawful and that same was done prematurely, as the application for debt review was done within the 60 day period as required in section 86(10) of the Act. The matter had been referred to a Magistrate's Court and was yet to be finalized. They further argued that the termination is a violation of section 130 of the Act.¹²²

5 2 1 2 Legal questions

The legal questions that the court needed to address in this case was whether

- (a) section 86(10) of the Act empowers a credit provider to terminate the debt review where a counsellor has referred the matter to the Magistrate's Court, with recommendations;
- (b) section 130(4)(b) of the Act is applicable where the applicant has failed to comply with section 86(10) of the Act.¹²³

¹²¹ 2010 JOL (GSL) at par 4.

¹²² 2010 JOL (GSL) at par 7.

¹²³ 2010 JOL (GSJ) at par 9.

5 2 1 3 Judgment

A credit provider may not terminate a debt review once it has been referred to the Magistrate's Court.¹²⁴

5 2 1 4 Ratio

The court started to address the matter by firstly referring to the purpose of the Act as confirmed in section 3 thereof, stating that the Act should promote and protect consumers. The court stated that the Act must give effect to this core purpose and be interpreted accordingly.¹²⁵ The court further stated that when reading section 86(10), the termination of a debt review referred to in section 86 specifically mentions the words "that is being reviewed in terms of this section". A credit provider's right to terminate a debt review in terms of section 86(10) will therefore only apply if section 86 applies, and once a matter is referred to the Magistrate's Court, section 86 is no longer applicable and section 87 (which regulates the referral of a debt review to the Magistrate's Court), then applies. A credit provider can therefore not terminate a debt review once same has been referred to the Magistrate's Court, and the court explicitly confirmed that any termination of the review, in terms of section 86(10), would be unlawful.¹²⁶

The court further stated that it is not the Magistrate's Court that is required to make a determination at least 60 business days from the date on which the consumer applied for the review in terms of section 86(1) of the Act, but rather the debt counsellor. In other words, should the counsellor fail to conclude the debt review within 60 business days from the date on which the consumer applied for the debt review, a credit provider would be entitled, in terms of section 86(10) of the Act, to give notice to terminate the debt review in the prescribed manner to the relevant parties.¹²⁷

The court also addressed the role that section 129 of the Act played when the termination of a debt review in terms of section 86(10) was applicable. Mr Van der

¹²⁴ 2010 JOL (GSL) at par 30.

¹²⁵ 2010 JOL (GSL) at par 11.

¹²⁶ 2010 JOL (GSL) at par 13.

¹²⁷ 2010 JOL (GSL) at par 17.

Merwe appeared on behalf of one of the respondents, and stated that section 129 becomes incompetent once the debt review has been referred to the Magistrates' Court. Section 129 states the required procedures before debt enforcement as:

- “(1) If the consumer is in default under a credit agreement, the credit provider-
- (a) May draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
 - (b) Subject to section 130(2), may not commence any legal proceedings to enforce the agreement before:
 - (i) First providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and
 - (ii) Meeting any further requirements set out in section 130.
- (2) 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.”

It is clear according to section 129(2) that a credit provider may not start to enforce the credit agreement once the matter has been referred to the Magistrate's Court with the intention to restructure debt by means of an order, or to any proceedings that may result in such an order.¹²⁸ Section 129(1) can only be executed if the provision of section 129(2) does not apply.

The court concluded that the above mentioned arguments are good in law and that once a debt review has been referred to court a credit provider may not terminate the debt review in terms of section 86(10) and is therefore declared invalid with no force or effect.¹²⁹

The court made the following statement:

“I am of the view that any contrary interpretation in terms of which a credit provider would be entitled to terminate the debt review process after a period of 60 days, despite it having been referred to a magistrate's court, would lead to an absurdity in that any delay by any party to such application, any delay occasioned at the instance of the court or even any delay due to unforeseen circumstances would deprive the consumer of the opportunity to have the matter properly determined by that court.”¹³⁰

5 3 Debt review can be terminated once referred to the Magistrate's Court

¹²⁸ 2010 JOL (GSL) at par 26.

¹²⁹ 2010 JOL (GSL) at par 27.

¹³⁰ 2010 JOL (GSL) at par 15.

5 3 1 *SA Taxi Securitisation (Pty) Ltd v L S Nako and Others*¹³¹

5 3 1 1 Facts

The applicant in this matter applied for summary judgement against the respondents and all of the applications were opposed. It was common cause between the parties that the applicant provided financing for taxis, to the respondents, however all of the respondents fell in arrears with the payments. All of the respondents applied for debt review with their respective debt counsellors for a debt restructuring order in terms of the Act. After the 60 business day period (in terms of section 86(10)) lapsed and the 10 day period (as per section 130(1)(a)) lapsed, the applicant cancelled the agreements and thereafter issued summons to institute legal action to confirm the cancellation of the agreements, return of the vehicles, damages and cost of suit.

The respondents entered into appearance to defend, and opposed the applications for summary judgement with two alleged *bona fide* defences, namely that the agreements constituted reckless credit and that their respective debt reviews were already referred to the Magistrate's Court for a debt restructuring order. The respondents further disputed the fact that the notice in terms of section 129(1) of the Act was received by them, and they alleged that their applications for debt review were referred to the Magistrate's Court in terms of section 87 of the Act. The respondents therefore requested that the debt review process should resume in terms of section 86(11) of the Act.¹³²

5 3 3 2 Legal question

The court confirmed that he was called to determine, among other things, whether a credit provider's rights would be limited if the debt reviews were terminated validly once the matter has been referred to the Magistrate's Court in terms of section 87 of the Act.¹³³

¹³¹ Unreported SGJ, Case number 19, 21, 22, 77m 89, 104 and 842/2010.

¹³² Unreported SGJ, Case number 19, 21, 22, 77m 89, 104 and 842/2010 at par 4.

¹³³ Unreported SGJ, Case number 19, 21, 22, 77m 89, 104 and 842/2010 at par 5.

5 3 3 3 Judgment

Application for summary judgement granted.¹³⁴

5 3 3 4 Ratio

Both the applicant and the respondents' counsel mainly based their respective arguments on the *SA Taxi Securitisation (Pty) Ltd v Mbatha*-case,¹³⁵ and the *Changing Tides*-case.¹³⁶ Counsel for the respondents argued that the *Changing Tides*-case provides conclusive law as it prohibited a credit provider to terminate a debt review once it was referred to a Magistrate's Court in terms of section 87. Counsel relied on the dictum by Binns Ward AJ that stated it would generally be improper for a credit provider to give notice to terminate a debt review if the application for debt review is currently pending before a Magistrate's Court and being attended to with reasonable efficiency. The court stated that the purpose of the termination clause of section 86(10) cannot be to give the right to a credit provider to terminate a debt review without good reason.¹³⁷

The court stated further that it should be kept in mind that the *Changing Tides*-case dealt with a dispute regarding the defendants' homes, and in such circumstances the bar is set higher against the applicant. Whilst a matter is pending before a Magistrate's Court it could be seen as inappropriate¹³⁸ if a credit provider gave notice in terms of section 86(10) to terminate the debt review seeing that the matter could already be pending in another court for an application for debt review and it would be expected that the credit provider pause the termination of the debt review until the pending application for debt review is settled. However, it does seem unfair to deny the credit provider its right to enforce the agreement against the consumer if the consumer did not adhere to his contractual obligations. The court went further and stated that the purpose of the notice by a credit provider in terms of section 86(10) of the Act is to enable the consumer and/or his debt counsellor to urgently bring an application to the Magistrate's Court in terms of section 86(11) of the Act and to

¹³⁴ Unreported SGJ, Case number 19, 21, 22, 77m 89, 104 and 842/2010 at par 45.

¹³⁵ 2011 (1) SA (GSJ).

¹³⁶ *Changing Tides 17 (Pty) Ltd NO v Frederick and Another* (WCC) Unreported case no 18153/09.

¹³⁷ At par 30, referring to a credit provider's right to cancel in terms of s 86(10).

¹³⁸ At par 24 and 30.

enable a magistrate to evaluate the application for debt review by the consumer on the one hand, and the termination of the debt review by the credit provider on the other and weighing the two against each other to make an appropriate order.

The court stated that in the *Changing Tides*-case the court seemed to recognize the right of a credit provider to validly terminate a debt review and proceed to enforce the credit agreement and that the comments regarding the fact that the last mentioned is deemed to be inappropriate can be seen as *obiter dictum*. The court defined the purpose of the Act as to promote and protect consumers¹³⁹ but stated the following regarding the other objectives of the Act that should also be taken into consideration:

“The Act has many other objectives, among them to provide for the promotion of responsible credit granting, with all of the complexities that entails. To interpret the Act through the lenses of “the promotion and protection of consumers” is with respect to lose sight of the other objectives of the Act and to load the bias in favour on consumers unfairly against the rights of the credit providers and ultimately, to potentially prejudice the rights of consumers, as their well-being and accessibility to credit is premised on a healthy and profitable industry.”¹⁴⁰

The court stated that the judgment in the *Standard Bank v Kruger*-case lost sight of the provisions¹⁴¹ of section 86(11) which provides that a matter where a credit provider gives notice to terminate a debt review and proceeds to enforce that agreement may be referred to the Magistrate’s Court that can order that the debt review resume on any conditions the court considers to be just in the circumstances.

In order for a Magistrate’s Court to hear an application for debt review in terms of section 87 a proposal must be compiled by the debt counsellor in terms of section 86. To argue that section 86(10) and section 87 is not contextually linked as the court stated in the *Standard Bank v Kruger*-case¹⁴² loses sight of the fact that the section 87 procedure is based on a proposal made in terms of section 86 and also loses sight of the protection expressly afforded to the consumer in terms of section 86(11).

The court made an important observation and stated that one must always balance the rights and obligations of consumers with those of credit providers.¹⁴³ Due to the fact that both parties entered into a valid contract the credit provider is entitled to

¹³⁹ Unreported SGJ, Case number 19, 21, 22, 77m 89, 104 and 842/2010 at page 5 par 10.

¹⁴⁰ Unreported SGJ, Case number 19, 21, 22, 77m 89, 104 and 842/2010 at par 38.

¹⁴¹ Unreported SGJ, Case number 19, 21, 22, 77m 89, 104 and 842/2010 at par 42.

¹⁴² 2010 JOL (GSJ) at par 13.

¹⁴³ Unreported SGJ, Case number 19, 21, 22, 77m 89, 104 and 842/2010 at par 44.

payment by the consumer and the consumer is entitled to receive credit from the credit provider. If one of the parties to the contract do not adhere to their obligations they cannot demand performance from the other.

5 4 Deciding judgement: *Colette*-case

5 4 1 *Colette v First Rand Bank* (National Credit Regulator as *amicus curiae*)¹⁴⁴

5 4 1 1 Facts

The respondent, a bank, held a mortgage bond against a property of the applicant. The applicant fell in arrears with her monthly instalments, and due to the fact that she defaulted on her payments the whole outstanding amount became payable in order for her to be able to keep possession and ownership of the property, and to keep the agreement between herself and the respondent in play.¹⁴⁵

The applicant was not able to make payment for the total outstanding amount and therefore applied for a debt review on 4 January 2010 from a debt counsellor. The relevant credit providers, which included the respondent, were notified on even date that the applicant applied for a debt review. On 15 February 2010 the debt counsellor notified the respondent and other credit providers that the application for debt review was brought successfully and that the applicant was found over-indebted. The debt counsellor circulated a proposal to possibly restructure the applicant's debt. None of the credit providers accepted the proposal for the restructuring of debt.¹⁴⁶

On 29 March 2010 the matter was referred to the Magistrate's Court by the debt counsellor in terms of section 86(8) to pray an order of court to declare the applicant over-indebted, to restructure her debt and to resume the debt review on the agreements that have been terminated by the credit providers.¹⁴⁷

The respondent in the meantime proceeded to terminate the debt review in terms of section 86(10) to enforce the credit agreement even though the debt review has

¹⁴⁴ 2011 JOL 27486 (SCA).

¹⁴⁵ 2011 JOL 27486 (SCA) at par 1 and 2.

¹⁴⁶ 2011 JOL 27486 (SCA) at par 2.

¹⁴⁷ 2011 JOL 27486 (SCA) at par 2.

already been referred to the Magistrate's Court in terms of section 87. The court, to which the last mentioned was referred, had to decide whether the respondent was correct in terminating the debt review process even though the initial application was still pending. The High Court answered this question in the affirmative, and confirmed that the termination in terms of section 86(10) is indeed lawful even though the matter has been referred to the court in terms of section 87(7)(c) and the proceedings are still pending in terms of section 87 of the Act. This matter has therefore been referred to this court for appeal purposes.¹⁴⁸

5 4 1 2 Legal questions

Is a credit provider entitled to terminate a debt review in terms of section 86(10) even though the matter has been referred to the Magistrate's Court in terms of section 87 of the Act and the hearing of this matter is still pending?¹⁴⁹

5 4 1 3 Judgment

Appeal not granted and the respondent's termination of debt review was valid.¹⁵⁰

5 4 1 4 Ratio

The court started by stating that the procedure to apply for debt review is confirmed in section 86 of the Act, and section 87 concerns the rearrangement of a consumer's debt by a Magistrate's Court. The court quoted section 86(10)¹⁵¹ and the following relevant sections:

"86.

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

¹⁴⁸ 2011 JOL 27486 (SCA) at par 4.

¹⁴⁹ 2011 JOL 27486 (SCA) at par 6.

¹⁵⁰ 2011 JOL 27486 (SCA) at par 19 and 20.

¹⁵¹ See par 4 3 above.

87. *Magistrate's Court may re-arrange consumer's obligations.–*

- (1) If a debt counsellor makes a proposal to the Magistrate's Court in terms of section 86(8)(b), or a consumer applies to the Magistrate's Court in terms of section 86(9), the Magistrate's Court must conduct a hearing and, having regard to the proposal and information before it and the consumer's financial means, prospects and obligations, may–
 - (a) reject the recommendation or application as the case may be; or
 - (b) make–
 - (i) an order declaring any credit agreement to be reckless, and an order contemplated in section 83(2) or (3), if the Magistrate's Court concludes that the agreement is reckless;
 - (ii) an order re-arranging the consumer's obligations in any manner contemplated in section 86(7)(c)(ii); or
 - (iii) both orders contemplated in subparagraph (i) and (ii).
- (2) The National Credit Regulator may not intervene before the Magistrate's Court in a matter referred to it in terms of this section."

The applicant stated in the initial hearing that her debt counsellor referred her debt review application to court as prescribed by the Act and that the respondent acted unlawful by terminating the review whilst same is still pending by a Magistrate's Court in terms of section 87 of the Act.

The court began by stating that the best approach in a Magistrate's Court dealing with relatively the same matter as currently in front of the court, was followed by Griesel J who spoke in the *Wesbank a Division of Firstrand Bank Ltd v Papier*.¹⁵² The court stated that after the 60 business day period has elapsed, the credit provider may terminate the pending debt review as it could never have been the contention of the legislator that the review will be finalized within the following 10 days.¹⁵³ The court further stated that section 86(10) must be read with all of the provisions of the Act, specifically section 86(11). The purpose of the Act is to assist over-indebted consumers as well as those who find themselves in strained circumstances. The option is available to these types of consumers to let their debt be restructured by a court, amongst other possibilities and so a consumer may apply for a restructuring order whether he is in default of payments to a credit provider or not. Where a consumer is not in default on any of his obligations, a credit provider is

¹⁵² 2011 (2) SA 395 (WCC).

¹⁵³ 2011 (2) SA 395 (WCC) at par 25.

unable to terminate due to the fact that section 86(10) gives a right to terminate only if the consumer is in default of payments. The court states that in these circumstances the credit provider must await the hearing in terms of section 87 of the Act which entails that the credit provider may not enforce the credit agreement as the consumer is not in default.¹⁵⁴

In the case where the consumer is in default of payments, the credit provider has a foot to stand on and can enforce the credit agreement provided that the consumer has not made an application for debt review, and that the credit provider complied with the requirements of section 129 and 130. Section 86(2) states clearly that an application for debt review cannot be made once a credit provider proceeded to take legal steps as contemplated in section 129 to enforce such an agreement.¹⁵⁵

It is important to take into account that the purpose of debt review is not to relieve the consumer of his obligations, but to voluntarily agree on a re-arrangement or await an order of court to establish a re-arrangement.¹⁵⁶ The court stated further that the purpose of the Act is to include the promotion of responsibility in the credit market by “encouraging responsible borrowing, avoiding over-indebtedness and fulfilment of financial obligations to consumers”. The approach to over-indebtedness is based on the principle of satisfaction of all responsible consumer obligations by providing for a consistent and harmonized system of debt restructuring, the Act places priority on the eventual satisfaction of all responsible consumer obligations. The Act serves the interest of all consumers, but it calls for a careful balancing of all relevant interests.¹⁵⁷

The debt counsellor is called upon to prepare a proposal for re-structuring purposes and to take part in the on-going court proceedings. The proposal takes form of an application governed by the rules of the Magistrate’s Court. Contextually it is evident that section 86(10) forms part of section 86, and therefore is part of the debt review process as opposed to section 87 which regulates the hearing of the matter in front of a Magistrate’s Court.¹⁵⁸

¹⁵⁴ 2011 JOL 27486 (SCA) at par 9.

¹⁵⁵ 2011 JOL 27486 (SCA) at par 9.

¹⁵⁶ 2011 JOL 27486 (SCA) at par 10.

¹⁵⁷ 2011 JOL 27486 (SCA) at par 10.

¹⁵⁸ 2011 JOL 27486 (SCA) at par 10.

It was noted in the *Webank v Papier*-case that a credit provider is not entitled to terminate a debt review once same has been referred to the Magistrate's Court in terms of section 86(7) and section 87. The argument before the court was that the debt counsellor has a period of 30 days to determine whether the consumer is over-indebted or not. If the consumer is found not over-indebted a consumer has a further 20 days to apply directly to the Magistrate's Court in terms of section 86(9) seeking an order in terms of section 86(7)(c). The court stated that a consumer or debt counsellor has an window of 60 business days to refer their application to court. This window, according to the court, does not only award the consumer and/or debt counsellor with 60 business days to approach the court, but also does not require that the restructuring has to be completed within the 60 business day period after the initial application was made. To expect a consumer and/or debt counsellor to complete the entire court procedure within the 60 business day period would be unrealistic when looking at our court's current full court roll, and further the credit provider will have almost no opportunity to terminate the review in this was the case.¹⁵⁹

The court stated that a better approach would be to recognize the specific wording of section 86(10) that gives a right to the credit provider to terminate a certain credit agreement under which the consumer is in default with payments. The court expressly stated the following:

"It must be emphasized that it is only when the consumer is in default that the credit provider being entitled to terminate it. It is not that the credit provider is "derailing" the review when he terminates the debt review: it is the consumer that is in breach of contract, not the credit provider. If the consumer applies for debt review before he is in default the credit provider may not terminate the review. But if the consumer is in default the consumer is entitled to a 60 business day moratorium during which time the parties may attempt to resolve the dispute."¹⁶⁰

When a credit provider terminates a debt review in terms of section 86(10) it is important to note that such a termination does not terminate a hearing. The hearing thus continues as a credit provider can only terminate a credit agreement and not a hearing.¹⁶¹ Although the credit provider may terminate the credit agreement at the time when it is under a debt review process, section 86(11) plays a balancing role confirming that if the credit provider continued to proceed with the enforcement of the

¹⁵⁹ 2011 JOL 27486 (SCA) at par 12.

¹⁶⁰ 2011 JOL 27486 (SCA) at par 12.

¹⁶¹ 2011 JOL 27486 (SCA) at par 14.

credit agreement, a Magistrate’s Court may resume the debt review process, placing the specific credit agreement into force again and under the review process.

It is important that the credit provider acts in good faith and cooperates with the debt counsellor to resolve the matter, and if this matter is being heard by the Magistrate’s Court and the credit provider can conclude that the proposed restructuring will not lead to the “satisfaction by the consumer of all responsible financial obligations” or a re-arrangement in terms of section 86(7)(c), the court concluded that over-indebtedness does not constitute a defence when a consumer cannot meet financial obligations, however, because of its extraordinary and stringent nature, a court has overriding discretion to refuse an application for summary judgement.

The proposal that was made by the debt counsellor in respect of the mortgage bond which the credit provider terminated, envisioned a restructuring in terms of which monthly instalments would be reduced by half but payable over the same time period. The court determined that this would deprive the respondent of over one half of what it was entitled to in terms of the initial credit agreement. The court stated that this is not in accordance with the Act specifically section 86(7)(c)(ii) and therefore confirmed that the termination of the debt review by the credit provider was valid as the rights of both the consumer and credit provider must be weighed and balances against each other.¹⁶² In this case the credit provider’s rights would have been severely prejudiced if the proposal by the debt counsellor was accepted by the court, and therefore by weighing both parties’ rights, the court came to this decision.

¹⁶² 2011 JOL 27486 (SCA) at par 19.

6 The balancing of rights

6.1 General

The *Colette*-case brought the arguments in the *Standard Bank*-case and the *Nako*-case together to firstly bring us legal clarity with regards to the question whether a debt review may be terminated after the matter has been referred to the Magistrate's Court, and secondly, and most importantly, showing us that only when the rights of the credit provider and the consumer are balanced, we find fair, reasonable and justifiable law governing the contractual relationship between two parties.

Two contradicting judgements were delivered in the *Standard Bank*- and *Nako*-case respectively. In the first the court found in favour of the consumer - limiting the rights of the credit provider, the other found in favour of the credit provider - limiting the rights of the consumer. The rights of both parties in both cases were unfairly limited and not balanced as it should have been. The contradicting judgements will now be discussed as well as the judgment in the *Colette*-case that gave legal certainty by balancing the rights of consumers and credit providers.

6.2 Two different schools of thought

Judgments in both the *Standard Bank v Kruger*- and *the Taxi Securitization v Nako*-case have two completely different approaches and focus points on the question whether a credit provider may terminate a debt review after the matter has been referred to the Magistrate's Court.

In *Standard Bank v Kruger*, the court was of the opinion that the purpose of the Act, as determined in section 3, should be the criteria against which all credit related matters should be measured.¹⁶³ The court stated that the protection of consumers must be the top priority when dealing with any credit related matter, and specifically when a credit provider wants to terminate a debt review.¹⁶⁴ The court stated further that once a debt review has been referred to the court as contemplated in section 87, a credit provider does not have the right to terminate such a review as the

¹⁶³ 2010 JOL (GSL) at par 11.

¹⁶⁴ 2010 JOL (GSL) at par 15.

termination clause, section 86(10) of the Act, only finds application in section 86 and not in section 87 of the Act and therefore, contextually, a credit provider is not entitled to terminate a debt review once same has been referred to the Magistrate's Court.¹⁶⁵ Therefore, if a debt counsellor refers the debt review to the Magistrate's Court within the 60 business day period, the credit provider will be barred from his right to terminate the debt review. However, if the debt counsellor does not refer the review to the Magistrate's Court within the 60 business day time period, the credit provider may terminate the review. The court has placed the onus on the debt counsellor to refer the matter within the 60 business day period to the Magistrate's Court and therefore, with respect, ignoring the credit provider's right to terminate. Writer is of the opinion that the credit provider's right to terminate a debt review is not a conditional right that can only come into operation if the debt review has not been referred to the Magistrate's Court within the 60 business day period.

The Act was compiled and brought into operation to specifically regulate credit matters between credit providers and consumers, and structuring the legislation in such a way that a credit provider must adhere to strict provisions so that consumers are properly informed and understand what they are buying, how instalment payments work, and what effect the financing received from the credit provider will have on their financial means. This, however, does not entail that if the credit provider did adhere to all of these provisions, he does not have any rights to enforce. The rights and obligations of consumers and credit providers are not balanced at all by barring a credit provider from access to his right to terminate a debt review.

The *Taxi Securitization v Nako*-case, as previously explained, looked at the termination of debt review from a completely different perspective. The court referred to the *Changing Tides*-case where it was found that a credit provider that enforced its right to terminate a debt review that was referred to the Magistrate's Court, is seen as inappropriate.¹⁶⁶ The court in the *Taxi Securitization v Nako*-case did not agree with the last mentioned and stated that although the actions of the credit provider might be inappropriate, it cannot deny a credit provider its right to enforce a credit agreement between itself and the consumer, as the credit provider has a valid enforceable right in terms of the credit agreement between itself and the

¹⁶⁵ 2010 JOL (GSL) at par 27.

¹⁶⁶ *Changing Tides 17 (Pty) Ltd NO v Frederick and Another* (WCC) Unreported case no. 18153/09 at par 30.

consumer. The court went further and confirmed that the purpose of the Act as determined by section 3 does not put the rights of the consumer above the credit provider's right, and therefore a balancing of rights between these two parties is of the utmost importance, especially if the credit provider acted in good faith and adhered to all of the provisions that the Act requires of it.¹⁶⁷

The stance of section 86(11) and the role it plays was also addressed by the court that confirmed that one must not lose sight of this important section of the Act that regulates the termination by a credit provider. In the event where a credit provider does enforce his rights and terminates the debt review, the termination will always be referred back to the Magistrate's Court who will have the final say in determining if the termination is valid or not. One cannot deprive the credit provider of his right to enforce the credit agreement because his actions might be seen as inappropriate. Section 86(11) was built into the Act to specifically regulate termination by giving the court the last say.

The court in the *Taxi Securitization v Nako*-case disagreed with the *Standard Bank v Kruger*-case and the comments regarding the fact that section 87 and 86 does not play in on one another and the fact that section 86(10) forms part of section 86 and not section 87 does not divide the two sections from each other.¹⁶⁸ The court stated that section 87 refers to the proposal that has to be made by the debt counsellor, and based on the proposal the court must make a determination whether the proposed restructuring is efficient in terms of the Act. The proposal and its composition is regulated by section 86 and regulation 24, and just because section 86(10) is not mentioned in section 87 does not exclude the fact that they do play an important role on each other. The proposal's construction is not confirmed in section 87, but the referral to the court is. It is evident that the two do play a very important role on each other. To favour the one's rights by denying the other its rights is a grave misunderstanding of the purpose of the Act.

One should not lose sight of the fact that a valid agreement came into being between a consumer and a credit provider, and such an agreement is especially valid when a credit provider acted in good faith and adhered to the provisions of the Act. It could

¹⁶⁷ Unreported SGJ, Case number 19, 21, 22, 77m 89, 104 and 842/2010 at par 10.

¹⁶⁸ Unreported SGJ, Case number 19, 21, 22, 77m 89, 104 and 842/2010 at par 43.

therefore never have been the intention of the legislator to favour a consumer if a credit provider met all of his requirements. The court stated that to interpret the Act with “lenses favouring a consumer” is a completely inaccurate way of applying the purposes of the Act, as the Act requires us to balance the rights of consumers and credit providers.¹⁶⁹ In the event where a consumer is unfairly favoured against the credit provider, we are losing sight of the Act and its true purpose. The court stated further that the unfair favouring of a consumer will potentially prejudice the rights of consumers as their well-being and accessibility to credit is premised on a healthy and profitable industry.¹⁷⁰

6.3 The deciding judgment: *Colette*-case

The *Colette v First Rand Bank*-case was decided by the Supreme Court of Appeal, and has to date become law by clarifying the legal position on whether a credit provider may terminate a debt review, and when a credit provider may do so.

The court concluded in the *Colette*-case that each case must be decided on own merits, but that two main distinctions can be made with regards to whether a credit provider is entitled to terminate a debt review after it has been referred to the Magistrate’s Court:

- (a) A credit provider may only terminate a credit agreement if the consumer was in default before he or she applied for debt review. Only then and after 60 business days from date of initial application, may a credit provider terminate debt review. Even if the review is referred to the Magistrate’s Court and is pending the hearing, a credit provider will have the right to terminate. The consumer then still has section 86(11) to fall back on since the Magistrate’s Court still has the final say in determining if the termination by the credit provider is valid or not.

- (b) The second distinction is exactly the opposite of the above mentioned. It entails that if a consumer did not default on a payment and applied for debt

¹⁶⁹ Unreported SGJ, Case number 19, 21, 22, 77m 89, 104 and 842/2010 at par 38.

¹⁷⁰ Unreported SGJ, Case number 19, 21, 22, 77m 89, 104 and 842/2010 at par 38.

review before any default occurred, a credit provider may not terminate the debt review. A credit provider may however confirm in court at the hearing of the matter in front of a magistrate, that they are not willing to accept the proposed restructuring. The court must then determine whether it would be viable, in terms of the Act, to accept the proposed restructuring or not, as both parties will be bound by this order.

In view of the above it is evident that whether the consumer has defaulted on payments or not, the matter will be heard by court who will have the final say. It is important to note that an application for debt review and a possible restructuring of debt does not have the goal to relieve a consumer of his obligations towards against the credit provider,¹⁷¹ and it would be a grave misunderstanding by consumers to apply for debt review solely in order to step away from their obligations with the misconception that the rights of credit providers do not exist.¹⁷²

The Act envisioned assistance to consumers where they find themselves in a situation where they are over-indebted. The Act most definitely favours the consumer by granting him the opportunity to apply for debt review and to be assisted in negotiating and restructuring current credit agreements, but one cannot ignore the fact that an agreement was reached between a credit provider and a consumer, and that although the Act does assist the consumer, at some point the balancing of rights of the consumer and credit provider will have to be weighed against each other.

6 4 Additional arguments

6 4 1 The “limbo” period

According to Van Heerden and Coetzee there appears to be a “limbo” period during which the credit provider cannot enforce the credit agreement.¹⁷³ This “limbo” period may in certain instances last for months, making it extremely prejudicial to the credit provider who is often not receiving any payment from the consumer who only plans on making further payments once ordered to do so by the court after a restructuring

¹⁷¹ See par 5 4 1 4 above.

¹⁷² Grobler *Debt review: Back to reality De Rebus*, January 23.

¹⁷³ 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” 2011 PER 55.

order has been made. This unfortunate instance should have been foreseen by the legislator and an appropriate remedy should have been incorporated into section 86.

According to van Heerden and Coetzee there are certain issues that may influence termination of a pending debt review:

- (a) The section 86(10) procedure is a unilateral one which does not provide an opportunity to the consumer to respond in order to ward off such termination. However, a consumer against whom a pending debt review was terminated is not completely without redress as section 86(11) provides that if a credit provider has given notice to terminate a review as contemplated in section 86(10) and proceeds to enforce that agreement, the Magistrate's Court hearing the matter may order that the debt review resume on any condition the court considers to be just in the circumstances.¹⁷⁴
- (b) The termination process to be followed is problematic in practice as we have seen in conflicting judgements in different cases, however, the Colette-case has now brought legal clarity with regards to the question whether a debt review may be terminated.¹⁷⁵
- (c) Should the right be given to the credit provider to terminate a debt review unilaterally after a lapse of 60 business days as long as the credit provider can show that the requirements of section 86(10) has been met, or should it be interpreted that the debt review procedure must first be finalized?¹⁷⁶

These requirements have wide interpretations and create uncertainty.

6 4 2 Good faith between credit provider and consumer

¹⁷⁴ 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" 2011 PER at par 4.

¹⁷⁵ 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" 2011 PER at par 4.

¹⁷⁶ 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" 2011 PER at par 4.

In *First National Bank v Seyffert and Other Similar Cases*,¹⁷⁷ the court discussed the good faith between the credit provider and consumer and stated that:

“In the particular context with which one is now concerned, it all depends on the extent to which the parties show good faith to one another, have sensible, fair and reasonable proposals and actively engage one another to find realistic solutions to particular consumer’s problems. Providing incentives for good sense and fairness on all sides will go a long way to achieve the objectives of the Act.”¹⁷⁸

J Grobler asked in his article *Debt review: Back to reality*¹⁷⁹ what would constitute good faith by a credit provider and how does acting in good faith bring both parties closer to negotiating the matter. He argued that although good faith is important between the parties, at the end of the day there is a valid contract between the parties, and negotiating the contract is what it all boils down to. The “everything goes” concept in the name of consumers, according to Grobler, is the wrong approach and credit providers are prejudiced.¹⁸⁰ Although Grobler does touch a valid point, one should also remember that a valid agreement came onto being between the credit provider and the consumer, but the court in the *Colette*-case truly gave effect of section 3(c) of the Act, and balanced the rights between the credit provider and the consumer very well.

6 4 3 Lessons from the past

6 4 3 1 General

Prior to the National Credit Act, the Credit Agreements Act¹⁸¹ and the Usury Act¹⁸² (herein after referred to as “the old legislation”) were the main pieces of legislation regulating credit lending in South Africa. The legislation was not sufficient as the South African credit consumers found themselves in on-going credit struggles.¹⁸³ The causes of the last mentioned are

¹⁷⁷ 2010 (GSJ) Unreported 212862.

¹⁷⁸ 2010 (GSJ) Unreported 212862 at par 14.

¹⁷⁹ Grobler Debt review: Back to reality De Rebus, January 23

¹⁸⁰ Grobler Debt review: Back to reality De Rebus, January 23

¹⁸¹ Act 75 of 1980.

¹⁸² Act 73 of 1968.

¹⁸³ A Boraine, “Some thoughts on the reform of administration orders and related issues” 2003 De Jure 217.

- (a) due to the micro-lending industry providing credit to consumers at extremely high interest rates making it in some circumstances impossible for consumers to fulfil their obligations and; and
- (b) section 74 of the Magistrate's Court Act¹⁸⁴, which introduced the administration procedure under which many consumers applied to be placed under.

Today, after the Act replaced the old legislation, the micro-lending industry is still operational and the administration procedure has been replaced with the new concept of debt review which is in essence only a regulated form of the administration procedure with exactly the same issues. Following herewith is Borraine's advises stating that we should learn from the lessons from the past to make sure debt review is successful and serves it purpose.

6 4 3 2 Comparing the administration procedure and debt review

The administration procedure provided an option to consumers who found themselves unable to satisfy their financial obligations, an opportunity to be placed under administration and have an administrator appointed by the court that recovers a certain amount from the consumer and distributes same to all the consumer's creditors. A limit of R50 000 was the total amount of debt that could have been placed under administration. The problem with the administration procedure was twofold:

- (a) The limit of debt was very low at the R50 000 ceiling, which entailed that many consumers who were a lot more indebted than the prescribed amount could not be assisted by the administration procedure, and therefore only a certain group of consumers could be afforded relief in terms of the Act.
- (b) The court appoints an administrator who distributes the amounts received from the consumer to his creditors. Unfortunately these administrators were not trustworthy as, in some cases; they did not

¹⁸⁴ 32 of 1944.

distribute the monies correctly or at all. These administrators did not need any formal qualification and therefore anyone could become an administrator. As a result of the last mentioned problems big, financial institutions were hit the hardest due to payments not being made to them. An urgent request was made by all affected parties for legal reform to the problems at hand.¹⁸⁵

Boraine notes in his article, *“Some thoughts on the reform of administration orders and related issues”*,¹⁸⁶ that an estimation by the Banking Council done in 2002 confirmed that between 100 000 and 120 000 administration orders were granted annually which affected 600 000 credit agreements, and the amount of debt that was involved ran into hundreds of millions of rand. When looking at these statistics that were applicable to all agreements (including credit agreements) nine years ago, it is understandable that the financial sector did not find the administration procedure a positive procedure assisting consumers in relieving their debt. Instead it was seen as a lucrative business for administrators for maximum financial gain.

Boraine states further that it should be noted that debt relief measures such as administration orders, address the consequences of credit granting that went wrong and that more emphasis should be placed on prevention, such as the introduction of formal financial education for consumers and more effective systems to control lending.¹⁸⁷ Boraine made recommendations for reform in his article, and it should be kept in mind that this article was written prior to the promulgation of the National Credit Act in 2005. He points out the following recommendations that should be taken into account and included into the Act:¹⁸⁸

- (a) A proper foundation for administration orders is called for as it, at that time, only amounted to the rescheduling of some debts.
- (b) Administration should comply with modern trends that provides for formal discharge.

¹⁸⁵ A Boraine, “Some thoughts on the reform of administration orders and related issues” 2003 De Jure 1.

¹⁸⁶ A Boraine, “Some thoughts on the reform of administration orders and related issues” 2003 De Jure 223.

¹⁸⁷ A Boraine, “Some thoughts on the reform of administration orders and related issues” 2003 De Jure De 222.

¹⁸⁸ A Boraine, “Some thoughts on the reform of administration orders and related issues” 2003 De Jure 247.

- (c) Should these matters remain under the supervision of the Magistrate's Court or should a specific official be included?
- (d) Administrators should be trained and properly qualified to administer these debts and payments thereof.
- (e) Credit providers suffered a loss for payments not made by consumers.

Boraine states that the general debt problem in South Africa at that time needed more than the administration procedure to be amended. Credit granting issues needed to be addressed.¹⁸⁹ Boraine makes the following important statement:

"All things considered, it remains important to strike a balance. Since consumer credit is usually based on contract, no debt relief measure should simply ignore the underlying basis of the law of contract, namely *pacta servanda sunt*. On the other hand, there is a dire need for a proper system of measures of debt relief that can assist debtors who find themselves in financial distress."¹⁹⁰

It must be kept in mind that the above mentioned administration procedure was administered by the Magistrate's Court Act,¹⁹¹ and sequestration in terms of the Insolvency Act.¹⁹² These debt relief measures in their own respective ways, are still in operation and does still provide a form of debt relief today. However, the reform that was so urgently needed in credit lending, as mentioned by Boraine above, has been captured in the National Credit Act by means of the debt review process.

The debt review process most definitely captures the reform that was needed. However, when comparing the proposed reform by Boraine with the current debt review process the following still remained the same:

- (a) Debts can still only be restructured in accordance with section 86(7)(c).
- (b) Debts can only be discharged if it is found that the credit agreement amounted to reckless credit.
- (c) The Magistrate's Court is still the court hearing these matters and no other official has been included to address these debt matters.

¹⁸⁹ A Boraine, "Some thoughts on the reform of administration orders and related issues" 2003 De Jure 250.

¹⁹⁰ A Boraine, "Some thoughts on the reform of administration orders and related issues" 2003 De Jure 251.

¹⁹¹ S 75, Magistrate's Court Act, 73 of 1968.

¹⁹² 24 of 1936, as amended.

- (d) Administrators are now debt counsellors who receive only five days of training where after they can act on behalf of consumers applying for debt review.
- (e) Credit providers still suffer the loss if payments are not made.

6 4 3 3 Conclusion

When looking at the proposed reform and the current debt review process, the question arises as to why the debt review process is still very much comparable to the administration process that was initially criticized as creating so many problems. It is however evident that the construction of the Act has made provision for detailed procedures that provide a debtor with time to assess his financial situation. Should he find that he is unable to meet his financial obligations, to apply for debt review and, in time, refer the matter to the court.

The Act has further regulated credit agreements by implementing strict provisions for credit providers and consumers to abide to. Writer is of the opinion that a proper reform has been done by the new National Credit Act, but that certain problems are still a reality and will only be bypassed if a complete new system is implemented. The question remains whether it would be practical. Seeing as the consumer has a detailed debt relief measure and the option of debt review available to him, the Act favours the consumer by giving him the chance to restructure his debt, even though there are still issues regarding debt counsellors and their ability to fulfil their duties. The other side of the coin must also be taken into account that the credit lending industry carries the burden of non-payments, even though a valid contract was concluded by the credit provider and consumer, is a reality and will have a grave effect on our economy in the long term.

It is important to conclude from the above that when comparing the administration procedure with the debt review procedure, it is almost completely the same. With both procedures the consumer has an option to obtain debt relief by placing a hold on payments and barring the credit provider from taking any action. It is clear that the consumer was favoured by this approach, leaving the credit provider to carry the burden. Today, the right of a credit provider to terminate a debt review does

however bring balance to the contractual relationship between the consumer and the credit provider which is so crucial in our current economic climate.

7 Conclusion

The main focus of this dissertation was on the interplay between the consumer and the credit provider's rights when a consumer has applied for debt review which has been referred to the Magistrate's Court, whilst the credit provider terminated the debt review to enforce the credit agreement against the consumer due to the consumer's default in payments. The question was asked whether the credit provider can terminate a debt review once it has been referred to court, and this question was answered in the affirmative. Although a consumer is given the chance to find debt relief, this right is not absolute and the credit provider's rights together with the rights of the consumer should be balanced to firstly honour the credit agreement initially entered into by both parties, and secondly for the sake of reasonable, fair and just law.

The consumer receives protection from the Act and the benefit will always be granted to the consumer, however, the purpose of the Act requires that a balance needs to be found between the credit provider and consumer's rights in all instances. If this is not the criteria the courts intend to compare relevant matters against, the scale will be tipped and we will find ourselves back at square one by having the credit provider's carrying the financial burden of non-paying consumers.

Debt review is an improvement on previous debt relief measures in South Africa and especially in today's economic climate the debt review procedure enables consumers to financially survive over-indebtedness, however, the relief brought to consumers by the debt review process is not absolute as credit providers' rights need to be taken into account to balance the financial relationship between the two parties. It will always have to take into account that a valid agreement came into being between a credit provider and consumer, and although the Act assists consumers who find themselves in an over-indebted situation by possible restructuring of obligations, the credit provider's rights will have to be taken into account. The balancing of both parties' rights should always lie with the objective discretion of the courts.

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