

A reassessment of the debt review procedure in light of the National Credit

Amendment Act 19 of 2014

by

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ABSTRACT

The National Credit Act 34 of 2005 introduced a new procedure, namely the debt review procedure, which enables financially strained natural person consumers to obtain relief from over-indebtedness. In the absence of the confusion that the language used in this piece of legislation brought to the legal arena, this Act is largely consumer friendly.

Indeed the National Credit Act is a difficult read owing to its voluminous nature and the generally inaccurate language that its drafters used in putting it together. In light of the above observation, the legislature promulgated the National Credit Amendment Act 19 of 2014 with the view of improving its readability in some cases and its clarity in others. This dissertation is dedicated to reassess the debt review procedure in light of the amendments made to it by means of the Amendment Act. Its objective is to establish the impact that the amendments have had on the position of the natural person consumer who seeks to utilise the debt review procedure to obtain relief from the courts, and recently, the Tribunal.

During the discussion, the dissertation draws comparisons between the National Credit Act before and after its amendment by the National Credit Amendment Act with regard to some of the aspects of the debt review procedure. The following findings, alternatively conclusions are made. In a nutshell, the natural person consumer's position is materially improved on the following grounds: more time is provided to over-indebted natural person consumers to seek relief from courts, given the new dispensation that forbids credit providers from applying for the termination of such review once it is pending before court; the Consumer Tribunal now has a new function to declare credit reckless, which would mean more applications for declaration of reckless credit and a speedy and more convenient process; a less expensive route to be followed in applying for the resumption of the debt review procedure and a clearer section 86(2) of the National Credit Act. All in all, this dissertation concludes that the new amendments brought improved debt relief for over-indebted natural person consumers who are party to specific credit agreements in respect to which, the National Credit Act, and more specifically, the debt review provisions apply.

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CHAPTER 1: GENERAL INTRODUCTION

1.1 Background

The National Credit Act¹ shook South Africa's legal landscape "on a level that has never been registered on the Richter scale."² Like any other piece of legislation, it has its own objectives and policy issues. Of particular interest to this dissertation are some of the purposes of this Act, especially those that relate to the prevention of over-indebtedness of consumers, and the provision of mechanisms for resolving same.³ Section 86 of the NCA provides for debt review – a mechanism that ropes debt counsellors and magistrates courts into the field of consumer credit with the view of satisfactorily and decisively dealing with over-indebtedness of consumers. It has been contended that debt review as envisaged in this NCA, seeks not only to assist over-indebted consumers, but also those who find themselves in financially strained circumstances.⁴ Of course, consumer protection as such is not a new phenomenon.⁵ Indeed section 86 of this Act places a pre-emptive duty on a consumer to take certain steps the moment it becomes clear to such consumer that his or her finances have deteriorated to a point that he or she cannot satisfy his or her obligations timeously⁶, as a way of kick starting the debt review process.

However, it must be noted that section 86(2) of the Act had prevented a consumer from using this procedure (debt review) with respect to credit agreements in terms of which a section 129 notice of the NCA had been delivered. The wording of section 129 of the NCA resulted in complications, and various courts interpreted it differently and judgments in the past further cast doubt on the debt review procedure in general.⁷ In addition to this, section 86(10) also added pressure to an already overburdened defaulting consumer in that it gave the credit provider permission to terminate the debt review after 60 days have elapsed since the application for such debt review, provided

¹34 of 2005. Hereinafter NCA or the Act.

² Otto JM: *National Credit Act. Vanwaar Gehasi? *Quo vadit lex. And some reflections on the National Credit Amendment Act 2014***(part 1). 2015 TSAR 583. Hereinafter JM Otto.

³Kelly-Louw Michelle and Stoop P: (2012) *Consumer Credit Regulation in South Africa*, Juta. Hereafter Kelly-Louw and Stoop p 362.

⁴ *Ibid.*

⁵ See the discussion in chapter 2 of this dissertation.

⁶ See *SA Taxi Securitisation (Pty) Ltd v Ndobela* [2011] ZAGPJHC 14 at par 15.

⁷See *Sebola and Another v Standard Bank of South Africa Ltd and Another* [2012] ZACC 11, in general.

all the conditions have been fulfilled.⁸ Indeed there are many other problems that emanated from the interpretation of the debt review procedures in the NCA that necessitated the promulgation of the National Credit Amendment Act.⁹ Some of those provisions form the basis of this discussion.

1.2 Problem statement and research objective

The debt review procedure, as set out in section 86 of the NCA and read with regulations 24 to 26¹⁰ comprises various processes and steps,¹¹ and is therefore generally complicated. The inelegant expressions used in the initial drafting¹² of the legislation further compound the issue of correctly interpreting the provisions related to the debt review procedure. In fact, section 86(2) cast doubt as to when exactly a consumer is barred from applying for debt review. The original provision debarred the consumer from applying for debt review in respect of a credit agreement where the credit provider had proceeded to take the steps contemplated in section 129 to enforce that agreement. There were conflicting court decisions on the correct interpretation of section 129(1)(a). As a result, the confusion that ensued such differing interpretations inevitably cast doubt on the meaning of section 86(2) of the NCA. The result was that any over-indebted consumer who was in arrears in respect of a specific credit agreement and where the credit provider had taken steps in terms of section 129(1)(a) was prevented from using the section 86(1) application for debt relief. There was also confusion with regards to what constituted “delivery” of the section 129(1)(a) notice. Ultimately, the original wording of section 86(2) fell short of addressing and fulfilling the object and the spirit of the NCA – namely to prevent over-indebtedness of consumers, and to provide mechanisms for resolving over-indebtedness.¹³

⁸ See the decision in *Collet v Firstrand Bank Ltd* 2011 (4) SA 508 (SCA).

⁹ 19 of 2014: National Credit Amendment Act, 2014. Hereinafter, NCAA.

¹⁰ See reg 24 in detail.

¹¹ Kelly-Louw and Stoop, 325.

¹² Coetzee H “*The impact of the National Credit Act on civil procedural aspects relating to debt enforcement*” 2009, Thesis on LLM, p2.

¹³ See s 3 of the NCA in general.

In addition to that, section 86(10) of the NCA presented some practical curve balls owing to its sparse provisions.¹⁴ It was pointed out that this uncertainty existed regarding exactly when a debt review could be terminated.¹⁵ Case law was divided on the question of whether or not a debt review could be terminated once a debt counsellor, having made a determination, had referred the matter to a magistrate's court with a recommendation in terms of section 86(8)(b) or 86(7)(c) but before the matter was actually heard by the court in terms of section 87.¹⁶ The implications of these judgments to the interpretation of section 86(10) are discussed later in this dissertation.¹⁷ Both subsections 86(2) and 86(10) were amended by section 26 of the NCAA. It is therefore the objective of this dissertation to assess the impact of these amendments to the debt review procedure, with the view of establishing whether the new provisions do in fact preserve and improve the consumer's right to debt relief.

1.3 Delineation and limitations

Debt review is inextricably connected to debt enforcement. However, the debt review procedure in terms of subsections 86(2) and 86(10), forms the focus of this dissertation and therefore, in as far as debt enforcement relates to and or affects debt review, such interplay will be referred to briefly. Further, whereas the duties of debt counsellors are an integral part of the debt review process, they do not form part of this dissertation and are therefore not discussed herein. This dissertation mainly deals with subsection 86(2) and 86(10) and their corresponding amendments in the NCAA.

¹⁴ Van Heerden CM and Coetzee H "*Perspectives on the termination of debt review in terms of section 86(10) of the National Credit Act 34 of 2005*" (2011) *PER/PELJ* volume p 40/226. Hereinafter Van Heerden and Coetzee.

¹⁵ *Ibid.*

¹⁶ Van Heerden and Coetzee, p 41/226.

¹⁷ See chapter 4 of this dissertation. It is the view of this dissertation that by and large, in certain court decisions where the courts gave summary judgment against over-indebted defaulting natural person consumers upon application by their prospective credit provider(s) to terminate the debt review procedure in terms of this section (86(10)), the effect was that such a consumer was robbed of an opportunity to have his or her obligations rearranged and reduced by the court.

1.4 Significance of the study

This investigation provides an insight into the amendments of the debt review procedure as reflected in the NCAA. This is done to determine whether the amendments have in fact improved the position of an over-indebted consumer.

1.5 Structure of the dissertation

This dissertation is divided into five chapters. Chapter 1 introduces the background to the study. It also sets out the problem statement and research objectives of this dissertation. Chapter 1 also sets out the limitations and significance of this study as well as its structure. Chapter 2 lays the foundation of the dissertation through discussing the background, objects and application of the NCA. Chapter 3 analyses the original debt review process in terms of sections 85 and 86 of the NCA. Chapter 4 then examines the impact of section 26 of the NCAA on the debt review procedure. Its aim is to determine if these amendments have in fact improved the position of the consumer with regards to what was envisaged by the legislature.¹⁸ Chapter 5 focuses on the findings of the study. It also concludes the dissertation.

1.6 Key references, terms and definitions

For the sake of clarity, I define the following terms as they will be a constant feature in the study.

“agreement” includes a contract entered into between two parties.¹⁹

“consumer” a party in a credit agreement in terms of the NCA.²⁰

“credit provider” in respect of any agreement will be used as defined in the National Credit Act.²¹

“debt counsellor” is an officer who assists to determine the consumer’s indebtedness through analysing the consumer’s financial means, prospects and obligations and then makes a recommendation in accordance with the provisions of debt review in the NCA.

¹⁸See s 3 (g) of the NCA.

¹⁹ See s 1 of the NCA.

²⁰*Ibid.*

²¹*Ibid*

“**over-indebtedness**” refers to the consumer’s inability to satisfy all his or her obligations under all his or her credit agreements in a timely manner.

CHAPTER 2: THE BACKGROUND, OBJECTS AND APPLICATION OF THE NCA

2.1 Introduction

The previous chapter introduced the central concerns of this dissertation, namely to investigate the impact of the amended provisions of the debt review procedure on the position of the consumer.²² It has to be reiterated that its objective is to determine if the new provisions in fact improve the position of the consumer in relation with the debt review procedure.

This chapter focuses on the background, objects and application of the National Credit Act²³ in general. It seeks to highlight the fact that the greater part of the NCA, and especially its objectives, is largely aimed at protecting the interests of the consumer,²⁴ who is party to a credit agreement. What follows is a discussion of the background, objectives and application of the NCA with the aim of laying a strong foundation for the examination of some aspects the debt review procedure.

2.2 Background to the NCA

The NCA addresses the problem of over-indebtedness by providing for debt relief in the form of debt restructuring.²⁵ The need to protect consumers by way of national legislation is indeed an international phenomenon.²⁶ Back in 1971 in Europe, Crowther highlighted the lack of knowledge or interest of the consumer in the terms of the credit (transaction) agreement – hence the need to have legislation that concisely protected consumers. In keeping with this objective, this Act introduced new forms of protection for debtors.²⁷ In its conception, a proposal was made that this Act's focus should be shifted away from price control and [be] geared towards protection against over-indebtedness. This need was born out of, among others, the compelling aim of

²² See Chapter 1 of this dissertation.

²³ 34 of 2005. Hereinafter, the NCA or the Act.

²⁴ See paragraph 2.3 later in this chapter.

²⁵ Scholtz JW, Otto JM, Van Zyl E, Van Heerden CM and Campbell N: (2008) *Guide to the National Credit Act*, LexisNexis, Durban para 11. Hereinafter The Guide.

²⁶ Crowther Report (1971) Report of the Committee Consumer Credit 231-236. Crowther discusses the fact that consumers do not only lack knowledge of consumer regulations but also lack interest in understanding the terms of the contracts that they enter into. Such disturbing discovery paved way to the enactment of legislation that would protect consumers in those circumstances.

²⁷ See s 3 of the NCA in detail.

protecting vulnerable and desperate consumers who were often on the receiving end of exploitative and questionable lending practices that were invariably followed by ruthless collecting systems by credit providers.²⁸

Prior to the promulgation of the NCA, especially in the years subsequent to 1994, there was a sharp increase in over-indebtedness in the Republic. This was precipitated by “aspirational” borrowing from the previously disadvantaged groups of people who were secluded from commercial participation in the main stream formal economy.²⁹

The legislation that regulated consumer credit was deficient in a number of areas, including the failure to protect the new and inevitably poor consumer in the market. It was further found that previous legislation indirectly encouraged reckless credit provision, and increased the levels of debt for consumers through encouraging predatory credit provision.³⁰ These problems set the scene for a thorough examination of consumer credit law with the view of improving it.

The NCA was assented to in March 2006. It only came into full operation in the year 2007.³¹ Prior to its promulgation, there were various pieces of credit legislation that regulated the credit industry.³² The Credit Agreements Act³³ and the Usury Act³⁴ did not apply to consumer credit agreements in terms of which the cash price exceeded a stipulated amount.³⁵ The promulgation of the NCA brought about great reforms to

²⁸Kelly-Louw and Stoop. There is a discussion in the first chapter of the reasons why it was necessary to enact the NCA. There were a number of grim and hideous practices by micro-lenders which inevitably resulted in the promulgation of the NCA para 1.

²⁹Kelly-Louw M. *“The Prevention and Alleviation of consumer Over-indebtedness”* 2008 (20) SA Merc LJ 200, p 3. Hereinafter Kelly-Louw.

³⁰Kelly-Louw. Between pages 204 and 206 the writer discusses the findings of the Report that was supervised and published by Fin Mark in 2006. This report lays bare the weaknesses of the previous laws that regulated the credit industry prior to the promulgation and operation of the NCA in 2007.

³¹ See The NCA in general.

³² JM Otto and R-I Otto (2013) *The National Credit Act Explained* (3rd) LexisNexis, Durban (herein after Otto and Otto) 2-4, discuss these Acts in considerable detail and allude to their importance and limitations.

³³75 of 1980.

³⁴73 of 1968.

³⁵ See Otto and Otto foot note 2, p 1.

consumer protection in the credit industry. In fact, it protects both the rich and the poor consumer,³⁶ as it seems to apply to a wider scope in terms of credit, a concept that did not exist in the previous statutes. However, the NCA is not without its weaknesses. It has been suggested in various platforms that the NCA was badly drafted and introduced certain terminology and concepts far removed from the South African legal parlance.³⁷ It is perhaps partly because of the Act's terminological inaccuracies that the legislature decided to amend some of its provisions – especially those that deal with the debt review procedure.³⁸

It is clear that the real and main objective of the NCA was to protect the consumer. Therefore the debt-review procedure entrenches this protection through section 86(1) provision. It is with this reason in mind that this dissertation will proceed to examine the impact of the new amendments on the position of the consumer.

2.3 The objects of the NCA

The NCA has many laudable purposes which are clearly set out in its preamble and section 3 provisions. The preamble provides for the NCA's goals in unequivocal terms, namely to: promote responsible credit granting and use, prohibit reckless credit granting and to provide for debt re-organisation in cases of over-indebtedness, among others.³⁹ These aims seek to achieve certain socio-economic purposes as well as to protect consumers.⁴⁰ It is fair to say that the debt review procedure, which forms the backbone of this dissertation, is informed by these broad objectives.

Section 3 of the NCA sets out three main purposes, namely, to promote and advance the social and economic welfare of South Africans; to promote a fair, transparent,

³⁶ See Otto and Otto p 1.

³⁷ See *Nedbank Ltd v The National Credit Regulator and Another* 2011(3) SA 581 (SCA) in general.

³⁸ See the construction of S 86(10) of the NCA in general. The effect was that this section was so unclear such that the legislature had to amend it in 2014 through the promulgation of s26 of the National Credit Amendment Act 19 of 2014. This new Act reads better than its predecessor.

³⁹ See the preamble of the NCA for a full list of the aims of the Act.

⁴⁰ See Kelly-Louw and Stroop, footnote p 308. The authors discuss various court decisions where the judges made it clear that although the NCA places the burden of protecting the consumer on the National Credit Regulator, it is incumbent on all courts and tribunals to pursue the same ideals in granting judgments against consumers.

competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers.⁴¹ In addition to that, subsection 3(c)(ii) discourages reckless credit granting, thus indirectly protecting consumers from over-indebtedness. Section 3(g) entrenches mechanisms for resolving over-indebtedness which, *inter alia*, include the debt review procedure.

As already stated above, the preamble of the NCA mentions a number of the objects of the legislation, among others, the aim to provide for debt re-organisation in cases of over-indebtedness.⁴² This objective finds effect in the sections 85 and 86 of the NCA, also called the debt review procedure – which form the foundation of this dissertation.

The protection of consumers mentioned in section 3 of the NCA is by no means the only objective of this legislation. There is a conglomerate of objectives that courts and the National Consumer Tribunal need to give effect to during the adjudication of both the consumer and the credit provider's interests. The court could not have put it better in *Standard Bank of South Africa Ltd v Hales*⁴³ when it held that:

It cannot be that the protection of consumers is the sole purpose [of the Act]. Neither can it be said that this is the chief purpose. Others include a balancing of rights and responsibilities of consumers and credit providers.

Indeed the learned judge pointed out the fact that the interpretation of the NCA calls for a careful balancing of rights of all the parties involved in a credit agreement. Section 2(1) of the NCA provides that, “this Act must be interpreted in a manner that gives effect to the purposes of this act as set out in section 3.” Certainly there is no doubt as to how the various provisions of the NCA should be interpreted.

⁴¹ See the discussion in *Otto and Otto* p 4. The essence of the broad objectives enunciated in s 3 of the NCA is the protection of the consumer. In any adjudication of the NCA where the interests and obligations of the natural persona consumer have to be decided upon, the courts and tribunals are encouraged by this section to uphold the principle of protecting the consumer before looking at other corollary issues.

⁴² See the preamble of the NCA in general and section 3 of the Act specifically.

⁴³ 2009 (3) SA 315 (D) paragraph 13.

However, this dissertation is concerned with the consumer rights as effected and or influenced by the debt review procedure as outlined in section 86 of the NCA as amended by the National Credit Amendment Act.⁴⁴

The purposes of the NCA may indeed prompt a court to make special orders to ensure that consumers are adequately protected.⁴⁵ This is to say that the consumer's rights are of paramount importance in any adjudication of a credit agreement where a natural person is a consumer. However, this is not a call for judges to be unreasonably biased towards consumers, at the expense of credit providers' rights.⁴⁶

Malan JA opined that⁴⁷ the section 3 objects of the Act provide for the "protection of the consumer". It was further held that the interpretation of the NCA must give effect to these objects.⁴⁸ This somehow sets clear the route that this dissertation would also take from now onwards. Willis J in *Firststrand Bank t/a FNB v Seyfferet*⁴⁹ sums up the objectives of the NCA by stating:

Certainly, the NCA is designed to protect consumers, but it was not intended to make South Africa a debtors' paradise.

In acknowledging the pressing need to protect the consumers in interpreting its objectives, the Supreme Court of Appeal⁵⁰ took time to send a clear warning against an interpretation of the NCA that is unnecessarily biased towards consumers. Such approach would not only be unfitting and spurious, but it would have long term devastating effects on the credit industry and by extension, the country's economy.

⁴⁴ 19 of 2014.

⁴⁵ See *Otto and Otto* (2013) paragraph 4 of page 6. Reference is made to a court decision where an order was made to refer the matter to a magistrate court so as to save the consumer costs.

⁴⁶ *Ibid.*

⁴⁷ *Nedbank v National Credit Regulator* (appeal decision) paragraph 1 and 2.

⁴⁸ *Ibid.*

⁴⁹ 2010 (6) SA (SCA) 429 paragraph 10. In this judgment the judge referred to Kathree-Setiloane AJ's sentiments in *Standard Bank Of SA v Pretoria* (2010) (4) SA 635p11, where it was held that "the purpose of the Act is clearly to promote and protect the consumers. The Act must accordingly be interpreted to give this core purpose. It is therefore understandable why the judge felt it important to clear the dust after this judgment because it may have left the impression that consumer rights have to be protected at all times regardless the merits of each case.

⁵⁰ *Ibid.*

Notwithstanding many other objectives that compete to be given effect to, it would seem to me that that of protecting consumers' rights is prime. Although other jurists and scholars have been at pains to down play this important objective (for fear of creating a debtors' paradise in the Republic), it is clear that this is an unavoidable necessity that is embedded in the NCA. Consequently, it can be asserted that priority will be given to establishing whether the new amendments really protect the consumers' rights before enquiring into whether credit providers' interests have been protected as well.

2.4 Application of the NCA

Part D of chapter 4 of the NCA, which contains, among others, the debt review procedure, does not apply to credit agreements in respect of which the consumer is a juristic person.⁵¹ This means that, even though the NCA may in some instances⁵² apply to a consumer who is a juristic person; such a juristic person is not afforded the same protection that natural consumers enjoy. Thus, only natural persons who are consumers in terms of credit agreements to which the NCA applies are afforded the debt relief and reckless credit protection provided for in terms of section 86 of the Act.

Section 4(1) of the NCA provides that the Act applies to all credit agreements between parties dealing at arm's length and made within or having effect within the Republic. There are certain exceptions to this general statement, as already pointed out in the previous paragraph.

The NCA applies to a wide variety of credit agreements.⁵³ In fact the NCA has a much broader application than its predecessors.⁵⁴ Otto and Otto⁵⁵ list a number of credit agreements that the NCA covers, among others: personal loans, loans secured by mortgage, rendering of services, sale and lease of movable property and credit guarantees. In addition to that, it has removed the debt or credit ceiling that applies to

⁵¹ See s 78 of the NCA.

⁵² See s 4 in general.

⁵³ Otto and Otto list a number of examples of credit agreements that are regulated by this statute which are in fact dealt with in s 8 of the NCA.

⁵⁴ See paragraph 2.2 of this dissertation.

⁵⁵ Otto and Otto p 16.

natural person consumers.⁵⁶ However, the NCA does not apply to agreements made between family members who are dependent on each other and loans taken by major or controlling members of a juristic person from such company or family.⁵⁷

The NCA defines credit agreements in section 8 as follows;

- (1) Subject to subsection (2), an agreement constitutes a credit agreement for the purposes of this Act if it is –
 - (a) a credit facility, as described in subsections (3)
 - (b) a credit transaction, as described in subsection (4)
 - (c) a credit guarantee, as described in subsection (5); or
 - (d) any combination of the above.⁵⁸

Section 8(4)(f)⁵⁹ of the NCA sums up the important elements of a credit agreement. These are, deferred payment and any other charge, fee or interest that is payable to the credit provider in respect of such an agreement.

It is my opinion that a natural person consumer is most likely to engage in credit agreements of this nature and as a result the NCA provides protection to such a consumer.

An investigation into the impact of the amended provisions of debt review procedure on the consumer's position will be incomplete if the exemptions to the application of the NCA are not considered. The NCA will not apply to any credit agreement if the consumer is: a juristic person with an annual turnover of beyond R1 million⁶⁰ or where the agreement involves a mortgage of a value that exceeds R250 000 and where the

⁵⁶ See Kelly-Louw and Stroop, paragraph 1.4.

⁵⁷ See Otto and Otto, paragraph 8.

⁵⁸ See s 8(1) of the NCA. A credit facility is an agreement in terms of which the credit provider undertakes to supply a consumer with goods or services to the consumer whereupon the consumer would repay such in terms of instalments that carry an interest or a charge. A credit transaction can be a pawn or discount transaction, incidental credit agreement, instalment, mortgage or lease. It could be any other credit arrangement that is not a facility or credit guarantee. Subsections (5) and (6) deal with the other types of credit agreements.

⁵⁹ See the wording of s 8(4)(f) in detail.

⁶⁰ See s 7 of the NCA in general.

consumer is a state organ. It will also not apply where the credit provider is the Reserve Bank of South Africa or resides (located) outside the Republic.⁶¹

2.5 Conclusion

The NCA replaced the Credit Agreements Act⁶² and the Usury Act⁶³. Before its promulgation, the Insolvency Act⁶⁴ provided relief to financially overburdened persons (consumers) through administration and sequestration. The debt relief procedures encapsulated in this Act were unheard of. These processes (administration and sequestration) invariably left the consumers with very limited or no remedy to their financial quagmire. As a result, the introduction of section 86 (of the NCA) debt relief procedure brought about this necessary relief to financially strained consumers.

The NCA seeks to regulate almost every aspect of the granting of credit (where the consumer is a natural person) in South Africa.⁶⁵ It regulates a number of credit agreements. However, the Act does not apply to all credit agreements simply because such an agreement meets the definition of one of the four main categories of credit agreements or one of the sub-categories.⁶⁶ In any inquiry that seeks to establish if the NCA applies to an agreement or not, it is suggested that regard must first be had to determining if the agreement is in fact a credit agreement, before establishing the scope thereof.⁶⁷

Whereas certain juristic persons do enjoy limited protection from this statute, it is submitted that the legislature had a natural person in mind when it enacted this Act, given its background, objects and application. The general import of this chapter is that the NCA was promulgated to create a statute that would comprehensively and concisely provide for the protection of a natural person consumer who is a party to any credit

⁶¹ See s 4(a)(i)-(iii).

⁶² 75 of 1980.

⁶³ 73 of 1968

⁶⁴ 34 of 1936

⁶⁵ Van Zyl E “The scope of the application of the National Credit Act”, in The Guide *ibid.* p 4.1

⁶⁶ See *Silver Falcon Trading 333 v Nedbank Ltd* 2012 (3) SA 371 (KZP), in general.

⁶⁷ See The Guide, paragraph 4.4.

agreement to which this statute applies. Such protection comes in different forms and key amongst them, for the purposes of this dissertation, is the debt review procedure that is encapsulated in Part D of Chapter 4 of the Act.

CHAPTER 3 THE DEBT REVIEW PROCEDURE PRIOR TO ITS AMENDMENT

3.1 Introduction

The previous chapter dealt in detail with the background, objects and application of the National Credit Act.⁶⁸ This was done whilst keeping the focus of this dissertation in mind, namely, the debt review procedure. In the present chapter focus shifts towards the debt review procedure as entrenched in the NCA specifically.

This chapter discusses first, the objectives of the debt review procedure, followed by an analysis of sections 86(2) and 129 of the NCA. This discussion will also refer to the section 85 provisions which provide two very important alternative avenues that an over-indebted consumer may take to seek relief in some instances where the section 86(1) route has been closed off. The chapter also considers section 86(10) that deals with the termination of the debt review procedure by a credit provider. It also seeks to identify and discuss the problems that emanated from the previous debt review provisions prior to their amendment by the National Credit amendment Act in 2014.

3.2 Objectives of the debt review procedure

Chapter 2 of this dissertation dealt with the broad objectives of the NCA. Presently the focus shifts to highlighting some of those objectives within the context of the debt review procedure. The NCA, in enunciating its objectives, partly reads: “to provide for debt re-organisation in cases of over-indebtedness and to promote a consistent enforcement framework relating to consumer credit”.⁶⁹ In echoing this objective, the court in *Firststrand Bank Ltd v Olivier*,⁷⁰ indicated that it is clearly desirable that parties, through the intercession of a debt counsellor, attempt to develop and agree on a plan to bring payments under a credit agreement up to date before approaching a court with debt enforcement procedures that are often costly and burdensome. In an almost similar case, Binns-Ward J, in *Standard Bank of South Africa Ltd v Newman*⁷¹ also conceded that the object of the debt review procedure is directed at a restructuring of a monetary

⁶⁸ 34 of 2005. Hereinafter the NCA or the Act.

⁶⁹ See the Preamble to the NCA in general.

⁷⁰ 2009 (3) SA 353 (SEC) para D-F.

⁷¹ 2011 ZAWCHC 91(14 April 2011).

debt. Further, the Supreme Court of Appeal in *Collet v Firstrand Bank Ltd*,⁷² held that the purpose of the debt review procedure is not to relieve the consumer of his obligations but to achieve either a voluntary debt re-arrangement or a debt re-arrangement by the Magistrate's Court.

In various divisions of the high court, it was held that debt review does not seek to protect consumers, in an over-due contract of repayment by allowing them to retain the goods and or property after such contract has been cancelled.⁷³ As a result, once a contract has been cancelled, a consumer is *ipso facto* barred from claiming back the goods and or property so repossessed upon cancellation of such contract.⁷⁴

Actually, the process of debt review is directed at the regulated settlement of monetary debt.⁷⁵ Even the Supreme Court of Appeal has emphasised that the underlying principle is that consumers settle all their debts, outstanding and current.⁷⁶ In fact, the idea is that consumers ultimately satisfy all their debts.⁷⁷ It was also pointed out that the purpose of debt review is not to relieve debtors of their financial obligations, but to establish a debt restructuring mechanism by a Magistrate Court.⁷⁸

However, it would seem to me that it is the gist of the above cases that the true objective of the debt review procedure as enunciated in section 86 is to assist the consumer to seek guidance from a debt counsellor (and a Magistrate Court) for the purposes of developing a plan to restructure and ultimately pay all such consumer's outstanding debts. In fact a reasonable consumer can make use of this route to avoid paying hefty sums in attorney fees and interests charged when the credit provider institutes enforcement procedures in court. The debt review process in terms of the

⁷²2011 (4) SA 508 (SCA) paragraph 10.

⁷³*BMW Financial Services SA (Pty) Ltd v Donkin* 2009 (6) SA 63 (KZD).

⁷⁴*BMW Financial v Donkin* *ibid*

⁷⁵*Standard Bank of SA Ltd v Jikeka* (unreported) WCC, case no 3430/2010 paras 3 and 4.

⁷⁶In *Collet v FirstRand Bank Ltd* 2011 (4) SA 508 (SCA) para 10. The judge held that the purposes of the NCA (debt review) include the promotion of responsible borrowing, avoidance of over-indebtedness and fulfillment of financial obligations. Through the provision of a harmonized system of debt- restructuring, the NCA, places its priority on the eventual satisfaction of all respective consumer responsibilities.

⁷⁷ Kelly-Louw and Stroop, paragraph 12.

⁷⁸Kelly-Louw and Stroop, p 325.

NCA is therefore a necessary low cost debt resolution procedure that seeks to protect defaulting over-indebted consumers from paying debt enforcement related costs.

3.3 Interpretation of section 86(2) read with section 129 of the NCA

The debt review procedure in terms of the NCA is a very important measure that was designed specifically to provide protection and assistance to an over-indebted consumer.⁷⁹ However, the NCA has become notorious for its lack of clarity.⁸⁰ The sections in the NCA that deal with the debt review procedure are among the more troublesome sections of the Act and have spawned numerous and often divergent interpretations.⁸¹ What follows is an attempt to expose the problems that emanated from these interpretations in respect of section 86(2) read with section 129 of the NCA.

Section 86(1) of the NCA provides that:

A consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted.

The NCA, through this provision, provided a consumer with an opportunity to approach a debt counsellor which would then assist such a consumer to re-arrange or restructure such consumer's debts so as to discharge his or her debts easily. In *SA Taxi Securitisation v Ndobela*,⁸² the court conceded (in obiter) that this section places a pre-emptive duty on a consumer who at any time, prior to receiving an enforcement order, realises that his or her finances have deteriorated, to take steps to set his or her house in order. Where the debt counsellor has made a determination that the consumer is in fact over-indebted, such a debt counsellor may proceed by way of section 86(7) of this Act.

However, the original wording of section 86(2) seemed to cancel this benefit that accrued to an over-indebted consumer. It provided that:

⁷⁹ See *Wesbank a division of Firstrand Bank Ltd v Papier* 2011 (2) SA 395 (WCC).

⁸⁰ See chapter 1 of this dissertation, especially para 1.2 dealing with the problem statement.

⁸¹ See The Guide, chapter 12.

⁸² 2011 ZAGPJHC 14 paragraph 14.

an application for debt review,[sic]“may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement.”

Section 129 is entitled, “required procedures before debt enforcement”. This provision received extensive attention from the courts. It provides that:

- (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
 - (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 130.⁸³

The first question that arose from this provision was; could a consumer to whom a section 129(1)(a) notice is delivered still apply for the debt review in terms of section 86(1) of this Act? Opinions differed in this regard. On one hand, there was a view that section 86(2) prevented a consumer from utilising section 86(1) to apply for a general debt review. For instance, in *Nedbank v Motaung*,⁸⁴ the court interpreted section 86(2) to mean that once a section 129(1)(a) notice has been sent, the consumer is barred from applying for debt review. In *National Credit Regulator v Nedbank and Others*,⁸⁵ the court reasoned that the section 129(1)(a) notice is a preliminary to debt enforcement.

⁸³ See s 129 of the NCA in full.

⁸⁴ 2007 ZAGPHC 367. Many other cases took the same view that was taken by this court. See *Potgieter v Greenhouse Funding (Pty) Ltd* (2009), *Absa Bank Ltd v Prochaska* (2009) and *Standard bank of South Africa Ltd v Hales* (2009) as well where the court was of the opinion that s 129 (1)(a) notice restricted a debt counsellor’s plans to try and resolve a dispute under the agreement and thus a consumer would be unable to apply for debt review.

⁸⁵ 2009 (6) SA 295 (GNP)

Many other courts tried to give a clearer interpretation of this section⁸⁶ but the risk of different outcomes was ever-present as a result of the failure to correctly decipher the legislature's intention in cross-referencing section 86(2) with a very long and confusing section 129 of the Act.

The Supreme Court of Appeal in *Nedbank v The National Credit Regulator*,⁸⁷ held that the section 129(1)(a) notice refers to a specific credit agreement in respect of which the consumer is in default and does not contemplate a general debt review. The answer to the first question was thus provided; a consumer could still apply for debt review in respect of other credit agreements whose credit providers had not sent a section 121(1)(a) notice but not in terms agreement for which notice has been delivered. Debt review in respect of that specific credit agreement was thus excluded. Further, it must be noted that the same court also ruled that the delivery of the section 129(1)(a) notice constituted a first step towards enforcement of that specific credit agreement.

Given the clarity that was provided by the Supreme Court of Appeal with regard to section 86(2) of the NCA in that it contemplates a debt review under which a specific credit agreement may be excluded,⁸⁸ I submit this section (86(2)) did not completely close all the avenues that an over-indebted consumer could utilise to get debt relief. Sections 85 and 83(2) and (3) of the NCA could still be used.⁸⁹ With regards to section 85, the Supreme Court of appeal held that that it enjoys unlimited application.⁹⁰ It seems that a financially strained consumer has an opportunity and a right to approach a court to be declared over-indebted, even where the credit provider has proceeded to take

⁸⁶ See The Guide, chapter 11.

⁸⁷ 2011 (3) SA 581 (SAC), paragraph 11.

⁸⁸ See previous footnote. The judge further argued that even if a particular credit agreement falls outside the scope of debt review a court may, nevertheless, as provided for by s 85, in any court proceedings 'in which a credit agreement is being considered' and in which it is alleged that the consumer is over-indebted, refer that matter to a debt counsellor for evaluation and a recommendation in terms of s 86(7) or declare that the consumer is over-indebted and make any of the orders contemplated in s 87. It was further held that, in terms of s 83(1), in proceedings where a credit agreement is being considered, a court may declare it to be reckless and make any of the orders provided for in s 83(2) and (3).

⁸⁹ See the argument in the previous footnote.

⁹⁰ See *Seyfrett v Firstrand Bank Ltd* 2012(6) SA 581 (SCA) 587 in general. See also a discussion of s 85 in Kreuser M. "The application of section 85 of the National Credit Act in application of summary judgment" 2012 *De Jure* 2.

steps in terms of the erstwhile section 129 of the NCA.⁹¹ In that way, such a consumer could still benefit from the other debt review procedures and ultimately get protected as envisaged by the legislature.⁹²

Section 129 has been a subject of litigation and academic debate for a number of other reasons as well. In addition to the first pivotal question already discussed above, the use of the word ‘may’ in subsection (1)(a) was also analysed by courts and academics alike. In the ordinary English lexicon, it presupposes discretion (on the part of the credit provider) with regards to drawing the default to the consumer. However, in *Absa v Mkhize*⁹³ the Supreme Court of Appeal held that section 129(1)(a) notice is a mandatory requirement prior to litigation, despite the use of the word ‘may’.⁹⁴ The section 129(1)(a) notice was held to be a compulsory step:

devised by the legislature in an attempt to encourage parties to iron out their differences before seeking court intervention.⁹⁵

Despite what some credit providers may think, the delivery of section 129 is mandatory as it seeks to protect over-indebted consumers from knee-jerk and unannounced debt enforcement procedures. The delivery of this notice helps to spur an over-indebted consumer to seek redress through the agency of the debt counsellor before the credit provider proceeds with the enforcement of that particular debt. The NCA thus limits credit providers’ rights when it comes to enforcing their remedies.⁹⁶

Secondly, the precise meaning of the phrases “draw the default to the notice of the consumer”, “providing notice”, and “deliver a notice” were also unclear.⁹⁷ The most

⁹¹ See Kreuser, footnote number 21 where the author discusses the decision taken by the judge in *Ex Parte Ford* case.

⁹² See the objects of the NCA in terms of s 3 in general.

⁹³ [2013] ZASCA 139 p 6.

⁹⁴ See also s 129(1) (b) read with s 130(1) of the NCA.

⁹⁵ See *The Guide*, chapter 12.

⁹⁶ See *Otto and Otto*, p 107.

⁹⁷ See *ABSA Bank Ltd v Mkhize* 2014 ALL SA 1 (SCA) in general.

logical meaning that could be attributed to these phrases is “delivery of notice.” The credit provider is expected to deliver the notice to the consumer in terms of the NCA. The question that arose was what exactly the legislature meant by “delivery.” Section 65 of the NCA defines the concept and method of delivery of a document. It is provided that every document that is supposed to be delivered in terms this Act “must be delivered in a prescribed manner”.⁹⁸ Section 96 explains the concept of address to a notice (that is delivered to a party).

In *Rossouw v First Rand Bank Ltd*,⁹⁹ the Supreme Court of Appeal ruled that delivery by a registered mail to the consumer’s last known address was sufficient for the purposes of complying with section 129 notice. The credit provider only needed to prove that it had sent the notice to the correct address. I submit that this view robbed the consumer of an opportunity of actually receiving this important notice in cases where the consumer had changed address or where the post office did not put it (the registered mail) in the correct pigeon hole for the consumer to pick it up in time. Further, in cases where, for some reason or another, the consumer did not check his or her box in time, this decision somehow took away that consumer’s right to receive the notice.

However, the Constitutional Court came to a different conclusion in *Sebola and Another v Standard Bank of South Africa*.¹⁰⁰ In this case, the appellants had appealed a decision from the court *a quo* that ruled in favour of the credit provider who had only proved that it had delivered the section 129 notice to the consumers’ correct address. The appellants had argued that they had not seen the notice.¹⁰¹ Cameron J concluded that the notice must be delivered to the consumer (be brought to the consumer’s subjective notice). He argued that delivery in this manner would give the consumers a “last chance before court enforcement procedures drop the guillotine on them.”¹⁰² For an

⁹⁸ S 65(2) lists various ways through which a document may be delivered to any person in terms of the NCA.

⁹⁹ 2010 ZASCA130 p 31.

¹⁰⁰ 2012 (5) SA 142 (CC).

¹⁰¹ The previous court had relied on the *Rossouw* case to deliver judgment in favour of the credit provider. The appellants had launched this appeal on grounds that their rights to receive the notice had been infringed and hence they had lost the protection that this delivery of the notice afforded them as consumers.

¹⁰² See *Sebola v Standard Bank of South Africa*, paragraph 83.

authoritative summary of this decision and other decisions connected therewith, see Coetzee 2015.¹⁰³ She further concedes that:

This decision led to legal uncertainty, the main point of contention being whether *Sebola* allows a consumer to unreasonably fail to collect or attend to properly dispatched notice— thereby prohibiting credit providers to enforce their rights under credit agreements;¹⁰⁴

In this regard, I share the same sentiments with professor Otto¹⁰⁵ that the learned justice stretched the provisions of debt review a little too far in an attempt to stay true to the scheme of the NCA that seeks to protect consumers. Of course the section 129 notice is an important warning before enforcement procedures are instituted, but the requirement that such notice must reach the subjective notice of the consumer is cumbersome and unreasonable. It would indirectly undermine responsible participation on the debt review, seeing that a large burden was placed on the credit provider to prove delivery to the consumer by creating a debtor's paradise. Whereas it seemed to provide enough protection to the over-indebted consumer, I submit that it was too generous a ruling in support of consumer protection. The court followed the same reasoning in *Absa Bank v Mkhize*¹⁰⁶ to the detriment of the credit provider despite the latter doing everything possible to deliver the notice. Nonetheless, it should be emphasised that the consumer received equal protection from this generous interpretation. Needles to point out that this view left a grey area in the jurisprudence around debt review which was to be clarified by the Constitutional Court in a 2014 decision.

¹⁰³ Coetzee H “A Comparative Reappraisal Of Debt Relief Measures For Natural Person Debtors In South Africa” LLD dissertation, 2015, p 213, Herein after Coetzee 2015. In foot note 290, she clarifies the Constitutional decision in *Sebola*. She attests that the essence of the decision was that: “In unopposed matters, where the credit provider posted the notice, proof of the registered dispatch to the address of the consumer coupled with proof that the notice reached the correct post office would constitute delivery. However, where a consumer alleges that the notice did not reach him, the court must investigate the truth of the allegation. If the court finds that the notice did not reach the consumer the court must in accordance with s 130(4)(b) adjourn the matter and set out the steps that the credit provider must take before the matter may be resumed.”

¹⁰⁴ *Ibid.*

¹⁰⁵ JM Otto p 606.

¹⁰⁶ *Sebola case* paragraph 46.

Professor Otto concedes that “consumer protection comes at a price, but the NCA has in many instances set the price far too high,”¹⁰⁷ This was the case in the *Sebola* case. This matter was finally settled in *Kubyana v Standard Bank of South Africa Ltd.*¹⁰⁸ The court held that the interpretation of ‘delivery’ “(must) be consonant with the statutory objectives of consumer protection.”¹⁰⁹ However, the court suggested that it would be unreasonable to demand that the credit provider proves that the notice actually came to the subjective notice of the consumer. A reasonable consumer must act reasonably and diligently to check the post box for registered mail. In that way, such a consumer would ensure that his or her rights to receive the notice are protected. I submit that the inclusion of the “reasonable consumer” was confusing and open to divergent interpretations. It brought more uncertainty than what it sought to remove. This uncertainty that surrounded the interpretation of section 129 caused doubt and confusion around the correct interpretation of section 86(2) of the NCA, which led the legislature to amending the subsection.¹¹⁰

3.4 Termination of debt review in terms of the NCA

Of particular importance to this dissertation is the termination of debt review by the credit provider in terms of section 86(10) of the NCA.¹¹¹ This subsection originally provided as follows:

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

- (a) the consumer
 - (b) the debt counsellor; and
 - (c) the National Credit Regulator
- at any time at least 60 business days after the date on which the consumer applied for the debt review.¹¹²

¹⁰⁷ JM Otto p 607.

¹⁰⁸ 2014 ZACC 1 paragraph 40.

¹⁰⁹ *Ibid.*

¹¹⁰ See s 26 of the NCA in general.

¹¹¹ See chapter 1 of this dissertation.

¹¹² See s 86(10) of the NCA.

The question that arose from this provision was whether a credit provider is entitled to terminate a debt review in terms of section 86(10) after the debt counsellor has referred the matter to the Magistrate's Court and the court has not yet decided on the issue. In *Wesbank, v Papier*,¹¹³ a full bench answered it the negative. The court based its reasoning on the objects of (Part D of Chapter 4 of the NCA) the Act, namely that: it seeks to provide protection and assistance to an over-indebted consumer. The court decided that the right of a credit provider to terminate the debt review is forfeited once the debt counsellor brings an application to the Magistrate Court in terms of section 86(7) or 87(7) of the NCA.¹¹⁴ Allowing a credit provider to terminate such an important process would unnecessarily impinge on that consumer's right to a debt review.¹¹⁵

This question was again considered this time by the Supreme Court of Appeal in *Collett v Firstrand Bank*.¹¹⁶ The court answered it in the positive. Malan JA took a different approach in interpreting the section 86(10) provisions. The court's reasoning was that a credit provider may indeed terminate the debt review once 60 days have lapsed since the application for debt review, provided that the consumer was in default, and (provided) the credit provider participated in good faith. This was a blow to an over-indebted consumer's right to a debt review that could have resulted in a favourable re-arrangement of that consumer's obligations.¹¹⁷

Indeed, there were too many divergent views on the interpretation of section 86(10).¹¹⁸ The most reasonable view, in my mind, was that the credit provider's right to terminate the debt review was stayed as soon as the debt re-arrangement order had been granted. The approach in the *Wesbank* case stayed true to the scheme and

¹¹³ 2011 SA 395 (WCC) paragraph 14

¹¹⁴ See *Wesbank v Papier*, paragraph 15.

¹¹⁵ See the discussion on chapter 4 of this dissertation.

¹¹⁶ 2011 ZASCA 78.

¹¹⁷ See Coetzee 2015 p 209. She concedes that this decision was to the detriment of "debt-stricken consumers". Although the court attempted to allay the fears of consumers that the termination only related to a specific agreement, the author rightfully argues that such termination would significantly derail the whole process of debt review.

¹¹⁸ See footnote 11 of *Wesbank*, case. There is enough case law that suggests that a contextual approach to reading this subsection would yield completely different results.

objects of the debt review process that is commenced in subsection 86(1) of this provision.¹¹⁹ The *Collet* case seemed to bring down the guillotine on the necks of debt ridden consumers despite the fact they had made reasonable attempts to resolve their over-indebtedness through bringing an application to court via the agency of a debt counsellor. Such interpretation of this provision robbed many financially strained consumers of the opportunity to get the protection and assistance that they needed.¹²⁰

Over-indebted consumers ought to be given enough time to apply for and get the relief that they need in terms of the section 86(1) provisions, in the absence of the fear that such review may be terminated by the credit provider. The previous provision clearly failed to guarantee over-indebted consumers such right.

However, consumers who had their debt review procedures terminated in terms of section 86(10) could use and rely on subsection 86(11). In terms of section 86(11), the [Magistrate] “Court hearing that matter may order that the debt review resume on any condition” it considers fit in the circumstances. It has been suggested that a court “will obviously make such an order only if it is sensible” and feasible to order a debt restructuring in the circumstances.¹²¹ I submit that this avenue is not certain. The court uses its prerogative to give such an order, which could be to the detriment to an over-indebted consumer who is desperate for a debt re-arrangement.

3.5 Conclusion

The NCA addresses the problem of over-indebtedness by way of debt review through a debt counsellor or a court. Section 86 is seen as an avenue by which a consumer may voluntarily apply for debt review which is conducted by a debt counsellor.¹²² Like many other provisions in this statute, section 86 is not without its confusion. For instance,

¹¹⁹ See the *Collet* case paragraph 7. The court held that the object of this part of the Act is to provide protection and assistance to an over-indebted consumer in an environment that encourages participation in good faith by both parties.

¹²⁰ See Coetzee 2015, p 209.

¹²¹ See *Otto and Otto* p 110. The others base their argument on court decision that significantly referred to in their discussion.

¹²² See paragraph 3.2 of this dissertation.

section 86(2) read with section 129, brought about a lot of uncertainties to the entire jurisprudence around the debt review procedure.¹²³ Section 86(10) also raised an interpretational dilemma. Its varied interpretations meant that, in some instances, over-indebted consumers were robbed of an opportunity to get protection and assistance that the debt review procedure provides to them.

Section 86(11) of the NCA gave them hope, although such (hope) depended entirely on the discretion of the Magistrate Court that heard such an application. The interpretational hiccups that the language of the NCA brought to the debt review procedure inevitably derailed this important procedural remedy for over-indebted consumers. This lack of clarity meant that the legislature had to amend this statute in order to improve the protection of over-indebted consumers in the credit industry in the Republic.

¹²³ See paragraph 3.3 of this dissertation.

CHAPTER 4: THE DEBT REVIEW PROCEDURE SUBSEQUENT TO ITS AMENDMENTS

4.1 Introduction

The National Credit Amendment Act¹²⁴ brought about important changes in the field of debt review.¹²⁵ In fact, the voluntary application for debt review in terms of section 86 of the NCA is amended by section 26 of the NCAA. Prior to an in depth analysis of some of these new provisions, I believe that it is important to preface this discussion with a brief over-view of the concept over-indebtedness. Moreover any successful application for a debt review contemplated in section 86(1) of the NCA hinges on whether the applicant is in fact over-indebted. Indeed this new Act introduces an array of changes to the NCA which seek to improve its readability and effectiveness in governing consumer credit in general and the administration of debt review in particular. Our concern is with regard to the administration of some aspects of debt review.¹²⁶

4.2 Over-indebtedness

Actually, the definition of over-indebtedness has not changed since the promulgation of the NCA in 2005. As indicated above, it behooves us to include a brief outline of this concept from the outset of this chapter since it would be a regular feature throughout this discussion. At the risk of repetition, it is a requirement that the consumer must be over-indebted if such a consumer is to qualify for an application for debt review. The concept of over-indebtedness refers to the consumer's inability to satisfy all his or her obligations under all his or her credit agreements in a timely manner.¹²⁷ The concepts of over-indebtedness and reckless credit are new to the South Africa credit legislation.¹²⁸ It is further contended that reckless credit and over-indebtedness overlap,¹²⁹ in the sense that the former causes the latter. Ultimately, a natural person who enters a credit agreement that is governed by the NCA, who at a later stage becomes over-indebted,

¹²⁴ 19 of 2014, hereinafter the NCAA.

¹²⁵ See Otto JM: *National Credit Act. Vanwaar Gehasi? *Quo vadit lex. And some reflections on the National Credit Amendment Act 2014***(part 1). 2015 TSAR 583, p 36. Hereinafter JM Otto.

¹²⁶ See the objectives of this dissertation in chapter 1 of this project. Focus is placed only on voluntary application for debt review in terms of S 86(2) and the termination of such review in terms of S 86(10).

¹²⁷ See s 79 in general.

¹²⁸ See the discussion in The Guide paragraph 11.3.

¹²⁹ Ibid.

may be granted debt relief (through restructuring). Concomitantly, a consumer who receives a reckless credit may find relief in terms of section 86(7) of the NCA.¹³⁰

Any determination of over-indebtedness must consider certain factors¹³¹ as they existed at the time such determination is made¹³² and not at a time the consumer raises it or the debt counsellor thereof. Over-indebtedness at a time the credit agreement was entered relates to reckless credit granting which therefore gives rise to the interplay already alluded to in this paragraph.

Indeed, courts are given power in terms of section 85 of the NCA to declare and relieve over-indebtedness. Consumers could also voluntarily apply for debt review in terms of section 86(1) of the NCA but not with regards to a credit agreement in respect of which a section 129(1)(a) notice has been granted. This position has since been amended.¹³³ A thorough discussion of this amendment would ensue in the latter paragraphs of this chapter.¹³⁴

4.3 Some aspects of debt review in terms the NCA as amended by NCAA

Section 26 of the NCAA amends section 86(2), (10) and (11) of the NCA.¹³⁵ The new changes brought about by these amendments form the crux of this dissertation. This paragraph and its sub-paragraphs seek to investigate the impact of these new amendments on certain aspects of the debt review procedure. The ensuing discussion aims to establish if the consumer's position is in fact improved by these amendments.

¹³⁰ See s 86(7)(c) for brief insight into the actions that a debt counsellor may take after determining that the consumer is over-indebted. In fact the debt counselor may recommend that the court make an order that one or more of the consumer's credits be declared reckless if upon examination, the debt counsellor concludes that they are reckless credits.

¹³¹ See s 79(1)(a) and (b).

¹³² See s 79(2).

¹³³ See s 25 of the National Credit Amendment Act 19 of 2014.

¹³⁴ See paragraph 5 of chapter 4 of this dissertation.

¹³⁵ See s 24(a) and (b) of the National Credit Amendment Act 19 of 2014 in full.

The foundation of this dissertation has its origins in section 86(2). Prior to its amendment by the NCAA, section 86(2) provided that an application for debt review could not:

be made in respect of and does not apply to, a credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take steps contemplated in section 129 to enforce that agreement.¹³⁶

As indicated in chapter 3 of this dissertation, opinions differed in this regard.¹³⁷ Two dissenting views emerged from courts that heard cases involving the interpretation of this section. On one hand, there was a view that section 86(2) prevented a consumer to whom a section 129(1)(a) notice has been delivered from applying for a general debt review. On the other hand, it was argued that the steps mentioned in section 129 were not steps to enforce the agreement but merely procedures before enforcement.¹³⁸

As already stated in the previous chapter, the Supreme Court of Appeal resolved this impasse.¹³⁹ It was held that once a section 129(1)(a) notice has been delivered in respect of a specific credit agreement, the provisions of section 86(2) bar the consumer from applying for debt review in respect of that specific agreement.¹⁴⁰ Section 26 of the NCAA amends section 86(2) of the NCA. In the following discussion, I will always be mindful of the objectives of this project.¹⁴¹ Professor Otto emphasised the objectives of consumer legislation when he stated that:

[It has to] protect vulnerable consumers, which is why it is called consumer legislation. In South African context this is an acute problem. We have a large number of illiterate or semi-illiterate, and ignorant or high ignorant people.¹⁴²

The need to protect consumers becomes critical if, in addition to being illiterate, find themselves over-indebted. It is for this reason that this project seeks to establish if these

¹³⁶ See s 86(2) of the Act.

¹³⁷ See paragraph 3.3 of this dissertation.

¹³⁸ See The Guide, p 12-45.

¹³⁹ See the decision in *Nedbank Ltd and Others v The National Credit Regulator* 2011 (3) SA 581 (SCA).

¹⁴⁰ See the discussion in The Guide, paragraph 11.

¹⁴¹ See paragraph 1.2 of chapter 1 of this project.

¹⁴² JM Otto p 584.

types of consumers do in fact receive the protection they deserve under the amended provisions of the NCA.

4.3.1 Application for debt review in terms of the NCA as amended by the NCAA

One of the contentious issues in connection with debt review was the interpretation and application of section 86(2) of the NCA.¹⁴³ Section 26(a) amends this section of the NCA and provides that:

(1) An application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take steps contemplated in section 130 to enforce that agreement.

As explained in chapter 3 of this dissertation, prior to its amendment by the NCAA, section 86(2) provided that an application for debt review could not be made in respect of, and did not apply to, a particular credit agreement if, at that time of the application, the credit provider had proceeded to take steps contemplated in section 129 to enforce the agreement.¹⁴⁴ Presently, a consumer is prevented from applying for debt review if the credit provider has taken steps contemplated in section 130 of the NCA. The effect of this amendment is that the delivery of section 129 notice will not serve to exclude the specific agreement in respect of which it is delivered from an application for debt review.¹⁴⁵

It is submitted that the amendment now affords a consumer an extended period, between the delivery of section 129 notice and the actual commencement of proceedings in terms of section 130 to apply for debt review.¹⁴⁶ The delivery of section 129(1)(a) notice still serves a purpose, in that it triggers a consumer to apply for debt review before the credit provider commences the enforcement proceedings against the

¹⁴³ JM Otto p 593. See also the discussion in chapter 3 of this dissertation.

¹⁴⁴ See s 86(2) of the NCA. The interpretational curve balls that this section threw at the courts and various legal writers formed the subject of paragraph 3.3 of this dissertation. It is not the intention of this dissertation to revisit that argument.

¹⁴⁵ The Guide, chapter 12.

¹⁴⁶ *ibid.*

same consumer. Indeed this amendment improves the position of the consumer with regards to debt review.

The gist of section 130(1) of the NCA is that a credit provider may approach the court to enforce a credit agreement at a time that the consumer has been in default for over 20 business days. Subsection (1)(a) requires that at least 10 business days must have elapsed after the credit provider had delivered a section 129 notice to the consumer in respect thereof.¹⁴⁷ I submit that the legislature has been more than generous to the consumer in this amendment. First, the 20 business days that a consumer is afforded between the first day of default and the delivery of the section 129 notice gives the natural consumer a full month (20 business days make up a complete month, barring the eight days of the weekends) to make the necessary payment. Secondly, the consumer is given 10 business days [which of course run co-currently with the 20 business days mentioned above] to respond to the credit provider's proposal in terms of section 130(1)(b)(i). I share the same sentiments with professor Otto's summary of the amendments. He submits that:

In terms of [the new amendments, a consumer's application for debt review will be stayed only until after –

- (i) he has received the section 129 notice
- (ii) did not respond to it properly and
- (iii) he has been in arrears for at least 20 business days; which is effectively a full month.¹⁴⁸

In view of the above, this is a very long period of time that a reasonable consumer should utilize to apply for debt review and start taking the necessary steps to fulfil his or her obligations in terms of the credit agreement. Further, the amendments assist in clarifying one very contentious issue that threatened to whisk away all the benefits and protection that the NCA sought to bring to financially strained consumers.

¹⁴⁷ See s 130 of the NCA in detail.

¹⁴⁸ JM Otto p 594.

With regards to the delivery of the notice, the NCAA settles the matter in section 32. Delivery is complete when the credit provider brings the section 129(1)(a) notice to the knowledge of the consumer through any one of the listed means.

The notice contemplated in subsection (1)(a) must be delivered to the consumer –

- (a) by registered mail; or
- (b) to an adult person at the location designated by the consumer.¹⁴⁹

Delivery by a registered mail and physically handing it to an adult person found at the address that the consumer supplied are very safe and efficient means of communication with the consumer. In the event that it is sent via a registered mail, proof of delivery shall be through a written confirmation by the postal service or its authorized agent. Where it is handed to an adult person found at the location or address that the consumer had supplied, proof shall be the signature of such recipient.¹⁵⁰ There can be no confusion arising from the delivery of this notice again. Indeed this statutory provision irons out any interpretational creases that developed a while ago with regards to this issue.¹⁵¹

4.3.2 Termination of debt review in terms of the NCAA

Another contentious issue was the interpretation and application of section 86(10) of the NCA. The termination of debt review and other related issues were discussed in detail in paragraph 3 of this dissertation. The question that arose from the interpretation of this provision was related to whether a credit provider could terminate the debt review that was pending before court. Despite what the High Courts had decided, the Supreme Court of Appeal declared that indeed the credit provider had a right to terminate such

¹⁴⁹ See s 32 of the NCAA in full.

¹⁵⁰ *Ibid.*

¹⁵¹ See *Sebola* referred to in chapter 3 of this project. Although the Constitutional Court had tried to clarify the *Sebola* judgment in *Kubyana* 2014, its decision could not be as clear. In this amendment, the legislature makes it clear that there will not be any deviation from the address that the consumer [has] supplied to the credit provider. There is no reasonable consumer test advocated by *Kubyana* which it was felt (see chapter 3) that it could be too wide and confusing. Either way (s 32 (a) or (b)), it is submitted that the consumer stands to be fully and fairly notified. The delivery methods provided for in this Amendment Act are clear and unambiguous.

review if such credit provider had complied with the statutory requirements that guide termination of the debt review.¹⁵²

Professor Otto laments the obvious difficulties that faced the consumers under the previous dispensation:

Various logistical difficulties relating to section 86(10) and the various outcomes of the judicial interpretation of this section could be abused by ... and credit providers.... However, a variety of factors such as lack of cooperation of credit providers and court backlogs prevented some consumers from timeously obtaining these orders [to be declared over-indebted].¹⁵³

Indeed the previous state of affairs put over-indebted consumers in an invidious position in that their application for debt review could be terminated by credit providers if the last mentioned felt that the debt review was not going the way they had envisaged it to go or when they felt that the consumers were simply stalling the process. At the end of it all, over-indebted consumers did not get the protection they would have set out to obtain through section 86(1) application procedures.

Van Heerden¹⁵⁴ looks at the implications of non-compliance with “procedural” requirements on the part of the credit provider. She distinguishes between statutory compliance in terms of section 86(10) and a lack of good faith by a credit provider. She submits that the logical order that the courts should make with regards to the latter would be the resumption of the debt review in terms of section 86(11).¹⁵⁵ Where the credit provider fails to correctly deliver the notice, she states that the courts have differed in their approach, but submits that the logical reason would be to deny the summary judgment. Either way, it is submitted that the granting of termination of review that was pending before court, only succeeded in piling debt on the already over-indebted consumer.

¹⁵² See the discussion on paragraph 3.5 of this dissertation.

¹⁵³ JM Otto p 597.

¹⁵⁴ In the Guide, p 11-52-11-53.

¹⁵⁵ See discussion on p 11-52.

The wording of section 86(10) has been changed by section 26 of the NCAA. In terms of section 26 of the NCAA:

- (10) (a) 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, at any time at least 60 business days after the date on which the consumer applied for the debt, give notice in the prescribed manner to –
- (i) the consumer
 - (ii) the debt counsellor; and
 - (iii) the National Credit Regulator,
- (b) No credit provider may terminate an application for debt review lodged in terms of this Act, if such application for debt review has already been filed in a court or the Tribunal.

The wording of the new provision can be conveniently sub-divided into two subsections, wherein subsection (a) focuses on the termination of review and subsection (b) deals with a bar on termination.¹⁵⁶ It is now clear that in addition to the requirement that 60 days must have elapsed since the application of review was lodged, the credit provider is expected to notify the consumer, the debt counsellor and the National Credit Regulator. The new provision is more than a “reshuffle” in that it is a concise articulation of the steps that the credit provider must follow in complying with statutory requirements of section 86(10).

Van Heerden laments the fact that there is a gap that the legislature left with regards to the powers of the consumer and the debt counsellor with respect to the withdrawal from the debt review process.¹⁵⁷ She also raises the fact there is no explicit provision for the automatic lapse of debt review. I submit that the debt review automatically expires on the day and date that the court issues an order with regards to the same review.

Further, whilst a credit agreement is subject to a pending debt review and before it is duly terminated in terms of section 86(10), there is a statutory *moratorium* against

¹⁵⁶ See The Guide p 11-48.

¹⁵⁷ *Ibid.*

enforcement of that credit agreement in terms section 88(3).¹⁵⁸This means that the consumer receives additional protection in paragraph (b) of the amended section 86(10) of the Act – now that such court proceedings cannot be terminated. It is argued that, the purpose of this moratorium (Section 86(10)(b) amendment) is

to afford consumers “breathing space” and to avoid disgorging them of their assets without offering them an opportunity to recover from what might be a bad patch in their financial circumstances.¹⁵⁹

Consumers, who timeously apply to the court to be declared over-indebted so as to have their obligations re-arranged by a court order, deserve to be offered that opportunity in the absence of termination of such court procedures. In this new provision, debt counsellors and consumers are given a reasonably lengthy period to prepare their applications and to argue their cases before courts. In that way, they may put up a solid defense against summary judgments. However, it must be mentioned that credit providers still retain the right to terminate the debt review if the debt counsellor does not file the application in good time with the court.¹⁶⁰Therefore, consumers are advised to encourage their counsellors to act expeditiously.

There is authority in *Seyffret v Firstrand Bank Ltd*,¹⁶¹ that non compliance by the credit provider with section 86(10) provisions prior to enforcement could afford a consumer a technical or procedural *bona fide* defense against summary judgment. This is to say that credit providers are still saddled with the statutory requirements they have to fulfil prior to applying for the termination of the debt review. As a result, there is a reduced chance of *mala fide* applications for the termination of debt review – a procedure that exposes consumers to paying hefty sums to settle their obligations. It is also clear that, section 86(10) as amended, affords the consumers the opportunity to restructure their debts

¹⁵⁸ See s 88(3) of the NCA in detail.

¹⁵⁹ See Roestoff M and Van Heerden CM. *Nedbank Ltd v Swartbooi* (Unreported Case No 708/2012(ECP) *Termination of debt review in terms of the National Credit Act – not the end of the road for over-indebted consumers*. 2014 *De Jure* p 144. Hereinafter Roustoff and Van Heerden.

¹⁶⁰ See JM Otto p 595.

¹⁶¹ 2012 6 SA 581 SCA para graph 13.

and bars the credit providers from enforcing credit agreements that have been lodged in court.¹⁶²

Section 86(11) was not significantly changed besides the fact that now any court can be approached with an application for debt review or resumption thereof. It is provided that the court hearing the enforcement of the credit agreement must be the court to grant and hear the resumption of debt review thereof.¹⁶³ I submit that this serves time and costs for the credit provider (which costs are in turn transferred to a consumer) in that the same court hearing the enforcement becomes the court to decide if resumption of the review may be granted. The facts of the case, various parties' submissions and averments for and against the termination of review and the granting of summary judgment could be easily used in the court's *ratio decidendi*.

4.4 Conclusion

The amended provisions are a welcome relief to consumers that are experiencing financial difficulties and as a result are *in mora debitoris*. The cross referencing of section 86(2) with section 130 brings about clarity with regards to application for debt review. In fact over-indebted consumers now have an extended period to apply for debt review after receiving the section 129 notice before the credit provider could commence with enforcement proceedings.¹⁶⁴ The reshuffling of section 86(10) improves its clarity and the inclusion of subsection 10(b) gives consumers a sense of ease and assurance that courts would hear their review applications free from termination by credit providers.

¹⁶² See the discussion above.

¹⁶³ See s 26(b) of the NCAA.

¹⁶⁴ See paragraph 4.4.

CHAPTER 5 GENERAL CONCLUSION AND REMARKS

5.1 Introduction

This dissertation sought to reassess the impact of amendments that the National Credit Amendment Act¹⁶⁵ effected on the debt review procedures. It focused on the amendments made to section 86(2) and 86(10) in terms of the NCAA. Its focus was on establishing if the consumer's position is improved by the new provisions.¹⁶⁶ Through an extensive discussion of various issues raised in chapter 1 of this project, the dissertation was able to come to a number of conclusions on some of the aspects of the debt review procedure.

5.2 Findings

The following findings were made during the course of the discussion:

- (a) The cross referencing of section 86(2) with section 130 brings about certainty. The substitution of section 129(1(a) by section 130 in the said provision gives the consumer enough time to consider taking the credit agreement in question for review before the credit provider takes steps to enforce it.¹⁶⁷ Previously, the method and essence of delivery of the 129(10(a) notice was contentious. The amendments that were made to section 129(5) with regards to what constitutes delivery of the notice help clear the confusion that hung around the interpretation of this provision. It is now a settled matter.
- (b) The insertion of paragraph (b) to section 86(10) assists consumers to take their reviews to court and get orders for re-arrangement of obligations in the absence of a possible termination of such review once it is before court. Credit providers are now prevented from terminating the debt review procedure if the matter has been brought before the court. This is a welcome intervention by the legislature to protect consumers from drowning in debt.

¹⁶⁵ 14 of 2014, hereinafter, the NCAA.

¹⁶⁶ See chapter 1, aims of the dissertation.

¹⁶⁷ Ibid.

(c) Lastly, it is comforting to note that, section 86(10) does not remove the statutory requirements that the credit providers have to fulfil before applying for a termination of the debt review. Such requirements act as safety valves against *mala fide* applications for termination of debt review. Even though a credit provider were to succeed in applying for the termination of debt review, it is not the end of the road for over-indebted consumers in that they may utilise section 86(11) to obtain relief against over-indebtedness.¹⁶⁸

5.3 Conclusion

It is an undoubted fact that the objects of the NCA are chiefly aimed at protecting consumers from over-indebtedness. It would seem that the purpose of the amendments made in the NCAA which are discussed in this project, also seek to boost the protection of consumers who find themselves in a financially strained position as a result of over-indebtedness. I submit that the new changes are a welcome improvement to the consumer's position with regards to debt review.

However, time will confirm if over-indebted consumers would fully utilise the new procedures and avoid further drowning in debt. The courts are advised to interpret these new provisions with the view of cementing the legislature objectives. In fact, I will be very much surprised if any court interprets the new provisions discussed herein, in any way that does not provide for consumer protection in whatever circumstances. *Lex non cogit impossibilia*. Lastly, the legislature should think of including the Tribunal in section 86(11) of the NCA to alleviate pressure on the courts.

¹⁶⁸ See amended s 86(11) of the NCA in full. Even though it was not comprehensively amended and did not form part of this dissertation, it is worth mentioning that the substitution of Magistrate Courts with court as a platform that can be approached by the consumer and the debt counsellor to hear matters connected with debt review is a welcome relief to over-indebted consumers. Consumers may approach the same court hearing the summary judgment to be declared over-indebted – thus by-passing court backlogs that are a characteristic feature in magistrate courts.

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