

DISSERTATION

**ASPECTS OF THE DEBT REVIEW PROCESS UNDER THE
NATIONAL CREDIT ACT 34 OF 2005**

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Abstract

The stated purpose of this study was to investigate and evaluate certain aspects of the debt review process under the National Credit Act with specific focus on the initiation of the debt review process and the interplay between debt review and debt enforcement. The interplay was done in accordance with the provisions of the Act and case law. An overview of the debt review and debt enforcement processes was also provided, with the aim to enable an explanation of the interplay. Finally, an overview of the field of application of the National Credit Act was provided in paragraph 2 with the aim to determine the ambit of the protection afforded by the Act.

The dissertation concludes that, the debt review process, introduced by the National Credit Act, provides an excellent alternative debt relief measure to credit consumers in South Africa. It is therefore to be welcomed that this process has survived its initial growing pains.

TABLE OF CONTENT

PARAGRAPH 1: GENERAL INTRODUCTION

1 1	Introduction	1-3
1 2	Research statement and objectives	3
1 3	Delineation and limitations	3-4
1 4	Overview of the paragraphs	4
1 5	Terminology	4
1 6	Key terms, references and definitions	4-5
1 7	Reference techniques	6

PARAGRAPH 2: AN OVERVIEW NATIONAL CREDIT ACT: FIELD OF

APPLICATION

2 1	Introduction	7
2 2	Credit agreements defined in terms of the National Credit Act	7
2 2 1	General	7
2 2 2	Credit Facilities	8
2 2 3	Credit Transactions	8
2 2 3 1	General	8
2 2 3 2	Pawn Transactions	8-9
2 2 3 3	Discount Transaction	9
2 2 3 4	Incidental Credit Agreement	9
2 2 3 5	Instalment Agreement	10
2 2 3 6	Mortgage Agreement	10
2 2 3 7	Secured Loan	10
2 2 3 8	Leasing Transaction	11



2 2 3 9	Other Agreements	11
2 3	Exclusions from the Ambit of the National Credit Act	12
2 3 1	Credit Agreements at Arm's Length	12
2 3 2	Other Exclusions	13
2 4	The third requirement	14
2 5	Conclusion	14

PARAGRAPH 3: THE ANALYSIS OF THE INITIATING METHODS TO INITIATE THE DEBT REVIEW PROCESS IN TERMS OF THE NATIONAL CREDIT ACT 34 OF 2005

3 1	Introduction	15
3 2	The Initiation of the debt review	15
3 2 1	General	15
3 2 2	Section 86 National Credit Act	15-17
3 2 3	Section 85 National Credit Act	17-18
3 3	Conclusion	18

PARAGRAPH 4: A BRIEF OVERVIEW OF THE DEBT ENFORCEMENT PROCESS IN TERMS OF THE NATIONAL CREDIT ACT

4 1	Introduction	19
4 2	Section 129(1)(a) and (b)	19-20
4 3	Section 130(1)	20-21

PARAGRAPH 5: THE INTERPLAY BETWEEN THE RIGHT TO DEBT REVIEW AND THE CREDIT PROVIDER'S RIGHT TO ENFORCE A CREDIT AGREEMENT

5 1	Introduction	22
5 2	Section 86(2)	22-24
5 3	Section 88(3)	24-28
5 4	Case Law	28



5 4 1	<i>Firststrand Bank Ltd v Mvelase</i>	28-29
5 4 2	<i>Pelser v Nedbank</i>	29
5 4 3	<i>Standard Bank v Kruger</i>	29-30
5 4 4	<i>SA Taxi Securitization (Pty) Ltd v Nako and others</i>	30-32
5 4 5	<i>Wesbank v Papier</i>	32-34
5 4 6	<i>National Credit Regulator v Nedbank and others</i>	34-35
5 4 7	<i>Collett v Firststrand Bank</i>	35-37
5 5	Section 86(10)(b)	37

PARAGRAPH 6: CONCLUSIONS AND RECOMMENDATIONS:

6	Conclusions and Recommendations	38-41
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BIBLIOGRAPHY

GENERAL INTRODUCTION

1 1 Introduction

The need for legislative reform in the field of consumer credit law arose *inter alia* because of the ineffectiveness of previous consumer credit legislation¹ to deal with the demands of a complex consumer market.² During 2004 the need for reform of the credit industry in South Africa became evident when a document called “ A Policy Framework for Consumer Credit ” was formulated and published by the Department of Trade and Industry.³ This credit policy framework laid the basis for a regulated credit market that will contribute positively to unlocking the economic potential of the nation, whilst minimising social and economic costs and addressing the structural legacy that still results in discrimination against a large section of the population.⁴ As a result the government through the Department of Trade and Industry introduced the National Credit Act 34 of 2005⁵ that was to bring change and give direction in the quest to address over-indebtedness amongst consumers in South Africa.⁶ The National Credit Act came into full operation on 1 June 2007.⁷ The Act has replaced the Credit Agreements Act and the Usury Act.⁸

The purpose of the Act as set out in section 3 thereof is, amongst others, to protect consumers, *inter alia* by promoting responsibility in the credit market. The latter should be achieved by encouraging responsible borrowing, avoidance of over-indebtedness, the discouraging of reckless credit granting by credit providers.⁹ The Act therefore not only prohibits reckless credit granting but also provides for debt re-organizations in cases of over-indebtedness by consumers.¹⁰

¹ The Credit Agreements Act 75 of 1980 (hereinafter the “Credit Agreements Act”) and the Usury Act 73 of 1968 (hereinafter the “Usury Act”).

² Renke, Roestoff and Haupt (2007) *Obiter* 226.

³ Policy Framework (2004) 13. See also Goodwin-Groen and Kelly Louw (2007) 12.

⁴ Policy Framework (2004) 13. See also Goodwin-Groen & Kelly - Louw (2007) 12.

⁵ Hereinafter the “National Credit Act” or the “Act”. All sections referred to will pertain to the National Credit Act unless the contrary is indicated.

⁶ S 3(g).

⁷ Renke, Roestoff and Haupt, (2007) *Obiter* 229-270.

⁸ S 172(4). See also Scholtz *ed* (2008) para 2.2.

⁹ S 3(c)(i)-(ii).

¹⁰ Renke, Roestoff and Haupt, (2007) *Obiter* 230.

The National Credit Act introduced new mechanisms, which are meant to provide solutions for consumers that are overburdened and that are being exploited by credit providers.¹¹ In terms of the Act, debt relief comes in the form of the debt review process in terms of section 86. In terms of this process, an over-indebted debtor applies to a debt counsellor to be declared over-indebted and to make recommendations to a court to find the consumer over-indebted. The debt counsellor may then issue a proposal¹² recommending that the court make an order that the credit agreement in question is declared to be reckless credit¹³ and an order that one or more of the debtor's credit agreements are re-arranged *inter alia* to afford the debtor a longer term for payment on a reduced instalment.¹⁴

However, the determination concerning over-indebtedness is made on the preponderance of available information on the date upon which the determination is made.¹⁵ When determining whether a consumer is over-indebted, regard must firstly be had to the consumer's financial means, prospects and obligations. Regard should secondly be held to that consumer's probable propensity to satisfy in a timely manner all his obligations under all the credit agreements to which he is a party, as indicated by the consumer's debt repayment history.¹⁶

It important to note that the effectiveness of the provisions of the Act¹³ to provide debt relief to the over-indebted consumer depends to some degree on the co-operation of the different role players and compliance with the requirements for the debt review process.¹⁷ The success of the debt review or the debt counselling process¹⁸ depends on a working relationship between the over-indebted consumer,

¹¹ See Otto and Otto (2013) 8-9.

¹² S 86(7)(c).

¹³ In terms of s 83(2) the consequences of a court declaring a credit agreement reckless are, *inter alia*, that the court may make an order setting aside all or part of a consumer's rights and obligations as the court may deem just and reasonable. The aforesaid could provide debt relief to the consumer.

¹⁴ Renke, Roestoff and Haupt, (2007) *Obiter* 230.

¹⁵ S 79.

¹⁶ Renke, Roestoff and Haupt, (2007) *Obiter* 230.

¹⁷ S 86(5)(b).

¹⁸ Kelly-Louw (2008) 225. The Act does not define the concept "debt counselling" but the regulation made in terms of the National Credit Act (GNR 489, GG 28864,31 May 2006) (hereinafter the National Credit Regulations) defines it as "performing the functions contemplated in section 86 of the Act".

credit provider and debt counsellor¹⁹ as major role players in the debt review process.

Due to the numerous submissions by scholars, credit representatives and the credit industry at large on the challenges experienced in practice on the implementation of the Act, the need to review the Act and the National Credit Regulations emerged. In June 2012 the Department of Trade and Industry embarked on a comprehensive review of the policy framework on consumer credit.²⁰ The main objective of the exercise was to analyse the policy framework with a view to identify gaps and to evaluate its effectiveness.

The Policy framework was then revised to enhance the provisions of the Act and to lay a proper base for the National Credit Amendment Act 19 of 2014.²¹ The National Credit Amendment Act was published for implementation on 19 May 2014 and became effective on 13 March 2015.²² Important amendments to the provisions pertaining to the debt review process were also affected.

1 2 Research statement and objectives

The purpose of this study is to investigate aspects of debt review in terms of the Act. The objectives that will receive attention are the initiation of debt review, the interplay between debt review and debt enforcement and the termination of debt review. However due to its relevance the field of application of the National Credit Act will be briefly set out. It has to be realised that the debt review process in terms of the Act only applies if the Act, according to its own rules finds application.

1 3 Delineation and limitations

Debt enforcement falls outside the ambit of the research objectives of this study. This study will also not address reckless credit in terms of the Act, or the implementation of the enforcement of reckless credit by the courts. The involvement

¹⁹The debt counsellor is a role player introduced by the Act, whose principal function is to assist the over-indebted consumers with the initiation of the debt review process, see section 44 and section 86.

²⁰ Policy Framework 2013 13.

²¹ Hereinafter the “National Credit Amendment Act”.

²² See GG No 37665, 14 May 2014.

of payment distribution agencies in the debt review process will also not be addressed.

1 4 Overview of paragraphs

- (a) Paragraph 1 provides the background to the study and sets out the problem statement and the research objectives thereof.
- (b) Paragraph 2 will briefly refer to the field of application of the Act, with the purpose to determine which consumers are entitled to debt review as a consumer protection measure.
- (c) In paragraph 3 the focus will fall on the initiation of debt review and the requirements to be met by a consumer to successfully initiate the debt review process. A brief overview of the process will be provided as well.
- (d) Paragraph 4 discusses the debt enforcement process in brief.
- (e) The interplay between debt review and debt enforcement will be addressed in paragraph 5. This will *inter alia* be done with reference to important court cases.
- (f) The conclusions and recommendations are set out in paragraph 6.

1 5 Terminology

In this dissertation the concepts “consumer”, “debtor” and “credit receiver” will be used interchangeably. The same holds for the concepts “credit provider”, “creditor” and “credit grantor”, “Consumer” and “credit provider” are defined in paragraph 1 6 below.

1 6 Key terms, references and definitions

For the purpose of this study the singular shall include the plural and any reference to the male will include the female gender. For clarity purposes, the definitions²³ of general terms that will be used throughout this dissertation are quoted hereafter:

²³ As defined in s 1 of the Act.

“agreement” includes “an arrangement or understanding between or among two or more parties, which purports to establish a relationship in law between those parties”

“consumer”, in respect of a credit agreement to which this Act applies, means –

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

“credit”, when used as a noun, means –

- (a) a deferral of payment of money owed to a person, or a promise to defer such a payment; or
- (b) a promise to advance or pay money to or at the direction of another person;

“credit agreement” means an agreement that meets all the criteria set out in section 8 ;

“credit provider”, in respect of a credit agreement to which this Act applies, means –

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

1 7 Reference techniques

The full titles of the sources referred to in this study are provided in the bibliography, together with an abbreviated “mode of citation”. This mode of citation is used to refer to a particular source in the footnotes. However, legislation and court decisions are referred to in full.

2 An overview of the field of application of the National Credit Act

2 1 Introduction

The aim of this paragraph is to provide an overview of the scope of application of the National Credit Act in order to determine the protection afforded to the consumer by the debt review process under the Act.²⁴ This will be achieved by defining the application of the Act with a brief reference to the type of transactions or agreements the Act applies to. Attention will also be paid to the exclusions to the Act's field of application. Section 4(1) determines as a point of departure that the Act applies to every credit agreement, between parties dealing at arm's lengths and when made within, or having an effect within the Republic of South Africa.

2 2 Credit agreements in terms of the National Credit Act

2 2 1 General

The credit agreements that are regulated in terms of the Act can be divided into three main categories. Section 8(1)(a) provides that an agreement constitutes a credit agreement for the purposes of the Act if it qualifies as a credit facility, credit transaction, credit guarantee²⁵ or a combination of the aforesaid.²⁶

It is important to note that section 8(2) of the Act specifically excludes from the definition of a credit agreement, a policy of insurance or credit extended by an insurer solely to maintain the payment of premiums on a policy of insurance,²⁷ a lease of immovable property, or a transaction between a stokvel and a member of that stokvel in accordance with the rules of that stokvel. Due to the fact that these agreements are not credit agreements, they are therefore not subject to the Act.²⁸

²⁴ S 86.

²⁵ As defined in s 8(5).

²⁶ Definition in s 8. See also Kelly-Louw and Stoop (2012) 28 and further Van Zyl in Scholtz *ed* (2008) para 4.2.

²⁷ S 8(2)(a). The Act does not differentiate between long-term and short-term insurance regarding the exclusion.

²⁸ Renke LLD Thesis (2012) 401.

2 2 2 Credit facilities²⁹

An agreement,³⁰ irrespective of its form,³¹ constitutes a credit facility if a credit provider undertakes to supply goods or services or to pay out money to the consumer, as determined by the consumer from time to time and either to defer the consumer's obligation to pay any part of the cost of such goods or services or to repay to the credit provider any part of such amount or bill the consumer periodically for any part of such costs or amount. All credit facilities include a charge, and any charge, fee or interest is payable to the credit provider in respect of such deferred payment or amount billed and not paid within the time provided in the agreement.³²

2 2 3 Credit transactions³³

2 2 3 1 General

Section 8(4) distinguishes eight types of credit transactions to which the National Credit Act applies, with the exclusion of section 8(2) agreements.³⁴ These transactions are defined in section 1 of the Act. The only exception is the so-called "other agreements", which is defined in section 8(4)(f).

2 2 3 2 Pawn transaction

Pawn transactions are agreements in terms of which one party advances money or grant credit to another and take possession of the goods as security for the money advanced or credit granted. Either the estimated resale value of the goods exceeds the value of the money advanced or credit granted or a charge, fee or interest is imposed. When the period of the credit agreement comes to an end, the party who took possession of the goods as security is entitled to sell the goods and retain the

²⁹ S 8(3).

³⁰ Agreements contemplated in s 8(2) are excluded and do not constitute a credit facility – Renke LLD Thesis (2012) 384.

³¹ But not including an agreement contemplated in section 8(2) or section 8(4) (6) (b), constitutes a credit facility if in terms of that agreement.

³² See Otto and Otto (2013) 20 and further Renke LLD Thesis (2012) 384-385.

³³ See Otto and Otto (2013) 20-28, for a complete discussion.

³⁴ Renke LLD Thesis (2012) 387.

proceeds of the sale in settlement of the consumer's obligations under the agreement.³⁵

2 2 3 3 Discount transaction

A discount transaction means an agreement whereby goods or services are provided and two prices are quoted for the goods supplied or services provided. One price is higher than the other and the parties will agree on the payment due date.³⁶ If the invoice is settled on or before a specified date, the lower cost is payable. If payment occurs after that date, or is paid periodically during the period, the higher price will apply.³⁷

2 2 3 4 Incidental credit agreement³⁸

The Act has limited application to Incidental credit agreements. An incidental credit agreement is an agreement in terms of which an account was tendered for goods or services that were provided to the consumer, or goods or services that are to be provided to a consumer over a period of time and either or both of the following conditions apply—

- (a) a fee, charge or interest became payable when payment of an amount charged in terms of that account was not made on or before a determined period or date; or
- (b) two prices were quoted for the settlement of the account, the lower price being applicable if the account is paid on or before a determined date, and the higher price being applicable due to the account not having been paid by that date.

The definition of Incidental credit agreement overlaps with the definition of a discount transaction, except that the Act is only applicable once incidental credit is granted after payment of a higher amount after the due date.³⁹

³⁵ See Otto and Otto (2013) 21 where it was highlighted that pawn transactions are exempt from some provisions of the National Credit Act, such as provisions that deal with reckless credit and unlawful agreements. See further Renke LLD Thesis (2012) 384-392.

³⁶ Renke LLD Thesis (2012) 387.

³⁷ See Kelly- Louw and Stoop for a discussion in respect to discount transactions and also Renke LLD Thesis (2012) 388 and Otto and Otto (2013) 21.

³⁸ See Van Zyl in Scholtz *ed* (2008) para 4.4.1.

³⁹ See Otto 2010 *THRHR* 637 for a discussion. See also Otto and Otto (2013) 21 and Renke LLD Thesis (2012) 389.

2 2 3 5 Instalment agreement⁴⁰

Instalment agreements are agreements which entail the sale of movable property where payment of the price or part thereof is deferred and is to be paid by periodic payments. Possession and use of the property is transferred to the consumer immediately for use and enjoyment, although ownership is reserved by the credit provider.⁴¹ Ownership of the property either—

- (a) passes to the consumer only when the agreement is fully complied with; or
- (b) passes to the consumer immediately subject to a right of the credit provider to repossess the property if the consumer fails to satisfy all of the consumer's financial obligations under the agreement.

Interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred.

2 2 3 6 Mortgage agreement⁴²

A mortgage agreement is defined as a credit agreement that is secured by the registration of a mortgage bond by the registrar of deeds over immovable property.⁴³ Although a mortgage agreement is a credit agreement, the definition of a mortgage agreement does not require the levying of a fee, interest or charge by the credit provider.

2 2 3 7 Secured loan⁴⁴

A secured loan is an agreement (excluding an instalment agreement) in terms of which a person advances money or grants credit to another and retains, or receives a pledge to any movable property or other thing of value as security for all amounts due under the agreement.⁴⁵

⁴⁰ Discussed in Otto and Otto (2013) 24 and Renke LLD Thesis (2012) 389.

⁴¹ Renke LLD Thesis (2012) 389.

⁴² See Otto and Otto (2013) 25.

⁴³ The definition of a mortgage was amended by the National Credit Amendment Act.

⁴⁴ See Otto and Otto (2013) 25 -26.

⁴⁵ This definition was also amended in terms of the National Credit Amendment Act.

2 2 3 8 Lease transaction

A lease transaction of movable property also constitutes a credit transaction under the Act.⁴⁶ Payment for the possession or use of the property is made on an agreed or determined periodic basis during the life of the agreement or is deferred in whole or in part for any period during the life of the agreement. Interest, fees or other charges are payable to the credit provider in respect of the agreement or deferred amount. At the end of the term of the agreement, ownership of the property, either passes to the consumer absolutely⁴⁷ or upon satisfaction of specific conditions set out in the agreement.⁴⁸

However, it should be stressed that a lease agreement in respect of immovable property is specifically excluded in the Act and does not fall within the definition of a credit agreement as contemplated in the Act.⁴⁹ In the case of *Pareto Ltd & others v Kalnisah Sigaban t/a Ks Flowers N More*,⁵⁰ the court held that lease agreement does not mean that part of the agreement dealing with rental but the composite agreement which includes all the material terms. It is incorrect and fallacious to attempt to sever or isolate certain parts of the agreement from the entire or whole agreement. The court further emphasized the reading of section 8(2) of the Act that it does not apply to a claim for rental in respect of immovable property.⁵¹

2 2 3 9 Other agreements

The legislation makes provision for a so-called “catch-all” provision in section 8(4)(f), which provides that an agreement will become a credit agreement if a payment obligation is deferred and there is a charge, fee or interest payable to the credit provider in respect of the amount so deferred.

⁴⁶ Renke LLD Thesis (2012) 393.

⁴⁷ Renke LLD Thesis (2012) 393.

⁴⁸ Discussed in full in Otto 2011 *THRHR*. See further Renke LLD Thesis (2012) 393.

⁴⁹ S 8(2).

⁵⁰ *Pareto Ltd & others v Kalnisah Sigaban t/a Ks Flowers N More* (A3096/09) (2010) ZAGP JHC 21.

⁵¹ (A3096/09) (2010) ZAGP JHC 21.

2 3 Exclusions from the ambit of the National Credit Act

2 3 1 Credit agreements at arm's length

The Act applies to credit agreements between parties dealing at arm's length.⁵² Therefore, if the credit provider and the consumer do not deal at arm's length, the Act is not applicable. The "at arm's length" cases⁵³ may be different in circumstance. An example would be a credit agreement between natural persons who are in a familial relationship and are co-dependent on each other or one is dependent upon the other.

The National Credit Act⁵⁴ specifically provides that in any of the following arrangements the parties are not dealing at arm's length—

- (a) a shareholder loan or other credit agreement between a juristic person, as consumer, and a person who has a controlling interest in that juristic person, as credit provider;
- (b) a loan to a shareholder or other credit agreement between a juristic person, as credit provider, and a person who has a controlling interest in that juristic person, as consumer;
- (c) a credit agreement between natural persons who are in a familial relationship and are co-dependent on each other or one is dependent upon the other;⁵⁵ and
- (d) any other arrangement in which a party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction; or that is of a type that has been held in law to be between parties who are not dealing at arm's length.

In these "within arm's lengths" cases the Act therefore does not apply. The reason is that there is a form of dependency between the contracting parties and the consumer therefore needs not to be protected in terms of the Act.

2 3 2 Other exclusions

The National Credit Act provides for more direct exclusions from the field of application of the Act. Credit agreements in terms of which the consumer is the state

⁵² See s 4(1) and for a full discussion, Renke LLD Thesis (2012) 398-399.

⁵³ See s 4(2)(b).

⁵⁴ S 4(2)(b).

⁵⁵ *Beets v Swanepoel* [2010] JOL 26422 (NC).

or an organ of state⁵⁶ are excluded from the application of the Act. The same applies to credit agreements in terms of which the credit provider is the Reserve Bank of South Africa⁵⁷ or a juristic person⁵⁸ whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons at the time the agreement is made, equals or exceeds R1 million.⁵⁹ A juristic person with an asset value or annual turnover of less than R1 million but that concludes a large agreement will also not fall within the scope of application of the Act.⁶⁰ It is important to note that, even when the Act applies to a juristic person consumer,⁶¹ it has limited application.⁶² Chapter 4 Part D in the Act, dealing with over-indebtedness, debt review and reckless credit, does not apply to juristic person consumers.

A credit agreement in respect of which the credit provider is located outside the Republic of South Africa⁶³ is equally excluded from the ambit of the Act. However, the exemption is applicable upon successful application by the consumer to the Minister of Trade and Industry in a prescribed manner and form.⁶⁴ It has already been stated⁶⁵ that a policy of insurance, are excluded from the ambit of the Act.⁶⁶

2 4 The third requirement

In terms of section 4(1) the National Credit Act only applies to credit agreements if the agreement was made within, or has an effect within, South Africa.

⁵⁶ S 1 defines “organs of state” as defined in section 239 of the Constitution.

⁵⁷ S 4(1)(c).

⁵⁸ “Juristic person “ is defined in S1 as including a partnership, association or other body of persons, corporate or unincorporated, or a trust if-
(a) there are three or more individual trustees; or
(b) the trustee is itself a juristic person,
but does not include a stokvel.

⁵⁹ S 4(1)(a)(i).

⁶⁰ S4(1)(b) read with S 7(1) and the threshold Regulations GN713 in GG 28893. See also Kelly Louw and Stoop (2012) 33.

⁶¹ Small juristic person consumers that conclude small or intermediate agreements.

⁶² S 6.

⁶³ Renke LLD Thesis (2012) 399.

⁶⁴ S 4(1)(d). See reg 2 for the prescribed manner and form 1 for the prescribed form.

⁶⁵ See par 2 2 1 above.

⁶⁶ S 8(2).

2 5 Conclusion

The National Credit Act therefore has a much wider scope of application than its predecessors, It basically applies to all situations in terms whereof credit is extended to a consumer, unless one of the exceptions applies. This is to be welcomed, because it means that more consumers enjoy the protection of the Act in respect of consumer spending, reckless credit lending and over-indebtedness.

3 An analysis of the methods to initiate the debt review process in terms of the National Credit Act 34 of 2005

3 1 Introduction

This paragraph aims to provide an analysis of the initiating methods of the debt review process in terms of the National credit Act. The debt review process in broad will also receive attention. Although the Act provides for a number of other debt alleviation measures, the focus of this study is on the debt review process as a remedy to over indebtedness.

Debt review is a process introduced by the Act, aimed at resolving the over-indebtedness of credit consumers in that it allows for debt restructuring if a consumer is over-indebted. The debt review process helps consumers resolve their over - indebtedness through the satisfying of their financial obligations by means of the steering of a registered debt counsellor. The debt counsellor was introduced as a role player in the credit market by the Act⁶⁷

3 2 The initiation of the debt review process

3 2 1 General

The National Credit Act recognizes two ways of initiating the debt review process. Section 86 and section 85 are pertinent and will now be discussed.

3 2 2 Section 86 National Credit Act

Section 86 of the Act provides that a consumer may approach a debt counsellor and apply to the debt counsellor to have the consumer declared over-indebted in the prescribed manner and form regulation 24⁶⁸ and form 16⁶⁹ are of importance. A

⁶⁷ In terms of s 44(2) debt counsellor have to be registered in terms of the Act in order to render debt counsellor services .Only natural persons may apply to be registered as debt counsellors – s 44(1).

⁶⁸ Of the regulations made in terms of the National Credit Act (GN R489 ,GG 28864) of 31 May 2006 – hereafter the National Credit Regulations.

consumer voluntarily applies for debt review in terms of section 86. By giving a debt counsellor a completed form 16.⁷⁰ Upon receipt of the completed Form 16 the debt counsellor must notify all credit provider listed in the application and all credit bureaux of such an application by the consumer. This must be done by means of Form 17.1,⁷¹ within five business days after the consumer has submitted a completed Form 16 to the debt counsellor.⁷² The debt counsellor must then conduct a verifying process of the information received from the consumer, credit provider and the credit bureaux to determine whether a consumer is over-indebted in terms of regulations 24 or Form 16 not.⁷³ The debt counsellor must make the determination in terms of section 86(6) of the Act within 30 business days after receiving the application for debt review from the consumer⁷⁴

In terms of section 86(6)(a) the debt counsellor must determine (in the prescribed manner and within the prescribed time) whether the consumer seems to be over – indebted. Where the consumer has sought a declaration of reckless credit this should also be assessed by the debt counsellor.⁷⁵

When assessing whether the consumer is over indebted in terms of section 86(6)(b), the debt counsellor must keep section 79⁷⁶ in mind.⁷⁷ The debt counsellor must also consider regulation 24(7)(a)-(c), which provides as follows:

- (a) A consumer is over-indebted if his/her total monthly debt payments exceed the balance derived by deducting his/her minimum living expenses from his/her net income;
- (b) Net income is calculated by deducting from the gross income, statutory deductions and other deductions that are made as a condition of employment;

⁶⁹ See Sch 1 to the National Credit Regulations .

⁷⁰ S 86(1) read with reg 24(1)(a). Form 16 must be accompanied by a copy of the consumer's identity document, a list of living expenses and proof of income.

⁷¹ Reg 24(5) prescribes how form 17.1 must be dispatched.

⁷² S 86(4)(b) read with reg 24(2). In terms of s 86(4)(a) the consumer must be provided with proof of receipt of the application.

⁷³ Reg 24(3) and (4). Documentary proof must be requested from the consumer, the relevant credit provider must be contacted, etc.- Reg 24(3) if a credit provider fails to provide the debt counsellor with corrected information within five business days from the request for verification, the information provided by the consumer may be accepted to be correct-Reg 24(4).

⁷⁴ Reg 24(6).

⁷⁵ S 86(6)(b).

⁷⁶ S 79 provides the definition of over-indebtedness. It also states that the assessment criteria in terms of s 79(1) must be applied as they exist at the time of the determination.

⁷⁷ Reg 24(7).

- (c) Minimum living expenses are based upon a budget provided by the consumer, adjusted by the debt counsellor with reference to guidelines issued by the National Credit Regulator.

Where the recklessness of particular debt has to be assessed in terms of section 86(6)(b), of the Act, Section 80 must be considered.⁷⁸ In addition, regulation 24(8)(a)-(d) of the NCA Regulations, providing as follows, must be taken into consideration:

- (a) the level of indebtedness of the consumer after that particular agreement was entered into; and
- (b) whether, when that particular credit agreement was entered into, the total debt obligations, including the new agreement exceeded the net income reduced by minimum living expenses;
- (c) the consumers' bank statement, salary or wage advice and records obtained from a credit bureau;
- (d) any guidelines published by the National Credit Regulator proposing evaluative mechanisms, models and procedures in terms of section 82 of the Act.

After the assessment has been completed, the debt counsellor must submit Form 17.2 to all the affected credit providers and all registered credit bureaux. This must be done within five Business days.⁷⁹ Form 17.2 informs the affected parties of the outcome of the debt counsellor's determination.

3 2 3 Section 85 National Credit Act

Section 85 of the National Credit Act also affords a consumer the opportunity to initiate the debt review process. However, this will usually be done via the consumer's legal representative. Section 85 provides that it may be alleged that the consumer under a credit agreement is over-indebted in any court proceedings in which a credit agreement is under consideration. One of the options available to the court⁸⁰ is then to refer the matter directly to a debt counsellor and to request that the

⁷⁸ S 80 *inter alia* sets out the different forms of reckless credit. It also determines when the reckless criteria set out in s 80(1) must be applied, namely as they existed at the time the agreement was made.

⁷⁹ Reg 24(10).

⁸⁰ S 85(a).

debt counsellor evaluate the consumer's situation and make a recommendation to the court in terms of section 86(7).⁸¹

If this option is followed, the debt counsellor must continue with the determination of the consumer's debt situation. Although the Act is silent on the matter, it is submitted that the provisions of regulation 24(7)⁸² will have to be adhered to. The debt counsellor must, in other words refer to section 79 and the aspects mentioned in regulation 24(7)(a)-(c) when conducting the assessment.

3 3 Conclusion

The so-called "debt review process" may therefore be initiated in terms of section 86(1) by approaching a debt counsellor and by applying for debt review or in terms of section 85, by alleging in court that the consumer is over-indebted under circumstances where the consumer's credit agreement already serves before the court.

These two initiation procedures are therefore distinct from each other. It also needs to be pointed out that section 85, in contrast with section 86, does not specifically afford the consumer the opportunity to request a declaration of reckless credit. It is therefore debatable whether reckless credit granting could be determined by a debt counsellor via the section 85 route.⁸³

⁸¹ The debt counsellor may conclude that the consumer is not over –indebted. This may, eg, be the case where the consumer was in default in terms of his credit agreement and the credit provider has issued summons against the consumer. And that the application is rejected, or that the consumer is not over-indebted, but is not withstanding finding it difficult to satisfy all the consumer's obligations under credit agreements in a timely manner, or that the consumer is over-indebted.

⁸² Discussed in par 3 2 2 above.

⁸³ Renke LLD Thesis (2012) 440-441.

4 A brief overview of the debt enforcement process in terms of the National Credit Act

4 1 Introduction

The debt review process that was discussed in the previous paragraph has to be distinguished from the credit provider's right to enforce a credit agreement in the event of default by the consumer. Where the former is regulated in terms of Chapter 4 Part D of the National Credit Act, the latter is being regulated in terms of Chapter 6 Part C. In this paragraph a brief overview of the debt enforcement process will be provided. However, the focus will only be placed on the process that has to be followed by a credit provider in order to be able to institute legal proceedings against the defaulting consumer in court.

4 2 Section 129(1)(a) and (b)

The departure point as far as the debt enforcement process is concerned is section 129(1)(a) read with section 129(1)(b).⁸⁴ Both sub-sub-sections apply where the consumer is in default in terms of his credit agreement. In terms of section 129(1)(a) the credit provider may draw the default to the consumer's attention by means of a so-called section 129(1)(a) National Credit Act notice. However, if one has a look at section 129(1)(b), which provides that the credit provider may not commence any legal proceedings before first providing the consumer with the section 129(1)(a) notice, it is clear that the notice is a requirement for debt enforcement. This was confirmed by the Supreme Court of Appeal in the case of *Nedbank v the National Credit Regulator*.⁸⁵ In terms of section 129(1)(a) the notice must be in writing and must contain certain proposals to the consumer, for instance, to go and see a debt counsellor, alternative dispute resolution agent, consumer court or ombud. The aim is to resolve any dispute under the agreement between the credit provider and consumer or to develop and agree on a plan to bring the arrear payments in terms of

⁸⁴ See in general Van Heerden in Scholtz ed (2008) par 12.4 and Otto and Otto (2013) and Van Heerden and Boraine (2011) *SA Merc LJ* 45.

⁸⁵ *Nedbank v the National Credit Regulator* 2011 (3) SA 581 (SCA).

the credit agreement up to date.⁸⁶ The notice must further warn the consumer that failure to rectify the default may lead to the institution of legal proceedings by the credit provider.⁸⁷ The other sub-sections in section 129 deal with the consumer's right to re-instate the credit agreement⁸⁸ and the methods of delivery (and proof thereof)⁸⁹ of the section 129(1)(a) notice to the consumer. These aspects do not receive further attention in this dissertation.

4 3 Section 130(1)

Reference has been made above to section 129(1)(b) requiring that a section 129(1)(a) notice be delivered before commencing legal proceedings. Section 129(1)(b) further requires that section 130 has to be complied with before legal proceedings may be commenced. In terms of section 130(1) of the National Credit Act certain additional requirements have to be met before the credit provider may issue or service summons to institute legal proceedings against the consumer to enforce the credit agreement. The latter is not clear. In section 130 the legislature uses the words "at that time", Meaning that the requirements in terms of section 130 have to be complied with "at that time". However, the legislature does not make it clear if "at that time" refers to the date of the issuing of the summons or the date of servicing of the summons. The requirements that have to be met in terms of section 130(1) "at that time" are as follows:

- (a) The consumer must have been in default for at least 20 business days. This period is clearly triggered by the default of the consumer.
- (b) At least 10 business days must have elapsed since the credit provider delivered the section 129(1)(a) notice to the consumer. This period therefore starts to run as soon as the section 129(1)(a) notice is delivered to the consumer.
- (c) The consumer has not responded to the notice or the consumer's response was to reject the credit provider's proposals in the notice.⁹⁰

⁸⁶ S 129(1)(a).

⁸⁷ Van Heerden and Boraine (2011) *SA Merc LJ* 1.

⁸⁸ S 129(3) and (4).

⁸⁹ S 129(5)-(7).

⁹⁰ To go and see a debt counsellor etc and to bring the arrear instalments up to date. S 130(1)(c) further requires that the consumer must not have surrendered the property forming the subject of an instalment agreement, secured loan or a lease in terms of s 127 of the Act.

In summary, it is therefore clear that a section 129(1)(a) notice and compliance with the provisions of section 130(1) is required in order for a credit provider to be able to issue and service summons against a consumer who is in default with the aim to enforce the credit agreement. Now that the debt review process and the debt enforcement process have been explained, I will proceed to investigate the interplay between these two procedures.

5 The interplay between the right to debt review and the credit provider's right to enforce a credit agreement

5 1 Introduction

There is a definite interrelation and therefore interplay between the consumer's right to apply for debt review⁹¹ on the one hand and the credit provider's right to enforce a credit agreement against a defaulting consumer⁹² on the other. Five sections and/or sub-sections in the National Credit Act are important in this regard. They are section 86(2) read with sections 129(1)(a)⁹³ and 130(1),⁹⁴ providing the one side of the coin, and sections 88(3), 86(10) and 86(11), providing the other side. These two sides will hereafter receive further attention, with the aim to make recommendations, if any, to improve the Act. In my opinion it is necessary to give the historical development as well, with the aim to tell the whole story and to make informed recommendations.

5 2 Section 86(2)

Section 86(2), before its amendment in terms of the National Credit Amendment Act, provided as follows:

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 the steps contemplated in section 129 to enforce that agreement.

The application referred to is the application for debt review in terms of section 86(1) of the Act discussed above.⁹⁵ Section 86(2) in its initial form therefore barred an application for debt review once the credit provider has commenced the necessary steps in terms of section 129 to enforce the credit agreement. The steps in section 129 refer to the delivery of the section 129(1)(a) notice, also discussed above.⁹⁶ I will come back to this below.

What immediately becomes clear, from a reading of the wording of section 86(2), is that debt review is not allowed to co-exist with the debt enforcement process.

⁹¹ Discussed in par 3 above.

⁹² Discussed in par 4 above.

⁹³ Discussed in par 4 2 above.

⁹⁴ See par 4 3 above.

⁹⁵ Par 3 2 2.

⁹⁶ Par 4 2.

This makes sense, because you cannot on the one hand create a process in the Act to alleviate a consumer's over-indebtedness and on the other allow the credit provider to take the consumer to court to enforce the debt.

The initial wording of section 130(2) caused uncertainty and seemed not to make sense.⁹⁷ The reason was as follows: in terms of section 129(1)(a) the credit provider may draw the default to the consumer's attention. by means of a so-called section 129(1)(a) National Credit Act notice. In the notice the credit provider must make certain proposals to the consumer, for instance that the consumer approaches a debt counsellor. It does not make sense to tell a consumer in the section 129(1)(a) notice to go and see a debt counsellor but as soon as the consumer does that, the consumer is no longer entitled to apply for debt review. The matter was eventually resolved by the Supreme Court of Appeal in the case of *Nedbank Ltd and Others v The National Credit Regulator*.⁹⁸ The court held that the section 129(1)(a) notice refers to a specific credit agreement in respect whereof the consumer is in default.⁹⁹ Section 129 refers only to one agreement and the aim of the section 129(1)(a) notice is to resolve disputes between the credit provider and the consumer and to make a plan to bring arrear instalments up to date. The aim is not general debt review and debt restructuring in terms of section 86 of the Act.¹⁰⁰ Where a section 129(1)(a) notice has been delivered in respect of a particular credit agreement, section 86(2) (in its initial form) bars the consumer from applying for debt review in respect of that specific credit agreement. However, the notice does not bar debt review in respect of any other credit agreements.¹⁰¹

Final clarity in the above-mentioned matter was provided with the amendment of section 86(2) in terms of the National Credit Amendment Act. Section 86(2), after its amendment, now provides as follows:

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

⁹⁷ See in general Van Heerden in Scholtz ed (2008) paras 11.3.3.2(d) and 12.4.11.

⁹⁸ 2011 (3) SA 581 (SCA).

⁹⁹ Par 9.

¹⁰⁰ Par 9.

¹⁰¹ Par 14.

under that credit agreement has proceeded to take the steps contemplated in section 130 to enforce that agreement.

It has to be remembered that section 130 concerns the steps that have to be taken by the credit provider in order to be able to issue or serve summons to institute action against the consumer to enforce a credit agreement.¹⁰² It is therefore the issuing or service of summons that will now bar an application for debt review in terms of section 86(2) and not the delivery of the section 129(1)(a) notice.

5 3 Section 88(3)

Section 88(3) provides the other side of the coin. The section provides as follows:

Subject to ..., a credit provider who receives notice of court proceedings contemplated in section ... or 85, or notice in terms of section 86(4)(b)(i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until –

- (a) the consumer is in default under the credit agreement; and
- (b) one of the following has occurred:
 - (i) An event contemplated in subsection (1)(a) through (c); or
 - (ii) the consumer defaults on any obligation in terms of a re-arrangement agreed between the the consumer and credit providers, or ordered by a court of the Tribunal.

Section 88(3), in other words, provides that as long as a consumer is subject to debt review in terms of section 85 or 86,¹⁰³ the credit provider is not entitled to enforce the credit agreement. This is in other words the reverse side of section 86(2) discussed above¹⁰⁴ and reiterates that debt review is not allowed to co-exist with the debt enforcement process.

The prohibition against debt enforcement in terms of section 88(3) continues until the happening of one of two events. The first one is until an event in terms of section 88(1)(a), (b) or (c) has occurred. Section 88(1)(a) makes provision for the rejection of the consumer's debt review application by the debt counsellor. In such an instance the consumer is allowed in terms of section 86(9) of the Act to approach the Magistrate's Court and ask the court's permission to come to the court with the debt

¹⁰² Par 4 3 above.

¹⁰³ Discussed in paras 3 2 2 and 3 2 3 above.

¹⁰⁴ Par 5 2.

review application. However, this has to be done within in prescribed¹⁰⁵ time period. If the debt counsellor rejects the application and the consumer is out of time with the section 86(9) application, the matter is finalised and the credit provider may enforce.

In terms of section 88(1)(b) the credit provider is also entitled to enforce a credit agreement if the relevant court has determined that the consumer is not over-indebted or has rejected the debt counsellor's proposal to the court or the consumer's direct application to the court in terms of section 86(9) discussed above. Finally, enforcement is permitted in terms of section 88(1)(c) if the consumer has fulfilled his obligations as re-arranged by a court.¹⁰⁶ Section 88(1) therefore deals with the finalisation of the debt review process, once it has started. Then and then only is the credit provided allowed to enforce.

However, section 88(3) makes it clear that enforcement can only take place if the consumer is in default in terms of the credit agreement.

In terms of section 88(3) enforcement can also take place where the consumer is in default in terms of any of his re-arranged obligations. In other words, the consumer has applied for debt review in terms of section 86 or has alleged in court that he is over-indebted in terms of section 85, the debt counsellor has completed his investigation and has referred the matter to the court and the court has re-arranged the consumer's obligations in terms of section 87 of the Act. If the consumer now defaults on his re-arranged obligations, debt enforcement may go ahead.

Before I go on, the case of *BMW Financial Services v Donkin*¹⁰⁷ has to be kept in mind. In this case it was held that an application for debt review may only delay the enforcement of a credit agreement where the debt review was applied for in a manner prescribed by the Act read together with the regulations¹⁰⁸ thereto.¹⁰⁹ What this means is that the presented information by the consumer must allow the debt

¹⁰⁵ See reg 26 of the National Credit Regulations. The consumer's application must be submitted to the court within 20 business days after the debt counsellor has provided the consumer with a letter of rejection in terms of regulation 25.

¹⁰⁶ Unless the consumer has fulfilled his obligations by means of a consolidation agreement. The reason is that such a consumer still owes money in terms of the consolidation agreement and has not fulfilled all his obligations. It is only when the consumer has fulfilled his obligations in terms of the consolidation agreement that the credit provider will be allowed to enforce against the consumer. See s 88(2).

¹⁰⁷ 2009 (6) SA 63 (KZN).

¹⁰⁸ See par 3 2 2 above.

¹⁰⁹ *Donkin* at par 18.

counsellor, credit providers and the court to make informed decisions on the level of indebtedness of a consumer. The consumer should comply with all the requirements as put forth by the debt counsellor in line with the provisions of the Act.

According to the court in *Donkin* a debt review process will only stay the enforcement of a credit agreement if it was properly applied for, in terms of regulation 24(1)(a) to (d). The regulation informs a consumer and a debt counsellor about required documentation and information when they apply for debt review.¹¹⁰

The court further held that the regulation provides that a consumer has to declare and undertake to commit to debt restructuring before a debt review process will be deemed to have been initiated.¹¹¹ The court found in favour of the plaintiff because information that had to be submitted in terms of regulation 24 had not been submitted. In terms of the aforementioned it is clear that it is not enough for a consumer to show an interest in applying for debt review. The consumer has to perform certain actions to qualify for protection under section 130(3)(c)(i).¹¹² The *Donkin*-case therefore provided an indication of what documents were required before the interplay between debt review and debt enforcement in terms of section 88(3) could become relevant.

The question is whether a credit provider is prohibited to enforce for as long as the debt review process goes on, under circumstances where section 88(3)(a) and (b) is not applicable. The answer is no. The Act makes provision for a credit provider to terminate debt review under circumstances in order to enable the credit provider to enforce the credit agreement. It must be remembered that the two processes cannot run together.

The termination of the debt review process is authorised in terms of section 86(10). Section 86(10)(a)¹¹³ provides as follows:

¹¹⁰ See the discussion in par 3 2 2 above.

¹¹¹ Reg 24(1)(b)(vi).

¹¹² S 130(3)(c)(i) provides that despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that the credit provider has not approached the court during the time that the matter was before a debt counsellor, alternative dispute resolution agent, etc.

¹¹³ Section 86(10)(a) has been amended in terms of the NCA Amendment Act.

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 has applied for debt review, give notice to terminate the review in the prescribed manner...

The situation is therefore as follows: in spite of the period prescribed in regulation 24¹¹⁴ for the finalisation of the debt review process, if the debt review process has not been completed after a period of at least 60 business days after the consumer has applied for the debt review process, the credit provider is allowed to terminate the debt review process.¹¹⁵ This is done by means of a so-called section 86(10) notice. In terms of section 86(10) the notice has to be given to the consumer who is under debt review, his debt counsellor and the National Credit Regulator. Once this is done, the debt review is terminated and debt enforcement may proceed.

It is important to note that the time period of 10 business days that have to expire after the delivery of the section 129(1) notice before debt enforcement can take place in terms of section 130(1),¹¹⁶ also applies in the case of a section 86(10) notice. In other words, if a credit provider has made use of a section 86(10) notice to terminate debt review, he will only be permitted to enforce after the expiry of 10 business days after delivery of the notice to the consumer. The section 86(10) notice therefore does not only terminate the debt review process, but also warn the consumer that his debt will be enforced in court after the period of 10 business days. Where a section 86(10) notice is used, a section 129(1)(a) notice is not required as well.¹¹⁷

An important question is whether section 86(10) may be used to terminate the debt review once the debt counsellor responsible for the debt review has completed his investigation and has referred the debt review matter to court. The debt counsellor has therefore done his part and the matter is now awaiting finalisation by the court in terms of section 87, referred to above. This question gave rise to conflicting judgments. These judgments will be discussed in the next

¹¹⁴ See par 3 2 2 above.

¹¹⁵ To put it in other words, once the consumer has initiated the debt review process, the credit provider is precluded from enforcing a credit agreement for at least 60 business days.

¹¹⁶ See par 4 3 above.

¹¹⁷ *Firststrand Bank v Owens* 2013 (2) SA 325 (SCA).

paragraph,¹¹⁸ not only as far as the question under discussion is concerned, but also in relation to sections 129(1) and 86(10) in general. This will be followed by the answer the legislature provided in terms of the National Credit Amendment Act.¹¹⁹

However, it is first of all necessary to have a look at section 86(11), which is related to section 86(10). Section 86(11) determines that where a credit provider proceeds to enforce a credit agreement after he has terminated the consumer's debt review in terms of section 86(10), the court hearing the matter (in other words the debt enforcement matter), may order that the debt review be resumed, on the conditions the court considers to be just under the circumstances.

5 4 Case law

5 4 1 *Firststrand Bank Ltd v Mvelase*¹²⁰

The decision in the *Mvelase*-case¹²¹ emphasises that “the NCA strikes this balance through a push/pull tension which ensures that, whenever sections of the NCA tip the scales in favour of the consumer, countervailing rights of the credit provider in other sections sway the balance in favour of the latter, and vice versa”. Section 86(10) therefore provides a proper balance between the rights of both consumers and credit providers. Therefore rights that are given to a party correspond to a duty bestowed upon the other. This creates a balance in the rights and duties between parties to a credit agreement.¹²²

5 4 2 *Pelser v Nedbank*¹²³

The choice of 60 business days in terms of section 86(10) before debt review may be terminated by a credit provider gave rise to the question why 60 business days. In

¹¹⁸ Par 5 4.

¹¹⁹ See par 5 5 below.

¹²⁰ 2011 (1) SA 470 (KZN).

¹²¹ Par 20 and 21.

¹²² *Otto* (2008) 49.

¹²³ 2011 (4) SA 388 (KZD).

the Pelser-case the court held that debt review should only lapse after the expiry of a reasonable time.¹²⁴

5 4 3 *Standard Bank v Kruger*¹²⁵

In this case the court first of all confirmed that a credit provider has to give a section 129(1)(a) notice prior to enforcing a credit agreement.¹²⁶ The debt review process may also only be terminated once a debt counsellor had failed to expeditiously apply for an order for debt restructuring. Furthermore, the court indicated that when it has to be determined if the debt review process has to be terminated, regard should be had to circumstances that may or had prevailed from time to time to ascertain if the debt counsellor is or has acted expeditiously.¹²⁷ Courts must not be quick to dismiss an application for debt review or allow a credit provider to enforce a credit agreement merely because 60 business days have passed since the application for debt review was made. It was stated that a court must also look at the reasons that have militated against the prompt finalisation of the process.

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

The court found that the purpose of the Act is to promote and protect a consumer and should therefore be interpreted as such. Of importance is that it was decided that once a matter has been referred to a Magistrate's Court, a credit provider may not terminate the debt review process in terms of section 86(10).¹²⁸ The court also

¹²⁴ See also Kelly-Louw (2012) par 12.3.4.4.

¹²⁵ (Unreported) case no 45438/2009 (GSJ).

¹²⁶ Par 28.

¹²⁷ Par 21.

¹²⁸ Par 21. The court relied on *Standard Bank of South Africa Ltd v Pretorius* (unreported) case number 39057/09 (GSJ) at paras 24 and 26, where the court held that a credit provider may not terminate a debt review process once s 86(8)(b) and 87 are applicable.

said where there are reasonable delays, the debt review process should not be terminated by a credit provider.¹²⁹

5 4 4 SA Taxi Securitization (Pty) Ltd v Nako and others¹³⁰

In the *Nako*-case the court held that a credit provider does not have to issue a section 129(1)(a) notice drawing the default to the attention of the consumer, where such a consumer has taken the steps anticipated by section 129(1)(a) or has approached one of the persons listed under that section. This is because the consumer would already have been informed of his options and therefore it would be futile for the credit provider to reiterate the information. The aim of the notice is to inform the consumer that he is in default and to inform the consumer about his available options in order to relieve the consumer of his credit obligations in a tolerable manner. The aim is also to allow the consumer to satisfy his credit obligations in a less burdensome manner. The court relied on section 129(2) which provides that subsection (1) does not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order. The court also relied on the decision in *Changing Tides 17 (Pty) Ltd v Erasmus*¹³¹ where it was held that in the ordinary case it would be inappropriate for a credit provider to give notice in terms of the provision if a relevant application was already pending before a Magistrate's court and being prosecuted with reasonable efficiency.

The importance of the *Nako*-case is that it provided a different perspective on the question in this study on the credit provider's right to terminate the debt review process and on the question whether the credit provider can terminate the process after referral to the Magistrate's Court. The respondents were joined in the case because the facts of their respective cases were to a large extent similar. The applicant had brought applications for summary judgments against the respondents. The court had to determine whether a debt review process had been terminated in a valid manner and whether referral of a proposal by a debt counsellor to a

¹²⁹ *Kruger*-case par 21.

¹³⁰ [2010] ZAECBHC 4 (8 Jun 2010).

¹³¹ *Changing Tides 17 (Pty) Ltd v Erasmus; Changing Tides (Pty) Ltd v Cleophas* (unreported) case no 18153/09 (WCC).

Magistrate's Court as provided for in section 87(1) had limited the rights of a credit provider to enforce a credit agreement.

The applications for summary judgments were opposed by all the respondents. The applicant financed vehicles that were bought by the respondents and the respondents accounts were in arrears. At the time the application was made by the applicant the respondents had already applied for debt review and the 60 business days period referred to in section 86(10) had already lapsed. The applicant had already cancelled the agreements and applied to a court seeking confirmation of the cancellation and the return of the vehicles.

The respondents entered appearances to defend, in which they alleged that credit was extended recklessly and should therefore be suspended. At the time the applicant issued summons, the respondents' proposals for debt review were pending before a Magistrate Court. Furthermore, all the respondents save for one disputed receipt of a section 129(1)(a) notice drawing their attention to the default. The applicant did not allege in the particulars of claim and the affidavit supporting its application for summary judgment whether a section 129(1)(a) notice had been issued to the respondents.

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

In reliance on the *Changing Tides*-case – where the court said that the evident purpose of the notice by a credit provider in terms of section 86(10) of the Act is to enable the consumer and/or the debt counsellor to urgently bring an application to a magistrate in terms of section 86(7)(c), or 86(8)(b), if that has not by then already been done, alternatively, if such an application is already pending, to approach the magistrate for an order in terms of section 86(11) of the Act that the debt review should be resumed – the court in the *Nako*-case said that it could conceive of no other reason for the requirement in terms of section 130(1)(a) of the Act that at least

10 business days must have elapsed after notice to the consumer was delivered as contemplated in terms of section 86(10) before a credit provider may institute proceedings for the enforcement of a credit agreement.

The court based on the above therefore held that the applicant was not supposed to issue a section 129(1)(a) notice. The respondents were already informed of what the notice would have conveyed to them. The court also importantly held that a credit provider may terminate the debt review process at any time before a magistrate has granted orders declaring the consumer to be over-indebted.¹³² The credit provider in the *Nako*-case was therefore justified to terminate the debt review processes.

5 4 5 *Wesbank v Papier*¹³³

In *Wesbank v Papier* a full bench held that prior to a credit provider enforcing a credit agreement the consumer must have been in default and 60 business days must have elapsed after such a consumer had applied for debt review. Of importance is that the full bench held that a credit provider may not terminate a debt review process once it has been referred to a Magistrate's Court.¹³⁴

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

¹³² Par 45.

¹³³ (Unreported) case no 14256/10 (WCC).

¹³⁴ Par 34.

On 12 March 2010 an application was made by the respondent's debt counsellor to the Magistrate's Court. The relief sought was an order declaring the consumer over-indebted, to have his debts re-arranged and to prevent credit providers from terminating the debt review process. The applicant had nonetheless notified the respondent that it had terminated the debt review process. The applicant had advised that the debt review was terminated as a result of the respondent having been in arrears for over 20 business days. The applicant had also demanded immediate satisfaction of the credit debt through an application for summary judgment. In the application the applicant sought confirmation that the credit agreement has been cancelled and the delivery of the leased vehicle with costs. The respondent responded by alleging that the application for debt review had been made before debt enforcement and that the matter was set down.

The court had to decide whether a credit provider may terminate a debt review process after a consumer had lodged an application to the court for an order declaring such a consumer to be over-indebted. The applicant relied on the interpretation of section 86(10) that a credit provider may terminate the debt review process after giving a notice to a consumer. The court held that in terms of section 86(10) two requirements have to be satisfied by a credit provider before a credit agreement may be enforced.¹³⁵ Firstly, a consumer must have been in default under the credit agreement that is under review. Secondly, 60 business days must have elapsed after the consumer applied for debt review. It was found to be common cause by the court that both the requirements listed under section 86(10) had been met.¹³⁶ Furthermore, the applicant had issued summons ten business days after it had indicated its intention to terminate the debt review process as required by section 130(1).

The court however, decided that the Act and regulations thereto must not be seen as too prescriptive on the timeframes within which debt counsellors are expected to issue proposals in terms of section 86(7)(c).¹³⁷ The court was of the opinion that when one has regard to regulation 24(6), it becomes clear that a debt counsellor has

¹³⁵ Par 17.

¹³⁶ Par 17.

¹³⁷ Par 36.

only 30 days to make a determination whether a consumer is over-indebted or not.¹³⁸ The court also went on to state that once the re-arrangement order has been granted a consumer is protected from litigation.¹³⁹

The court used an analogy that where a consumer is deprived of the protection it would be like providing the consumer with an umbrella and then snatching it back the moment it starts raining.¹⁴⁰

It was held by the court that a credit provider is not competent to file a notice terminating a debt review process in terms of section 86(10), once steps referred to under section 86(7)(c), 86(8) and 86(9) (to refer the matter to the court) have been taken.¹⁴¹ The reason is that the protection of a consumer who has taken steps to have his debts restructured, will only cease to exist where the magistrate has refused the application for debt review, where such an application was withdrawn or where it has been abandoned.¹⁴² The court was of the opinion that the 60 business days period was introduced to allow the consumer and the debt counsellor sufficient time to prepare the necessary documentation and the information required for the court to consider debt-re-arrangement.

5 4 6 *National Credit Regulator v Nedbank and others*¹⁴³

In this case the National Credit Regulator sought a declaratory order from the court to clarify interpretational difficulties with the National Credit Act and with the debt review process. The court first of all dealt with the provisions in the Act and the National Credit Regulations in connection with debt review.¹⁴⁴ It then said that referring debt review matters to a Magistrate's Court ensures that there is judicial oversight over these processes. The oversight can only be provided where a hearing was conducted. According to the court the oversight is a judicial role magistrates have to play and not an administrative role as it was previously thought.

¹³⁸ Par 25.

¹³⁹ Par 26. The court stated that "[i]t would be counter-productive to the whole purpose of the Act to allow a credit provider unilaterally to terminate the consumer's protection at the precise moment when he or she may need it the most".

¹⁴⁰ Par 30.

¹⁴¹ Par 30.

¹⁴² Par 30.

¹⁴³ 2009 (6) SA 295 (GNP).

¹⁴⁴ As discussed in par 3 2 2 above.

There are a number of things that may be gained from this judgment. Firstly, a magistrate has to conduct a hearing where a consumer is over-indebted in a bid to make an order declaring the consumer over-indebted. When making the declaration the court offers judicial oversight. The oversight is necessary to ensure that the aims of the Act are adhered to. Secondly, the court held that an application for debt review is an application as per the procedures of the Magistrate's Court. Therefore any referral to a court under section 86(8)(b) or 86(7)(c) for debt review becomes *sub-judice* which means that only a court may make a decision on the way forward.¹⁴⁵ The implication of this judgment was therefore that a credit provider must then not be allowed to terminate a debt review process after the matter was referred to a Magistrate's Court. The credit provider may, however, terminate the process if the court finds the consumer not to be over-indebted, that the consumer has engaged into further credit commitments while the review is pending or where the consumer withdraws the application for debt review.

5 4 7 Collett v Firstrand Bank¹⁴⁶

In the *Collett*-case the Supreme Court of Appeal gave clarity in respect of the termination of the debt review process. The appellant had defaulted on a credit agreement and all amounts as a result became due and payable. The appellant applied for debt review and was later advised to be successful, as he was determined to be over-indebted by the debt counsellor. However, none of the credit providers accepted the proposal for debt re-arrangement prepared by the debt counsellor. The debt counsellor referred the matter to the Magistrate's Court for consideration and for an order declaring the consumer to be over-indebted. The 60 business day period within which an application for debt review had to be made in the Act had lapsed at the time at or just after the matter was referred to the Magistrate's Court. The respondent terminated the debt review process in terms of section 86(10).

Further to that the respondent instituted an application for summary judgment. The debt counsellor subsequently requested that the terminated debt review be re-

¹⁴⁵ *Nedbank* at 522.

¹⁴⁶ 2011 (4) SA 508 (SCA).

instated. The court therefore had to decide whether a credit provider may terminate the debt review process under the abovementioned circumstances.

The appellant in his affidavit opposing the application for summary judgment merely challenged the ability of the respondent to institute an application for summary judgment. The appellant did not however challenge the merits of the case. In the court *a quo*¹⁴⁷ the court held that a credit provider may terminate the debt review process even after the matter was referred to a court. The court mentioned that context was given with regards to delays in the *Wesbank v Papier*¹⁴⁸ case. In the case the court stated that regard must be had to the objects of the Act when the 60 business days period has elapsed. The objects are to protect and assist over-indebted consumers in an environment that encourages participation in good faith.¹⁴⁹ The Supreme Court of Appeal in *Collett* agreed with the judge in the court *a quo* who said that he was

unable to find anything in the structure of section 86, or of the Act in its entirety, which is indicative of an intention on the part of the legislature to limit the right of a credit provider under section 86(10) to the process prior to the reference to the magistrate's court.

In agreement with the court *a quo* the Supreme Court of Appeal therefore held¹⁵⁰ that the right of the credit provider to give notice in terms of section 86(10) and to terminate the debt review legitimately continues until the court has made an order in terms of section 87.¹⁵¹ The Supreme Court of Appeal importantly indicated that the right of the credit provider to terminate the debt review (even at this late stage) is balanced by section 86(11),¹⁵² discussed above.¹⁵³ It should be remembered that section 86(11) allows a court to order that debt review resume once the debt review has been terminated in terms of section 86(10). In summary, the decision of the Supreme Court of Appeal therefore differed from that of the full bench of the High Court in the *Papier*-case.

¹⁴⁷ *Collett v Firstrand Bank* 2010 (6) SA 351 (ECG).

¹⁴⁸ See par 5 4 5 above.

¹⁴⁹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC).

¹⁵⁰ Par 11.

¹⁵¹ S 87 sets out the powers of the court in connection with debt review. The court may *inter alia* rearrange the consumer's obligations in terms of s 86(7)(c)(ii) by extending the period of the agreement and reducing the amount of each instalment accordingly, or by postponing during a specified period the dates upon which payments are due under the agreement.

¹⁵² *Collett* par 15.

¹⁵³ Par 5 3.

5 5 Section 86(10)(b)

It has been said above¹⁵⁴ that the legislature eventually gave clarity regarding the question whether a credit provider may terminate the debt review process once it has been referred to the court for the hearing and court orders in terms of section 87(1). This was done by inserting section 86(10)(b) into the National Credit Act by means of the National Credit Amendment Act. Section 86(10)(b) determines as follows: “No credit provider may terminate an application for debt review lodged in terms of this Act, if such application for review has already been filed in a court or in the Tribunal.”

In other words, the legislature did not agree with the Supreme Court of Appeal in the *Collett*-case discussed above.¹⁵⁵ The legislature now makes it clear that, once the debt review matter has been referred to a court (or the Tribunal)¹⁵⁶ in terms of section 86, section 86(10) may no longer be used by the credit provider to terminate the debt review. This also means that, once the debt review matter has been referred to a court (or the Tribunal), the credit provider may no longer enforce the credit agreement in terms of Chapter 6 Part C of the Act.¹⁵⁷

¹⁵⁴ Par 5 3.

¹⁵⁵ Par 5 4 7.

¹⁵⁶ Van Heerden in Scholtz ed (2008) par 11.3.3.3 finds the sudden reference in s 86(10)(b) to the Tribunal peculiar because the Tribunal is not empowered to hear debt review cases.

¹⁵⁷ Discussed in par 4 above.

6 Conclusions and recommendations

The stated purpose of this study was to investigate and evaluate certain aspects of the debt review process under the National Credit Act with specific focus on the initiation of the debt review process¹⁵⁸ and the interplay between debt review and debt enforcement.¹⁵⁹ The interplay was done in accordance with the provisions of the Act and case law.¹⁶⁰ An overview of the debt review¹⁶¹ and debt enforcement¹⁶² processes was also provided, with the aim to enable an explanation of the interplay. Finally, an overview of the field of application of the National Credit Act was provided in paragraph 2 with the aim to determine the ambit of the protection afforded by the Act.

It was seen in paragraph 2 that the National Credit Act has a wide field of application. The Act basically applies to all situations in terms whereof credit is extended to a consumer, unless one of the exceptions applies. This is in particular true due to section 8(4)(f),¹⁶³ which provides for the so-called catch-all section in the Act. The Act applies to a credit agreement, irrespective of the amount of money or the type of goods involved. The wide field of application of the Act is to be welcomed. The aim of the Act is to protect consumers, and the wide scope of its application means that as many as possible consumers enjoy its protection. The same applies to consumers who are over-indebted. They enjoy the protection afforded in terms of Chapter 4 Part D of the Act.¹⁶⁴ However, it was seen¹⁶⁵ that juristic person consumers are excluded from the debt review process. The same holds for smaller juristic person consumers that conclude small or intermediate credit agreements. Perhaps the legislature should consider extending the Act's debt review protection to this group of juristic person consumers. It is well-known that small businesses in South Africa experience tough times and it will therefore be good if at least these businesses have the opportunity to approach debt counsellors for debt review. Finally, the wide ambit of the Act's field of application is of course also to be

¹⁵⁸ Par 3 2.

¹⁵⁹ Par 5.

¹⁶⁰ Par 5 4.

¹⁶¹ Par 3.

¹⁶² Par 4.

¹⁶³ Discussed in par 2 2 3 9.

¹⁶⁴ Discussed in par 3.

¹⁶⁵ Par 2 3 2.

welcomed as far as the Act's protection with regard to debt enforcement¹⁶⁶ is concerned.

The initiation and a broad overview of the debt review process was provided in paragraph 3. The introduction of the debt review process in terms of section 86 of the National Credit Act is to be welcomed. This process creates an alternative, additional remedy for over-indebted consumers. The proviso is of course that the consumer and his credit agreement must be subject to the Act. The purpose with paragraph 4 was to give an overview of the debt enforcement protection measures in terms of the Act. The aim was also to enable me to do a meaningful discussion of the interplay between the debt review process on the one hand and the debt enforcement process on the other.

As far as the mentioned interplay is concerned, it was seen¹⁶⁷ that debt review and debt enforcement can never be on-going at the same time. This makes sense and is to be welcomed. It cannot be allowed that the consumer, who is over-indebted, approaches a debt counsellor and asks for assistance to get alleviation for his debt, but at the same time the credit provider is permitted to issue summons against the consumer in court to enforce the credit agreement, inter alia by cancelling the agreement and asking for the goods to be returned to the credit provider.

Section 86(2),¹⁶⁸ which excludes an application for debt review once the credit provider has commenced steps to enforce the credit agreement, initially gave rise to interpretational problems, to such an extent that it was necessary for the Supreme Court of Appeal in the *Nedbank-case*¹⁶⁹ to try and find a solution. The legislature eventually stepped in and amended section 86(2), which is to be welcomed. There is now legal certainty and it is clear that only the issuing or service of summons will bar an application for debt review. It is a pity that the legislature did not use the opportunity to make it clear whether it is the issuing or service of summons that will bar debt review.

¹⁶⁶ See par 4.

¹⁶⁷ Paras 5 2, 5 3 and 5 4.

¹⁶⁸ See par 5 2.

¹⁶⁹ See par 5 2.

Section 88(3)¹⁷⁰ provides the reverse side of the coin. Once a consumer has applied for debt review, debt enforcement is no longer possible. However, the credit provider is afforded the opportunity to terminate the debt review in terms of section 86(10) under certain circumstances in order that the credit provider may enforce his credit agreement in a court. This is to be welcomed, as it may prevent misuse of the debt review process in the Act by consumers to avoid debt enforcement with all its negative consequences, such as the loss of the vehicle that forms the object of the credit agreement. It also ensures a balance between the rights of the credit provider and the consumer.

Section 86(10) and the question whether a credit provider may terminate a consumer's debt review once it has been referred to a court for a hearing and the court's orders in terms of section 87(1), gave rise to a number of court cases, of which the cases indicating the two streams of thought as well as the case that eventually gave clarity, the *Collett*-case, were discussed in this dissertation.¹⁷¹ This was done to give the background to the necessity for the eventual amendment of section 86(10).

Although the Supreme Court of Appeal in the *Collett*-decision clarified the matter whether a credit provider may terminate a consumer's debt review once it has been referred to a court, the amendment to the Act in terms of the National Credit Amendment Act by the insertion of section 86(10)(b)¹⁷² is to be welcomed. We now have final clarity on the matter and know that once the debt counsellor has completed his investigation and has referred the debt review matter to a court, the termination of the debt review in terms of section 86(10), and therefore debt enforcement in respect of that credit agreement, is no longer possible. The debt review will therefore continue until its completion, for instance by the necessary court orders in terms of section 87(1) read with section 86(7)(c).

However, the credit provider's right to terminate the debt review when it has been on-going for a period of at least 60 business days but before it has been referred to

¹⁷⁰ Par 5 3.

¹⁷¹ Par 5 3 and more in particular par 5 4.

¹⁷² Par 5 5.

the court,¹⁷³ is a positive aspect. It forces the consumer and his debt counsellor to complete the debt review process as soon as possible and not to drag their feet. It would have caused credit providers headaches if consumers (and debt counsellors) were allowed to initiate the debt review process and then to continue with it indefinitely to stall debt enforcement from taking place.

Finally, the debt review process, introduced by the National Credit Act, provides an excellent alternative debt relief measure to credit consumers in South Africa. It is therefore to be welcomed that this process has survived its initial growing pains.

¹⁷³ Par 5 3.



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