Annexure N

THE DELAY OF DEBT REVIEW REFERRALS IN THE MAGISTRATES' COURTS

by

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Annexure G

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Declaration of originality

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SUMMARY

The purpose of this study is to evaluate, within the practical arena, how debt counselling industry guidelines, being the Task Team Agreements and the Court Application Guidelines, challenge the application and interpretation of the National Credit Act 34 of 2005 (the NCA), in respect of the debt review process by leading to impractical application. The study achieves this purpose by discussing select challenges under two objectives to evaluate possible solutions to these challenges. The first objective is to discuss select factors that a debt counsellor must consider in determining over-indebtedness. The finding of over-indebtedness is evaluated with consideration of the concept "financial means, prospects and obligations" as described in sections 78 and 79 of the NCA. The interpretation thereof is done with specific reference to the realisation of assets, consideration of household income, and the proposed consumer budget. These challenges demonstrate how opposing views and impractical expectations regarding "financial means, prospects and obligations" delay the court process in debt reviews. The second objective of the study is to discuss select factors that magistrates should consider in determining whether the re-arrangement proposal of a debt counsellor is fair. The select factors discussed are: interest rate concessions, repayment term concessions, the application of the *in duplum*-rule to debt restructuring proposals, and the ordering of a reckless credit investigation by a magistrate. The challenges discussed under the two aforementioned objectives demonstrate how the interpretational uncertainties with regard to the select factors challenge the finalisation of the debt review court process. The study concludes with recommendations on how these interpretational uncertainties can be resolved.

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CHAPTER 1: GENERAL INTRODUCTION

1 Introduction

Credit is one of the oldest economic building blocks of human civilization. Anthropologist David Graeber holds that debt and credit were used by ancient civilizations before money and barter.[1] In these ancient civilizations, credit was advanced at such rates that the children of the borrowers would become the victims of debt peonage.[2] To alleviate the tension caused by enslavement of large portions of communities, rulers periodically granted amnesty to these borrowers by cancelling all debts.[3] We can therefore accept that credit (or debt) has always has always been accompanied by over-indebtedness. Further, it can be accepted that over-indebtedness is not only an individual concern, but a concern for authorities, due to its broader social, economic, and legal impact.

Legislation regulating credit relationships can be found world-wide, and differs depending on the needs, circumstances, resources, political agenda, economy, and history of the jurisdiction.[4] In the South African context, credit relationships were previously principally regulated by the Usury Act.[5] The Credit Agreements Act[6] was ancillary, and regulated the format of credit contracts.[7] The Usury Act was intricate, and limited access to credit, which led to numerous amendments and, eventually, exemption notices, in an attempt to advance credit regulation.[8] Some of the shortcomings of the Usury Act was that it did not make provision for more modern financial instruments such as credit cards, mortgage bonds, and microloans.[9] The Usury Act, prior to the exemption notices, had regulatory shortcomings such as failure

1 Graeber *Debt: the first 5 000 years* (2011) 23.
2 Graeber 65.
3 Graeber 65.
4 JM Otto and R-L Otto *The National Credit Act explained* (2015) 2.
5 Act 73 of 1968 (hereinafter "Usury Act"); Otto and Otto 3.
6 Act 75 of 1980 (hereinafter "Credit Agreements Act").
7 Kelly-Louw "The prevention and alleviation of consumer over-indebtedness" 2008 *SA Merc LJ* 203.
8 Usury Amendment Act 62 of 1987; Usury Amendment Act 100 of 1998; Usury Amendment Act 91 of 1989; Usury Amendment Act 67 of 1990; Notice 73 in *GG* 14498 of 1992-12-13; Notice 713 in *GG* 20145 of 1999-06-01 as amended by Notice 910 in *GG* 20307 of 1999-07-16; Scholtz ed *Guide to the National Credit Act* (2008) par 1.3.1; Kelly-Louw 2008 *SA Merc LJ* 201-202.
9 Kelly-Louw 2008 *SA Merc LJ* 201. See Kelly-Louw 2008 *SA Merc LJ* 202 for a discussion of Notice 73 in *GG* 14498 of 1992-12-13 with regard to exemption from the Usury Act for loans under R6 000, which led to the development of an unregulated micro-lending industry.

to provide for the comprehensive disclosure of the cost of credit and administrative penalties for contravention of its provisions.[10]

On the back of outdated legislation, credit regulation in South Africa was further challenged by political and historical circumstances, which led to the development of both a formal and an informal financial sector.[11] The formal sector, being banks and financial institutions, provided credit to predominantly white consumers and large enterprises.[12] Historically disadvantaged consumers and small and medium enterprises were subjected to obtaining credit from the informal sector, which consisted of micro-lenders, loan sharks, and pawnbrokers.[13] The informal sector, being unregulated, exploited borrowers, and contributed to over-indebtedness amongst these borrowers.[14]

With the dawning of a new constitutional era in 1994, credit from the formal sector was becoming available to historically disadvantaged consumers.[15] An unintended, but also unavoidable, consequence was that over-indebtedness became an epidemic, due to inadequate credit legislation, lack of consumer protection, the informal (and unregulated) credit sector, reckless lending, failure to conduct affordability assessments, and faulty credit bureau information.[16] The debt relief measures available during this time were ineffective, and did not address the underlying reasons for consumers becoming over-indebted.[17]

In 1992, the South African Law Commission recognised the need for revised legalisation to regulate the credit industry, with specific reference to the shortcomings of the Usury Act. The matter was referred to the Minister of Trade and Industry, without result.[18]

A renewed review of South African credit legislation and market was a long and intricate process, initiated in 2001 by the Department of Trade and Industry.[19] The

[10] Kelly-Louw 2008 *SA Merc LJ* 201-202.
[11] Kelly-Louw 2008 *SA Merc LJ* 203.
[12] Kelly-Louw 2008 *SA Merc LJ* 203.
[13] Kelly-Louw 2008 *SA Merc LJ* 203.
[14] Kelly-Louw 2008 *SA Merc LJ* 204.
[15] Kelly-Louw 2008 *SA Merc LJ* 204.
[16] Kelly-Louw 2008 *SA Merc LJ* 204.
[17] Kelly-Louw 2008 *SA Merc LJ* 205.
[18] *South African Law Commission Working Paper 46 Project 67* "The Usury Act and related matters" (1993); Kelly-Louw 2008 *SA Merc LJ* 205.
[19] Kelly-Louw 2008 *SA Merc LJ* 207.

review resulted in the promulgation of the National Credit Act 34 of 2005.[20] The operation of the Act was effected in three phases, with the largest portion coming into operation on 1 June 2007.[21] The Act[22] repealed the Usury Act and Credit Agreements Act. The Act is applicable to all credit agreements where parties deal at arm's length, subject to certain limitations.[23] The Act specifically provides that Chapter 4 Part D is not applicable to a credit agreement where the consumer is a juristic person.[24]

The Act has ambitious objectives to address a wide range of issues within the credit industry that gave rise to over-indebtedness, restricted access to credit, and unregulated credit practices.[25] One of the objectives of the Act is to protect the consumer by addressing and preventing over-indebtedness and providing mechanisms for the resolution of over-indebtedness whilst ensuring that the consumer's financial obligations are satisfied.[26] The Act also aims to provide a consistent and harmonised system for debt restructuring.[27]

In support of these objectives, Chapter 4 of the Act titled "Consumer Credit Policy" contains Part D titled "Over-indebtedness and reckless credit". Part D of Chapter 4 introduced two new concepts underpinning over-indebtedness, namely "reckless credit" and "debt review", into South African credit legislation for the first time.[28] Both reckless credit and debt review pertain to the alleviation of over-indebtedness, and it is possible for a consumer to use debt review and reckless credit simultaneously to obtain relief from over-indebtedness.[29]

[20] Hereinafter "National Credit Act", "NCA", or "the Act". All references to sections and regulations hereinafter will be in accordance with the National Credit Act, unless indicated otherwise.
[21] Notice 22 in *GG* 28824 of 2006-05-11; Kelly-Louw 2008 *SA Merc LJ* 207.
[22] S 172(4).
[23] S 4(1). See s 4(2)(b) for instances in which parties are not dealing at arm's length. See ss 4(1)(a)-(d) and 8(2) for exemptions to the NCA's field of application, and ss 5 and 6 for specific instances in which the Act has limited application. For a comprehensive discussion of the scope and application of the National Credit Act, see Scholtz ed chs 4 and 8 and par 11.2; Otto and Otto ch 3.
[24] S 78(1). "Juristic person" is defined in s 1, and includes partnerships, associations of persons, and a trust having three or more natural persons as trustees, or having a juristic person as trustee.
[25] S 3.
[26] S 3(g). See ch 2 for a comprehensive discussion of the concept of "over-indebtedness", as well as Scholtz ed par 11.3.
[27] S 3(i).
[28] Ss 80 and 86; Kelly-Louw 2008 *SA Merc LJ* 218; Scholtz ed pars 11.3 and 11.6.
[29] S 86(6)(a)-(b); Scholtz ed par 11.1.

With consideration of the historic background of the Act, one could argue that addressing over-indebtedness is the underlying theme of the entire Act – through either prevention or remedy post-occurrence.

2 Debt review and reckless credit – a brief overview

As noted, both debt review and reckless credit serve to alleviate over-indebtedness.[30] One of the most remarkable provisions contained in the Act is that the legislator has, "despite any provision of law or agreement to the contrary", granted the judiciary the power to make a declaration of over-indebtedness and to further take active measures to relieve over-indebtedness when an allegation of over-indebtedness has been made.[31] Whilst it is possible for a debt review to be initiated by the judiciary when prompted thereto,[32] the majority of debt review applications are initiated by consumers.

Section 86 dictates the process to be followed during a consumer-initiated debt review.[33] Section 86 is supported by regulation 24 of the Regulations made in terms of the National Credit Act,[34] in terms of which it is required that a consumer submit a Form 16, or provide the prescribed information to a debt counsellor.[35] The debt counsellor is a statutory functionary created by the NCA who offers debt counselling services. The debt counsellor must be a natural person.[36]

Once a debt counsellor has received an application for debt review, the debt counsellor must, within five business days, issue a notice, known as a Form 17.1, to all the credit providers of the consumer involved and all registered credit bureaux, advising that the consumer has applied for debt review.[37] Following the issuing of Form

30 S 86(6)(a)-(b); Scholtz ed par 11.1; Otto and Otto 69.
31 S 85; Scholtz ed par 11.3.3.5; Otto and Otto 69.
32 S 85; See Scholtz ed par 11.3.3.5. For a comprehensive discussion regarding debt review proceedings initiated by the judiciary see Van Heerden and Lötz "Over indebtedness and discretion of court to refer to debt counsellor *Standard Bank of SA Ltd v Hales* 2009 3 SA 315 (D)" 2010 *THRHR* 502; Kreuser "The application of section 85 of the National Credit Act in an application for summary judgment" 2012 *De Jure* 1-21; Renke and Coetzee "The circumstances under which section 85(a) of the National Credit Act 34 of 2005 can be utilised as an avenue to access or re-access the debt relief measures in terms of the National Credit Act 34 of 2005" 2018 *De Jure* 17.
33 S 86; Scholtz ed par 11.3.3.2; Otto and Otto 70.
34 GN R489 *GG* 28864 of 2006-05-31.
35 For a comprehensive discussion of the contents of Form 16, see Scholtz ed par 11.3.3.2, and take note of the declaratory order in *Van Der Hoven Attorneys and The National Credit Regulator and Others*, unreported case GNP case nr 10918/2015 (2015-05-26) (hereinafter "*Van Der Hoven Attorneys Declarator*") confirming that Form 16 is not a requirement for a court application for debt review.
36 Reg 1; s 86(6); Scholtz ed par 11.3.3.2; Otto and Otto 72.
37 S 86(4); reg 24(2); Scholtz ed par 11.3.3.2.

17.1, the debt counsellor has 30 business days to make a determination of over-indebtedness.[38]

The debt counsellor will use the Form 16 information to make a finding regarding over-indebtedness, and the consumer is therefore required to provide confirmation to the debt counsellor that the information in the Form 16 is correct.[39] Should the consumer fail to provide the necessary supporting documentation, the debt counsellor may proceed with the information in Form 16.[40] The debt counsellor is statutorily bound to make a finding regarding over-indebtedness, and is not exempt from making the said finding due to lack of supporting documentation.[41]

The finding of the debt counsellor will result in the transmission of a Form 17.2 to the credit providers and credit bureaux, confirming the outcome of the application for debt review.[42] The debt counsellor must refer a debt review application to a Magistrate's Court within 60 business days of date on the Form 16.[43]

During the assessment of over-indebtedness, the debt counsellor can also investigate reckless credit if prompted by the consumer.[44] Reckless lending occurs when the credit provider, at the time the credit agreement is entered into, fails to conduct a financial assessment, or conducts the assessment and grants the credit despite the consumer not understanding the impact of the agreement, or the agreement leading to the consumer becoming over-indebted.[45] The legislator places an obligation on both credit provider and consumer to prevent reckless lending.[46] The Act has awarded the judiciary powers to address suspected reckless lending, and makes provision for remedies.[47]

[38] Reg 24(6); Scholtz ed par 11.3.3.2. The concept of "over-indebtedness" is comprehensively discussed in ch 2.
[39] Reg 24(1)(b)(viii); Scholtz ed par 11.3.3.2.
[40] Reg 24(4); Scholtz ed par 11.3.3.2.
[41] S 86(6).
[42] Reg 24(10); Scholtz ed par 11.3.3.2.
[43] S 86(10); Scholtz ed par 11.3.3.2; Otto and Otto 114.
[44] S 86(6)(b); Scholtz ed par 11.6; Otto and Otto 89.
[45] S 80. For a comprehensive discussion of the different forms of reckless credit, see Renke "Measures in South African consumer credit legislation aimed at the prevention of reckless lending and over-indebtedness: an overview against the background of recent developments in the European Union" 2011 *THRHR* 208.
[46] S 81; Scholtz ed par 11.6; Otto and Otto 89. For a comprehensive discussion of the duty to prevent reckless lending, see Renke 2011 *THRHR* 208.
[47] Ss 80 and 83-84. See Scholtz ed par 11.6; Otto and Otto 89; Renke 2011 *THRHR* 208. The scope of these judiciary duties is comprehensively discussed in ch 3.

3 Development of the debt review court process

The National Credit Act fails to define the debt review court process.[48] Debt review applications in terms of which a restructuring order is prayed for are referred to a magistrate's court in terms of Rule 55 of the Magistrates' Courts Rules.[49] If the consumer and credit providers all consent to the suggested restructuring of the debt, the debt counsellor has the option to file an application for a consent order.[50] Applications for consent orders are referred to the National Consumer Tribunal[51] in the prescribed format.[52] The most important distinction between the process before a magistrate's court and the Tribunal is that, for a referral to the Tribunal, the debt counsellor must be in receipt of consent to the proposed restructuring from all the credit providers involved.[53]

There were widespread concerns regarding the debt review court process, and the National Credit Regulator[54] engaged the University of Pretoria (UP) to undertake a desk- and empirical research study, published in April 2009, into the challenges inherent in debt review referrals to magistrates' courts.[55] The UP Report revealed that, in December 2008, the Regulator had reported that approximately 42 000 consumers had applied for debt review, but that fewer than 1 600 matters had been finalised in Magistrates' Courts across South Africa.[56] Therefore, the purpose of the UP study was to:

> …conduct an assessment of the reasons for debt restructuring not being achieved and applications not being finalised by Magistrates' Courts and identify the parties responsible for the delay or preventing the finalisation of cases and the approach followed.[57]

During a committee meeting of the Regulator and the Tribunal in 2009, it was estimated that there is a backlog of 70 000 debt review cases, with this backlog

[48] *National Credit Regulator v Nedbank Limited and Others* 2009 (6) SA 295 (GNP) (2009-08-21) (hereinafter "*Nedbank Declarator*") 28 prayer 1.6.
[49] *Nedbank Declarator* 28 prayer 1.6; Scholtz ed par 11.3.3.2; Otto and Otto 74-75.
[50] S 138.
[51] Hereinafter "Tribunal".
[52] S 138.
[53] S 138.
[54] Hereinafter "Regulator".
[55] Research report submitted by the University of Pretoria Law Clinic to the Regulator titled "The debt counselling process: challenges to consumers and the credit industry in general", dated Apr 2009, hereinafter "UP Report"; Roestoff *et al* "The debt counselling process — closing the loopholes in the National Credit Act 34 of 2005" 2009 *PELJ* 247.
[56] Roestoff *et al* 2009 *PELJ* 247.
[57] UP Report 17.

increasing by 9 000 cases per month.[58] Interpretational difficulties with the Act were identified as a contributing factor in these delays.[59]

As mentioned, the National Credit Act fails to define a court process for debt reviews, and, in 2009, the Regulator approached the Gauteng High Court for a series of declaratory orders, aimed at furthering interpretation of the Act.[60] The credit providers cited in the *Nedbank Declarator* had been unhappy with the outcome of certain declaratory orders, and approached the Supreme Court of Appeal in 2011.[61] In the Nedbank Appeal, Malan AJ noted:

> Unfortunately, the NCA cannot be described as the best drafted Act of Parliament which was ever passed, nor can the draftsman be said to have been blessed with the 'draftsmanship of a Chalmers'. Numerous drafting errors, untidy expressions and inconsistencies make its interpretation a particularly trying exercise. Indeed, these appeals demonstrate the numerous disputes that have arisen around the construction of the NCA. The interpretation of the NCA calls for a careful balancing of the competing interests sought to be protected, and not for a consideration of only the interests of either the consumer or the credit provider.[62]

Following the UP Report and the *Nedbank Declarator*, the Regulator, in 2010, set up a task team to address the reasons delaying the finalisation of debt review referrals.[63] The terms of reference, in concurrence with the issues identified in the UP Report, were to:

- identify the primary causes for the current backlogs and delays in finalising debt review referrals;
- propose common standards and procedures that would facilitate the processing and finalisation of debt review referrals;
- establish mechanisms through which credit providers, debt counsellors, and payment distribution agents can engage on operational and procedural problems in relation to the implementation of debt restructuring proposals;

58 "National Credit Regulator and National Consumer Tribunal" available at https://pmg.org.za/committee-meeting/10945/ (accessed 2018-12-29).

59 Roestoff *et al* 2009 *PELJ* 247.

60 *Nedbank Declarator* 1. For a comprehensive discussion of the *Nedbank Declarator* and the subsequent SCA case, see below; De Villiers "National Credit Regulator versus Nedbank Ltd and the practice of debt counselling in South Africa" 2010 *PELJ* 128-160, available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812010000200006&lng=en&tlng=en (accessed 2019-11-20).

61 *Nedbank v The National Credit Regulator* 2011 (3) SA 581 (SCA) (28 March 2011) (hereinafter "*Nedbank Appeal*"). See also De Villiers 2010 *PELJ* 128.

62 *Nedbank Appeal* par 2; De Villiers 2010 *PELJ* 128.

63 Circular 2 of 2015 published by the Regulator, titled "Debt Review Task Team Agreements of 2010 Guidelines", dated Jan 2015 (hereinafter "Task Team Agreements").

- establish mechanisms through which disputes in relation to specific cases can be resolved;
- provide information through circulars or similar mechanisms to credit providers and debt counsellors on any standard procedures or documentation; and
- assist and advise the Regulator with the objective of implementing an effective debt counselling process, as intended by the Act.[64]

The Credit Industry Forum was established in 2013, and was requested to review the draft (revised) Task Team Agreements.[65] The Credit Industry Forum consists of debt counselling and banking associations.[66] The members of the Credit Industry Forum approved the revised Task Team Agreements and submitted same to the Regulator for issuing as an industry guideline.[67] The Task Team Agreements are only guidelines, and compliance therewith is voluntary.[68] However, the Regulator has ensured compliance with the Task Team Agreements by deploying the Task Team Agreements under section 48(1).[69] Therefore, should a debt counsellor or credit provider fail to comply with the Task Team Agreements, the Regulator may refuse registration of said debt counsellor or credit provider under the Act.[70]

Following the publication of the Task Team Agreements, the magistrates' courts adjudicating referrals of debt review took it upon themselves to ensure that debt counsellors and credit providers comply with the Task Team Agreements, which

64 Task Team Agreements Covering Report 3.
65 Task Team Agreements Covering Report 3.
66 "The Credit Industry Forum" available at http://debtfreedigi.co.za/credit-industry-forum-the-new-drac/ (accessed 2018-12-30).
67 Task Team Agreements Covering Report 3.
68 Task Team Agreements Annexure D 2.
69 S 48(1):

"(1) If a person qualifies to be registered as a credit provider, the National Credit Regulator must further apply the following criteria in respect of the application:
(a) to the extent it is appropriate having regard to the nature of the applicant, the commitments, if any, made by the applicant or any associated person in terms of black economic empowerment considering the purpose, objects and provisions of the Broad-based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003);
(b) the commitments, if any, made by the applicant or any associated person in connection with combating over-indebtedness and compliance with a prescribed code of conduct as well as affordability assessment regulations made by the Minister on the recommendation of the National Credit Regulator; and
(c) registration with the South African Revenue Services."

70 S 48(1); s 44; Task Team Agreements Annexure D 2. For an example of deregistration matters in which concerns regarding compliance with guidelines were raised, see *Fulton v National Credit Regulator* 2019 ZANCT 146 (2019-09-10).

resulted in further delays in the finalisation of debt review referrals.[71] The undertone of the wording of the Task Team Agreements is undoubtedly that compliance with the document is optional:

> The task team, given the realities in the market in the wake of the economic recession came to the conclusion that at present there is a need in the market for voluntary credit provider concession in deserving cases that go beyond these adjustments allowed for in the Act and developed a set of proposed debt restructuring rules presented to industry.[72]
>
> The concessions are made on a voluntary basis and will therefore be subject to constant review and adjustment depending on the market response.[73]

The Task Team Agreements were drafted from a practical and educational perspective, and it is therefore not surprising that the courts chose to use this as a guideline for adjudicating debt review referrals.[74] Debt counsellors, credit providers, and legal practitioners have developed various opposing views and diverse practices from the Act, the *Nedbank Declarator*, and the Task Team Agreements.[75]

Due to these continued difficulties, and in the interest of promoting the streamlining of the debt review process, Van Der Hoven Attorneys, a law firm specialising in debt review referrals, approached the Gauteng Division of the High Court in 2015 to seek clarity on various issues causing unnecessary delays in magistrates' courts throughout South Africa.[76] A second declaratory order of the same nature was then sought from the Free State Division of the High Court by another law firm focused on debt review, Jordaans Rijkheer and Partners, in the Free State, in 2016.[77] Both declarators were granted.

The Regulator identified the need for an all-inclusive guide incorporating the Task Team Agreements and the three declaratory orders, and, subsequently, the Court

71 Examples of case law where the Task Team Agreements was considered are: *Driskel v Maseko and Others* [2017] ZAFSHC (hereinafter "*Driskel*") 150; *Motor Finance Corporation (Pty) Ltd v Jan Joubert and Others*, unreported case GNP case nr A629/2013 (2013-08-19) (hereinafter "*MFC v Joubert*") and *Sansom v Mars and Others* 2017 ZAWCHC 112.

72 Task Team Agreements Annexure D 1.

73 Task Team Agreements Annexure D 2.

74 See examples listed above.

75 Circular 1 of 2016 published by the National Credit Regulator titled "Debt Review Court Application Guidelines 2016" dated March 2016 (hereinafter "Court Application Guidelines").

76 *Van Der Hoven Attorneys Declarator*.

77 *MC Rijkheer v The National Credit Regulator and Others*, unreported FS case nr 363/2016 (2016-04-07).

Application Guidelines were published in March 2016.[78] The Court Application Guidelines aim to:

- facilitate uniformity in the adjudication of debt review referrals to avoid wasteful expenditure and delays;
- accelerate restructurings;
- reduce end balance disputes; and
- simplify the practical application of the applicable declarators.[79]

The backlog of debt review referrals has, since the onset of the debt review process, been noted in the annual reports of the Regulator, confirming that, to date, no suitable solution has been implemented.[80] In its 2017/18 Annual Report, the Regulator took an aggressive approach by advising that the backlog in courts had now become a threat, undermining the implementation of the objectives of the Act.[81]

Statistics from the Regulator in its October 2018 quarterly Credit Bureau Monitor indicated that, of the 24.59 million credit records held, only 15.02 million were in good standing.[82] The data translate into approximately 39% of credit records being impaired. Debt counsellors throughout 2018 reported double-digit growth in the number of debt review applications received.[83]

The second National Credit Amendment Act was signed into law on 16 August 2019[84], and contains various provisions that will impact the debt review process.[85] Against the backdrop of this new legislation, it was reported in November 2019 that the percentage of consumers who owned assets and applied for debt review increased from 49% to

78 Court Application Guidelines 3.
79 Court Application Guidelines 4.
80 National Credit Regulator Annual Report 2016/17 39; National Credit Regulator Annual Report 2015/16 38; National Credit Regulator Annual Report 2014/15 23.
81 National Credit Regulator Annual Report 2017/18 22.
82 National Credit Regulator Credit Bureau Monitor 2018 1.
83 "Here's how much it costs to get debt counselling in South Africa", available at https://businesstech.co.za/news/finance/270881/heres-how-much-it-costs-to-get-debt-counselling-in-south-africa/ (accessed 2018-12-29).
84 Act 7 of 2019 (hereinafter "2019 National Credit Amendment Act").
85 Select amendments are discussed and their possible effectiveness considered in ch 3.

56%.[86] The need to streamline the debt review referral process by resolving issues is therefore of utmost importance.

4 Research statement

This purpose of this study is to evaluate, within the practical arena, how the industry guidelines, being the Task Team Agreements and the Court Applications Guidelines, challenge the application and interpretation of the National Credit Act in respect of the debt review process by leading to impractical application.

The study will achieve its purpose by discussing select challenges to evaluate possible solutions to these challenges. The study will discuss the legal merits of the various challenges raised through these practical examples. The study will further present holistic solutions to these issues, either with the Act as primary source, supported by case law and the industry guidelines, or by proposing amendments to the Act.

5 Research objectives and lay-out of chapters

Chapter 1:

This chapter presents the background, theoretical framework and rationale for the study, the research statement, research objectives, methodology, delineation, and limitations of the study.

From the discussion of the literature in Chapter 1, the research objectives were identified in respect to the research statement of this study. The research objectives are addressed per subsequent chapter.

Chapter 2:

Research Objective 1: To discuss select factors that a debt counsellor must consider in determining over-indebtedness.

The finding of over-indebtedness is evaluated with consideration of the concept of "financial means, prospects and obligations" as described in sections 78 and 79 of the NCA. The interpretation thereof is done with specific reference to the realisation of assets, consideration of household income, and the proposed consumer budget. The

[86] "South Africans now over-indebted sooner after fewer credit agreements — report", available at https://www.fin24.com/Money/Debt/south-africans-now-over-indebted-sooner-after-fewer-credit-agreements-report-20191116 (accessed 2019-11-18).

chapter demonstrates how opposing views and impractical expectations regarding "financial means, prospects and obligations" delay the court process in debt reviews.

Chapter 3:

Research Objective 2: To discuss select factors that magistrates should consider in determining whether the rearrangement proposal of a debt counsellor is fair.

The select factors discussed in this chapter are: interest rate concessions, repayment term concessions, the application of the *in duplum* rule to debt restructuring proposals, and the ordering of a reckless credit investigation by a magistrate. The chapter demonstrates how the interpretational uncertainties with regard to the select factors challenge the finalisation of the debt review court process.

Chapter 4: This chapter contains the conclusions and recommendations of the study.

6 Research methodology

The study will be based on a literary study of legislation, case law, articles, reports, and industry guidelines. The study will also incorporate a review of debt review referrals to various magistrates' courts across South Africa, to highlight practical issues that arise during litigation.

These case studies have been made available by Van Der Hoven Attorneys. Van Der Hoven Attorneys, their respective debt counsellors, and the correspondent attorneys instructed by Van Der Hoven Attorneys capture all data relating to their debt review matters on an electronic server operated by Servsol. As on November 2019, Van Der Hoven Attorneys have been instructed on approximately 45 000 debt review matters.

7 Delineation and limitations

The study will not address consent orders referred to the Tribunal under section 138. The study will also not address the reinstatement of credit agreements terminated under the debt review process in terms of section 86(11). The concept of "over-indebtedness" will be limited to realisation of assets, consideration of household income, and the proposed consumer budget.[87] The only factors that will be discussed pertaining to the suggested debt restructuring proposal of the debt counsellor will be

[87] Ch 2.

interest rate concessions, repayment term concessions, the application of the *in duplum* rule, and the ordering of a reckless credit investigation by a magistrate.[88]

8 Reference techniques

For the sake of brevity, the masculine form is used throughout this dissertation to refer to a natural person.

[88] Ch 3.

CHAPTER 2: DETERMINATION OF OVER-INDEBTEDNESS

1 Introduction

Before a consumer can obtain debt relief in terms of section 86 of the National Credit Act, he must apply to a debt counsellor to be declared over-indebted.[1] The debt counsellor will conduct an assessment after receiving the application from the consumer, and reach one of the conclusions provided in section 86(7):

> (7) If, as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably concludes that –
>
> (a) the consumer is not over-indebted, the debt counsellor must reject the application, even if the debt counsellor has concluded that a particular credit agreement was reckless at the time it was entered into;
>
> (b) the consumer is not over-indebted, but is nevertheless experiencing, or likely to experience, difficulty satisfying all the consumer's obligations under credit agreements in a timely manner, the debt counsellor may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement; or
>
> (c) the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or both of the following orders –
>
> (i) that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless; and
>
> (ii) that one or more of the consumer's obligations be re-arranged by –
>
> (aa) extending the period of the agreement and reducing the amount of each payment due accordingly;
>
> (bb) postponing during a specified period the dates on which payments are due under the agreement;
>
> (cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or
>
> (dd) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6.

This study is limited to the circumstances contemplated under section 86(7)(c) of the Act.[2] Once the debt counsellor has concluded that a consumer is over-indebted, he is statutorily obligated to approach a magistrate's court to obtain a rearrangement order.[3] The magistrate's court will conduct a hearing before granting a rearrangement order, to consider the alleged over-indebtedness of the consumer.[4] To prove the allegation

[1] S 86(1). For a comprehensive discussion of the forms and processes under s 86, see Scholtz ed par 11.3.3.2. Although s 85 also makes provision for a finding of over-indebtedness by a court, alternatively for a referral to a debt counsellor for a finding of over-indebtedness, it will not be discussed in this study.

[2] See *Nedbank Declarator*, in which it was held that s 86(8) is applicable to the circumstances contemplated in s 86(7)(c). For a comprehensive discussion of the procedure to be followed in the magistrates' courts, see De Villiers 2010 *PELJ* 128 and Scholtz ed par 11.3.3.2.

[3] Ss 86(8) and 87(1); *Nedbank Declarator* 309; De Villiers 2010 *PELJ* 128; Scholtz ed par 11.3.3.2.

[4] S 87(1); *Nedbank Declarator* 309; De Villiers 2010 *PELJ* 128; Scholtz ed par 11.3.3.2.

of over-indebtedness, evidence will have to be placed before the court by the debt counsellor.[5] To determine the evidence that a debt counsellor must gather requires consideration of the definition of over-indebtedness provided in section 79(1):

> (1) A consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, having regard to that consumer's –
> (a) financial means, prospects and obligations; and
> (b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment.

One of the considerations in determining over-indebtedness is the consumer's financial means, prospects, and obligations.[6] A definition of financial means, prospects, and obligations is provided in section 78(3):

> (3) In this Part, "financial means, prospects and obligations", with respect to a consumer or prospective consumer, includes –
>
> (a) income, or any right to receive income, regardless of the source, frequency or regularity of that income, other than income that the consumer or prospective consumer receives, has a right to receive, or holds in trust for another person;
> (b) the financial means, prospects and obligations of any other adult person within the consumer's immediate family or household, to the extent that the consumer, or prospective consumer, and that other person customarily –
> (i) share their respective financial means; and
> (ii) mutually bear their respective financial obligations; and
> (c) if the consumer has or had a commercial purpose for applying for or entering into a particular credit agreement, the reasonably estimated future revenue flow from that business purpose.

Regulation 24(7) also makes a contribution towards the methodology to be employed in determining over-indebtedness:

> (7) When assessing the consumer's application in terms of section 86(6)(a) of the Act, the debt counsellor must refer to section 79 and further consider the following:
>
> (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;
> (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.

[5] S 86(8)(b) obligates a debt counsellor who has made a finding of over-indebtedness to refer the matter to a magistrate's court. See De Villiers 2010 *PELJ* 128 for a comprehensive discussion regarding the interpretation of ss 86(8) and 86(7)(c) in the *Nedbank Declarator*. See also Scholtz ed par 11.3.3.2.
[6] S 79(1)(a); Scholtz ed par 11.3.3.2.

From section 79 and regulation 24(7), it is evident that there is no simple definition of over-indebtedness, and that it is determined using various formulas. The conclusion can thus be drawn that, if there are challenges in determining over-indebtedness during the hearing of a debt review referral, the finalisation of the referral in court will be delayed.

This chapter discusses three variables that, in practice, delay the determination of over-indebtedness, namely[7]:

- Spousal contributions: this variable is present in applications where a consumer is married out of community of property, and the question is raised whether his spouse can alleviate his over-indebtedness through financial contributions to the consumer directly, or to the joint household.
- Asset investigations: this variable is present in applications where a consumer has financed a home or vehicle, and the question is raised whether the consumer can liquidate assets to alleviate his over-indebtedness.
- Living expenses: this variable is present in all applications, and the question is raised whether the consumer could alleviate his over-indebtedness by reducing his living expenses.

2 Spousal contributions

2.1 Introduction

Section 78(3)(b)[8] notes that the financial means, prospects, and obligations of any adult person within the consumer's immediate family or household must also be considered when determining the consumer's financial means, prospects, and obligations. The requirement is limited to the extent that the consumer and the adult person customarily share their respective financial means and mutually bear their

[7] These factors have been derived from a document titled "Court requirements", compiled by Van Der Hoven Attorneys and utilised to draft and prepare debt review applications to magistrates' courts across South Africa. The original document is in possession of the author, who has access to the document and is a contributor to same.
[8] See Ch 2 par 1 above.

respective financial obligations.[9] The Act contains no definition of "customarily", and a broad definition is "commonly practiced, used, or encountered; usual".[10]

The most apparent relationship in which persons would customarily share financial obligations is marriage.[11] Section 78(3)(b) is broad enough to also include any other adult person who shares a household with the consumer regarding whom the assessment to determine over-indebtedness is being made.[12] This study is limited to a discussion of the application of section 78(3)(b) on marriages out of community of property.

In this study, any reference to "marriage" or "spouse" should be understood to not be limited persons who concluded a marriage under the Marriage Act,[13] but also a marriage according to any law or custom, as well as persons living together as spouses, but who are unmarried.[14] A "marriage", in this study, also includes a marriage or civil partnership as defined in the Civil Union Act.[15] The definition of a "civil union partner" allows for unions between persons of the same gender.[16] A civil union has the same legal consequences *mutatis mutandis* for the civil union partners as a marriage under any other legislation or common law.[17]

2.2 Marriages

Under the South African regime, persons entering into a marriage have the option to regulate the matrimonial consequences of their marriage through the Matrimonial Property Act.[18] Persons can either have their marriage be deemed in community of property, by default, or can enter into an ante-nuptial contract to exclude community

[9] S 78(3)(b)(i) and (ii).
[10] Definition available at https://www.thefreedictionary.com/customarily (accessed 2019-10-04).
[11] See discussion of spousal income in Scholtz ed par 11.6.7.2.
[12] See discussion regarding the different forms of income under s 78(3) from either a spouse or life partner, or similar relationship, in Scholtz ed par 11.6.7.2.
[13] Act 25 of 1961.
[14] See the definition of "spouse" in s 21(3) of the Insolvency Act 24 of 1936 (hereinafter "Insolvency Act"). An example of a marriage according to any law or custom would be a marriage under the Recognition of Customary Marriages Act 120 of 1998.
[15] Act 17 of 2006 (hereinafter "Civil Union Act").
[16] S 1 of the Civil Union Act.
[17] S 13(2) of the Civil Union Act.
[18] Act 88 of 1984 (hereinafter "Matrimonial Property Act").

of property, profit, and loss, and make provision for accrual.[19] Religious marriages, such as Muslim marriages, are considered to be out of community of property.[20]

In the instance where the persons choose to be married in community of property, they have a joint estate in terms of which they share equally in profits and are equally liable for all the debts of the joint estate.[21] In the instance where a consumer is married in community of property, both spouses must be included in the debt review application.[22] The question of what is referred to in practice as "spousal contribution" becomes of importance where a marriage is considered to be out of community of property.[23] When a consumer is married out of community of property, he may apply for debt review without his spouse.[24]

Marriage creates a reciprocal duty of maintenance on spouses, and it is expected that the spouses contribute to the joint household in such a manner that a role division occurs that allows each spouse to benefit from the contribution being made by the other spouse.[25] This reciprocal maintenance duty is important for the purposes of debt review, as the debt counsellor must take into account any right to income, regardless of the source or frequency of that income.[26]

2.3 Task Team Agreements

The Task Team Agreements recommend that, when making a determination regarding over-indebtedness of a consumer who is married out of community of property, the debt counsellor should take a view of joint income.[27] The Task Team Agreements recommend a joint income approach, as both the parties to the marriage benefit from

[19] S 2 Matrimonial Property Act; Clark *Family Law Service* (2018) par F24.
[20] For a comprehensive background regarding religious marriages, see *Women's Legal Centre Trust v President of the Republic of South Africa and Others, Faro v Bingham NO and others, Esau v Esau and Others* 2018 (6) SA 598 (WCC) (2018-08-31), and Moosa and Abduroaf "Faskh (divorce) and intestate succession in Islamic and South African law: impact of the watershed judgment in Hassam v Jacobs and the Muslim Marriages Bill" 2014 *Acta Juridica* 160.
[21] S 15 of the Matrimonial Property Act; Clark par B1.
[22] Task Team Agreements Annexure B 5; Scholtz ed par 11.3.3.3.
[23] Where a consumer is married in community of property, his or her spouse must be added as an applicant, as the debt rearrangement is of reference to the joint estate. See s 17 of the Matrimonial Property Act and Task Team Agreements Annexure B 6.
[24] Task Team Agreements Annexure B 6.
[25] Clark par A61.
[26] S 78(3)(a); Task Team Agreements Annexure B 7.
[27] Task Team Agreements Annexure B 6.

the joint income in the household finance, and credit may have been advanced by the credit provider with consideration of the joint income.[28]

In determining over-indebtedness of a consumer who is married out of community of property, there is the risk that either all or a substantial portion of the household debt may have been obtained by one spouse, who then sought debt relief, with the other spouse then having a substantial surplus with which to support a lavish lifestyle for the household.[29] The Task Team Agreements recommend that the debt counsellor obtain a full picture of the household income to determine the proportional responsibility of household expenses of each spouse.[30]

The Task Team Agreements advises debt counsellors that the proportional responsibility for household expenses can be established through two avenues.[31] The first is the inclusion of an appropriate contribution from the spouse who has not applied for debt review to the household income.[32] The second avenue is the reduction of the contribution of the spouse who has applied for debt review to the household expenses.[33] The Task Team Agreements indicates that full disclosure of the household income is recommended.[34]

The Task Team Agreements provides no guidance as to how the proportional contribution of the spouses should be calculated. A practical illustration of the proportional contribution based on income only would be as follows: X and Y share a joint household. X earns a net income of R20 000 per month, and Y earns a net income of R15 000 per month. The joint household income is R35 000, with X contributing 57% and Y contributing 43%. If the essential living expenses for the household are R25 000 per month, it would mean that X is responsible for R14 250 (57%) and Y is responsible for R10 750 (43%). X would therefore have R5 750 left for own use, and Y would have R4 250 left for own use.

In this scenario, the debt counsellor would simply calculate a proposal that X and Y contribute the correct proportional percentage with consideration of their income.

[28] Task Team Agreements Annexure B 6.
[29] Task Team Agreements Annexure B 7. See discussion in par 2.5 regarding the justification for infringement on the property rights of a spouse under s 21 of the Insolvency Act.
[30] Task Team Agreements Annexure B 7.
[31] Task Team Agreements Annexure B 7.
[32] Task Team Agreements Annexure B 7.
[33] Task Team Agreements Annexure B 7.
[34] Task Team Agreements Annexure B 7.

However, should X require R7 000 to settle his debt, a problem arises. This will result in him only being able to contribute R13 000 to the joint household. Y will have to contribute the additional R1 250 from her income to meet the household expenses of R25 000. The R1 250 being contributed additionally by Y has been termed "spousal contribution". While this contribution by the spouse to assist her over-indebted spouse may not appear unreasonable, the National Credit Act does not regulate matrimonial property, and does not empower either a debt counsellor or a magistrate's court to require such a contribution from a spouse.

2.4 Matrimonial Property Act

As briefly discussed in paragraph 2.2, the Matrimonial Property Act affords South Africans the opportunity to choose the matrimonial property regime that will be applicable to their marriage, and makes specific provision for the regulation of the matrimonial property where spouses choose to be married out of community of property.[35]

The concept of "spousal contribution" is underpinned by the Matrimonial Property Act;[36] section 23(2) reads:

> A spouse married out of community of property before or after the commencement of this Act is liable to contribute to necessaries for the joint household *pro rata* according to his financial means, and is deemed to have been so liable for the period from the beginning of his marriage until that commencement.

Two phrases from section 23(2) of the Matrimonial Property Act deserve further discussion. Firstly, section 23(2) specifically refers to "contribute to necessaries".[37] We can therefore accept that there is merit in the view of the Task Team Agreements that the debt counsellor should determine the appropriate contributions of the spouses to the joint household expenses.[38]

Secondly, section 23(2) of the Matrimonial Property Act specifically refers to "*pro rata* according to his financial means".[39] The Task Team Agreements, in contrast, refers to

[35] S 2 Matrimonial Property Act; Clark par F24.
[36] S 2(3) Matrimonial Property Act.
[37] The Matrimonial Property Act contains no definition of "necessaries". However, Task Team Agreements Annexure B 18 provides a guideline for "essential living expenses", and may offer valuable insight into the types of household expenses that could be expected to be necessaries.
[38] Task Team Agreements Annexure B 7.
[39] S 23(2) of the Matrimonial Property Act; Clark par B50.

the “total income of the household”.[40] The reference to “financial means” in section 23(2) of the Matrimonial Property Act implies that the consideration must be broader than just income.[41] Section 78(3) of the National Credit Act also refers to “financial means”, as opposed to just “income”. In the context of the Matrimonial Property Act, “financial means” is interpreted very broadly to include, but is not limited to, assets, shares in companies, memberships in closed corporations, loan accounts, share options, pension interests, and life insurance policies.[42]

We can thus conclude that both the National Credit Act and Matrimonial Property Act determine that financial means, and not only income (as recommended in the Task Team Agreements), must be considered in determining the proportional responsibility of each spouse for the joint household necessities.[43] During proceedings in which the financial means for purposes of the Matrimonial Property Act are being determined, the court will rely on evidence from expert witnesses, and a trial will be conducted to determine the accuracy of such evidence, with all parties receiving an opportunity to challenge evidence.[44] During debt review proceedings, the National Credit Act provides only for the debt counsellor to present evidence regarding financial means of the consumer who applied for debt review.[45] The debt counsellor is not qualified to give evidence pertaining to the financial means of a person with respect to shares in companies, share options, pension interests, or life insurance policies.[46] The preferred method to determine financial means would certainly be by way of expert evidence, as it would be exact and more comprehensive. However, it does not seem plausible to expect such an extensive investigation, considering that the debt counsellor has only 60 business days from the date of application to refer a debt review application

[40] Task Team Agreements Annexure B 7.
[41] See *W v H* 4 All SA 260 (WCC) (2016-08-05) (hereinafter “*W v H*”) as an example of how broadly “financial means” may be interpreted.
[42] Van Niekerk *A practical guide to patrimonial litigation in divorce actions Chapter 5 Pre-trial procedures* (2019) par 7.2.
[43] S 23(2) of the Matrimonial Property Act; Task Team Agreements Annexure B 7.
[44] For a comprehensive discussion, see Van Niekerk par 5.6; see also *W v H* pars 40-74 for extensive examples of the evidence that can be led to determine “financial means”, and par 184, where it is noted that the evidence for one spouse consisted of over 600 pages.
[45] Ss 78(3), 79 and 86; reg 24; Scholtz ed par 11.3.1; *Nedbank Declarator*.
[46] See Reg 10(a)-(b) for the educational background and competencies required to register as a debt counsellor. See Scholtz ed par 11.3.3.2 for a discussion regarding the training of debt counsellors. See Task Team Agreements Annexure B 8, where debt counsellors are specifically advised to refrain from conducting property valuations, due to the fact they are not registered appraisers or qualified under the Financial Advisory and Intermediary Services Act 37 of 2002.

to court.[47] Obtaining such evidence would also have financial consequences for the already over-indebted consumer.

It is also important to remember that, when a determination of financial means is made under the Matrimonial Property Act, it will be due to dissolution of the marriage.[48] In the instance of dissolution due to divorce, the court making a determination regarding the financial means of a spouse will be either a high court or a regional division of a magistrate's court.[49]

The magistrate's court, as a creature of statute, may only entertain matters authorised under the Magistrates' Courts Act.[50] The magistrate's court is specifically empowered to adjudicate debt rearrangement referrals.[51] However, the magistrate's court is not empowered to hear matters pertaining to matrimonial property.[52] If a magistrate's court makes an order in terms of which one spouse must make a contribution to the household greater that what he is proportionally responsible for, the magistrate is redistributing matrimonial property regulated by the Matrimonial Property Act.

The Matrimonial Property Act also regulates the right to recourse between spouses for household necessities.[53] As discussed in paragraph 2.3, the Task Team Agreements suggests that an amount be listed as income from the spouse, to ensure that each spouse makes a proportional contribution.[54]

Section 23(3) and (4) of the Matrimonial Property Act reads:

> (3) A spouse married out of community of property before the commencement of this Act has a right of recourse against the other spouse in so far as he has contributed more in respect of necessaries for the joint household than that for which he was liable in terms of subsection (2).
> (4) In the absence of any agreement to the contrary between spouses, a spouse does not have a right of recourse against the other spouse to whom he was married out of community of property after the commencement of this Act with regard to any contribution which he made in respect of necessaries for the joint household.

[47] S 86(10) entrusts the credit provider with the right to terminate the debt review proceedings should a court date not be obtained within 60 business days. See above regarding the extensive nature of expert evidence required to prove "financial means".
[48] See 3(1) of the Matrimonial Property Act, where it is specifically noted that the accrual of a marriage is only calculated upon dissolution (by either divorce or death).
[49] The definition of "court" in s 1 of the Divorce Act 70 of 1979 only allows for a high court or a regional division in terms of s 29(1B) of the Magistrates' Courts Act 32 of 1994 to hear divorce proceedings.
[50] For an example of a magistrate's court having exceeded its jurisdiction during a debt review application, see *Nedbank Limited v Jones and Others* 2017 (2) SA 473 (WCC) (2016-10-12).
[51] Ss 86(8)(b) and 87; *Nedbank Declarator*.
[52] With the exclusion of a regional division.
[53] S 23(4) of the Matrimonial Property Act.
[54] Task Team Agreements Annexure B 7.

As is evident from section 23(3) of the Matrimonial Property Act, if spouses were married out of community of property before 1 November 1984, such spouses have a right of recourse against each other in so far as one spouse contributed more in respect of necessities for the joint household than the amount which he was proportionally required to contribute.[55] With regard to marriages entered into since 1 November 1984, spouses have no right of recourse for contributions made in respect of household necessities, unless an agreement was entered into to such effect.[56] In the instance where spouses are married with the accrual system, an adjustment will be made upon the dissolution of the marriage, to ensure that, during the marriage, a proportional balance had been maintained.[57] Where no provision was made for the accrual system, it is accepted that the spouses waived the right to recover a contribution from the other spouse.[58] It is accepted that there is a legal duty on each spouse to contribute proportionally to the household necessities; however, this legal duty to contribute is unenforceable.[59] Should a debt counsellor follow the guidelines of the Task Team Agreements and include an income from the spouse, and it should later emerge that the spouse was contributing more than proportionally required, said spouse would be left out of pocket if not protected by the accrual system or an agreement.[60]

There is consequently a significant risk for the spouse to be financially prejudiced through a “spousal contribution”. It is important to note that for debt incurred in respect of household necessities by spouses married out of community of property, they are jointly and severally liable.[61] Joint and several liability entails that the creditor is entitled to claim, from one or two (or more) debtors who are jointly and severally liable, the entire outstanding amount under an obligation.[62] This study will not consider the possible consequences of joint and several liability for debt incurred for household necessities, where such debt is rearranged under section 86.

[55] S 23(4) of the Matrimonial Property Act; Van Niekerk par 9.4.
[56] S 23(4) of the Matrimonial Property Act; Van Niekerk par 9.4.
[57] S 3(1) of the Matrimonial Property Act; Van Niekerk par 9.4.
[58] For a comprehensive discussion, see Van Niekerk par 9.4.
[59] S 23(5) of the Matrimonial Property Act; Van Niekerk par 9.4.
[60] S 23(4) of the Matrimonial Property Act; Van Niekerk par 9.4.
[61] S 23(5) of the Matrimonial Property Act: “Spouses married out of community of property are jointly and severally liable to third parties for all debts incurred by either of them in respect of necessaries for the joint household."
[62] Christie *The Law of Contract in South Africa* (2011) 263.

The three remarks below are made with consideration of the aforementioned provisions of the Matrimonial Property Act and the guidelines of the Task Team Agreements discussed in paragraph 2.3:

First, both the National Credit Act and the Matrimonial Property Act make reference to "financial means".[63] The determination of financial means in terms of the Matrimonial Property Act is done through the consideration of extensive expert evidence, and both parties are afforded the opportunity to rebut any evidence that may prejudice them financially.[64] The National Credit Act allows for financial means to be determined through a debt counsellor, and only makes provision for the spouse under debt review to rebut any evidence.[65]

Second, the Matrimonial Property Act makes provision for a high court or a regional division of a magistrate's court to make an order pertaining to the matrimonial property of spouses.[66] The National Credit Act does not empower a magistrate's court to make an order pertaining to the matrimonial property of spouses. Should a magistrate's court grant an order in terms of which a spouse must contribute more than his proportional requirement under the Matrimonial Property Act, the magistrate's court would be attempting to regulate matrimonial property.

Third, an order in terms of which a spouse must contribute more than his proportional responsibility under the Matrimonial Property Act will have severe financial consequences for that spouse, as that spouse will not have any recourse under either the Matrimonial Property Act or any other legislation to claim these additional contributions back from his spouse, either during the subsistence or at dissolution of the marriage.[67]

[63] S 78(3)(b); s 23(2) of the Matrimonial Property Act.
[64] Van Niekerk par 7.2; *W v H* pars 40-74.
[65] S 78(3). See the *Nedbank Declarator* for a discussion of the court procedure for debt review applications.
[66] See above.
[67] S 24(4) of the Matrimonial Property Act.

2.5 Insolvency Act

Section 21 of the Insolvency Act provides for a process whereby a person who is not insolvent but married out of community of property to an insolvent individual can be deprived of certain rights in the interest of protecting credit providers. Section 21(1) makes specific provision for the vesting of property of the solvent spouse in the trustee of the insolvent estate, until such time that the solvent spouse secures release as provided for in section 21(3) of the Insolvency Act.[68] The discussion regarding the Insolvency Act will be limited to section 21, and will only serve as an example of legislation providing for the restriction of rights due to the existence of a marriage.

The justification behind this deprivation of rights is that a debtor who is anticipating the sequestration of his estate may transfer assets to his spouse as a tactic to avoid claims against said assets by his creditors.[69] The constitutionality of this section has been challenged, but the Constitutional Court held that the purpose of the section was not to deprive the solvent spouse of property, but to ensure that the insolvent estate is not deprived of property.[70] The justification for "spousal contribution" under the Task Team Agreements is also the risk of unjust benefit.[71]

The Insolvency Act contains various provisions aimed at the protection of the interests of the solvent spouse.[72] Three examples of provisions that are aimed at protecting the interests of the solvent spouse are the following:

- Section 21(2) of the Insolvency Act provides for the release of any property of the solvent spouse that vested in the trustee.[73]

[68] Sharrock *LAWSA* (2008) par 254; Meskin *Insolvency Law* (2019) par 5.30. For a comprehensive discussion regarding the interpretation of s 21 of the Insolvency Act, see Van Der Walt "Striving for the better interpretation – a critical reflection on the Constitutional Court's Harksen and FNB decisions on the property clause" 2004 *SALJ* 854; Stander "Artikel 21 van die Insolvensiewet – reg of weg?" 2005 *TSAR* 316; Evans "Developments in the law of insolvency" 2000 *SA Merc LJ* 109.
[69] Sharrock par 254; Meskin par 5.30.1.2; Van Der Walt 2004 *SALJ* 854; Stander 2005 *TSAR* 316; Evans 2000 *SA Merc LJ* 109.
[70] *Harksen v Lane* 1997 ZACC 12 (2019-10-07) par 118; Sharrock par 254; Meskin par 5.30.1.2; Van Der Walt 2004 *SALJ* 854; Stander 2005 *TSAR* 316; Evans 2000 *SA Merc LJ* 109.
[71] See discussion in par 2.4 pertaining to the justification for "spousal contribution" under the Task Team Agreements.
[72] Sharrock par 254; Meskin par 5.30.3; Van Der Walt 2004 *SALJ* 854.
[73] Sharrock par 254; Meskin par 5.30.3; Van Der Walt 2004 *SALJ* 854.

- Section 21(3) of the Insolvency Act ensures that the property of the solvent spouse is not sold without prior notice to the solvent spouse.[74]
- Section 21(10) of the Insolvency Act provides for the court to make an order excluding the property of the solvent spouse where the vesting of the property in the insolvent estate will hold serious prejudice for the solvent spouse.[75]

The above illustrates the existence of legislation that allows for the deprivation of the rights of a person who is not the subject of a legal process, but is bound to certain legal provisions due to the existence of a marital relationship out of community of property.[76] It is important to highlight that only a high court may make an order pertaining to insolvency, and, subsequently, only a high court may make an order infringing on the rights of the solvent spouse.[77] Once again, the magistrate's court is not empowered to infringe on the rights of a person merely on the basis of a marital relationship.

In terms of the Insolvency Act, the solvent spouse has certain rights to protect him against undue financial prejudice.[78] Under the Matrimonial Property Act, a spouse also has the opportunity to take action to ensure he does not suffer financial prejudice.[79] The National Credit Act and the Task Team Agreements fail to make any provision for protection of a spouse who will be subjected to financial scrutiny due to the debt review application of his spouse.

2.6 Case law

2.6.1 Introduction

In terms of section 79(1)(a), read with section 78(3)(b),[80] there is undeniably an obligation on a debt counsellor to consider the contribution of any adult person in the household of a consumer when assessing over-indebtedness. Section 78(3)(b) is also

[74] For a discussion of the notice requirements, see Sharrock par 259 and Meskin par 5.30.3; s 21(4) of the Insolvency Act. For a discussion of the procedure to be followed, see Sharrock par 258 and Meskin par 5.30.3.
[75] Sharrock par 255; Meskin par 5.30.1.2.
[76] See brief discussion above regarding the application of s 21 of the Insolvency Act to a solvent spouse. For a comprehensive discussion, see authorities listed above.
[77] See definition of "court" in s 2 of the Insolvency Act.
[78] Examples are ss 21(2), 21(3) and 21(10) of the Insolvency Act.
[79] Van Niekerk par 7.2; *W v H* par 40-74.
[80] See Ch 2 par 1 above.

applicable to credit providers conducting affordability assessments. Due to the limited case law available on section 78(3)(b), the case law pertaining to affordability assessments will be evaluated to provide further guidance on the concept of "spousal contribution".

2.6.2 *Sonnenberg v Wesbank, A Division Of Firstrand Limited*[81]

In *Sonnenberg* the applicant brought an application for the rescission of a default judgment against her.[82] The applicant raised the defence of reckless credit against the respondent.[83] From the affordability assessment presented *in casu*, it was evident that no provision had been made for necessary living expenses such as food, policies, clothing, transport, *et cetera*.[84] During the affordability assessment process, the applicant indicated that these items had been paid for by her spouse.[85] The respondent submitted that, due to the fact that the applicant and her spouse were married out of community of property, there was no obligation on the court to assess the financial affairs of her spouse.[86]

The Northern Cape Division, in *Sonnenberg*, came to the conclusion that:

> Respondent's counsel, Advocate Olivier, quite rightly submitted that those expenses were considered on the premise of the applicant's own papers but conceded, correctly so in my view, that no assessment was done as far as the applicant's husband's financial means, prospects and obligations are concerned. The respondent should therefore have taken reasonable steps to assess the applicant's husband's financial means, obligations and prospects as envisioned by Section 78(3)(b) of the National Credit Act.[87]

The principle from *Sonnenberg* is thus that, should you wish to rely on income from a spouse, such reliance is only merited when a thorough investigation has been done.

2.6.3 *National Credit Regulator v Shoprite Investments Ltd*[88]

In *Shoprite* the Regulator referred complaints of reckless credit against the credit provider to the Tribunal for consideration.[89] The complaints were based on the failure of the credit provider to take the existing financial means and prospects of the

81 2018 ZANCHC 90 (2018-11-30) (hereinafter "*Sonnenberg*").
82 2018 ZANCHC 90 (2018-11-30) (hereinafter "*Sonnenberg*").
83 *Sonnenberg* par 22.
84 *Sonnenberg* par 27.
85 *Sonnenberg* par 27.
86 *Sonnenberg* par 28.
87 *Sonnenberg* par 20.
88 2017 ZANCT 98 (2017-09-05) (hereinafter "*Shoprite*");
89 2017 ZANCT 98 (2017-09-05) (hereinafter "*Shoprite*"); Scholtz ed par 11.6.7.2.

consumers into account in the affordability assessments, which subsequently led to the credit provider entering into credit agreements that resulted in consumers becoming over-indebted.[90]

During the evaluation of the affordability assessments conducted by the credit provider, it was found that the income calculation for the consumers to whom credit had been advanced had negative disposable income results.[91] The credit provider *in casu* challenged the assumption of the Regulator that a negative disposable income translates into the consumer being over-indebted.[92] The credit provider argued that there are certain conditions that justify the granting of credit despite a negative disposable income result.[93] The justifications presented by the credit provider for the granting of credit to certain consumers were as follows:

- it is appropriate to make adjustments to expenses such as payments for short-term commitments (such as insurance policies, television payments, cellular phone or telephone payments), instalments for credit agreements with only four repayments remaining, and instalments for which it appears that the credit bureau records are outdated;[94]
- if a consumer has a good repayment history and there is no material default (the credit provider indicated this meant that there are no arrears of more than three months on any account);[95] and
- a consumer having a spouse or being in an alternative form of partnership may influence the consumer's financial means and prospects.[96]

Regarding the third argument listed above, the view of the Tribunal is evident from the following:

> However the mere fact of a marriage or the existence of a life partnership and potential income from those other sources is not sufficient on its own to influence a consumer's financial means for the better. To rely on this factor without requiring concrete and specific proof of income of the spouse or life partner and their expenses is not justifiable in the view of the Tribunal. The correct application of section 81(2)(a)(iii) is for a credit provider to verify and not to merely assume the additional income of the spouse, life partner or household member and to also

90 *Shoprite* par 43; Scholtz ed par 11.6.7.2.
91 *Shoprite* par 45; Scholtz ed par 11.6.7.2.
92 *Shoprite* par 52; Scholtz ed par 11.6.7.2.
93 *Shoprite* par 57; Scholtz ed par 11.6.7.2.
94 *Shoprite* par 57; Scholtz ed par 11.6.7.2.
95 *Shoprite* par 57; Scholtz ed par 11.6.7.2.
96 *Shoprite* par 57; Scholtz ed par 11.6.7.2.

> determine what obligations that individual has to meet from the verified income. The Respondent did not do this.[97]

The Tribunal found the credit provider guilty of granting reckless credit.[98] The view of the Tribunal was that the assessment of the credit provider relied on the consumer reducing expenses, unilaterally rescheduling debts, and relying on family members for financial support.[99]

The legal principle from both *Sonnenberg* and *Shoprite* is that section 78(3)(b) does make provision for the consideration of "spousal contribution", but that the consideration of same as income for a consumer is subject to obtaining evidence.[100] In *Shoprite*, the Tribunal also noted that verifying the income of the spouse or life partner must also include a determination of his financial obligations.[101]

2.7 Examples from practice

The two examples discussed below are aimed at giving insight into the application of "spousal contribution" with regard to section 78(3)(b) in magistrates' courts.

In case number 7756/2018, the Germiston Magistrate's Court for the sub-district of Ekurhuleni Central handed down a ruling on 18 March 2019 that dismissed the debt review application referred for adjudication on various grounds.[102] "Spousal contribution" was one of the grounds for the dismissal.[103] The relevant facts appear from paragraph 4 of the written ruling:

> According to the affidavit compiled by the consumer in support of his over-indebtedness he avers that his girlfriend helps him with the rental expense... The following household expenses will be reduced by 50% as the girlfriend stays in the same premises. Those expenses are food, rental, water and electricity. The reduced expenses come to a total of R3 400.00...

The Founding Affidavit of the debt counsellor in the above matter suggested the following amounts for the expenses reduced by the magistrate[104]:

97 *Shoprite* pars 73-74.
98 *Shoprite* par 90. See Scholtz ed par 11.6.7.2 for a comprehensive evaluation of all three arguments advanced by the credit provider.
99 *Shoprite* par 77; Scholtz ed par 11.6.7.2.
100 *Sonnenberg* par 20; *Shoprite* pars 73-74; Scholtz ed par 11.6.7.2.
101 *Shoprite* pars 73-74; Scholtz ed par 11.6.7.2. This also occurred in the judgment of the Northern Cape High Court in *Sonnenberg* par 20.
102 The original file, containing a written ruling, is available for public inspection at the Magistrate's Court for the sub-district of Ekurhuleni Central, held at Germiston under case number 7756/2018 (hereinafter "Case 7756/2018").
103 Case 7756/2018 Ruling par 5.
104 Case 7756/2018 Founding Affidavit par 15.

- groceries: R2 000;
- rent: R4 150; and
- water and electricity: R650.

The consumer indicated as follows on the affidavit filed in support of his over-indebtedness:

> "Rent – R8 500 per month[;] my girlfriend helps with this."[105]

The magistrate clearly failed to consider that the debt counsellor had already suggested only approximately 50% of the full rental amount.[106] The debt counsellor averred that he deemed the amounts suggested for living expenses reasonable.[107]

The magistrate continued to work through the suggested budget of the debt counsellor, and reduced various other expenses as well.[108] The other expenses suggested by the debt counsellor were:[109]

- transport: R4 500;
- medical expenses: R300;
- maintenance: R500;
- telephone: R2 000;
- clothing: R400;
- Vehicle insurance: R1 860;
- bank charges: R150;
- contingency money: R187;
- household items: R400;
- credit life insurance: R348.57; and
- life insurance: R400.

The total amount for living expenses suggested by the debt counsellor was R17 845.57.[110] The conclusion reached by the magistrate in paragraph 4 of the ruling was:

[105] Case 7756/2018 Founding Affidavit annexure K 2.
[106] Case 7756/2018 Founding Affidavit par 15.
[107] Case 7756/2018 Founding Affidavit par 22.
[108] Case 7756/2018 Ruling par 4.
[109] Case 7756/2018 Founding Affidavit par 25.
[110] Case 7756/2018 Founding Affidavit par 25.

> The reduced monthly expenses amount to R8 745.57. Amount available to pay credit providers is R22 877.09. The monthly obligations per month is R26 265.85. There is a shortfall of R3 388.76.

The finding of the magistrate was thus that there was still a shortfall, causing the consumer to remain over-indebted; however, the overall recommendation of the debt counsellor was still rejected.[111] The magistrate, however, reduced the budget to such an extent that, should the relationship between the consumer and his girlfriend end, the consumer would only have R8 745.57 available for living expenses, from which he would be liable for rent in the amount of R8 500.[112]

The contentions pertaining to contributions to the joint household made by the magistrate in Case 7756/2018 was based on the judgment in *FirstRand Bank Limited v Barnard and Another*.[113] In *Barnard*, the court held that:

> He told the debt counsellor that he was the sole provider to his family. This is relevant because for these purposes the financial means, prospects and obligations of a consumer include those of any other adult person within the consumer's immediate family, to the extent that they share their respective financial means and mutually bear their respective financial obligations.[114]

In case number 36728/2016, the Johannesburg Central Magistrate's Court handed down judgment on 18 March 2017, dismissing the debt review application, due to a lack of averments regarding the contribution of the spouse to whom the consumer was married out of community of property.[115] The debt counsellor in Case 36728/2016 placed an additional supplementary affidavit before the court, confirming that the spouse of the consumer earns approximately R5 000 per month and uses R2 500 for groceries and R2 500 for educational fees.[116] The magistrate wrote in paragraph 5 of the ruling that:

> In addition the court is not satisfied with the tersely drafted affidavit of the consumer as well as the supplementary affidavit of the debt counsellor which amounts to hearsay evidence when the debt counsellor attests to the circumstances of the spouse of the consumer.

The ruling in Case 36728/2016 confirms that this specific magistrate required that the spouse (who is not a party to the proceedings before the court) give evidence to ensure

111 Case 7756/2018 Ruling par 11.
112 Case 7756/2018 Ruling par 11 and Founding Affidavit Annexure K 2.
113 2016 JOL 36061 (2015-08-11) (hereinafter "*Barnard*"); Case 7756/2018 Ruling par 5.
114 *Barnard* par 9.
115 The original file, containing a written ruling, is available for public inspection at the Johannesburg Central Magistrate's Court, held at Johannesburg under case number 36728/2016 (hereinafter "Case 36728/2016").
116 Case 36728/2016 Supplementary Affidavit par 4.

that the evidence is not hearsay.[117] Hearsay evidence is defined in section 3(4) of the Law of Evidence Amendment Act[118] as follows:

> For the purposes of this section – 'hearsay evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.

The aforementioned can be contrasted with the decision in *Barnard*, where the court indicated that the mere conveyance of the contribution of a spouse to the debt counsellor by the consumer was sufficient.[119] The position in *Barnard* is supported by the *Nedbank Declarator*:

> [T]he consumer's application in terms of section 86(1) is made to the debt councillor and not the court. Moreover, it is not the consumer who determines whether his application is to be referred to the court and what information is to be put before court: the debt counsellor refers 'the matter' to the court with his/her recommendation. The procedure is not one whereby the consumer, as *dominus litis* applies to the court and decides what evidence to put before the court. The consumer is not the 'gedingvoerder' or 'master of the suit'.[120]

The aforementioned two practical examples display instances where the magistrates felt that dismissal of a debt review was appropriate, with one of the considering factors being household contributions by a third party. It should also be noted that substantial time passed before these applications were finalised. Case 36728/2016 was issued on 14 October 2016, and the ruling was only handed down five months later, on 18 March 2017, after the matter had been heard four times and postponed for additional evidence.[121] Case 7756/2018 was also enrolled for approximately five months; however, no opportunity was provided to file further evidence for this case.[122]

[117] Case 36728/2016 Ruling par 5.
[118] Act 45 of 1988.
[119] *Barnard* par 9.
[120] *Nedbank Declarator* 22.
[121] Case 36728 — see Notice of Motion and Ruling for confirmation of issue dates.
[122] Case 7756/2018 — see Notices of Motion and Rulings for the dates of issue.

2.8 Preliminary findings

The two examples demonstrate that some magistrates hold the view that they are empowered during debt review proceedings to make orders pertaining to the financial position of spouses, or order said spouses to give evidence. However, the National Credit Act does not empower a magistrate's court to make such an order. If one refers back to the practical examples, it is evident that magistrates require of spouses to contribute to the debt review of a consumer without consideration of the magistrate's courts lack of authority under the Matrimonial Property Act to intervene in matrimonial property, or possible infringement on the spouse's constitutional right to property.[123]

In the absence of legislative regulation, matters are thus delayed or not finalised, due to unauthorised orders by magistrates. Because the debt counsellor is not legally bound to investigate the financial position of the spouse, a debt review application may be referred to the magistrate's court without such an investigation. If a particular magistrate is of the of view that such an investigation is required, the matter will be postponed or dismissed. If postponed, the debt counsellor can only request information from the spouse. The spouse is under no legal obligation to provide information or to make a contribution towards the debt review, and so commences a cycle of delays in the debt review, until the debt counsellor is able to satisfy the magistrate's requirements.

The Task Team Agreements does require the investigation of a spouse's financial position, but also fails to take into consideration the Matrimonial Property Act and the spouse's constitutional right to property. However, the Task Team Agreements is only a guideline, and cannot empower a magistrate's court to make orders pertaining to spousal contribution.

The Insolvency Act provides an example of a spouse who, through legislation, is subjected to a legal process, due to the financial status of the insolvent debtor. However, under the Insolvency Act, such a spouse has defined obligations (such as giving information) and rights (such as the protection of their property rights). The National Credit Act contains no similar provisions.

[123] See Ch 2 par 4.3.3 below.

It is clear from the case law discussed above that, if "spousal contribution" is considered, a thorough investigation must be made into the financial position of the spouse. However, the National Credit Act does not prescribe defined rights and obligations for magistrates' courts, debt counsellors, consumers, or their spouses. In the absence of such prescriptions, orders pertaining to spousal contribution remain unauthorised, and will continue to cause delays in the finalisation of debt review referrals.

3 Asset investigations

3.1 Introduction

The National Credit Act does not provide for the sale or execution of assets during the debt review process.[124] The legislature granted a magistrate's court only the power to make a rearrangement order based on the recommendation of the debt counsellor, reject the recommendation of the debt counsellor, or make a reckless lending declaration.[125]

A magistrate's court is a creature of statute, and the NCA does not make provision for any orders pertaining to the execution of movable or immovable property under the auspices of section 86.[126] In terms section 87 of the Act, a magistrate's court is only empowered to do the following:

- reject the recommendation of the debt counsellor that the consumer is over-indebted;[127]
- make an order declaring any credit agreement reckless;[128]
- make an order rearranging the consumer's obligations as contemplated in section 86(7)(c)(ii);[129] or

[124] Boraine, Roestoff and Van Heerden "A comparison between formal debt administration and debt review — the pros and cons of these measures and suggestions for law reform (Part 2)" 2012 *De Jure* 264.
[125] S 87(1)(a)-(b); Boraine, Roestoff and Van Heerden 2012 *De Jure* 264; Scholtz ed par 11.3.3.2.
[126] For an example of a magistrate's court having exceeded its jurisdiction during a debt review application, see *Nedbank Limited v Jones and Others* 2017 (2) SA 473 (WCC) (2016-10-12).
[127] S 87(1)(a).
[128] S 87(1)(b)(i).
[129] S 87(1)(b)(ii).

- make an order pertaining to both reckless credit and rearrangement of debt obligations.[130]

Section 79 requires that a debt counsellor consider the financial means, prospects, and obligations of a consumer, to determine whether the consumer is over-indebted.[131] The Act provides for the definition of financial means, prospects, and obligations.[132] However, section 78(3) makes no reference to assets. The movement to classify assets as "financial means" and the liquidation of an asset as a "prospect" can be attributed to the judgment in *Standard Bank of South Africa Ltd v Panayiotts.*[133]

In *Panayiotts*, it was held that "financial means" is more than mere income; it also includes assets.[134] It was further held that "prospects" include the prospect of the consumer improving his financial position through the sale of assets.[135] However, what is of importance in *Panayiotts* is that the asset in question was not used by the consumer as a primary residence, and there was clear evidence of neglect of the property, which was depreciating the value of the property to the detriment of the credit provider.[136]

Despite the above specific facts of *Panayiotts*, the court in S*A Taxi Securitisation (Pty) Ltd & others v Mbatha; SA Taxi Securitisation (Pty) Ltd v Molete; SA Taxi Securitisation (Pty) Ltd v Makhoba*[137] justified the *Panayiotts* interpretation of financial means, as the court held that it is essential that asset-based lenders recover their security promptly in instances where, such as in the case with a vehicle, the value of the asset is deteriorating.[138] From the *Panayiotts* judgment, an approach was established, not only for matters under section 85, but also debt review applications.[139] In *Standard Bank of SA Ltd v Jikeka,*[140] *Standard Bank of South Africa Ltd v Newman*[141] and *The Motor Finance Corporation (Pty) Ltd v Zyster*[142], the courts held that the purpose of debt

130 S 87(1)(b)(iii).
131 Scholtz ed par 11.2.
132 S 78(3); Scholtz ed par 11.2.
133 [2009] ZAGPHC 22 (hereinafter "*Panayiotts*") par 77; Scholtz ed par 11.2; Otto and Otto 69.
134 *Panayiotts* par 77; Scholtz ed par 11.2.
135 *Panayiotts* par 77; Scholtz ed par 11.2.
136 *Panayiotts* par 78.
137 2010 JOL 25355 (2010-03-20) par 48.
138 2010 JOL 25355 (2010-03-20) par 48.
139 For examples of application of *Panayiotts* during debt review applications, see *Barnard* par 20 and *MFC v Joubert* par 23.
140 Unreported WCC case nr 3430/2010 (2011-06-09) at pars 3 and 4; Scholtz ed par 11.3.3.1.
141 [2011] ZAWHC 91 (hereinafter "*Newman*") par 11; Scholtz ed par 11.3.3.1.
142 Unreported WCC case number 1977/2012 as discussed in Scholtz ed par 11.3.3.1.

review is the regulated settlement of debt, and not to enable consumers to retain possession of goods after cancellation of the sale agreement.[143]

The interpretation of financial means and prospects from the aforementioned cases developed the approach in many magistrates' courts that a consumer cannot be placed under debt review whilst retaining possession of assets.[144] The position that certain magistrates' courts have thus assumed is that assets should first be liquidated, and if the consumer is still over-indebted, he should apply for a debt restructuring order.[145]

3.2 Section 127 of the National Credit Act

A debt counsellor has been given no power under the National Credit Act to recommend that the court make an order for the execution and sale of property, and the Act does not make available such a process for a debt counsellor.[146] However, the Act makes provision for a consumer to voluntarily surrender an asset under certain circumstances.[147]

Section 127 provides for a voluntary surrender process for a consumer who purchased goods under an instalment agreement, lease agreement, or a secured loan agreement.[148] The voluntary surrender process is one in terms of which a consumer can return goods to a credit provider for the purpose of selling said goods to settle the outstanding obligation under the credit agreement.[149]

The voluntary surrender process is initiated by the consumer giving notice to the credit provider.[150] The credit provider must, within ten days after receipt of the aforementioned notice, provide an estimated value of the goods to the consumer.[151] After receiving the estimated value of the goods, the consumer may unconditionally withdraw the surrender notice and reclaim possession of the goods, as long as the

143 Scholtz ed par 11.3.3.1.
144 See practical examples in par 3.5 below. See also *Barnard* par 20 and *MFC v Joubert* par 23.
145 See examples from the magistrates' courts discussed in par 3.5. See also *Barnard* par 20 and *MFC v Joubert* par 23.
146 See 86(7)(c) as discussed in par 3.1; Scholtz ed par 11.3.3.1.
147 S 127.
148 S 127(1). For a comprehensive discussion of the voluntary surrender process, see Scholtz ed par 9.5.4 and Coetzee "Voluntary surrender, repossession and reinstatement in terms of the National Credit Act 34 of 2005" 2010 *THRHR* 569.
149 S 127(1); Scholtz ed par 9.5.4.1; Coetzee 2010 *THRHR* 569.
150 S 127(1); Scholtz ed par 9.5.4.1; Coetzee 2010 *THRHR* 569.
151 S 127(2); Scholtz ed par 9.5.4.1; Coetzee 2010 *THRHR* 569.

consumer is not in default.[152] Should the consumer not withdraw the notice, the credit provider will continue with the sale.[153] The credit provider must provide a written notice indicating to the consumer the settlement value of the agreement immediately before the sale, gross proceeds realised from the sale, the net proceeds after deduction of the allowed charges, and the amount owed or owing.[154] The credit provider may approach a court with jurisdiction to obtain judgment in respect of any amount owing under the credit agreement following the sale.[155]

It is important to note that there is no cross-reference between sections 127 and 86. In *MFC V Joubert*, the credit provider appealed against the finding of over-indebtedness and the rearrangement order granted by the magistrate's court.[156] One of the grounds of appeal raised by the credit provider was that the debt counsellor had failed to consider the sale of assets, specifically the vehicle financed by the credit provider, when determining over-indebtedness in accordance with the judgment in *Panayiotts*.[157]

In *MFC v Joubert*, the court accepted the argument of the credit provider that the obligation for disclosure during debt review proceedings and proceedings for a voluntary surrender of an estate are similar.[158] The court *in casu* specifically noted that, in voluntary surrender cases, the applicant must satisfy the court that he owns realisable property, and that his sequestration will be to the advantage of creditors.[159] In *MFC v Joubert*, paragraph 9 of *Ex parte Arntzen*[160] is quoted to demonstrate the measure of disclosure required during voluntary surrender applications:

> In essence what was required was full and frank disclosure along with clear proof of the necessary facts. The proof of the indebtedness giving the applicant *locus standi* generally required documentary proof. In addition, a full and complete list of the assets of the respondent was required, including a valuation by a qualified person containing cogent reasons for arriving at the valuation, both for movable and immovable property.

[152] S 127(3); Scholtz ed par 9.5.4.1; Coetzee 2010 *THRHR* 569.
[153] S 127(4); Scholtz ed par 9.5.4.3; Coetzee 2010 *THRHR* 569.
[154] S 127(8); Scholtz ed par 9.5.4.4. See specifically fn 194 regarding the exclusive jurisdiction of magistrates' courts in these circumstances; Coetzee 2010 *THRHR* 569.
[155] S 127(5); Scholtz ed par 9.5.4.4; Coetzee 2010 *THRHR* 569.
[156] *MFC v Joubert* pars 3-5. See also the reference to *MFC v Joubert* in Scholtz *et al* par 11.3.3.2.
[157] *MFC v Joubert* par 9; *Panayiotts* par 9.
[158] *MFC v Joubert* par 12. See s 6 of the Insolvency Act, which deals with the process for a voluntary surrender of an estate.
[159] *MFC v Joubert* par 12; s 6(1) of the Insolvency Act.
[160] 2013 (1) 49 (KZP) (2012-09-28) par 9.

The court in *MFC v Joubert* relied on the judgments in *Pelzer v Nedbank Limited*[161] and *Newman* to support the view that the purpose of the Act in respect of over-indebtedness is only to grant the consumer an opportunity to regain financial control, and not to allow the consumer to retain possession of assets whilst not paying.[162] The court *a qou* in *MFC v Joubert* found that the vehicle of the consumers should remain in possession of the consumers, as one consumer used the vehicle to travel to work and had a medical condition that made travelling by way of public transport inconvenient.[163] The court *in casu* disagreed, and the debt review application was referred back to the magistrate's court for consideration whether the consumers could return their vehicle in terms of the voluntary surrender process available under section 127 of the Act.[164]

The reliance of the court in *MFC v Joubert* on *Pelzer* and *Newman* is not without criticism.[165] In *Pelzer*, the court had to consider whether the debt review application of a consumer of two years prior had lapsed, to determine whether the consumer was still entitled to maintain possession of the asset under an instalment agreement.[166] The credit provider in *Pelzer* had cancelled the instalment agreement a year after the debt counsellor had failed to properly issue the From 17.1.[167] In *Newman*, the credit provider had cancelled the instalment agreement approximately one month before the consumer applied for debt review.[168] The cancellation of the instalment agreement in *Pelzer* and *Newman* is the reason why the legal precedent created could not be applied in *MFC v Joubert,* in which case the credit provider did not cancel the instalment agreement.[169] The reason for the aforesaid is that a cancelled agreement cannot be reinstated or revived by a debt review application.[170]

The magistrate's court only has the jurisdiction to order the return of a vehicle when the underlying credit agreement has been cancelled.[171] Thus, a magistrate's court

[161] [2010] ZAGPPHC 119 (hereinafter "*Pelzer*") par 6.5.
[162] *MFC v Joubert* par 23; *Pelzer* par 6.1; *Newman* par 11.
[163] *MFC v Joubert* par 23.
[164] *MFC v Joubert* par 23.
[165] Van Niekerk "Ordering the selling of motor vehicles in debt re-arrangement orders: a road not (to be) travelled?" 2014 *De Rebus* 41-42.
[166] *Pelzer* pars 1, 4 and 6; Van Niekerk 2014 *De Rebus* 41.
[167] *Pelzer* par 2.5; Van Niekerk 2014 *De Rebus* 41.
[168] *Newman* pars 3-4; Van Niekerk 2014 *De Rebus* 41.
[169] Van Niekerk 2014 *De Rebus* 41.
[170] Van Niekerk 2014 *De Rebus* 41. See also *BMW Financial Services (SA) (Pty) Ltd v Donkin* 2009 (6) SA 63 (KZD) (2009-06-04); Scholtz ed par 11.3.3.1.
[171] Van Niekerk 2014 *De Rebus* 41.

cannot order the return of goods during debt review proceedings.[172] It should also be noted that there is legal precedent confirming that section 127 of the National Credit Act only awards the consumer the right to terminate an agreement and return the goods, and that a consumer cannot be obligated, coerced, or forced to do so.[173] Should a magistrate's court have the authority to order consumers to use section 127 before applying for debt rearrangement, it would also place a financial and administrative burden on credit providers, as they would become responsible for the resale of numerous assets.[174]

Section 86(7)(c) does not award a magistrate's court any power to order attachment against an asset during debt review proceedings, nor does it provide for a consumer to be forced into a voluntary surrender under section 127.[175] Section 78(3) makes no reference to assets and liabilities.[176] The Act does not place any duty on a consumer to liquidate assets to settle debt obligations or to cure over-indebtedness.[177] An application for debt review is not a sequestration, and the principles of sequestration therefore cannot be applied to debt review.[178] The judgment in *MFC v Joubert* erroneously created a platform for courts to attempt to merge the processes of debt rearrangement and voluntary surrender.[179]

[172] Van Niekerk 2014 *De Rebus* 41.
[173] *Maqeda v Toyota Financial Services and Another* 2014 ZAECMHC 4 (2014-02-14) par 21. See also Van Heerden "The importance of section 127 of the National Credit Act 2005" 2018 *THRHR* 239, and Kreuser 2012 *De Jure* 2.
[174] Vessio "Section 127 of the National Credit Act: a form of statutory repudiation – how it modifies the common law" 2016 *SPECJU* 6.
[175] See Ch 2 par 1 above for a discussion of the order contemplated in s 86(7)(c); Van Niekerk 2014 *De Rebus* 41.
[176] Kreuser 2012 *De Jure* 2.
[177] Kreuser 2012 *De Jure* 2.
[178] Kreuser 2012 *De Jure* 2.
[179] Examples of case law where the judgment in *MFC v Joubert* was referred to as precedent are: *Barnard* par 30 and *Driskel* par 49. See also practical examples discussed in par 3.5 below.

3.3 Task Team Agreements

The Task Team Agreements recommends that consumers be encouraged to complete a list of assets when applying for debt review.[180] A debt counsellor is not a specialist in the valuation of assets, and the Task Team Agreements recommends that debt counsellors avoid fulfilling this function.[181] The Task Team Agreements further recommend that debt counsellors do not place any value on an asset, other than a value indicated by the consumer, in an application before the court.[182]

After being thoroughly warned not to perceive themselves as experts in this arena, debt counsellors are encouraged to ask consumers to identify assets that they could sell to settle debt obligations.[183] The Task Team Agreements constricts assets to certain categories, particularly to assets which are luxury items, assets used for pleasure, and all readily available cash or reserves.[184] Where items have been financed, proceeds from the sale should repay the debt, and any shortfall should be restructured through debt review.[185] The Task Team Agreements provides specific examples of what could be deemed assets that should be sold in this category:

- cash investments (such as a money market account or term investment);
- quoted shares;
- a right to share option held by the consumer with his employer;
- luxury vehicles such as ski boats, quad bikes, and other “toys”;
- investment properties and holiday homes;
- vehicles not used by the consumer or his dependants; and
- with regard to a luxury home or vehicle, consideration should be given to whether a less expensive alternative is available.[186]

Where assets are not sold, specifically a second property, reasons should be provided by the debt counsellor to the credit providers and the court hearing the application.[187]

[180] Task Team Agreements Annexure B 8.
[181] Task Team Agreements Annexure B 8; see also *Barnard* par 40, where the court held that, should the debt counsellor have any knowledge pertaining to the property sales and rental market or the value of a vehicle, the debt counsellor should offer the information to the court and, in the instance where the information is challenged, vouchers may be presented to support the information provided.
[182] Task Team Agreements Annexure B 8.
[183] Task Team Agreements Annexure B 8.
[184] Task Team Agreements Annexure B 8.
[185] Task Team Agreements Annexure B 9.
[186] Task Team Agreements Annexure B 9.
[187] Task Team Agreements Annexure B 9.

The sale of assets may not be possible for a variety of reasons. The Task Team Agreements identifies the following general reasons why the sale of an asset is not always viable:[188]

- Renting a new home could cost more than the bond instalment on the home of the consumer.[189]
- If a home is sold for less than the settlement amount of the bond, the consumer could be financially worse off, as he must still pay the shortfall on the bond, and would have to pay the rent of a new property.[190]
- Consumers under debt review experience difficulty securing a rental property, as their credit records reflect that they are over-indebted.[191]
- Whilst under debt review, a consumer does not have access to credit[192], and can therefore not obtain finance for a less expensive vehicle.[193]
- If a vehicle is sold for less than the settlement amount, the consumer could be financially worse off, as he must still repay the shortfall, and would have to budget monies for either renting a vehicle or using public transport. [194]

Whilst under debt review, a consumer may not enter into any further credit agreements, except a consolidation loan.[195] Consolidation loans could be used to relieve over-indebtedness if used to finance a less expensive property or vehicle.[196] However, credit providers are of the view that financing a less expensive property or vehicle whilst under debt review will not fall within the ambit of consolidation agreements, and be a contravention of section 88(4), and will consequently be reckless credit.[197]

[188] Task Team Agreements Annexure B 9.
[189] Task Team Agreements Annexure B 9.
[190] Task Team Agreements Annexure B 9.
[191] Task Team Agreements Annexure B 9.
[192] S 88(1) prohibits a consumer from obtaining credit whilst under debt review.
[193] Task Team Agreements Annexure B 9.
[194] Task Team Agreements Annexure B 9.
[195] S 88(4).
[196] Task Team Agreements Annexure B 10.
[197] Task Team Agreements Annexure B 10; s 88(4) reads:
"(4) If a credit provider enters into a credit agreement, other than a consolidation agreement contemplated in this section, with a consumer who has applied for a debt re-arrangement and that re-arrangement still subsists, all or part of that new credit agreement may be declared to be reckless credit, whether or not the circumstances set out in section 80 apply."

The Task Team Agreements takes the approach that the consumer should apply for debt review and then proceed to sell the property.[198] The Task Team Agreements recommends that consumers be encouraged to sell property as quickly as possible, and not wait to consider the best possible option.[199] Selling a property for the first offer received may leave a consumer with a significant shortfall to settle whilst also having to also budget for new accommodation.

Another important consideration in the sale of an asset is the time restrictions of the debt review. In terms of section 86(10), a credit provider may, 60 business days after a consumer has applied for debt review, give notice to terminate said proceedings, unless the debt counsellor has obtained a court date.[200] Essentially, a consumer must, within 60 business days, sell his home or vehicle. Considering all of the administrative procedures accompanying a transfer of property, it is very unlikely that this process will be completed within this period. It is estimated that obtaining an offer on a property in South Africa takes, on average, 99 days.[201] It is further estimated that, from the date of sale, the registration process will take a further three months.[202]

3.4 Evaluation of case law from the Constitutional Court pertaining to the sale of assets

3.4.1 *Gundwana v Steko Development CC and Others*[203]

In the matter of *Gundwana,* Ms Gundwana, in 1995, purchased a property with a mortgage obtained from Nedcor Bank Limited.[204] During 2003, she fell into arrears, and Nedcor Bank Limited obtained default judgment, together with a further order from the Western Cape registrar declaring the property executable.[205] In 2007, said property was sold to Steko Development cc, who proceeded to seek an eviction order

198 Task Team Agreements Annexure C 22.
199 Task Team Agreements Annexure C 22.
200 S 86(10). For a comprehensive discussion of the terminations under s 86(10), see Scholtz ed par 11.3.3.3.
201 "How long it takes to sell your house in South Africa based on its size and location" available at https://businesstech.co.za/news/property/339893/how-long-it-takes-to-sell-your-house-in-south-africa-based-on-its-size-and-location/ (accessed 2019-10-13).
202 "The process of transferring a property" available at https://www.privateproperty.co.za/advice/property/articles/the-process-of-transferring-a-property/586 (accessed 2019-10-13).
203 [2011] ZACC 14 (hereinafter "*Gundwana*")*.*
204 *Gundwana* par 5.
205 *Gundwana* par 5.

against her.[206] Ms Gundwana appealed against the eviction order in both the Western Cape High Court and the Supreme Court of Appeal, without success.[207] She also lodged an application in the Western Cape High Court to rescind the default judgment granted against her.[208]

In *Gundwana*, the legal question was whether section 27A of the Supreme Court Act[209] and rule 31(5) of the Uniform Rules of Court are unconstitutional in so far as they make provision for the registrar of a high court to grant orders declaring immovable property executable.[210]

The Constitutional Court held that, while a mortgagor does provide his immovable property as security, and thereby accepts the risk that the property may be executed to satisfy the debt, it is not tacit consent that a mortgage debt be enforced without court sanction.[211] The Constitutional Court found that it is of the utmost importance that orders in terms of which homes are declared executable be properly evaluated.[212] An evaluation of this magnitude must be made by a judicial officer.[213] Arguments were also advanced on behalf of Ms Gundwana that the right to property[214] is implicated when an order for the execution of a property is made.[215] Froneman J expressed no view regarding infringements in terms of section 25 of the Constitution, being the right to property, and indicated that this matter be confined to the potential infringement of a homeowner's right under section 26(1) and (3) of the Constitution.[216] Section 26 of the Constitution provides as follows:

> (1) Everyone has the right to have access to adequate housing.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
>
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

206 *Gundwana* par 7.
207 *Gundwana* pars 8-10.
208 *Gundwana* pars 8-10.
209 Act 59 of 1959.
210 *Gundwana* par 34.
211 *Gundwana* par 44.
212 *Gundwana* par 50.
213 *Gundwana* par 50.
214 S 25 of the Constitution of the Republic of South Africa 1996 (hereinafter "Constitution").
215 *Gundwana* par 51.
216 *Gundwana* par 51.

The Constitutional Court held that the purpose of the judgment is not to undermine the security of a credit provider.[217] The purpose of the judgment is to caution courts that appropriate considerations should be made when an execution order is granted against immovable property.[218] Where a debt can be satisfied in a reasonable manner without execution, it should be considered as an alternative before granting an order for execution.[219] The position of the Constitutional Court was thus that, in the instance where there is disproportionality between the execution of a property and an alternative manner for payment of the debt, one should tread careful.[220]

The Constitutional Court found that rule 31(5) of the Uniform Rules of Court was unconstitutional, to the extent that it permitted the registrar to order the sale in execution of a home without judicial oversight.[221]

3.4.2 *Nkata v FirstRand Bank Ltd and others (Socio-Economic Rights Institute of South Africa as amicus curiae)*[222]

In the matter of *Nkata,* Ms Nkata acquired a property in 2006 through the registration of two mortgage bonds over said property.[223] Ms Nkata repeatedly fell into arrears on the bonds.[224] The credit provider issued summons, and a default judgment was eventually granted against Ms Nkata.[225] Ms Nkata and the credit provider reached a settlement during 2011, and Ms Nkata settled the arrears.[226] Ms Nkata again repeatedly fell into arrears during 2011 and 2012.[227] During this period, Ms Nkata unsuccessfully attempted to have the default judgment rescinded in the Western Cape High Court.[228] During 2013, the bank proceeded with execution, and sold the property to a third party.[229]

The principal question before the Constitutional Court was whether Ms Nkata had re-instated the credit agreement when the arrears were paid, and if this disentitled the

[217] *Gundwana* par 53.
[218] *Gundwana* par 53.
[219] *Gundwana* par 53.
[220] *Gundwana* par 54.
[221] *Gundwana* par 52.
[222] 2016 (6) BCLR 794 (CC) (2016-04-21) (hereinafter "*Nkata*").
[223] *Nkata* par 3.
[224] *Nkata* par 4.
[225] *Nkata* pars 5-6.
[226] *Nkata* par 10.
[227] *Nkata* pars 11-14.
[228] *Nkata* pars 9-4.
[229] *Nkata* pars 9-14.

credit provider from proceeding with the sale of the property.[230] For the purposes of this study, only the view of the majority of the Constitutional Court, delivered by Moseneke DCJ, pertaining to the reinstatement of a credit agreement under section 129(3) and (4) and the manner in which a credit agreement is re-instated will be discussed.

Section 129(3) and (4) provides the following:

> (3) Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.
>
> (4) A credit provider may not re-instate or revive a credit agreement after –
> (a) the sale of any property pursuant to –
> (i) an attachment order; or
> (ii) surrender of property in terms of section 127;
> (b) the execution of any other court order enforcing that agreement;

Moseneke DCJ held that section 129(3) and (4) introduces a manner of reinstatement that departs from historical debt collection practices.[231] The position of the majority judgment was that, when a credit agreement has not been cancelled and the consumer is only in default, the consumer may settle the arrears to re-instate the credit agreement and reclaim possession of any property that has been attached.[232] Moseneke DCJ held that the purpose of section 129(3) is to encourage consumers to pay overdue amounts, for which they, in return, are rewarded with the reinstatement of credit agreements and return of the property.[233]

Moseneke DCJ further held that reinstatement occurs by operation of law, and that payment in the prescribed manner of the required amount is sufficient to re-instate a credit agreement.[234]

3.4.3 Application of *Gundwana* and *Nkata* in debt review

In both *Gundwana* and *Nkata*, the Constitutional Court protected consumers who had become the victims of financial hardship through the loss of immovable property.

[230] *Nkata* par 30.
[231] *Nkata* par 100.
[232] *Nkata* par 100.
[233] *Nkata* par 100.
[234] *Nkata* par 105.

Three general principles from these two cases deserve consideration during the debt review process with regard to the assets of consumers under debt review.

The first is that judicial oversight is required when consideration whether a property should be sold to extinguish a debt.[235] The second principle is that the sale of the property should be considered against all alternative options to settle the outstanding debt.[236] The third principle is that a consumer who is willing to settle arrears and honour his credit agreement should be rewarded with the return of his property.[237]

Debt review is certainly an alternative option that should be considered as a suitable option for the settlement of a debt secured by a property.[238] A consumer who has opted to be rehabilitated through the debt review process has essentially opted to honour his credit agreement by ensuring that he attends to the settlement of the full outstanding balance due to the credit provider, and therefore should also be rewarded with being allowed to retain possession of his property.

When considering the sale of assets as a portion of over-indebtedness, one cannot avoid measuring the conflicting interests of credit providers and consumers. The consumer wishes to retain use of the asset, and the credit provider wishes to be reimbursed for the finance advanced.

With the financing of vehicles, the credit provider has a substantially larger risk, due to the depreciation in the value of vehicles.[239] The consumer who is under debt review is also in a unique position with regard to asset retention, in that his debt review status bars him from obtaining finance for a new vehicle or home, and will also cause obstacles in attempting to lease a vehicle or home.[240]

Finding a balance between the interests of consumers and credit providers is a difficult task. The NCA sets a high standard for interpretation by requiring the rectification of imbalances between the negotiation positions of consumers and credit providers, along with the prevention and remedying of over-indebtedness.[241] Brits notes that

[235] *Gundwana* par 50.
[236] *Gundwana* par 54.
[237] *Nkata* par 100.
[238] Du Plessis "Judicial oversight for sales in execution of residential property and the National Credit Act" 2012 *De Jure* 537.
[239] See as an example *MFC v Joubert*.
[240] S 88(1).
[241] Brits "The National Credit Act and the Bill of Rights: towards a constitutional view of consumer credit regulation" 2017 *TSAR* 492.

over-indebtedness is “a social ill with numerous negative consequences for the socio-economic well-being of individuals and families”.[242] Therefore, when considering the sale of assets, specifically with regard to homes, the NCA should be interpreted in a manner that limits infringement on the consumer’s right to housing, in accordance with section 26 of the Constitution.[243]

3.5 Examples from practice

The examples discussed below provide insight into the application of “asset investigations” under the auspice of section 78(3)(b) of the National Credit Act in the magistrates’ courts.

In case number 242/2018, the Roodepoort Magistrate’s Court for the district of Johannesburg West handed down a ruling on 16 April 2018 in which the debt review application was dismissed for various reasons.[244] One of the reasons for the dismissal was held at paragraph 9 to be:

> In this matter the consumers have one motor vehicle. In order to ensure that she pays her debt timeously she should have thought of selling her assets including her motor vehicle to pay her debts. If she sells her vehicle she will be able to her pay credit providers. The founding affidavit does not mention the other movable assets the consumer had. They don’t even specify the assets which were not viable for liquidation. It was just a general statement made... The founding affidavit [is] supposed to clarify the court on the furniture that was available.

The above was reiterated in paragraph 10 of the ruling, as follows: “I humbly submit that […] selling the vehicle will result in the consumer not being over-indebted.”

In the above matter, the monthly instalment due to the credit provider was R2 580.[245] The monthly obligations of the consumer amounted to R8 228, and, without the vehicle, would have amounted to R5 648.[246] The consumer was only in a position to pay R2 187.91, meaning that, even if the vehicle were sold, there would still be a shortfall of R3 460.09, which the consumer could not afford.[247]

Debt review applications, case numbers 707/2016 and 52273/2015, before the Johannesburg Central Magistrate’s Court were both dismissed. The magistrate

[242] Brits 2017 *TSAR* fn 170.
[243] Brits 2017 *TSAR* 494.
[244] The original file, containing a written ruling, is available for public inspection at the Magistrate’s Court for the district of Johannesburg West, held at Roodepoort under case number 242/2018 (hereinafter “Case 242/2018”).
[245] Case 242/2018 Founding Affidavit par 32.
[246] Case 242/2018 Founding Affidavit par 32.
[247] Case 242/2018 Founding Affidavit par 32.

provided written reasons in terms of Magistrates' Court Rule 51(1).[248] In this matter, two debt counsellors appeared, giving oral evidence, and the following was noted in the written reasons with regard to the sale of assets: "Various modes of transport are available to commuters in Gauteng."[249]

It was also noted at paragraph 18: "Once again there's no consideration given to selling the motor vehicle. Roets is unavailable and also not in a position to tell the court what the value of the motor vehicle is."[250]

Furthermore, the Johannesburg Central Magistrate's Court, in case number 36727/2016, dismissed the debt review application was dismissed on 8 March 2017.[251] One of the reasons for the dismissal was held to be:

> The supplementary affidavit of the debt counsellor is tersely drafted and does not explain clearly why the consumer would need such an expensive vehicle for transportation. In addition the debt counsellor does not explain exactly how the value of the vehicle had been calculated.

The vehicle in Case 36727/2016 had an outstanding balance of R636 881.34, and the consumer estimated that the resale value of the vehicle would be only R300 000.[252] The Supplementary Affidavit in this matter addressed the fact that the consumer used the vehicle daily to travel to work, and recommended that the consumer not sell the vehicle, due to various factors.[253] These factors were listed for consideration, and included the possibility of replacing the vehicle with an alternative, whether the vehicle satisfied a basic need, and the associated cost of the sale.[254]

The Germiston Magistrate's Court for the district of Ekurhuleni, in case number 7756/2018, dismissed the debt review application on 18 March 2019. One of the reasons for the dismissal was held at paragraph 8 to be:

> If the consumer felt that he was over-indebted he should have sold his asset inclusive of the vehicle. It was expected of the applicant to advise the consumer accordingly about the

[248] The original file, containing a written ruling, is available for public inspection at the Magistrate's Court for the district of Central Johannesburg, held at Johannesburg under case numbers 707/2016 and 52273/2015 (hereinafter "Case 707/2016" and "Case 52273/2015").
[249] Cases 707/2016 and 52273/2015 Ruling par 15.
[250] Cases 707/2016 and 5227/2015 Ruling par 18.
[251] The original file, containing a written ruling, is available for public inspection at the Magistrate's Court for the district of Johannesburg Central, held at Johannesburg under case number 36727/2016 (hereinafter "Case 36727/2016").
[252] Case 36727/2016 Founding Affidavit par 32; Case 36727/2016 Supplementary Affidavit par 4.
[253] Case 36727/2016 Supplementary Affidavit par 8.
[254] Case 36727/2016 Supplementary Affidavit pars 6-7.

provisions of section 79. Section 79 requires that the assets be sold to pay debts. Furniture or the motor vehicle should have been sold to cover the shortfall of the credit providers.

In the Germiston Magistrate's Court for the district of Ekurhuleni, various applications were dismissed during March 2019, with all of reports citing the above application of section 79 as one of the reasons for dismissal.[255]

All of the aforementioned examples confirm the tendency of magistrates' courts to attempt to utilise the liquidation of assets to relieve over-indebtedness, instead of granting a rearrangement order to restructure debt obligations to allow a consumer to retain possession of the asset whilst becoming financially rehabilitated.

3.6 Preliminary findings

The practical examples demonstrate that some magistrates hold the view that a consumer must first sell assets before applying for debt rearrangement. The examples specifically highlight that magistrates take offence when consumers attempt to apply for debt rearrangement with regard to luxury vehicles. The National Credit Act does not require of a consumer to first sell assets, whether luxury vehicles or not, before being entitled to debt rearrangement. The Act also does not empower a magistrate's court to make an order for the sale of an asset to pay debts.

The absence of legislative regulation is causing matters to be delayed due to unauthorised orders by magistrates. The debt counsellor is not legally bound to have the consumer sell assets before commencing with debt review; a debt review application may be referred to the magistrate's court with the inclusion of all the consumer's assets. If the magistrate in question is of the view that assets must first be sold, the matter will be postponed or dismissed. If postponed, the debt counsellor can request that the consumer consider selling the assets, or the debt counsellor can attempt to demonstrate why sale of the assets is not viable. The consumer is under no legal obligation to sell the assets, and a cycle of delays is initiated, until the debt counsellor is able to satisfy the magistrate.

The misdirection of magistrates can be attributed, firstly, to *MFC v Joubert*, the *locus classicus* for justifying the sale of an asset during debt rearrangement. The finding in

[255] The case numbers for these dismissals are: 8142/2018, dismissed on 14 March 2019; 7760/2018, dismissed on 14 March 2019; 9142/2018, dismissed on 14 March 2019; 7756/2018, dismissed on 18 March 2019; 9541/2018, dismissed on 18 March 2019; and 9546/2018, dismissed on 25 March 2019.

MFC v Joubert was flawed from the moment that debt rearrangement was equated to the voluntary surrender of an estate. The judge in *MFC v Joubert* also failed to consider that the earlier judgments of *Pelzer* and *Newman* relied on the return of assets under credit agreements that had been cancelled. Secondly, magistrates are influenced by the Task Team Agreements recommending the sale of assets to relieve over-indebtedness, with particular reference to luxury assets. However, the Task Team Agreements also identifies numerous concerns regarding the sale of assets during debt review, and it is clear from the practical examples discussed that magistrates fail to consider these. The Task Team Agreements does not empower a magistrate's court to order the sale of movable or immovable property.

The view of the Constitutional Court, as demonstrated in *Gundwana* and *Nkata*, is that the sale of an asset to settle debt should be a last resort. This should provide the primary guidance when addressing the question of asset retention during debt rearrangement. The National Credit Act, in section 127, makes available a process separate from debt rearrangement for consumers wishing to alleviate indebtedness through the surrender of goods. A separate process for surrendering assets confirms that the intention of the legislature with regard to debt rearrangement is the settlement of all debt obligations, including secured finance agreements, through restructured payments.

The National Credit Act remains the primary source of debt review referrals, and, in the absence of provisions in the Act ordering the sale of assets to alleviate over-indebtedness before debt rearrangement is done, magistrates' courts ordering the sale of assets in debt reviews remains unauthorised.

4 Living expenses

4.1 Introduction

The debt counsellor must consider the budget of a consumer during the over-indebtedness assessment.[256] As part of the debt review application (Form 16)[257], the consumer will submit his current budget to the debt counsellor.[258] The revision of a budget by the debt counsellor must be done with great care, to ensure that it is a reasonable and sustainable long-term budget that makes sufficient provision for living expenses and a maximum possible amount available for the settlement of debt obligations.[259] It is common within the debt counselling industry that consumers wish to maintain their lifestyle, to the detriment of their credit providers.[260] This study is limited to an assessment of the debt repayment amount and living expenses in the budget proposed by a debt counsellor.

4.2 National Credit Act

To assess over-indebtedness, the debt counsellor must refer to section 79, with consideration of regulation 24(7)(a)-(c).[261] However, notice should be taken of regulation 24(1) first, which reads:

> (1) A consumer who wishes to apply to a debt counsellor to be declared over-indebted must:
> (a) Submit to the debt counsellor a completed Form 16; or
> (b) Provide the debt counsellor with the following information:
> (i) personal details, including:
> (aa) name, initials and surname; identity number, if the consumer does not have an identity number, the passport number and date of birth;
> (bb) postal and physical address;
> (cc) contact details.
> (ii) all income, inclusive of employment income and other sources of income (specify).
> (iii) monthly expenses, inclusive of, but not limited to:
> (aa) taxes;
> (bb) unemployment insurance fund;
> (cc) pension;
> (dd) medical aid;
> (ee) insurance;
> (ff) court orders;
> (gg) other (specify).

256 Task Team Agreements Annexure B 4; Scholtz ed par 11.3.3.2.
257 See Ch 1 par 2 above.
258 Reg 24(1); Task Team Agreements Annexure B 4; *Driskel* par 45.
259 Task Team Agreements Annexure B 4.
260 Task Team Agreements Annexure B 15.
261 Reg 24(7); Scholtz ed pars 11.3.2. and 11.3.3.2.

(iv) List of all debts, disclosing monthly commitment, total balance outstanding, original amount and amount in arrears (if applicable) inclusive of, but not limited to:
(aa) home loans;
(bb) furniture retail;
(*cc*) clothing retail;
(*dd*) personal loans;
(*ee*) credit card;
(*ff*) overdraft;
(*gg*) educational loans;
(*hh*) business loans;
(*ii*) car finances and leases;
(*jj*) sureties signed;
(*kk*) other (specify).
(v) Living expenses, inclusive of, but not limited to:
(*aa*) groceries;
(*bb*) utility and continuous service;
(*cc*) school fees;
(*dd*) transport costs;
(*ee*) other (specify).
(vi) A declaration and undertaking to commit to the debt restructuring.
(vii) A consent that a credit bureau check may be done.
(viii) Confirmation that the information is true and correct.
(c) Submit to the debt counsellor the documents specified in Form 16.

Regulation 24(3) places a verification duty on the debt counsellor with regard to all information obtained from the consumer under regulation 24(1):

> The debt counsellor must verify the information provided in terms of subsection (1) above by requesting documentary proof from the consumer, contacting the relevant credit provider or employer or any other method of verification.

Regulation 24(7) describes the evaluation process to be followed by a debt counsellor during the over-indebtedness assessment:

> (7) When assessing the consumer's application in terms of section 86(6)(a) of the Act, the debt counsellor must refer to section 79 and further consider the following:
> (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;
> (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.

We can firstly conclude that, before the debt counsellor can determine whether the consumer is over-indebted, the debt counsellor must adjust the budget provided by the consumer. Secondly, the budget of the debt counsellor will not reflect the factual amounts for living expenses, but rather an amount that should be allowed for said item. Regulation 24(3) requires of the debt counsellor to verify the living expenses provided by the consumer, and this verification is in contradiction to regulation

24(7)(c), which requires that the debt counsellor adjust the budget in accordance with the minimum living expense guidelines issued by the Regulator. My view is that the correct interpretation of regulation 27(3) is that, only in the event where an expense is not in line with the minimum living expense guidelines of the Regulator must the factual value be verified.

4.3 Insolvency Act

4.3.1 Introduction

Before assessing the minimum living expense guidelines under the National Credit Act, it is important that we first consider living expenses of an insolvent in the context of insolvency proceedings.

4.3.2 Section 23(5) of the Insolvency Act

The voluntary sequestration process in terms of the Insolvency Act has the goal of liquidating the assets of the insolvent and distributing the proceeds amongst his creditors.[262] The insolvent must prove that the sequestration will be beneficial to his credit providers.[263] However, additional surplus income of the insolvent may also be used to prove benefit to credit providers.[264]

Section 23(5) of the Insolvency Act addresses the surplus income of an insolvent:[265]

> (5) The trustee shall be entitled to any moneys received or to be received by the insolvent in the course of his profession, occupation or other employment which in the opinion of the Master are not or will not be necessary for the support of the insolvent and those dependent upon him, and if the trustee has notified the employer of the insolvent that the trustee is entitled, in terms of this subsection, to any part of the insolvent's remuneration due to him at the same time of such notification, or which will become due to him thereafter, the employer shall pay over that part to the trustee.

Legal precedent confirms that, if the Master has expressed the view that the income is not required by the insolvent or his dependants, the trustee becomes entitled to said income for distribution to the creditors.[266] Roestoff expresses the view that section

[262] For a comprehensive discussion of voluntary sequestration, see Roestoff "The income of an insolvent and sequestration under the Insolvency Act 24 of 1936" 2017 *SA Merc LJ* 478-514.
[263] S 3(1) of the Insolvency Act; Roestoff 2017 *SA Merc LJ* 478-514.
[264] For examples of voluntary sequestration in which surplus income was considered, see Roestoff 2017 *SA Merc LJ* 478-514.
[265] Roestoff 2017 *SA Merc LJ* 478-514.
[266] Fn 91 in Roestoff 2017 *SA Merc LJ* 478-514 provides examples of the legal precedent regarding the entitlement of the trustee.

23(5) of the Insolvency Act has a shortcoming, in that it fails to give a clear guideline on how the Master should exercise his discretion.[267]

4.3.3 *Ex parte Van Dyk*[268]

In *Van Dyk*, the court was tasked with considering whether the applicant could prove advantage to his creditors by forfeiting his salary.[269] The applicant received a net income of R13 107.99, of which he was willing to pay his creditors R2 900.[270]

To answer the question of whether it would be permissible to allow the applicant to waive his right to his income, Makhubele AJ quoted from par 67 of *Ex Parte Kroese and Another*:[271]

> Taking into account the vital importance of the inalienable right to human dignity of the applicants and indeed whatever dependants they may have and the right to work or trade, coupled with the purpose of excepting basic necessities, I am of the view that the applicants may not waive their entitlement.

Makubele AJ aligned himself with Landman J in stating that one of the constitutional rights that must be considered is the applicant's right to food.[272] In *Van Dyk* it was held that consideration must be given to whether the monetary contribution of the applicant is more important than the rights and obligations of the applicant to provide for himself and his family.[273] The right to dignity is an inalienable right, and, therefore, a person cannot waive his right to basic necessities.[274]

The right to dignity is protected by section 10 of the Constitution. One of the core elements of the right to dignity is the recognition of socio-economic rights such as the right to housing, food, water, and a livelihood.[275]

267 Roestoff 2017 *SA Merc LJ* 478-514.
268 [2015] ZAGPPHC 154 (hereinafter "*Van Dyk*"). See the discussion in Roestoff 2017 *SA Merc LJ* 478-514.
269 *Van Dyk* par 1; Roestoff 2017 *SA Merc LJ* 478-514.
270 *Van Dyk* pars 5 and 8; Roestoff 2017 29 *SA Merc LJ* 478-514.
271 2015 (1) SA 405 (NWM) as referred to in Van Dyk par 19; Roestoff 2017 *SA Merc LJ* 478-514.
272 *Van Dyk* par 20; Roestoff 2017 *SA Merc LJ* 478-514. See also Evans "Legislative exclusions or exemptions of property from the insolvent estate" 2011 *PELJ* 28.
273 *Van Dyk* par 20; see Roestoff 2017 *SA Merc LJ* 478-514 for a comprehensive discussion of other cases interpreting s 25(3) of the Insolvency Act.
274 *Van Dyk* par 20; *Bafana Finance Mabopane v Makwakwa and Another* [2006] ZASCA 46 (2006-03-30) par 11; *S v Makwanyane and another* [1995] ZACC 3 par 270; *Ex parte Anthony en 'n ander en ses soortgelyke aansoeke* 2000 (4) SA 116 (K) (2000-05-29) par 19-20. See also Roestoff 2017 *SA Merc LJ* 478-514.
275 For a comprehensive discussion of dignity, see Steinmann "The core meaning of human dignity" 2016 *PELJ* 1-32.

4.4 Task Team Agreements

The Task Team Agreements provides much more comprehensive guidelines with regard to the detailed calculations required in determining the budget referred to in regulation 24(7) of the National Credit Act. This discussion views two calculations. The first is determining the minimum amount is that should be made available by the consumer for debt repayments. The second calculation is determining the minimum living expenses that should be allowed.

4.4.1 Determining a minimum net income available for debt repayment

The consumer's budget must strike a balance between living expenses and debt repayments.[276] If the amount made available for debt repayments is too low, it will result in very low repayment instalments and unrealistically long repayment terms.[277] However, if the debt repayment is too high, the consumer may not be able to honour the repayments in the long term.[278] The Task Team Agreements provides a guideline for determining the minimum amount for debt repayment.[279]

The goal of the Task Team Agreements in setting minimum criteria is to:

- prevent unrealistic repayment proposals with low repayment instalments[280];
- force consumers to lower their lifestyle[281];
- improve negotiations based on industry-agreed concessions[282]; and
- assist debt counsellors.[283]

The guideline in determining a minimum repayment was developed with consideration of the fact that the spending patterns of each consumer will be determined by his income, the joint household income, dependants, and essential expenses.[284] The

[276] Task Team Agreements Annexure B 15.
[277] Task Team Agreements Annexure B 15; See also *MFC v Joubert*, where the repayment proposal suggested an excessively long term for repayment of the vehicle.
[278] Task Team Agreements Annexure B 4.
[279] Task Team Agreements Annexure B 16.
[280] Task Team Agreements Annexure B 16.
[281] Task Team Agreements Annexure B 16.
[282] Task Team Agreements Annexure B 16.
[283] Task Team Agreements Annexure B 16.
[284] Task Team Agreements Annexure B 16.

table below provides an indication of the recommended percentage a consumer should make available based on his "after-tax income"[285]:

After-tax income	Percentage of household income to be available as a minimum for re–payment of debt
R0 – R2 000	23% to 45%
R2 001 – R5 000	32% to 47%
R5 001 – R10 000	35% to 49%
R10 001 – R20 000	37% to 51%
R20 001 – R40 000	40% to 53%
R40 001 – R60 000	45% to 55%
R60 001 +	45% to 58%

The Task Team Agreements advises that the above-mentioned table is only a general guideline, and that it is recommended that special circumstances that warrant recommendations outside of the above parameters be motivated by the debt counsellor.[286]

4.4.2 Determining living expenses

4.4.2.1 Introduction

The debt counsellor must adjust the living expenses of the consumer as suggested in the guidelines issued by the Regulator.[287] It is recommended that, during the initial consultation, the consumer be advised of what the impact will be on his standard of living.[288] The Task Team Agreements terms this exercise of adjusting the living expenses of the consumer as "a review of spending patterns".[289] This review is a two-part exercise, of which the first is the inclusion of essential expenditures and the reduction or elimination of luxury expenses.[290] The debt counsellor, in presenting the budget to the court, fulfils a statutory duty, and, accordingly, it must be evident from the proposed budget that he has applied his mind to the financial position of the consumer.[291]

[285] The Task Team Agreements provides no definition of "after-tax income" and, from the description, one can only assume that it means the gross income only, minus tax. Task Team Agreements Annexure B 16.
[286] Task Team Agreements Annexure B 17.
[287] Reg 24(7)(c); Task Team Agreements Annexure B 17.
[288] Scholtz ed par 14.3; Task Team Agreements Annexure B 17.
[289] Task Team Agreements Annexure B 17.
[290] Task Team Agreements Annexure B 17.
[291] Reg 24(7); Task Team Agreements Annexure B 17.

The question to ask is thus: “What is deemed an essential expense, and what is deemed a luxury expense?” Each household has its own needs and requirements, and what one person may consider a luxury another may consider an essential living expense.[292] However, the Task Team Agreements warns against this exact individual interpretation[293]:

> What is important to Debt Counsellors is to ensure that overall expenditure is reasonable and defendable. Many Credit Providers and Magistrates will have different interpretations of individual items. For instance some might argue that smoking should be stopped while others might consider even reasonable telephone expenditure as unreasonable.

The Task Team Agreements concisely captures why living expenses delay the finalisation of debt review applications: subjective interpretation of what is reasonable by debt counsellors, magistrates, credit providers, and consumers. In my view, it is exceedingly difficult for the person assessing the living expenses of a third party to not make comparisons to his own living expenses, or not to make determinations based on what he considers reasonable with regard to specific circumstances.

The consequence of these personal convictions is that a budget will be revised to satisfy either the credit provider or the court. However, the debt counsellor holds no power to enforce such a revised budget, and is completely dependent on the *bona fide* participation of the consumer. The Task Team Agreements also acknowledges this:

> For instance some consumers will spend more on the education of their children but will spend less on food. Other might decide to spend money on their DSTV but decrease spending on a different item.[294]

Despite all the aforementioned contradictions and challenges, the debt counsellor remains statutorily bound to determine the minimum living expenses.[295] The Task Team Agreements creates three categories of expenses: essential living expenses, non-essential living expenses, and luxury items.[296]

4.4.2.2 Essential living expenses

[292] Task Team Agreements Annexure B 17.
[293] Task Team Agreements Annexure B 17.
[294] Task Team Agreements Annexure B 17.
[295] Reg 24(7)(c).
[296] Task Team Agreements Annexure B 18.

The Task Team Agreements defines essential expenses as “those expenses that a consumer has little or no control over. They are necessary to conduct daily life.”[297] Expenses that fall into this category[298] are:

- rent[299];
- groceries (food, toiletries, cleaning materials) in line with the size and dietary requirements of the household;
- water and electricity;
- rates and taxes;
- body corporate levies;
- domestic worker where a substitute for day care, crèche or after-care facilities;
- educational fees (includes school fees, day care, or tertiary education);
- transport (public transport or reasonable running expenses for fuel and maintenance of a vehicle);
- Telkom telephone, cellular phone, or Internet access;
- maintenance;
- clothing and shoes;
- chronic medication;
- support of relatives with valid reasons;
- financial services (medical aid, life assurance, credit life insurance, and short-term insurance).[300]

[297] Task Team Agreements Annexure B 18.
[298] Task Team Agreements Annexure B 18.
[299] See Task Team Agreements Annexure B 18, where it is recommended that the amount for rent should be reasonable, and that it should be asked whether it is possible to obtain more affordable rent and whether the more affordable accommodation is still close to the place of employment of the consumer, as well as the possible costs of moving (such as the hiring of a moving company, deposit for a new rental property, payment of administration fees, possible amendments to insurance premiums due to location changes, etc). However, the Task Team Agreements makes no mention of the contractual implications of the lease agreement, should a consumer decide to cancel. See also Task Team Agreements Annexure B 9, where it is confirmed that consumers who are under debt review have difficulty qualifying for lease agreements, due their credit status.
[300] Task Team Agreements Annexure B 18. The debt counsellor may not recommend any reductions in medical aid, insurance or assurance, as giving advice pertaining to these services without being an

The Task Team Agreements then open the flood gate with the following statement: "Anything else can be regarded as essential under the consumer's unique circumstances."[301] The possible '"unique circumstances" that a consumer could conjure to be allowed to retain as much money as possible for living expenses are infinite. In my view "unique circumstances" must be supported by documentary proof as provided for in regulation 24(3).

4.4.2.3 Non-essential expenses

The Task Team Agreements define non-essential expenses as "those expenses paid by the consumers that are not absolutely necessary, but that are none the less an important part of daily existence".[302]

The expenses which fall into this category according to the Task Team Agreements are:[303]

- domestic worker[304];
- garden service;
- alcoholic beverages and tobacco or cigarettes need only be reduced and not suspended;
- entertainment;
- DSTv or M-Net;
- recreational/club memberships;
- pocket money for children;
- tithes/donations; and
- cosmetic services, beautician, or pampering sessions.

The Task Team Agreements recommend that allowance be made for expenses which fall into this category subject thereto that the amount is reasonable with consideration of the circumstances of the consumer.[305] If used in moderation the aforementioned non-essential living expenses can therefore be included in the budget of a consumer

approved financial planner with the Financial Services Board is a contravention of the Financial Advisory and Intermediary Services Act 37 of 2002.
301 Task Team Agreements Annexure B 19.
302 Task Team Agreements Annexure B 20.
303 Task Team Agreements Annexure B 20.
304 See par 4.4.2.2 above.
305 Task Team Agreements Annexure B 20.

"on condition that the *total spending* on essential and non-essential items is reasonable and defendable".[306]

4.4.2.4 Luxury expenses

The Task Team Agreements defines luxury expenses as outlay for "Luxurious items … that the consumer does not need and which the average consumer applying for Debt Counselling should not have."[307] Expenses that fall into this category are for[308]:

- multiple properties;
- vehicle asset finance for a boat, jet ski, other "toy" items or a luxury vehicle not used;
- membership of holiday clubs; and
- gambling.

4.4.2.5 Broad guideline for spending patterns

Any revision of expenses is done on a voluntary basis, and mutual agreement must be reached between the consumer and the debt counsellor as to which expenses will be reduced.[309] The Task Team Agreements provides general guidelines for identifying excessive spending that indicate that the consumer should reduce his financial lifestyle.[310]

The first guideline is:

> Where the combined spending on household items exceeds 35 percent of after tax income there could be room for reduction. Household expenditure include domestic, garden service, groceries, telephone, Internet, entertainment, education, rates and taxes, electricity, water, tithes, pocket money and cosmetics.[311]

The second guideline is:

> Where the combined spending on financial services exceeds 25 percent of after tax income there could be room for review. Financial services includes insurance, assurance, pension, medical aid and other savings. Consumers who apply for debt review very often spend less than the guideline of 25 percent on financial services. Debt Counsellors cannot advise consumers to reduce assurance, pension and medical spending. Where spending appears to

306 Task Team Agreements Annexure B 20. Emphasis added.
307 Task Team Agreements Annexure B 21.
308 Task Team Agreements Annexure B 21.
309 Task Team Agreements Annexure B 21.
310 Task Team Agreements Annexure B 23.
311 Task Team Agreements Annexure B 23.

> be high the consumer should be referred to a Registered Financial Planner or FAIS registered Broker.[312]

The third guideline is:

> Where a property is rented, it is difficult to provide a guideline mainly because many factors such as lifestyle requirements and area influence the amount required for rental payment. However, the following general rule could assist Debt Counsellors. Where rental payment exceeds 23 percent of after tax income, there should be room for review. The percentage required for rent is not part of household expenses set out above.[313]

The above guidelines are mathematically unsound, and do not corresponded with the guidelines provided for debt repayment.[314] The first guideline for debt repayments allows the consumer to retain 35% of his after-tax income for household items.[315] The second guideline allows for retention of 25% of after-tax income for financial services[316], and the third spending guideline allows 23% of after-tax income for housing.[317] This leaves only 17% available for repayment of debt obligations[318], while the minimum percentage that should be made available is 23%.[319]

4.5 Case law: *Barnard*[320]

In *Barnard*, the evidence that a debt counsellor must provide to support a finding of over-indebtedness was extensively argued.[321] The court held that it was not necessary *in casu* to identify what a debt counsellor should provide in this regard.[322] Tuchten J stated that it may not even be possible to exhaustively identify what a debt counsellor may have to determine during the assessment of over-indebtedness.[323]

In *Barnard*, the following guideline was set:

[312] Task Team Agreements Annexure B 23.
[313] Task Team Agreements Annexure B 23.
[314] See the discussion in par 4.4.1 above.
[315] Task Team Agreements Annexure B 23.
[316] Task Team Agreements Annexure B 23.
[317] Task Team Agreements Annexure B 23.
[318] 35% of the income for living expenses plus 25% of the income for financial services plus 23% of the income for housing calculates to 83% of the income being used, leaving only 17% of the income for distribution to the credit providers.
[319] See discussion in par 4.4.1 for the recommended percentages that should be made available.
[320] For a comprehensive discussion of *Barnard*, see Van Heerden "Debt restructuring, partisan debt counsellors, costs and other important debt counselling issues. An appraisal debt counselling issues. An appraisal Bank v Barnard 2015 JDR 1614 (GP)" 2016 *THRHR* 632-651.
[321] *Barnard* par 6.
[322] *Barnard* par 6; Van Heerden 2016 *THRHR* 632-651.
[323] *Barnard* par 6; Van Heerden 2016 *THRHR* 632-651.

- The debt counsellor is entitled to accept information provided by the consumer, if such information is supported by vouchers that appear to be regular and genuine.[324]
- In the event where the information or vouchers provided by the consumer raise suspicion, the debt counsellor must investigate further.[325]

4.6 Examples from practice

In case number 9142/2018 in the Magistrate's Court for the district of Ekurhuleni, Germiston, a ruling was handed down on 14 March 2019, in terms of which the debt review application was dismissed, for various reasons.[326] Paragraph 5 of the ruling captures one of the reasons as follows:

> The monthly living expenses are recorded at a total of R10 898.94. The water and lights are recorded at R1 700.00 per month, however the supporting document from the Municipality for the month of December 2018 reflect[s] services in the amount of R686.00. That is an indication that an amount of R1 014.00 will [be] utilized to cover monthly obligations of the credit providers. The life insurance for the amount of R14078 per month is very exorbitant. That insurance can be paid by the person who can afford it. The first consumer also has an option to approach his insurance company in order to reduce his premium. The amount available to pay credit providers on a monthly basis is R12 787.90. They are liable to pay their credit providers R32 672.61 per month. There is a shortfall of R19 793.71.

In Case 9142/2018, the consumer earned a gross salary of R28 534.16.[327] The monthly tax paid by the consumer was R5 199.64.[328], leaving an after-tax income of R23 334.52.[329] The repayment amount proposed by the debt counsellor was R11 864.90[330], which was 50.84% of the net income.[331] For this category of net income, the Task Team Agreements suggests that 40%–53% be made available for debt repayment.[332] Based on the Task Team Agreements, there was no reason to further reduce the living expenses of this consumer.

In Case 7756/2018, the Germiston Magistrate's Court, at paragraph 4, held that:

[324] *Barnard* par 6; Van Heerden 2016 *THRHR* 632-651.
[325] *Barnard* par 6; Van Heerden 2016 *THRHR* 632-651.
[326] The original file, containing a written ruling, is available for public inspection at the Magistrate's Court for the district of Ekurhuleni, held at Germiston under case number 9142/18 (hereinafter "Case 9142/2018").
[327] Case 9142/2018 Founding Affidavit par 16.
[328] Case 9142/2018 Founding Affidavit par 17.
[329] R28 534.16 (gross salary) minus R5 199.64 (tax).
[330] Case 9142/2018 Founding Affidavit par 26.
[331] R11 864.90 (repayment amount) divided by R23 334.52 (after-tax income) multiplied by 100.
[332] See the discussion in par 4.4.1 for the recommended percentages that should be made available.

> The telephone account of R2 000 is exorbitant. It will be reduced to R800.00. The insurance expense can be taken when the consumer has enough funds to subsidize that expense. The reduced monthly expenses are R8 745.57.

In this matter, the consumer earned a gross salary of R50 190.[333] The monthly tax paid by the consumer was R11 106.60,[334] leaving a net income of R39 083.40.[335] The repayment amount proposed by the debt counsellor was R11 642.62[336], which was 29% of the net income.[337] The guideline for this category of net income is 40%–53%.[338] The debt repayment amount therefore did not meet the guideline of the Task Team Agreements.[339] However, what is interesting in this matter is that the consumer's rent was R4 150.[340] This amount translated into 10% of the after-tax income, and was thus compliant with the suggested guideline.[341] The total amount for household expenses was R11 087, which translated into 28.36%, with the guideline suggesting not more than 35%.[342] The financial services of the consumer amounted to R7 036.65, or 17%, which was also below the guideline of 23%.[343] Accordingly, the conclusion is that the consumer did not meet the minimum debt repayment criteria, but did meet the minimum spending criteria.[344]

4.7 Preliminary findings

The practical examples demonstrate that some magistrates are of the view that they are empowered to recalculate a consumer's budget and reduce certain amounts for living expenses that were recommended by the debt counsellor. Under the National Credit Act, only a debt counsellor is authorised to adjust the living expenses of a consumer, with consideration of the guidelines of the Regulator. The Task Team Agreements provides guidance on which living expenses should be adjusted, and the extent of such adjustment. From the practical examples, it is clear that the magistrates

[333] Case 7756/2018 Founding Affidavit par 16.
[334] Case 7756/2018 Founding Affidavit par 17.
[335] R50 190 (gross salary) minus R11 106.60 (tax).
[336] Case 7756/2018 Founding Affidavit par 26.
[337] R11 642.62 (repayment amount) divided by R39 083.40 (after-tax income) multiplied by 100.
[338] See the discussion in par 4.4.1 for the recommended percentages that should be made available.
[339] See the discussion in par 4.4.1 for the recommended percentages that should be made available.
[340] Case 7756/2018 Founding Affidavit par 25.
[341] See discussion in par 4.4.2.5 above; R4 150 (rent) divided by R39 083.40 (after-tax income) multiplied by 100.
[342] Case 7759/2018 Founding Affidavit par 25; see discussion in par 4.4.2.5 above; R11 087 (household expenses) divided by R39 083.40 (after-tax income) multiplied by 100.
[343] Case 7759/2018 Founding Affidavit pars 17 and 25; see discussion in par 4.4.2.5 above; R7 036.65 (household expenses) divided by R39 083.40 (after-tax income) multiplied by 100.
[344] See discussion in par 4.4.2.5 above.

did not consider the guidelines contained in the Task Team Agreements in reducing the living expenses. However, the Task Team Agreements provides only guidelines, and are therefore not binding on a magistrate's court.

In the absence of legislative regulation of budgets, matters are being delayed due to unauthorised orders by magistrates. The debt counsellor is not legally bound to calculate a budget in terms of predetermined rules, and a debt review application may be referred to the magistrate's court with a budget that the debt counsellor deems reasonable or in accordance with the guidelines in the Task Team Agreements. If the particular magistrate is of the view that the living expenses are too high, even if these are in line with the guidelines of the Task Team Agreements, the matter may be postponed or dismissed. If postponed, the debt counsellor could attempt to justify the item in question in the budget, which will require obtaining further evidence from the consumer, or the debt counsellor could simply restructure the budget. The consumer is under no legal obligation to implement this restructured budget, and it is presented with the hope that the magistrate will be satisfied.

The Task Team Agreements recommends a minimum debt repayment of 23% of the consumer's after-tax income. However, under the spending guidelines of the Task Team Agreements, a consumer is allowed to retain 83% of this income for living expenses, only leaving 17% for debt repayment.[345] For the Task Team Agreements to present a clear and workable solution, this discrepancy must be resolved.

The provisions of the Insolvency Act that provide for the waiver of a right to income in the budget of a debtor (and the interpretation of this provision in case law) highlight that budgets must be considered in a manner does not infringe on the debtor's right to dignity or his ability to meet his obligation to support his family. Consumers under debt review who agree to have their budgets altered should be treated by both debt counsellors and the courts in a manner that does not infringe on their or their families' socio-economic rights. The practical examples discussed above do not indicate that any consideration was given to the broader impact of reducing the living expenses of the consumers.

[345] See discussion in par 4.4.2.5.

The National Credit Act fails to provide for the regulation of the living expenses of consumers under debt review in a manner that will prevent infringement on their basic human rights.

CHAPTER 3: RESTRUCTURING OF DEBT OBLIGATIONS

1 Introduction

After a finding of over-indebtedness, section 86(7)(c) obligates the debt counsellor to make a recommendation to the magistrate's court of an order of either rearrangement of the consumer's debt obligations or reckless credit, or both.[1] Section 86(7)(c) provides as follows:

> (7) If, as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably concludes that –
>
> (c) the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or both of the following orders –
>
> (i) that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless; and
>
> (ii) that one or more of the consumer's obligations be re-arranged by –
>
> (*aa*) extending the period of the agreement and reducing the amount of each payment due accordingly;
>
> (*bb*) postponing during a specified period the dates on which payments are due under the agreement;
>
> (*cc*) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or
>
> (*dd*) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6.

A magistrate's court has the jurisdictional authority to make the suggested rearrangement by the debt counsellor, as provided for in section 86(7)(c), into an order of court.[2] Section 87 provides as follows:

> (1) If a debt counsellor makes a proposal to the Magistrate's Court in terms of section 86(8)(b), or a consumer applies to the Magistrate's Court in terms of section 86(9), the Magistrate's Court must conduct a hearing and, having regard to the proposal and information before it and the consumer's financial means, prospects and obligations, may –
>
> (a) reject the recommendation or application as the case may be; or
>
> (b) make –
>
> (i) an order declaring any credit agreement to be reckless, and an order contemplated in section 83(2) or (3), if the Magistrate's Court concludes that the agreement is reckless;
>
> (ii) an order re-arranging the consumer's obligations in any manner contemplated in section 86(7)(c)(ii); or
>
> (iii) both orders contemplated in subparagraph (i) and (ii).

[1] See Ch 2 for a discussion of challenges facing a finding of over-indebtedness. For a comprehensive discussion of over-indebtedness, see Scholtz ed par 11.3. The terms "debt review order", "restructuring order", and "rearrangement order" are used interchangeably, and all references must be construed to be an order granted under s 86 of the National Credit Act.

[2] S 87.

The purpose of the rearrangement order is thus to distribute the reduced amounts that an over-indebted consumer can afford to the relevant credit providers over a longer period.[3] Debt counsellors use specialised software, developed by payment distribution agencies or debt counselling firms, to calculate restructuring proposals.[4]

The debt counsellor, as a neutral functionary, must present a fair and reasonable proposal to the court, without causing prejudice to any of the parties.[5] In *Nedbank Declarator*, the court provided declaratory direction with regard to the role of the debt counsellor when submitting a proposal to the magistrate's court.[6] The court in *Nedbank Declarator* held that the debt counsellor is the party who should submit the restructuring proposal to the magistrate's court, as the debt counsellor is responsible for the financial investigation, and will have knowledge of the factual circumstances that justify the restructuring proposal.[7] The court *in casu* noted:

> A debt counsellor who refers a matter to the Magistrate's Court in terms of sections 86(7)(c) and 86(8)(b) of the National Credit Act, 2005 has a duty to assist the court and should be available and able to render such assistance by way of furnishing evidence or making submissions as to his or her proposal or to answer any queries raised by the Court.[8]

Accordingly, the legal position is that the work of a debt counsellor is two-fold: determining over-indebtedness, accompanied by a restructuring proposal.

This chapter discusses variables that, in practice, challenge the rearrangement of debt obligations during the debt review process and eventually result in delays in finalisation of debt review applications. This chapter firstly discusses the utilisation of debt counselling software to calculate restructuring proposals, followed by an overview of four variables that commonly challenge the finalisation of the restructuring process during debt review applications. The variables are:

- Interest rate concessions: this variable is present where the debt counsellor chooses to negotiate a lower interest rate with the credit provider.
- Repayment term extensions: this variable is present in all applications, and the question will be raised whether the industry-agreed concessions, per the Task Team Agreements, remain applicable in all circumstances.

3 S 87(c)(ii)(aa)-(bb); Scholtz ed par 11.3.3.2.
4 Task Team Agreements Annexure C 3.
5 *Nedbank Declarator* 30; *MFC v Joubert* par 27; Scholtz ed par 11.3.3.2.
6 *Nedbank Declarator* 30; *MFC v Joubert* par 27; Scholtz ed par 11.3.3.2.
7 *Nedbank Declarator* 30; *MFC v Joubert* par 27; Scholtz ed par 11.3.3.2.
8 *Nedbank Declarator* 30; Scholtz ed par 11.3.3.2.

- The *in duplum* rule: this variable is present in all applications, and the question will be raised whether the rule should be applied after a rearrangement order has been granted.
- Reckless credit: this variable should currently only be present when a consumer has requested a reckless credit investigation.

The 2019 National Credit Amendment Act was signed into law on 19 August 2019.[9] According to the Department of Trade and Industry's implementation plan for the 2019 National Credit Amendment Act, January 2021 has been set as the goal date for promulgation, with implementation phased in over a period of 15 to 24 months.[10] The 2019 National Credit Amendment Act is discussed briefly hereunder with regard to instances where the aforementioned four variables may be influenced by their enactment.

2 Debt counselling software systems

2.1 Introduction

Debt counsellors utilise specialised debt counselling software to calculate restructuring proposals.[11] According to the Task Team Agreements, there are five software options available to debt counsellors, with two software programs dominating the debt counselling market.[12] This portion of the study gives a comprehensive background on how restructuring proposals are calculated in practice.

[9] See *GG* 42649 of 2019-08-13.
[10] "South Africa: Will The Signing Of The National Credit Amendment Bill Into Law Be Somewhat Muted?" available at http://www.mondaq.com/southafrica/x/848312/Consumer+Credit/Will+The+Signing+Of+The+National+Credit+Amendment+Bill+Into+Law+Be+Somewhat+Muted (accessed 2019-12-08); Department of Trade and Industry implementation plan available at http://www.dti.gov.za/parliament/2019/Nat_Credit_Amend_Act.pdf (accessed 2019-12-08).
[11] Task Team Agreements Annexure C 3.
[12] Task Team Agreements Annexure C 3.

2.2 Task Team Agreements

One of the main purposes of the Task Team Agreements is to develop parameters for the software packages used by debt counsellors to calculate restructuring proposals that are trustworthy and consistent.[13] To achieve this goal, the Task Team Agreements recommend that the Regulator publish guidelines[14] that:

- define the minimum parameters for all debt counselling software packages[15];
- provide for the audit of debt counselling software packages to evaluate the rules applied during restructuring and to measure the control methods applied to ensure consistency[16]; and
- provide for the publication of these audits.[17]

The Task Team Agreements propose the following parameters[18] with which all restructuring software packages must comply:

- The proposal must contain a summary of the affordability assessment (the consumer's income, living expenses[19], and an assessment of the possible liquidation of assets[20]).[21]
- The proposal must contain the position prior to debt restructuring for each credit agreement (including the initiation date, amount of credit advanced, repayment term, current outstanding balance, remaining repayment term, monthly instalment, annual interest rate, and additional fees).[22]
- The proposal must contain the proposed restructuring, including the repayment instalment and term, along with the effective interest rate and additional fees for each credit agreement.[23]

[13] Task Team Agreements Annexure C 3.
[14] Task Team Agreements Annexure C 3.
[15] Task Team Agreements Annexure C 3.
[16] Task Team Agreements Annexure C 3.
[17] Task Team Agreements Annexure C 3.
[18] Task Team Agreements Annexure C 4.
[19] See discussion pertaining to the assessment of living expenses in ch 2 par 4.
[20] See the discussion pertaining to the sale of assets in ch 2 par 3.
[21] Task Team Agreements Annexure C 4.
[22] Task Team Agreements Annexure C 4.
[23] Task Team Agreements Annexure C 4.

- The proposal must provide for amortization schedules (also referred to as cascades) for each credit agreement.[24]

The Task Team Agreements also requires that these debt counselling software packages produce a detailed description of the rules applied to determine the distribution amount for each credit agreement, which description must include[25]:

- the rationale applied for the instalment allocated for distribution to either the different categories of credit agreements, or each individual credit agreement, including any ranking system applied to the agreement or categories of agreements[26];
- the method with which the repayment instalments and terms were calculated for credit facilities or any other agreement in terms of which there is a defined repayment instalment and/or term[27];
- the method used to select credit agreements for deferred or interrupted payments[28];
- the method used to calculate repayment terms for different categories of credit agreements, along with any limits applied[29];
- the method used to reduce interest on any credit agreement and the method used to select these credit agreements, along with any limits applied[30];
- the method used to allocate surplus funds as these become available[31];
- confirmation as to whether any escalation has been calculated into the repayment plan and the calculation of any such escalation[32];
- the model utilised to identify any potential reckless loans[33]; and

[24] Task Team Agreements Annexure C 4.
[25] Task Team Agreements Annexure C 4.
[26] Task Team Agreements Annexure C 5.
[27] Task Team Agreements Annexure C 5.
[28] Task Team Agreements Annexure C 5.
[29] Task Team Agreements Annexure C 5.
[30] Task Team Agreements Annexure C 5.
[31] Task Team Agreements Annexure C 5.
[32] Task Team Agreements Annexure C 5.
[33] Task Team Agreements Annexure C 5.

- confirmation that the statutory *in duplum* rule, as envisaged in section 103(5), has been applied.[34]

Therefore, the Task Team Agreements provide that every software package utilised be subjected to an annual audit by an independent firm to confirm compliance with the guidelines.[35] The Task Team Agreements emphasises that the rules that are selected to restructure debt obligations of consumers must be measured against[36]:

- the ability of the restructuring proposal to resolve over-indebtedness with consideration of the Act and voluntary credit provider concessions[37];
- the consistent treatment of credit providers and categories of credit agreements[38];
- the trustworthiness and integrity of the method of calculation[39]; and
- the level of standardisation.[40]

From the aforementioned, it is evident that there are numerous considerations in calculating a debt restructuring proposal. The application of all the suggested guidelines and rules would not be possible; therefore, the Task Team Agreements recommend that the appropriate debt restructuring rules be selected to ensure rehabilitation of the consumer within the shortest possible period and the consistent treatment of credit providers.[41]

A debt counsellor is thus not bound to any specific set of rules, as long as the rules selected uphold and can be measured against the broad objectives set by the Regulator with regard to restructuring proposals.[42] The Task Team Agreements remain voluntary, non-statutory agreements that only provide non-binding guidelines for both credit providers and debt counsellors.[43] However, the Regulator holds

[34] Task Team Agreements Annexure C 5.
[35] Task Team Agreements Annexure C 6.
[36] Task Team Agreements Annexure C 6.
[37] Task Team Agreements Annexure C 6.
[38] Task Team Agreements Annexure C 6.
[39] Task Team Agreements Annexure C 6.
[40] Task Team Agreements Annexure C 6.
[41] Task Team Agreements Annexure C 6.
[42] Task Team Agreements Annexure C 6.
[43] Scholtz ed par 11.3.3.2.

registration as a debt counsellor subject to compliance with any guidelines issued by the Regulator.[44]

2.3 Debt Counselling Rules System

In 2010, the Regulator launched an investigation into the reasons for delays in the debt review process.[45] Inconsistencies in the debt review process and a low proposal acceptance rate were identified as contributing factors.[46] This led to the development of the Debt Counselling Rules System (DCRS).[47] The Regulator recommends that debt counsellors use this online platform to calculate proposals in an attempt to obtain consents from credit providers.[48] The system[49] is explained as follows:

> The DCRS is a set of standard rules agreed upon by the industry that provide voluntary concessions by exclusion of certain charges, adjusting the contractual fees, interest rates and repayment terms on credit agreements that are restructured under debt counselling. The objective of the DCRS is to enable the smooth negotiation and acceptance, thus improving the solve rate of proposals whilst addressing inconsistencies in debt review.

However, the system is not being utilised by the industry[50], and a sub-committee has been called by the Regulator to investigate the low usage rate.[51] Various complications were identified within the DCRS, and, in 2019, it was announced that seven alterations had been made to the system.[52] Concerns regarding the DCRS have been raised, and, in 2011, specific concerns were raised regarding the system not making provision for the statutory *in duplum* rule, and that consumers were therefore being placed in perpetual debt.[53]

2.4 Case law

In *Barnard*, the debt counsellor was reprimanded on appeal for the "fatally irrational" restructuring proposal she had recommended the magistrate's court elevate to an

[44] See as an example of a de-registration matter in which concerns were raised regarding compliance with guidelines: *Fulton v The National Credit Regulator* 2019 ZANCT 146 (2019-09-10) (hereinafter "*Fulton*").
[45] Circular 15 of 2014 published by the Regulator, titled "Debt Counselling Rules System", dated Dec 2014 (hereinafter "Circular 15 of 2014").
[46] Circular 15 of 2014.
[47] Circular 15 of 2014.
[48] Circular 15 of 2014.
[49] Circular 15 of 2014.
[50] Circular 15 of 2014.
[51] Circular 3 of 2019 published by the Regulator, titled "Updates from the Credit Industry Forum", dated Apr 2019 (hereinafter "Circular 3 of 2019").
[52] Circular 3 of 2019.
[53] https://www.debtsafe.co.za/debt-counselling-rules-system-dcrs-and-consumer-rights-%E2%80%93-consumers-beware/ (accessed 2019-07-07).

order of court.[54] The court *in casu* identified three problems with the restructuring proposal:

- The interest rate for a vehicle asset finance account was reduced without a consent letter from the credit provider.[55]
- The suggested repayment term for the vehicle asset finance account was so long that the value of the vehicle would depreciate to such an extent that the credit provider would be deprived of its security.[56]
- Finally, the debt counsellor postponed payments to the credit providers until all of her debt counselling fees had been settled.[57]

The Court was so taken aback by the partisan[58] defence undertaken by the debt counsellor that a cost order was awarded against the debt counsellor.[59] Following this judgment, the debt counsellor first lodged a complaint with the Regulator as the court finding her proposal to be "fatally irrational" was due to her use of a computerised debt restructuring program that the Regulator insists she uses.[60] According to her, the outcome of the complaint was not in accordance with section 140, and she wrote an open letter to the Regulator on 16 April 2016.[61] In the letter, she called on the Regulator to reconsider the Task Team Agreements, and specifically the DCRS, as her compliance with these guidelines had led to for the criticism of her proposal.[62] She further alleged that, "When proposals are challenged in higher courts, …[they fall] apart and are declared irrational at the expense of the debt counsellor and the consumer."[63] This creates the impression that magistrates' courts do not correctly consider debt restructuring proposals, alternatively that the debt counselling software prescribed by the Regulator is defective.

[54] *Barnard* par 45; Van Heerden 2016 *THRHR* 632.
[55] *Barnard* par 29; Van Heerden 2016 *THRHR* 632.
[56] *Barnard* par 29; Van Heerden 2016 *THRHR* 632.
[57] *Barnard* pars 31-32; Van Heerden 2016 *THRHR* 632.
[58] "Partisan" conduct in the context of this case refers to the debt counsellor having acted in a manner that strongly supported the interests of the consumer.
[59] *Barnard* pars 46-47; Van Heerden 2016 *THRHR* 632. See also Scholtz ed par 11.3.3.2.
[60] Open letter available at https://debtfreedigi.co.za/open-letter-to-the-industry/ (accessed on 2019-07-07) (hereinafter "Open Letter").
[61] Open Letter.
[62] Open Letter.
[63] Open Letter.

I am of the view that no software package can take into account every possible variable, and that the debt counsellor remains responsible for presenting an economically feasible restructuring proposal. Van Heerden expressed the view that a successful debt rearrangement is dependent on the manner in which a debt counsellor attends to a debt review.[64] Appropriateness and fairness of the restructuring proposal with consideration of every role player in the debt review process should be the overarching goal.

2.5 Preliminary findings

The aforementioned discussion confirms that the restructuring proposals that are elevated to court orders on a daily basis are calculated without any legislative regulation. The guidelines prescribed by the Task Team Agreements were drafted in a careless manner, allowing debt counsellors to select the rules that suit them. The case of *Barnard* is an excellent example – the debt counsellor used a prescribed software package that allowed her to calculate a proposal to collect her debt counselling fees first and suspend payments to the credit providers.

The case is an example of matters being delayed due to an absence of legislative regulation and a lack of standardisation of restructuring proposals. If debt counsellors are not bound by standards, any proposal they conjure up could be referred to the magistrate's court. These proposals are also sent to credit providers for their response with regard to acceptance of the proposed restructuring, causing further delays. The credit provider may oppose the debt review application because it is of the view that one of the rules prescribed by the Task Team Agreements has not been upheld. The debt counsellor is, of course, not bound to apply the rule, and so a cycle of delays commences.

The Regulator has attempted to address the lack of standardisation and the low proposal acceptance rate through the introduction of the DCRS. This endeavour failed, and, upon investigation, it was found that the system had shortcomings. Debt counsellors specifically raised the concern that the system does not make provision for the incorporation of the statutory *in duplum* rule, which is one of the rules recommended in the Task Team Agreements.

[64] Van Heerden 2016 *THRHR* 632.

The National Credit Act does not regulate these debt counselling software systems. In the absence of such regulation, debt counsellors, credit providers, and magistrates' courts are unable to answer simple questions, such as, for example, whether the *in duplum* principle should be applied or an annual escalation incorporated. The Task Team Agreements also offer no guidance regarding selective application of the proposed rules.

3 Interest rate concessions in debt restructuring proposals

3.1 Introduction

Section 87 empowers a magistrate to rearrange the debt obligations of a consumer as noted in section 86(7)(c)(ii)[65], which provides the following ways of rearrangement:

- extension of the repayment term and reduction of the repayment instalments[66];
- postponing payments for a specified period[67];
- extension of the repayment term and postponing payments for a specified period[68]; or
- recalculation due to a contravention of Part A or B of Chapter 5 or Part A of Chapter 6.[69]

Interest rate concessions are viewed as a tool which can assist an over-indebted consumer to overcome his distressed situation, as the reduced interest rate translates into a reduced monthly payment obligation and overall debt amount.[70] It is evident that section 86(7)(c)(ii) does not provide for interest rate concessions, and a magistrate's court is therefore not empowered to reduce the interest rate unilaterally.[71] This part of the study discusses the unilateral reduction of the contractually agreed interest rate. The following points are considerations in the present discussion, but will not be addressed in detail:

[65] For a discussion of the omission by the legislature in the introductory part of s 87 to also refer to s 86(7)(c) and an interpretation of s 86(7)(c) in s 87, see Scholtz ed par 11.3.3.2.
[66] S 86(7)(c)(ii)(*aa*).
[67] S 86(7)(c)(ii)(*bb*).
[68] S 86(7)(c)(ii)(*cc*).
[69] S 86(7)(c)(ii)(*dd*).
[70] Task Team Agreements Annexure D 3.
[71] Scholtz ed par 11.3.3.2. See also fn 83 for case law examples and the case law discussion in par 3.3 below.

- the incorporation of variable interest rates in debt restructuring proposals[72]; and
- the obligation on the debt counsellor, consumer, and credit provider to negotiate in good faith.[73]

3.2 The Task Team Agreements

The Task Team Agreements provides for various concessions that go beyond the provisions of the National Credit Act.[74] The motivation for these concessions is to assist in the rehabilitation of overindebted consumers.[75] One of the most (if not the most) significant and far-reaching concessions agreed to between industry role players pertains to finance costs.[76]

Finance charge concessions, and specifically concessions on the interest rate, allow consumers the opportunity to settle their debt obligations in a shorter period.[77] For secured loans, the Task Team Agreements suggests, as a minimum interest rate, the Reserve Bank's repurchase (repo) rate plus 2%.[78] Secured loans, in this instance, are limited to housing- and vehicle finance.[79] For unsecured loans, the Task Team Agreements suggests a minimum interest rate of 0%.[80] The Task Team Agreements further recommends that the interest rate for both secured and unsecured loans should be fixed for the rehabilitation term.[81] The consent of a credit provider to an interest rate concession is documented in an acceptance letter.[82]

It is evident from the aforementioned and section 86(7)(c)(ii) that interest rate concessions go beyond the ambit of the National Credit Act. Due to the absence of provisions for interest rate concessions in the Act, magistrates' courts have questioned

[72] See Task Team Agreements Annexure D 3. The guidelines first provide for variable interest (being the prime interest rate) with regard to the secured loans, and then state that such interest rate should be set for the remainder of the restructuring order.
[73] S 86(5). See Scholtz ed par 11.3.3.2 for a discussion of good faith participation.
[74] Task Team Agreements Annexure D 3.
[75] Task Team Agreements Annexure D 3.
[76] Task Team Agreements Annexure D 3.
[77] Task Team Agreements Annexure D 3.
[78] Task Team Agreements Annexure D 3.
[79] Task Team Agreements Annexure D 3.
[80] Task Team Agreements Annexure D 3.
[81] Task Team Agreements Annexure D 3.
[82] Task Team Agreements Annexure E 13.

whether they have been given the authority to grant a rearrangement order in which the interest rate is reduced.[83]

In 2015, the Gauteng Division of the High Court, in the *Van Der Hoven Attorneys Declarator*, confirmed that a magistrate's court may indeed grant an interest rate concession:[84]

> In an application to the Magistrates' Court in terms of section 86 of the National Credit Act 34 of 2005, and in circumstances where the parties reach an agreement in terms of which a credit provider respondent consents to an amended interest rate other than provided for in the credit agreement concerned, the Magistrate may make an order re-arranging the consumer's payment obligations upon the agreed amendment interest rates to give effect to the agreement between the parties.

The legal position is simple – if there is no agreement between the debt counsellor and the particular credit provider with regard to the amendment of the contractually agreed interest rate of a credit agreement, the magistrate's court does not have the authority to elevate an arrangement in which the contractually agreed interest rate is amended to an order of court.[85]

However, following the above declaratory order, magistrates remained uncertain, due to the judgments discussed in paragraph 3.3, below. The discussion focuses on the unilateral amendment of interest rates.

3.3 Case law

3.3.1 *Nedbank Limited v Norris and Others*[86]

In *Norris*, a rearrangement order was granted, in terms of which the credit provider would receive a monthly instalment of R289.15 for a period of 260 months at 0% interest, to settle a balance of R105 612.15.[87] There was no agreement by the provider on the reduction of the interest rate.[88] The credit provider sought to vary the granted

[83] *Van Der Hoven Attorneys Declarator* 7th Order; Scholtz ed par 11.3.3.2; Court Application Guidelines 15. See also *SA Taxi Securitisation (Pty) Ltd v Lennard* 2012 (2) SA 456 (ECG) par 9; *SA Taxi Securitisation v Mongezi Mani* [2011] ZAECGHC 11 par 34; *First National Bank v Adams* 2012 (4) SA 14 (WCC) 14, along with the discussion of case law in par 3.3 below.
[84] *Van Der Hoven Attorneys Declarator* 7th Order; Scholtz ed par 11.3.3.2; Court Application Guidelines 15.
[85] *Van Der Hoven Attorneys Declarator* 7th Order; Scholtz ed par 11.3.3.2; Court Application Guidelines 15.
[86] 2016 (3) SA 568 (ECP) (2016-03-01) (hereinafter "*Norris*").
[87] *Norris* par 6; Scholtz ed par 11.3.3.2. For a comprehensive discussion of *Norris*, see Van Niekerk "Reviewing the powers of a magistrate's court in debt review applications" 2016 *De Rebus* 47.
[88] *Norris* par 7; Scholtz ed par 11.3.3.2; Van Niekerk 2016 *De Rebus* 47.

order, but the application was dismissed by the Magistrate's Court, and the credit provider proceeded to file an appeal in the Eastern Cape High Court.[89]

The Eastern Cape High Court held that section 86(7)(c)(ii) does not empower a magistrate's court to vary a contractually agreed interest rate.[90] It was held that the purpose of the rearrangement order is to rearrange the payments of the consumer in such a manner that all the debt obligations are ultimately paid, but that such a rearrangement is limited to the extension of the repayment term and reduction of the repayment instalment.[91] A rearranged order is not aimed at nullifying the contractual terms and conditions of the credit agreement.[92] The Eastern Cape High Court held that a magistrate's court is a statutory body with no inherent jurisdiction to order the amendment of a contractually agreed interest rate[93], and that such an order would therefore be *ultra vires*.[94]

The Eastern Cape High Court not only granted relief to the credit provider *in casu*, but also granted declaratory relief.[95] In support of the declaratory relief, the High Court held that rearrangement orders altering contractual interest rates were constantly being granted in magistrates' courts throughout South Africa.[96] The declaratory order granted reads as follows:[97]

> A Magistrate's Court hearing a matter in terms of s 87(1) of the National Credit Act, 34 of 2005 does not enjoy jurisdiction to vary (by reduction or otherwise) a contractually agreed interest rate determined by a credit agreement;

3.3.2 *Jones*

The facts of *Jones* are similar to those of *Norris*, and therefore only covered briefly. In *Jones*, the magistrate unilaterally ordered the reduction of a variable interest rate of 10.9% (at the time of conclusion of the credit agreement) to a fixed interest rate of 10.4%.[98] The credit provider in *Jones* also appealed against this procedurally defective variation application in the Magistrate's Court.[99]

89 *Norris* par 8; Scholtz ed par 11.3.3.2; Van Niekerk 2016 *De Rebus* 47.
90 *Norris* par 44; Scholtz ed par 11.3.3.2; Van Niekerk 2016 *De Rebus* 47.
91 *Norris* par 44; Scholtz ed par 11.3.3.2; Van Niekerk 2016 *De Rebus* 47.
92 *Norris* par 44; Scholtz ed par 11.3.3.2; Van Niekerk 2016 *De Rebus* 47.
93 *Norris* par 44; Scholtz ed par 11.3.3.2; Van Niekerk 2016 *De Rebus* 47.
94 *Norris* pars 44-45; Scholtz ed par 11.3.3.2; Van Niekerk 2016 *De Rebus* 47.
95 *Norris* pars 50-51; Scholtz ed par 11.3.3.2; Van Niekerk 2016 *De Rebus* 47.
96 *Norris* pars 50-51; Scholtz ed par 11.3.3.2; Van Niekerk 2016 *De Rebus* 47.
97 *Norris* par 51.
98 *Jones* pars 5-6.
99 *Jones* par 6-7.

The Western Cape High Court in *Jones* held that it was important that lower courts and debt counsellors within the Western Cape Division adhere to the position set forth in *Norris*.[100] The High Court granted declaratory orders per the orders granted in *Norris*.[101] Following *Jones* and *Norris*, magistrates' courts in the Western Cape started dismissing debt review applications if the interest rates had been reduced in the application – even when consented to by the credit provider.[102]

3.3.3 *Sansom*

In *Sansom*, the Worcester Magistrate's Court had dismissed various debt review referrals on the basis that a magistrate's court does not have the necessary authority to grant an order in terms of which the contractually agreed interest rate is altered.[103] The magistrate did not consider it adequate that the credit providers had consented to the reduced interest rates suggested by the debt counsellor.[104]

In the High Court Allie J emphasised the competing interests of consumers and credit providers during the debt review process.[105] The High Court held that, where the debt counsellor and credit provider could reach settlement on the essential terms of the debt review, such settlement must be considered by the court hearing the rearrangement.[106] In *Sansom*, it was held that the interest rate and other ancillary costs must be considered for rearrangement, as they have a direct bearing on the level of over-indebtedness of the consumer.[107]

Allie J explained that, when a magistrate reduces the instalment due, he also reduces the amount of interest to be paid, without reducing the interest rate charged.[108] It was also noted that, if interest rates could not be reduced, consumers would be exposed to perpetual debt, which would be prejudicial to consumers and credit providers alike.[109] It was thus concluded in *Sansom* that a magistrate's court, by its power to

100 *Jones* par 30.
101 *Jones* par 30; Scholtz ed par 11.3.3.2.
102 "Nedbank v Jones Did this case change Debt review forever?" available at]https://debtfreedigi.co.za/wp-content/uploads/2012/11/Debtfree-DIGI-Magazine-Jan-2017.pdf (accessed 2019-07-14).
103 *Sansom* pars 1-5; Scholtz ed par 11.3.3.2.
104 *Sansom* par 6.2; Scholtz ed par 11.3.3.2.
105 *Sansom* pars 7-9; Scholtz ed par 11.3.3.2.
106 *Sansom* par 9; Scholtz ed par 11.3.3.2.
107 *Sansom* pars 23-24; Scholtz ed par 11.3.3.2.
108 *Sansom* par 26; Scholtz ed par 11.3.3.2.
109 *Sansom* par 24; Scholtz ed par 11.3.3.2.

extend the repayment terms and reduce the instalment, also has the implicit power to vary the interest rate for the duration of rearrangement.[110] Regarding *Jones*, Allie J held:

> In my view the ratio in Jones is too broad and overarching and does not admit of exceptions. The order made in the Jones' case fails to recognise that there are instances in which a magistrate, after duly applying his/her mind to all the relevant factors, will be required to vary the duration of the credit agreement, the instalments due and payable and the interest that forms part of the indebtedness under the credit agreement to achieve an equitable and fair result for the parties.[111]

The Court correctly clarified that both *Norris* and *Jones* dealt with situations where the magistrate had failed to apply his mind to the correct factors during adjudication.[112] The legal position in *Sansom* is further in accordance with the general principles of noting a settlement, as Magistrate's Court Rule 29(10)(b) authorises a court to make any settlement agreement an order of court. *Sansom* and the *Van Der Hoven Attorneys Declarator* were confirmed as correct in *P v Vosloo and Others*.[113] In *Vosloo*, the Western Cape High Court held that negotiating a reduced interest rate forms part of the duty under section 86(5)(b) to negotiate in a manner that is meaningful, responsible, and *bona fide.*[114]

3.4 Example from practice

A court rearranging the payment obligations of a consumer acts *ultra vires* if it amends the interest rate unilaterally.[115] Section 86(7)(c)(ii)[116] does not make provision for the amendment of interest rates in a restructuring proposal.[117] Such unilateral altering of the interest rate challenges the finalisation of debt review proceedings in magistrates' courts. Before the judgments of *Sansom* and *Vosloo*, some magistrates took the view that the debt counsellor must reduce the interest rate. This is a common practice in the Potchefstroom Magistrate's Court. The debt review referral under case number 2000/2017 was issued on 6 June 2017. The order was only granted on 23 July 2018, after the parties had appeared on six occasions, only for the matter to be postponed

110 *Sansom* par 23; Scholtz ed par 11.3.3.2.
111 *Sansom* par 38; Scholtz ed par 11.3.3.2.
112 *Sansom* pars 30-35.
113 2018 (5) SA 206 (WCC) (2017-10-23) (hereinafter "*Vosloo*").
114 *Vosloo* par 9.
115 See discussion of case law in par 3.3.
116 See Ch 3 par 1 above.
117 The 2019 National Credit Amendment Act amended s 86(7)(c)(ii) through insertion a of a sub-paragraph to address interest rate concessions. The subsection in question is discussed in par 3.5 below.

so that the interest rates could be reduced – in some instances, further reduced.[118] In Case 2000/2017, the restructuring[119] submitted to the court on 18 September 2017 contained the following information:

Table 1

Account	Account number	Interest rate	Suggested instalment	Outstanding balance	Repay-ment term (months)	Consent
Standard Bank Ltd	10067875481	20.50	799.00	26 154.27	34	No
Markham	0012010001038361656	25.40	302.00	3 873.66	12	Yes
Lewis Stores (Pty) Ltd	0580-286363-24	0.00	250.99	18 199.59	40	Yes
Lewis Stores (Pty) Ltd	0580-286363-23	0.00	123.00	10 094.65	42	Yes
Lewis Stores (Pty) Ltd	0580-286363-22	0.00	182.00	10 738.20	39	Yes
Standard Bank Ltd (personal loan)	273207105	23.00	514.00	36 916.03	59	Yes
Nedbank Ltd (personal loan)	8000818799701	15.50	950.00	130 633.11	78	No
Standard Bank Ltd (Bluebean credit card)	5120550401118672	22.00	92.00	4 700.65	40	No
Woolworths (Pty) Ltd	6007850157440189	19.00	82.00	1 174.43	13	No
Century Capital (Pty) Ltd (previously Capfin (Pty) Ltd)	CO19837124	10.50	642.00	7 038.65	13	Yes
Finchoice (Pty) Ltd (a division of Homechoice (Pty) Ltd)	2779829	60.00	532.00	5 604.71	13	No
Standard Bank Ltd	10054079762	31.00	191.00	9 081.36	50	No
Truworths Ltd	10101341173190	23.20	154.00	4 161.83	29	No
Mr Price Group Ltd (Mr Price)	0184732535	9.00	80.00	1 139.00	11	No
Standard Bank Ltd	10017925639	23.00	284.00	3 006.93	11	No
Nedbank Ltd (personal loan)	8001667601101	32.10	212.00	9 181.31	47	No
Edcon (Pty) Ltd T/A Jet	7006600100053865491	21.00	174.00	4 702.63	28	No
Standard Bank Ltd (personal loan)	273204408	23.00	859.00	21 649.00	29	No
Heinricha Hodgson Inc Attorneys	PRE10/0003	10.50	99.99	4 929.00	39	Yes
Heinricha Hodgson Inc Attorneys	PRE10/0002	10.50	99.99	5 709.00	44	Yes
Heinricha Hodgson Inc Attorneys	PRE10/0001	10.50	99.99	2 200.00	17	Yes

[118] The original file, containing court notes, is available for inspection at the Tlokwe Magistrate's Court, held at Potchefstroom under case number 2000/2017 (hereinafter "Case 2000/2017").
[119] Case 2000/2017 draft order filed with payment plan reference 7003165068088/010.

FNB Ltd (personal loan)	4000060094187	10.50	66.00	2 994.99	44	No

The above restructuring was dependant on a minimum payment of R8 576.89 (including the necessary fees).[120] From the above restructuring tables the following can be deduced:

- The longest repayment term would be 73 months, with most of the other repayment terms being less than 60 months.[121]
- Various credit providers had consented to the suggested rearrangement, as indicated in the last column.

On 18 September 2017, the matter was postponed for the debt counsellor to lower all the interest rates, or, alternatively, provide proof of attempts at negotiation.[122] The aim of the request was to assist the consumer.[123] Approximately one year later, a restructuring order was granted.[124] The table below compares the proposal presented on 18 September 2017 against the order granted on 23 July 2018, to indicate the results of the negotiations ordered by the court[125]:

Table 2

		Proposal on 18/09/2017		Proposal on 23/07/2018	
Account	Account number	Interest rate	Consent	Interest rate	Consent
Standard Bank Ltd	10067875481	20.50	No	18.00	Yes
Markham	0012010001038361656	25.40	Yes	25.40	Yes
Lewis Stores (Pty) Ltd	0580-286363-24	0.00	Yes	0.00	Yes
Lewis Stores (Pty) Ltd)	0580-286363-23	0.00	Yes	0.00	Yes
Lewis Stores (Pty) Ltd	0580-286363-22	0.00	Yes	0.00	Yes
Standard Bank Ltd (personal loan)	273207105	23.00	Yes	18.00	Yes
Nedbank Ltd (personal loan)	8000818799701	15.50	No	15.50	Yes
Standard Bank Ltd (Bluebean credit card)	5120550401118672	22.00	No	0.00	Yes
Woolworths (Pty) Ltd	6007850157440189	19.00	No	19.00	No

120 Case 2000/2017 draft order filed with payment plan reference 7003165068088/010.
121 See the discussion pertaining to repayment terms in par 4 below.
122 Case 2000/2017 court record and/or appearance notes and court report made available to me.
123 Case 2000/2017 court record and/or appearance notes and court report made available to me.
124 Case 2000/2017 granted order.
125 Case 2000/2017 granted order and draft order filed with payment plan reference 7003165068088/010.

Century Capital (Pty) Ltd (previously Capfin (Pty) Ltd)	CO19837124	10.50	Yes	10.50	Yes
Finchoice (Pty) Ltd (a division of Homechoice (Pty) Ltd)	2779829	60.00	No	Outstanding balance settled.	
Standard Bank Ltd	10054079762	31.00	No	25.50	Yes
Truworths Ltd	10101341173190	23.20	No	23.20	No
Mr Price Group Ltd (Mr Price)	0184732535	9.00	No	9.00	No
Standard Bank Ltd	10017925639	23.00	No	23.00	Yes
Nedbank Ltd (personal loan)	8001667601101	32.10	No	10.25	Yes
Edcon (Pty) Ltd T/A Jet	7006600100053865491	21.00	No	21.00	No
Standard Bank Ltd (personal loan)	273204408	23.00	No	18.00	Yes
Heinricha Hodgson Inc Attorneys	PRE10/0003	10.50	Yes	10.50	Yes
Heinricha Hodgson Inc Attorneys	PRE10/0002	10.50	Yes	10.50	Yes
Heinricha Hodgson Inc Attorneys	PRE10/0001	10.50	Yes	10.50	Yes
FNB Ltd (personal loan)	4000060094187	10.50	No	10.50	No

Table 2 confirms that, during the further negotiations ordered by the court, consent letters were obtained for only the Standard Bank and Nedbank accounts. However, the interest rate for the Standard Bank accounts were not substantially reduced.[126]

The debt counsellor in this matter filed additional evidence that attempts had been made to negotiate lower interest rates with the credit providers.[127] The requests for lower interest rates by the magistrate led to Standard Bank opposing the application on 31 May 2018.[128] The issues pertaining to the interest rates were only resolved once the credit provider, Standard Bank, attended Court and gave evidence as to how the decision was taken whether a consumer is entitled to an interest concession.[129] These factors include, but are not limited to, the repayment history of the consumer, the remaining period on the credit agreement, the outstanding balance, the initial cost of credit, and the suggested restructured amount and period.[130]

[126] Case 2000/2017 granted order and draft order filed with payment plan reference 7003165068088/010.
[127] Case 2000/2017 court record and/or appearance notes and court report made available to me.
[128] Case 2000/17 Notice of Intention to Oppose dated 2018-05-31.
[129] Case 2000/2017 court record and/or court notes and court report made available to me.
[130] Case 2000/2017 court record and/or appearance notes and court report made available to me.

The debt counsellor was unable to negotiate lower interest rates on the accounts with Markham, Woolworths, Finchoice, and Edcon, and the decision was made to exclude these credit providers from the rearrangement order, in the interest of obtaining an order.[131]

The question to consider is whether there was substantial benefit to the consumer in Case 2000/2017. The calculations below were done by me, by using the cascading tables prepared by the debt counsellor, to demonstrate the cascading monthly payments and the payment distribution statements made available by the debt counsellor (which indicate past months).

When looking at the first account in Table 1 and Table 2, Standard Bank Ltd (account 10067875481, the repayment as suggested on 18 September 2017 (Table 1) would have resulted in the consumer repaying a total amount of R35 845.99 for 34 months (from 15 September 2017 to 15 June 2020).[132] In terms of the restructuring granted (Table 2, second column), the consumer would repay an amount of R21 363.60 for twelve months (15 July 2018 to 15 June 2019).[133] During the postponement period, the consumer made monthly payments in the amount of R8 465.55.[134], totalling R29 829.15.[135] The consumer thus saved approximately R6 016.84 through the reduction in interest on the outstanding amounts.[136]

However, it is important to note that the interest rate reduction from 20.50% to 18% was only agreed to by the credit provider on the condition that the instalment under rearrangement be increased from R799[137] (see Table 2) to R1 724.54.[138] The original contractual instalment for this credit agreement was R1 901.90[139], and the consumer

[131] Case 2000/2017 granted order.
[132] The amount of R35 845.99 was calculated by me with the use of the cascading tables prepared by the debt counsellor to demonstrate the cascading monthly payments (attached as Annexure CO1.23 to the draft order with payment plan reference 7003165068088/010 under Case 2000/2017), as well as the payment distribution statements made available to me by the debt counsellor.
[133] The amount of R21 363.60 was calculated by me with the use of the cascading tables prepared by the debt counsellor to demonstrate the cascading monthly payments (attached as Annexure CO1.17 to the granted order of Case 2000/2017).
[134] The amount of R8 465.55 was calculated by me with the use of the payment distribution statements made available to me by the debt counsellor.
[135] The amount of R8 465.55, being the payments made during the postponement, was added to the amount of R21 363.60, being the amount that would be paid in the granted order of Case 2000/2017.
[136] I deducted the initial total repayment of R35 845.99 from the final total repayment of R29 829.15.
[137] Case 2000/2017 draft order filed with payment plan reference 7003165068088/010; attached as Annexure CO1.23.
[138] The amount of R1 724.54 was obtained from Annexure CO1.17 to granted order of Case 2000/2017.
[139] Case 2000/2017 Founding Affidavit Annexure F1 76.

had to pay an additional R925.54 per month[140]. The conclusion can thus be drawn that, long-term, the consumer saved in interest repayments, but, in the short term, the consumer had to repay a higher instalment, which would impact his lifestyle.

My conclusion from the information tendered by Standard Bank during the proceedings of Case 2000/2017 is that interest rate concessions cannot be done on all credit agreements submitted for restructuring, and that justifiable factors exist for a credit provider not granting a concession.

3.5 2019 National Credit Amendment Act

Section 86(7)(c)(ii)(ccA) of the 2019 National Credit Amendment Act contains the following provision under section 86(7)(c)(ii):

> …determining, as prescribed, the maximum rate of interest, fees or other charges, excluding charges contemplated in section 101(1)(e), under a credit agreement, for such a period as the Magistrate's Court deems fair and reasonable but not exceeding the period contemplated in section 86A(6)(d);

This additional provision has empowered a magistrate's court to unilaterally amend interest rates when making a restructuring order.[141] However, these new powers to alter a contract is curbed by section 86A(6)(d) of the 2019 National Credit Amendment Act.[142] Section 86A(6)(d) of said Act determines that debt intervention may not exceed a period of more than five years, or a period that may be prescribed, and this time limit has been incorporated into section 86(7)(c)(ii)(ccA) for interest rate amendments on debt restructuring orders.[143]

The magistrate to whom a restructuring proposal has been referred fulfils a judicial role, not an administrative role.[144] The duty of the magistrate is to consider the relevant evidence, make factual findings, consider the status of the applicant, and to apply rules, principles and legislation in reaching a finding.[145] It is thus evident that the magistrate must consider the evidence and apply his mind, and not merely be a rubber stamp of proposals.[146]

[140] I deducted the original instalment of R799 from the final instalment of R1 724.54.
[141] Scholtz ed par 11.3.3.2.
[142] Scholtz ed par 11.3.3.2.
[143] Scholtz ed par 11.3.3.2. For a comprehensive discussion of debt intervention, see Scholtz ed par 11.3.3.2.
[144] *Nedbank Declarator* 15; *Barnard* par 18; *Driskel* par 40; Scholtz ed par 11.3.3.2.
[145] *Nedbank Declarator* 15; *Barnard* 18; *Driskel* par 42; Scholtz ed par 11.3.3.2.
[146] See *MFC v Joubert* par 9; Scholtz ed par 11.3.3.2.

Whilst awaiting the prescriptions pertaining to the maximum interest rate and reductions, one can only speculate what these would be. The Task Team Agreements only indicates that the reduced interest rate must still allow the debt to be repaid, and that the maximum concession on secured loans would be the repo interest rate plus 2% and, for unsecured loans, 0%.[147]

However, the guidelines in the Task Team Agreements do not make provision for factors such as the applicant's repayment history, the instalment offered under the restructuring, or the remaining period on the credit agreement, to ensure that the concession is, in fact, economical.[148] Regulation 42 of the National Credit Act prescribes the maximum interest rate per credit agreement category that a credit provider may charge, which may serve as an indication of how section 86(7)(c)(ii)(ccA) will be interpreted.

Another question is whether section 86(7)(c)(ii)(ccA) will deprive a magistrate's court of exercising judicial oversight.[149] Section 86(7)(c)(ii)(ccA) may essentially make the consideration of whether a proposal is accepted a checklist exercise, especially if a similar format to that of Regulation 42 is prescribed. In my view, it is not reasonable to expect a credit provider to be subjected to an interest rate concession on a credit agreement when the consumer has a poor payment history, or where the consumer had only recently concluded the credit agreement.

Only consumers and debt counsellors will derive benefit from section 86(7)(c)(ii)(ccA). The debt counsellor will simply calculate the proposal within the prescribed parameters, and will no longer be required to conduct the sometimes lengthy negotiations and proposals being rejected, followed by instalments constantly being reworked. It would seem that a consent letter from the credit provider will no longer be required to reduce the interest rate[150] Credit providers and debt counsellors will both benefit from less administration.[151] However, the credit provider will now, in all instances of a consumer applying for debt review, be deprived of a portion of the cost of credit, whereas, currently, it is only in the instance where the credit provider has

147 Task Team Agreements Annexure D 5.
148 See discussion of Case 2000/2017 in par 3.4 above.
149 *Nedbank Declarator* 15; *Barnard* par 18; *Driskel* par 40; Scholtz ed par 11.3.3.2.
150 For the format of an acceptance letter, see Task Team Agreements Annexure E 13.
151 Debt counselling firms and the banking sector employ persons specifically to negotiate a settlement between the debt counsellor, consumer, and credit providers. This amendment may also result in job losses, as, in the long term, these persons may become obsolete.

consented to an interest rate reduction. This may result in a backlash of credit providers terminating debt reviews or opposing debt review applications, to ensure that agreements are not subjected to a rearrangement order. The end result could thus be further delays in the finalisation of debt review referrals.

In my view, this amendment will essentially reduce the rearrangement aspect of debt review to a rubber-stamp process. The rules that will be prescribed could simply be applied to the calculation software used by debt counsellors. If the software has been declared compliant by the Regulator, the magistrate would be entitled to simply elevate the rearrangement to an order of court, as the proposal had emanated from a trusted source. The duty of the debt counsellor to furnish evidence and to make submissions on the restructuring proposal would become obsolete.[152]

3.6 Preliminary findings

The practical example discussed in paragraph 3.4 demonstrates that certain magistrates attempt to circumvent the fact that magistrates' courts are not authorised to reduce interest rates by forcing the debt counsellor to negotiate until a satisfactory interest rate, according to the magistrate, is reached. These forced negotiations delay the finalisation of debt review referrals. The National Credit Act does not authorise any forced reduction in interest rates, and all interest rate concessions are supposed to be voluntary. The practical example above demonstrates that there are factors to be considered, specifically by the credit provider, before a consumer is rewarded with an interest rate concession.

Magistrates' courts will, in future, under the 2019 National Credit Amendment Act, be authorised to unilaterally reduce the interest rates on credit agreements in debt rearrangement. This may resolve delays, but, as credit providers will now be deprived of interest on all credit agreements under debt restructuring, the factors that are currently considered in granting a concession may in future become the basis of opposition to the inclusion of the agreement in a debt rearrangement. An example is, if the credit provider is currently not granting an interest rate concession due to the payment history of the consumer, the credit provider may in future object to the inclusion of the credit agreement under debt rearrangement.

[152] *Nedbank Declarator* 30.

Details have not been published on exactly how these interest rate reductions will be done under the 2019 National Credit Amendment Act. The Task Team Agreements simply suggests a minimum interest rate of 0% for unsecured loans, and the repo rate plus 2% for secured loans. Considering the current regulation 42, the legislature may prescribe a maximum prescribed interest rate per type of credit agreement under debt rearrangement. None of these options can factor in the repayment history of the consumer, the remaining period on the credit agreement, the outstanding balance, initial costs of the credit, and the suggested restructuring instalment in considering whether the consumer should be entitled to an interest rate reduction. It appears as if the legislature is attempting to eliminate the negotiations between the debt counsellor, consumer, and credit provider, to create a checklist exercise.

In *Sansom*, Allie J explained that a too broad and overarching approach that does not allow for exceptions will not achieve an equitable and fair result. This level of standardisation, specifically with regard to interest rate concessions, may streamline the debt review process, but will not always deliver the desired results.

The National Credit Act does not authorise the reduction of interest rates during debt rearrangement. The 2019 National Credit Amendment Act will authorise such a reduction, but will not regulate when such reductions would be justifiable. Magistrates' courts have used a loophole in the NCA to force interest rate reductions, resulting in delays. Without clear provisions in the 2019 National Credit Amendment Act regulating these unilateral interest rate reductions in a manner that will deliver equitable and fair results, matters may in future still being delayed, for a different reason – opposition by credit providers. It also remains a possibility that the provision in the 2019 National Credit Amendment Act will be challenged as being an unjustifiable deprivation of the property rights of credit providers.

4 Repayment term extension

4.1 Introduction

Sections 86(7)(c)(ii)(aa) and 86(7)(c)(ii)(cc) of the National Credit Act both make provision for the extension of the original contractual repayment term under the credit agreement being restructured. The Act does not prescribe any specific provisions

regarding repayment timelines for a restructuring order.[153] The restructured repayment terms for vehicle asset finance agreements are a contentious issue, due to the fact that the credit provider runs a substantial risk of losing the security it holds, due the depreciation of the value of the vehicle.[154]

4.2 Credit Agreements Act[155]

The Credit Agreements Act was repealed by the National Credit Act. The Credit Agreements Act[156] made specific provision for determining the repayment periods of credit agreements:

> (6) No person shall be a party to a credit agreement in terms of which
>
> (a) the period within which the full price is payable, exceeds the appropriate prescribed period;

The aforementioned prescribed period was either 18, 24, or 54 months.[157] Items that could be purchased over an eighteen-month period included jewellery, photographic equipment, video cassette players, and electronic television games.[158] Examples of items could be purchased over a 24-month period are household furniture, appliances for domestic use, televisions, and radios.[159] Motor vehicles and motor cycles were limited to a repayment period of 54 months.[160]

The purpose of the prescriptions with regard to the maximum periods of payment was to prevent over-indebtedness by ensuring that consumers are not subjected to debt repayments for extended periods, and to prevent overspending.[161] These prescriptions were very restrictive compared to the National Credit Act, which does not restrict the contractual repayment term in any manner.

153 Note that s 86(7)(c)(ii)(ccA) of the 2019 National Credit Amendment Act has possibly limited the repayment period to five years or to a period to be announced – see Ch 3 par 3.5 above.
154 See as examples: *Seyffert and Another v Firstrand Bank Ltd t/a First National Bank* 2012 ZASCA 81 (2012-05-30) par 16; *BMW Financial Services (SA) (Pty) Ltd v Mudaly* 2010 ZAKZDHC 35 (2010-08-20) par 40; *MFC v Joubert* pars 20-21; Scholtz ed par 11.3.3.2.
155 For a comprehensive discussion regarding the Credit Agreements Act and its interaction with the National Credit Act, see Kelly-Louw 2008 *SA Merc LJ* 203.
156 S 6(6)(a).
157 Notice R401 in *GG* 3147 of 1981-02-27.
158 Notice R401 in *GG* 3147 of 1981-02-27.
159 Notice R401 in *GG* 3147 of 1981-02-27.
160 Notice R401 in *GG* 3147 of 1981-02-27.
161 Renke, Roestoff and Haupt "The National Credit Act: new parameters for the granting of credit in South Africa" 2007 *Obiter* 229.

4.3 Task Team Agreements

One of the parameters set by the Task Team Agreements for debt review proposal calculations is that the extension of the repayment period must be applied proportionally to the repayment term for the categories of credit agreements, and the same extension method should apply to all the agreements in each category.[162] The Task Team Agreements suggests the following limits[163] for repayment periods per category of credit agreement:

- On a mortgage agreement, the term extension is up to 240 months from date of restructuring, and subject to a maximum repayment period of 360 months from inception of the loan.[164]
- On a vehicle asset finance agreement for private vehicles, the term extension is up to 1.5 times the contractual term from inception, subject to a limit of 84 months.[165]
- On a vehicle asset finance agreement for commercial vehicles, the term extension is up to 1.25 times the contractual term from inception, subject to a limit of 84 months[166].
- For credit facilities, other and incidental credit agreements without a defined term and a balance of more than R3 601, the extended term is 24 months from date of restructuring, and is limited to 60 months from date of restructuring.[167]
- For credit facilities, other and incidental credit agreements without a defined term and a balance of between R1 501 and R3 600, the extended contractual term is twelve months from date of restructuring, and is limited to 36 months from date of restructuring.[168]
- For credit facilities, other and incidental credit agreements without a defined term and a balance of up to R1 500, the extended contractual term is twelve

[162] Task Team Agreements Annexure C 7. See discussion in ch 3 par 2 above regarding the rules and guidelines set for the calculation of restructuring proposals.
[163] Task Team Agreements Annexure D 5.
[164] Task Team Agreements Annexure D 6.
[165] Task Team Agreements Annexure D 6.
[166] Task Team Agreements Annexure D 6.
[167] Task Team Agreements Annexure D 6.
[168] Task Team Agreements Annexure D 6.

months from date of restructuring, limited to 18 months from date of restructuring.[169]

- For unsecured and short-term credit transactions, other and incidental agreements with a defined term and a balance of more than R3 601, the extension is limited to 60 months from date of restructuring.[170]
- For unsecured and short-term credit transactions, other and incidental agreements with a defined term and a balance of between R1 501 and R3 600, the extension is limited to 36 months from date of restructuring.[171]
- For unsecured and short-term credit transactions, other and incidental agreements with a defined term and a balance of between R1 501 and R3 600, the extension is limited to 36 months from date of restructuring.[172]

As discussed above, compliance with the Task Team Agreements remains voluntary, as it provides non-statutory guidelines for both credit providers and debt counsellors.[173] However, the Regulator holds registration as a debt counsellor subject to compliance with its guidelines.[174] There is case law in which the courts chose to hold debt counsellors accountable for compliance with the provisions of the Task Team Agreements, specifically when addressing repayment terms. These cases are discussed below.

4.4 Case law

4.4.1 *MFC v Joubert*[175]

One of the grounds of appeal raised by the credit provider in *MFC v Joubert* was that the granted debt review order extended the repayment term on the vehicle asset finance agreement to 153 months.[176] The 153 month repayment period translated into

[169] Task Team Agreements Annexure D 6.
[170] Task Team Agreements Annexure D 6.
[171] Task Team Agreements Annexure D 6.
[172] Task Team Agreements Annexure D 6.
[173] Scholtz ed par 11.3.3.2.
[174] See *Fulton* as an example of a de-registration matter in which concerns were raised regarding compliance with guidelines.
[175] The facts in *MFC v Joubert* were comprehensively discussed in ch 2 par 3.2. The present discussion is limited to issues raised regarding the repayment term suggested by the debt counsellor *in casu*.
[176] *MFC v Joubert* par 5; Scholtz ed par 11.3.3.2.

a 12.5-year repayment period, whilst the original repayment period was only five years.[177]

The credit provider argued that, by granting a 153-month repayment period, the magistrate had failed to consider the relevant industry standards.[178] The credit provider relied on the Credit Agreements Act to demonstrate the importance of linking repayment periods to the deteriorating value of items purchased on credit.[179]

The credit provider further argued that the magistrate had failed to consider the voluntary guidelines in the Task Team Agreements, and that the extension to 153 months went beyond the 1.5 times multiplication recommended by the Task Team Agreements.[180] The credit provider argued that, with an extension beyond 84 months, the vehicle would not have any value if the credit provider had to sell the vehicle in execution to recover any outstanding monies.[181]

The magistrate had used the fact that the consumer had a medical condition and needed the vehicle to travel to work in justifying the retention of the asset.[182] However, the high court found that these circumstances did not outweigh the right of the credit provider to security for the finance advanced.[183] The appeal was upheld, and the magistrate was, *inter alia*, ordered to reconsider the application with consideration of the Task Team Agreements.[184]

4.4.2 *Sansom*[185]

Samson highlighted the importance of achieving a fair and equitable result when conducting debt restructuring, and specific reference is made *in casu* to this also being applicable in determining a repayment term.[186]

177 *MFC v Joubert* par 5; Scholtz ed par 11.3.3.2.
178 *MFC v Joubert* par 5; Scholtz ed par 11.3.3.2.
179 *MFC v Joubert* par 5; Scholtz ed par 11.3.3.2. See Ch 2 par 4.2 above for a brief description of the repayment provisions prescribed under the repealed Credit Agreements Act.
180 *MFC v Joubert* par 19; Scholtz ed par 11.3.3.2. See par 4.3 above for a discussion of the suggested extensions in the Task Team Agreements.
181 *MFC v Joubert* par 20; Scholtz ed par 11.3.3.2.
182 *MFC v Joubert* par 23.
183 *MFC v Joubert* par 23.
184 *MFC v Joubert* par 20. See Ch 2 par 3.2 for a comprehensive discussion of the validity of a forced voluntary surrender process under section 127 of the National Credit Act.
185 The facts in *Sansom* were discussed comprehensively in ch 3 par 3.3.3 above.
186 *Sansom* par 38.

4.5 Example from practice

The following example demonstrates how magistrates' courts apply the repayment term guidelines of the Task Team Agreements.

In case number 5528/2017 in the Mogale City Magistrate's Court, held at Krugersdorp, the application was postponed on 27 November 2017 so that the debt counsellor could lower the repayment terms on various accounts to below 60 months.[187] The debt counsellor was requested to lower the following proposed repayment terms[188]:

Account	Balance	Proposed repayment term
Capitec Bank Ltd	50 631.00	75
ABSA Bank Ltd	83 726.14	78
Price 'n Pride	19 793.08	75
Lewis Stores (Pty) Ltd	38 063.00	76
Nedbank Ltd	17 924.38	72

The concern was that the credit providers had consented to the above repayment terms and, in certain instances, to even longer repayment periods. Capitec Bank Ltd had issued a consent letter for a repayment period of 94 months.[189] Nedbank Ltd had issued a consent letter for a repayment period of 83 months[190], and ABSA for a repayment period of 103 months.[191] The acceptance letter received by the debt counsellor for Price 'n Pride indicated that the restructuring was accepted until the debt was settled in full.[192] The Lewis Stores (Pty) Ltd acceptance letter also did not accept a specific repayment term, but accepted the restructuring of the debt counsellor.[193] Consequently, despite obtaining consent from all the credit providers, the debt counsellor was still ordered to renegotiate and obtain lower repayment terms.

[187] The original court file is available for inspection at the Mogale City Magistrate's Court, held at Krugersdorp under case number 5528/2017 (hereinafter "Case 5528/2017"). I also reviewed the court report received by the debt counsellor.
[188] Case 5528/2017 draft court order with reference number 22/11/2017.
[189] Case 5528/2017 Founding Affidavit Annexure F11 40.
[190] Case 5528/2017 Founding Affidavit Annexure F24 53.
[191] Case 5528/2017 acceptance letter filed with draft order with reference number 22/11/2017.
[192] Case 5528/2017 acceptance letter filed with draft order with reference number 22/11/2017.
[193] Case 5528/2017 acceptance letter filed with draft order with reference number 22/11/2017.

4.6 The 2019 National Credit Amendment Act

As discussed earlier, section 86(7)(c)(ii)(ccA) of the 2019 National Credit Amendment Act provides for an interest rate amendment for a period not exceeding five years, or the prescribed period.[194] In my view, one possible interpretation of section 86(7)(c)(ii)(ccA), read with section 86A(6)(d) of the 2019 National Credit Amendment Act, is that the repayment term on a debt review order may not exceed five years or the prescribed period. A second possible interpretation is that the debt review order may exceed five years or the prescribed period, on the condition that the contractual interest rate will again become applicable to the debt after the five year period or the prescribed period.

In my view, the first suggested interpretation is too strict. The reason for my position is that, to ensure a debt is paid within a five-year period, the consumer will have to commit to a specific instalment. For instance, let us consider a debt of R100 000 to be repaid at a 0% interest rate over a five-year period (60 months). In this example, the consumer would have to pay a minimum of R1 666.67 per month.[195] If the consumer cannot afford the instalment of R1 666.67, he would be excluded from debt review as a debt alleviation measure.

4.7 Preliminary findings

The National Credit Act only provides for the extension of the repayment term of a credit agreement under debt rearrangement, and fails to prescribe any specific period for the term extension. The Task Team Agreements contains guidelines for the maximum restructured term towards which debt counsellors should strive. Despite the fact that the Task Team Agreements contains non-binding guidelines, the practical example discussed in paragraph 4.5 clearly demonstrates that magistrates apply the provisions pertaining to repayment terms as law, and not as a non-binding guideline. In the particular practical example, the magistrate also chose not to consider the fact that the credit providers had consented to repayment terms longer than the recommended terms of the Task Team Agreements.

The Credit Agreements Act had previously provided for specific repayment terms on all credit agreements. The purpose was to ensure that consumers were not indebted for extended periods. The National Credit Act does not contain any similar provisions.

[194] See also Scholtz ed par 11.3.3.2.
[195] R100 000 divided by 60 months (12 months multiplied by 5).

However, one possible interpretation of section 86(7)(c)(ii)(ccA) of the 2019 National Credit Amendment Act is that debt restructuring will, in future, be limited to five years, or to a period that will be prescribed.

The 2019 National Credit Amendment Act, in this regard, is again drafted without certainty, which will delay the finalisation of deb review referrals. If the interpretation of section 86(7)(c)(ii)(ccA) of the 2019 National Credit Amendment Act is correct – that all debt must be settled within five years (which would be impossible on mortgage bonds, for example), consumers may be excluded from the remedies of debt review if they cannot make offers that will allow settlement within five years.

The judgment in *Sansom*, provides the necessary guidance – a too broad and overarching approach, including consideration of interest rate concessions, that does not allow for exceptions will not achieve an equitable and fair result. Both the National Credit Act and the 2019 National Credit Amendment Act, firstly, fail to provide distinguishable time periods for reasonable debt rearrangement for secured and unsecured debt. Secondly, both fail to recognise the significance of the debt counsellor, the consumer, and the credit provider reaching settlement on the aspects of rearrangement, specifically in this regard the repayment term.

5 *In duplum*

5.1 Introduction

In section 103(5) of the NCA, the legislature captures the statutory *in duplum* rule as follows:

> Despite any provision of the common law or a credit agreement to the contrary, the amount contemplated in section 101(1)(b) to (g) that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the default occurs.

The statutory *in duplum* rule provides that, when a consumer is in default under a credit agreement, all the costs of credit listed in section 101(1)(b) to (g) may not accrue beyond the outstanding balance of the principle debt at the time at which the default occurred.[196] The items that may be charged as costs of credit under a credit agreement in terms of section 101(1)(b) to (g) are:

[196] See Kelly-Louw "The statutory *in duplum* rule as an indirect debt relief mechanism" 2011 *SA Merc LJ* 352; Friedman and Otto "Section 103(5) of the National Credit Act 34 of 2005 as inspired by the

(b) an initiation fee, which –
  (i) may not exceed the prescribed amount relative to the principal debt; and
  (ii) must not be applied unless the application results in the establishment of a credit agreement with that consumer;
(c) a service fee, which –
  (i) in the case of a credit facility, may be payable monthly, annually, on a per transaction basis or on a combination of periodic and transaction basis; or
  (ii) in any other case, may be payable monthly or annually; and
  (iii) must not exceed the prescribed amount relative to the principal debt;
(d) interest, which –
  (i) must be expressed in percentage terms as an annual rate calculated in the prescribed manner; and
  (ii) must not exceed the applicable maximum prescribed rate determined in terms of section 105;
(e) cost of any credit insurance provided in accordance with section 106;
(f) default administration charges, which –
  (i) may not exceed the prescribed maximum for the category of credit agreement concerned; and
  (ii) may be imposed only if the consumer has defaulted on a payment obligation under the credit agreement, and only to the extent permitted by Part C of Chapter 6; and
(g) collection costs, which may not exceed the prescribed maximum for the category of credit agreement concerned and may be imposed only to the extent permitted by Part C of Chapter 6.

Thus, under the statutory *in duplum* rule, the charges that may accrue whilst the consumer is in default are limited. The statutory *in duplum* rule is applicable to all credit agreements that fall within the ambit of the NCA.[197] A juristic person is excluded from the application of the statutory *in duplum* rule.[198]

The statutory *in duplum* rule contains both similarities and dissimilarities to the common law *in duplum* rule. Under the common law *in duplum* rule, interest will cease to accrue when the unpaid interest equals the outstanding capital.[199] The effect of the common law *in duplum* rule is that, once unpaid interest has accrued to an amount equal to the outstanding capital balance, interest will stop accruing, and, when a payment is made to reduce the outstanding balance, thereby reducing the accrued interest to an amount below the outstanding balance, the interest will again start to

common-law *in duplum* rule (1)" 2013 *THRHR* 132 and "Section 103(5) of the National Credit Act 34 of 2005 as inspired by the common-law *in duplum* rule (2)" 2013 *THRHR* 361; Scholtz ed par 10.6.4; Otto and Otto 100.

[197] See ss 4-10; Kelly-Louw 2011 *SA Merc LJ* 352; Friedman and Otto 2013 *THRHR* 361.

[198] S 6; Kelly-Louw 2011 *SA Merc LJ* 352; Friedman and Otto 2013 *THRHR* 361.

[199] For a comprehensive discussion of the common-law *in duplum* rule, see Sonnekus "Limitering van renteheffing en die *ultra duplum*-reël: 'n evaluering van die historiese ontwikkeling van die reël en die vermeende oogmerk daaragter (Deel 1)" 2012 *TSAR* 247 en "Limitering van renteheffing en die *ultra duplum*-reël: 'n evaluering van die historiese ontwikkeling van die reël en die vermeende oogmerk daaragter (Deel 2)" 2012 *TSAR* 387; Kelly-Louw "Better consumer protection under the statutory *in duplum* rule" 2007 *SA Merc LJ* 337. See also Kelly-Louw 2011 *SA Merc LJ* 352; Friedman and Otto 2013 *THRHR* 361; Scholtz ed par 10.6.4; Otto and Otto 100.

accrue until an amount equal to the outstanding balance is reached.[200] The purpose of the common law *in duplum* rule is to protect a debtor against perpetual debt.[201] The statutory *in duplum* rule has the same aim.[202]

However, the statutory *in duplum* rule curbs the total cost of credit under the credit agreement, whilst the common law *in duplum* rule only curbs the interest accrual under the credit agreement.[203] Kelly-Louw explains the differentiation as due to the statutory rule being a substantive expansion of the common law, and notes that there are procedural differences in their application, and that the statutory rule provides better consumer protection.[204] Any further reference to "*in duplum*" in further discussions is to the statutory rule, unless indicated otherwise.

An example from practice will serve as the background against which the application of the *in duplum* rule within the context of debt review will be considered. The purpose of this discussion is to address the following questions:

- May the in *duplum rule* be applied to a rearrangement proposal under section 86?
- Is a consumer subject to a debt rearrangement proposal in default under the credit agreement for the purposes of section 103(5)?

The following points may be relevant to a comprehensive answer to the *in duplum* question in the context of debt review, but will not be discussed in this study:

- In the context of the legal position surrounding the application of *in duplum pendente lite*, the question should be addressed what the principle debt is, for the purposes of the calculation of interest on a credit agreement subject to a rearrangement order.[205]

[200] Sonnekus 2012 *TSAR* 247; Sonnekus 2012 *TSAR* 387; Friedman and Otto 2013 *THRHR* 361; Kelly-Louw 2011 *SA Merc LJ* 352; Scholtz ed par 10.6.4.
[201] Sonnekus 2012 *TSAR* 247; Sonnekus 2012 *TSAR* 387; Friedman and Otto 2013 *THRHR* 361; Kelly-Louw 2011 *SA Merc LJ* 352; Scholtz ed par 10.6.4.
[202] Friedman and Otto 2013 *THRHR* 361; Kelly-Louw 2011 *SA Merc LJ* 352; Scholtz ed par 10.6.4.
[203] Friedman and Otto 2013 *THRHR* 361; Kelly-Louw 2011 *SA Merc LJ* 352; Scholtz ed par 10.6.4.
[204] Kelly-Louw 2011 *SA Merc LJ* 352; Scholtz ed par 10.6.4.
[205] For a comprehensive discussion of *in duplum pendente lite*, see Otto "Die ultra duplum-reël haal die Konstitusionele Hof na meer as 2000 jaar – *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2015 3 SA 479 (KH) 1" 2015 *THRHR* 863; Rautenbach "Vonnisbespreking: die toepassing van die gemeenregtelike *in duplum*-reël tydens gedingvoering, grondwetlike proporsionaliteit en die skeiding van magte *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2015 5 BCLR 509 (KH)" 2015 *Litnet* 789; Vessio "*In duplum* and the lump-sum loan: the common law and section 103(5) of the National Credit Act" 2019 *SALJ* 463.

- It is a common occurrence during restructuring that the credit provider will consent to a reduced interest rate. This study will not address the question whether interest for purposes of *in duplum* is to be calculated in terms of the contractual or amended interest rate.
- The study will advance the position that the *in duplum* rule is applied to a rearrangement order as a form of relief, and will therefore not address the question of the point in time that the default occurs on a credit agreement subject to a rearrangement order.
- The obligations of the role players (i.e. the debt counsellor and the court) to address a contravention of *in duplum* on a credit agreement subject to a restructuring order will not be considered.[206]
- The interaction between calculating the cost of credit given to a consumer when a credit agreement is entered into and when the *in duplum* rule applies will also not be discussed.

To guide the discussion on *in duplum* and debt review, an example from practice provided first.

5.2 Example from practice

In case number 6498/2015 in the Pretoria-North Magistrate's Court for the district of Tshwane, one of the credit providers in the original section 86 application lodged a variation application under Magistrate's Court Rule 49 during 2018.[207] In the matter, the credit provider sought to have the debt review order varied under Magistrate's Court Rule 49(7).[208] The apparent reason for specific reliance on this rule was that the court has the power to vary or rescind any judgment if it is satisfied that there is good reason to do so.

The first ground on which the credit provider in Case 6498/2015 sought to vary the granted order was that the monthly instalment was less than the interest that was

[206] For a discussion, see Kelly-Louw 2011 *SA Merc LJ* 352 and Campbell "The excessive cost of credit on small money loans under the National Credit Act 34 of 2005" 2007 *SA Merc LJ* 251.
[207] The original court file, containing the rescission application, is available for public inspection at the Magistrate's Court for the district of Tshwane North, held at Pretoria North under case number 6498/2015 (hereinafter "Case 6498/2015").
[208] Case 6498/2015 Founding Affidavit par 2.

accruing on the account, causing a state of perpetual debt for the consumer.[209] The credit provider also expressed the following point of view in paragraph 9.4 of its Founding Affidavit:

> It is respectfully submitted that, to the extent that it is sought to be argued that the Order will solve by the application of the *in duplum* rule, same is untenable in law. Further legal argument will be advanced on this point at the hearing of the matter.

The credit provider thus sought variation of the debt review order on two grounds. First, that the instalment that was catered for in the order was less than the monthly interest accruing on the outstanding balance; and, secondly, that a debt review order that relies on the *in duplum* rule for its efficacy is not competent under the Act.[210] The credit provider relied strongly on the argument that, to subject the credit agreement to the *in duplum* rule was a deprivation of its rights under section 25 of the Constitution.[211] The credit provider further argued that the *in duplum* rule was no longer applicable to the credit agreement, as the consumer was no longer in default.[212] The view of the credit provider was that, should the Court find that the default still existed, subjecting it to the *in duplum* rule would be grossly unfair, and will not advance the purpose of the Act.[213]

The debt counsellor opposed the above rescission application, and, following the filing of the Opposing Affidavit by the debt counsellor, a settlement between the debt counsellor and credit provider was negotiated.[214] The credit provider issued an acceptance letter on the terms of the restructuring order it initially sought to vary.[215] The credit provider proceeded with the variation application, and an order was granted to incorporate the acceptance letter of the credit provider.[216] However, the variation did not alter the instalment amount specified in the original rearrangement order.[217]

The following two questions emerge from Case 6498/2015:

- Is a debt rearrangement order under section 86 subject to the *in duplum* rule?

[209] Case 6498/2015 Founding Affidavit pars 9.1-9.4. See also *Sansom* par 26.
[210] Case 6498/2015 Founding Affidavit par 9.6.
[211] Case 6498/2015 Founding Affidavit par 11.2.
[212] Case 6498/2015 Founding Affidavit par 14.2 subpoint c on 15.
[213] Case 6498/2015 Founding Affidavit par 14.2 subpoint d on 15.
[214] Case 6498/2015 Notice of Intention to Oppose.
[215] Case 6498/2015 Variation Order.
[216] Case 6498/2015 Variation Order.
[217] Case 6498/2015 Variation Order.

- Is a consumer subject to a debt rearrangement order under section 86 in default for the purposes of *in duplum* in terms of section 103(5)?

5.3 Rearrangement proposals and *in duplum*

5.3.1 Introduction

Any credit agreement under the National Credit Act is subject to all the provisions of the Act, unless the operationalisation of a provision is specifically excluded.[218] Section 103(5) does not create any exclusions.[219] The question that must be addressed is whether rearrangement of a credit agreement exempts said credit agreement from the application of section 103(5).

5.3.2 Task Team Agreements

The Regulator advises debt counsellors to employ a software system that applies the *in duplum* rule in preparing debt-restructuring proposals.[220] Thus, the view of the Regulator is that the requirements to apply *in duplum* are present during the debt review process, and it should therefore be applied to the rearrangement order.

5.3.3 *Case law*

5.3.3.1 Nedbank Declarator and *Nedbank Appeal*

The Court in the *Nedbank Declarator* dealt specifically with the interpretation of section 103(5), read with section 101(1)(b) to (g).[221] The court held that, upon proper interpretation, the charges that accrue under section 101(1)(b) to (g) may not exceed an amount equal to the unpaid balance of the principal debt at the date of default, and that payments made by die consumer do not entitle the credit provider to again levy charges under section 101(1)(b) to (g).[222]

Understandably, the credit providers did not find the aforementioned interpretation favourable, and an appeal was lodged against the declaratory order made with regard to the interpretation of section 103(5). The Supreme Court of Appeal heard the matter

[218] An example of such exclusion is the suspension of the right of a credit provider to enforce a credit agreement by way of litigation or any other judicial process as provided for by s 88(3).
[219] See s 103(5) quoted in par 5.1.
[220] Task Team Agreements Annexure C 5.
[221] *Nedbank Declarator* 43.
[222] *Nedbank Declarator* 43.

of the *Nedbank Appeal*. The Regulator argued before the court that credit providers had interpreted section 103(5) as a codification of the common-law *in duplum* rule, and proceeded to levy charges, specifically interest, as soon as payment was made on an account in default.[223]

The Supreme Court of Appeal held two aspects of the common-law *in duplum* rule to be relevant to the interpretation of section 103(5).[224] The first was that, under the common-law *in duplum* rule, unpaid interest will cease to accrue once the interest amount equals the outstanding balance of the capital debt, and that interest may again accrue once a payment is made.[225] The second was that the *in duplum* rule is suspended pending litigation, and that the *lis* commences with service of the initial process.[226] Each credit provider that appealed against the *Nedbank Declarator* had differing views on how section 103(5) should be interpreted.[227]

The Supreme Court of Appeal addressed the interpretation question by first applying the objects of the Act.[228] The objects that the court found to be of specific importance were the encouragement of responsible borrowing, avoidance of over-indebtedness, and fulfilment of financial obligations by consumers.[229] The Court also referred to the promotion of equity in the credit market through the balancing of the rights and responsibilities of consumers and credit providers, and the promotion of responsibility in the credit market through a harmonised system of debt restructuring and enforcement, one which prioritises the eventual satisfaction of debt obligations.[230]

The court, in defining "responsible consumer obligations" referred to section 100(1)[231], which provides as follows:

> (1) A credit provider must not charge an amount to, or impose a monetary liability on, the consumer in respect of -
>
> (a) a credit fee or charge prohibited by this Act;
>
> (b) an amount of a fee or charge exceeding the amount that may be charged consistent with this Act;

223 *Nedbank Appeal* par 36.
224 *Nedbank Appeal* par 37.
225 *Nedbank Appeal* par 37.
226 *Nedbank Appeal* par 37. See discussion in Kelly-Louw 2011 *SA Merc LJ* 352.
227 *Nedbank Appeal* pars 40-44.
228 *Nedbank Appeal* par 44.
229 *Nedbank Appeal* par 44; s 3.
230 *Nedbank Appeal* par 44; s 3.
231 *Nedbank Appeal* par 43.

(c) an interest charge under a credit agreement exceeding the amount that may be charged consistent with this Act; or
(d) any fee, charge, commission, expense or other amount payable by the credit provider to any third party in respect of a credit agreement, except as contemplated in section 102 or elsewhere in this Act.

The court found that the interest provided for in a credit agreement must be consistent with the provisions of the Act.[232] The position of the court was that the interest rate levied in terms of a credit agreement must be "consistent" with the provisions of section 103, and that section 103 was expressly incorporated into a credit agreement to define the obligations of a consumer and the credit provider.[233] In support of this broad application of section 103, and specifically section 103(5), the court relied on section 103(5), which reads: "[d]espite any provision of the common law or a credit agreement to the contrary".[234]

The Court held that the credit provider has no contractual entitlement to interest, except as allowed for by section 103.[235] The finding was that section 103(5) is not only a moratorium on interest and cost accrual whilst the consumer is in default, but in actually defines the consumer's obligations towards the credit provider under a credit agreement.[236]

The next point of importance addressed by the Supreme Court of Appeal was the meaning of the word "accrue".[237] The Court found that the cost of credit contemplated in section 101(1)(b) to (g) accrues, whether it is paid or unpaid, as section 103(5) makes no distinction between unpaid and paid charges.[238] The conclusion of the Supreme Court of Appeal was that section 103(5) is not a moratorium on payment of the amounts contemplated in section 101(1)(b) to (g), but that section 103(5) prohibits the credit provider from obtaining an enforceable right in respect of the amounts contemplated in section 101(1)(b) to (g).[239]

The interpretation of the Supreme Court of Appeal reflects the notion that the Act makes available processes in terms of which the credit provider is prohibited from

[232] *Nedbank Appeal* par 47.
[233] *Nedbank Appeal* par 47.
[234] *Nedbank Appeal* par 47. See discussion in Kelly-Louw 2011 *SA Merc* LJ 352.
[235] *Nedbank Appeal* par 47.
[236] *Nedbank Appeal* par 47.
[237] *Nedbank Appeal* pars 48-49.
[238] Nedbank Appeal par 49.
[239] *Nedbank Appeal* par 49.

enforcing its contractual rights under the credit agreement.[240] Considering that the purpose of a debt rearrangement is also to prohibit the enforcement of contractual rights, my view is that there is justification for the application of both the *in duplum* rule and debt restructuring to a credit agreement to offer a consumer protection in respect to the enforcement of the contractual rights in terms of the said credit agreement.

5.3.3.2 *Firstrand Bank Ltd v Munsamy*[241]

In *Munsamy*, the consumer opposed summary judgment on her mortgage bond, and applied for the resumption of a terminated debt review application in terms of section 86(11).[242] In addressing the question whether successful rearrangement would be possible if resumption were ordered in terms of section 86(11), the Court touched on the application of the *in duplum* rule to a rearrangement proposal.[243]

In casu a rearrangement proposal was presented to the Court in terms of which the mortgage bond would be settled in a reasonable period despite an initial low instalment.[244] The court held that the rearrangement proposal was flawed, as it was dependent on the application of the *in duplum* rule.[245]

The Court noted that the reason why the proposal would solve in 282 months as proposed is because on the calculation done by the debt counsellor, the consumer would have paid R3 486 950.90 by month 282 on the current outstanding balance of R1 734 475.45.[246] The court came to this conclusion because, at this point, the loan would be deemed settled, as the outstanding balance of R1 734 475.45 and interest of R1 734 475.45 (limited due to *in duplum*) had been paid. However, if the *in duplum* rule had been disregarded, the unpaid balance on the bond after 282 months would be R8 795 313.24.[247] From the judgment, it is assumed that Rogers AJ calculated the unpaid balance with consideration of the R3 486 950.90, which would have been paid during the 282 months. The Court held that, if the debt counsellor did in fact apply *in*

[240] See the discussion in par 5.4.
[241] [2013] ZAWCHC 13 (hereinafter "*Munsamy*").
[242] *Munsamy* par 1.
[243] *Munsamy* par 20.
[244] *Munsamy* par 22.
[245] *Munsamy* par 22.
[246] *Munsamy* par 22.
[247] *Munsamy* par 22.

duplum correctly, the credit provider would be deprived of interest in the amount of R8 795 313.34.[248]

In spite of the rather detailed excursion into the application of the *in duplum* rule, the court held that the possible application of the *in duplum* rule to a debt rearrangement proposal remains open.[249] The Court also gave no definitive answer as to whether a consumer under debt review would be in default under section 103(5).[250]

The Court in *Munsamy* further held that, if the position were that a consumer remained in default, it would be substantially prejudicial towards a credit provider by depriving the credit provider of interest.[251] The court further noted that, if a proposal is to be prepared with application of the *in duplum* rule, the proposal must at least quantify the amounts in question.[252] However, the court took the stance that the question whether a proposal could be accepted to which the *in duplum* rule had been applied was not one the court had to decide.[253] The conclusion of the court was that credit providers and the court are entitled to be informed of the consequences of the application of the *in duplum* rule to the proposal, as it is certainly relevant in determining whether the proposal being presented is reasonable.[254] *Munsamy* consequently offered no rule cast in stone pertaining to application of the *in duplum* rule to a rearrangement proposal.

5.3.3.3 *Jones*

In *Jones*, the credit provider attempted to obtain a declaratory order from the Western Cape High Court that section 103(5), as well as the common-law *in duplum* rule, is not applicable when a consumer's obligations have been rearranged in terms of section 87(1)(b)(ii) and the consumer is in compliance with the restructuring order.[255] The court did not grant the declaratory relief, on the basis that the relief sought had never been

[248] *Munsamy* par 22.
[249] *Munsamy* par 23.
[250] *Munsamy* par 23.
[251] *Munsamy* par 23.
[252] *Munsamy* par 23.
[253] *Munsamy* par 24.
[254] *Munsamy* par 24.
[255] *Jones* par 33.

incorporated in the application before the court, and seemed to be an afterthought that emerged during the preparation for and presentation of the case.[256]

5.3.4 *In duplum* as a form of debt relief

Considering the aforementioned, my view is that *in duplum* is applied to a restructuring order as a form of further consumer protection. Kelly-Louw also advances the position that the *in duplum* rule is an indirect debt relief mechanism for consumers in default under a credit agreement.[257]

The only conclusion one can make is that the application of the *in duplum* to a restructuring proposal is a secondary form of debt relief, termed "indirect debt relief" by Kelly-Louw.[258] Vessio extends the argument that *in duplum* is an issue of public interest, and the application thereof should be to protect debtors from over-extension by credit providers.[259] Kelly-Louw holds that the argument of Vessio is also applicable to the statutory *in duplum* rule.[260] Both Kelly-Louw and Campbell advance the position that the purpose of the *in duplum* rule is a remedy for victims of expensive credit.[261] The *in duplum* rule can be raised by a consumer as defence, and the Court has a duty to consider its application.[262]

One must also consider that too broad an application of *in duplum* may be an unlawful deprivation of the interest to which the credit provider is entitled in terms of the credit agreement.[263]

Before the question of default is addressed, it is important to consider what the effect of a debt rearrangement order is on a credit agreement.

256 *Jones* par 33.
257 Kelly-Louw 2011 *SA Merc LJ* 352.
258 Kelly-Louw 2011 *SA Merc LJ* 352.
259 Vessio "A short discussion on the effects of the in duplum rule upon commencement of litigation and after judgment: a view both 'inside' and 'outside' the National Credit Act" 2019 *Obiter* 725; Kelly-Louw 2011 *SA Merc LJ* 352.
260 Kelly-Louw 2011 *SA Merc LJ* 352.
261 Kelly-Louw 2011 *SA Merc LJ* 352; Campbell 2007 *SA Merc LJ* 251.
262 F & I Advisors (Edms) Bpk en 'n ander v Eerste Nasionale Bank van Suidelike Afrika Bpk 1999 (1) SA 515 (SCA) (1998-09-10) par 20; Kelly-Louw 2011 *SA Merc LJ* 352; Campbell 2007 *SA Merc LJ* 251.
263 In Case 6498/2015, the credit provider strongly relied on the argument that the application of *in duplum* to a restructuring order unlawfully deprived it of its rights under section 25 of the Constitution. For a comprehensive discussion of the effect of curbing the rights of credit providers, see Wallis "Commercial certainty and constitutionalism: are they compatible?" 2016 *SALJ* 545.

5.4 The effect of a debt rearrangement order on a credit agreement

5.4.1 Introduction

The essential question that is addressed in this section is whether a debt review order cures any default on the original credit agreement by way of rearrangement in terms of section 86 of the National Credit Act. It is trite that a debt rearrangement order does not novate any of the contractual terms of a credit agreement, and is only a bar against enforcement of the contractual rights of the credit provider.[264] However, in *Coetzee v Nedbank*, the Tribunal held that the granting of a rearrangement order cures any default under the credit agreement.[265] The Tribunal held that the consequence hereof is that the *in duplum* rule is not applicable.[266]

In my view, it is not possible for the rearrangement order to cure the default under a credit agreement without accepting that the rearrangement order has novated the credit agreement. This can be explained by way of an example:

- B enters into a credit agreement with C Bank, in terms of which B will repay an amount of R1 000 per month.
- B applies for debt review, and a rearrangement order is granted, in terms of which B must repay only R750 per month. Should one accept that the rearrangement order does not novate the terms of the credit agreement, as is discussed in detail below, it means that every month that B only pays R750, he is in default under the credit agreement. However, C Bank is prohibited from enforcing its right to receive R1 000 per month, due to the rearrangement order.
- However, the only conclusion is that B remains in default for the duration that the credit agreement's terms are being breached. The only way in which B would not be in breach of the credit agreement is if the credit agreement is altered to provide that B only has to pay R750 per month.

[264] S 88(3); *Firstrand Bank Ltd formerly known as First National Bank of Southern African Ltd v Fester and Another* [2011] ZAWCHC 363 (hereinafter "*Fester*"); *Firstrand Bank v Fillis and Another* 2010 (6) SA 565 (ECP) (2010-2017) par 569 G-570C; Scholtz ed pars 11.3.3.4 and 11.3.3.6.
[265] NCT 21237/2015/141(1)(B) (2017-03-24) (hereinafter "*Coetzee*"); Scholtz ed par 11.3.3.6.
[266] *Coetzee* as discussed in Scholtz ed par 11.3.3.6.

5.4.2 National Credit Act

Section 88(3) of the National Credit Act provides as follows:

> (3) Subject to section 86(9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86(4)(b)(i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until –
> (a) the consumer is in default under the credit agreement; and
> (b) one of the following has occurred:
> (i) An event contemplated in subsection (1)(a) through (c); or
> (ii) the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal.

Once a consumer defaults under a debt rearrangement order, the debt review automatically terminates, and the statutory bar against litigation is lifted.[267] However, to proceed to enforce litigation, the consumer must also be in default under the credit agreement.[268] The construction of section 88(3) sets default on the credit agreement as the first jurisdictional requirement, creating the impression that the default under the credit agreement must exist before the rearrangement order is breached.[269]

If we assume the position that the rearrangement order cures the default under the credit agreement whilst the rearrangement order is being complied with, then the consumer would be entitled to cure the default on the credit agreement on the terms of the rearrangement order. The reason for the aforesaid is that this assumption is dependent thereon that the debt rearrangement is a novation of the terms of the credit agreement. However, the case law discussed in paragraph 5.4.1 makes it clear that this is not possible.

Another difficulty with the assumption that a debt rearrangement order cures default is that the terms of the debt rearrangement order would result in a novation of the credit agreement with terms that are more favourable towards the consumer (being a lower instalment and lower interest rate, repaid over a longer period). Section 116 of the NCA provides as follows:

> Any change to a document recording a credit agreement or an amended credit agreement, after it is signed by the consumer, if applicable, or delivered to the consumer, is void unless–
> (a) the change reduces the consumer's liabilities under the agreement;
> (b) after the change is made, unless the change is effected in terms of section 119(1)(c), the consumer signs or initials in the margin opposite the change;
> (c) the change is recorded in writing and signed by the parties; or
> (d) any oral change is recorded electromagnetically and subsequently reduced to writing.

Should the consumer default on the debt rearrangement order, the credit provider would be prohibited from enforcing the original contractual terms, as the original

[267] *Fester* par 5.
[268] S 88(3)(a).
[269] S 88(3)(a).

contractual terms will not necessarily reduce the liabilities of the consumer, and the credit provider would have to obtain a written amended credit agreement from the consumer. The credit provider would consequently have to enforce the credit agreement on the terms of the debt rearrangement order. It could not have been the intention of the legislature to compromise the contractual capacity of a credit provider in such a manner.

5.4.3 Case law

In *Firstrand Bank v Evans*[270], the Court dealt with the question whether a rearrangement order can alter the contractual obligations of a consumer under a credit agreement.[271] The Court held that the only purpose of the rearrangement order was to preclude a credit provider from pursuing the contractual rights afforded to it under the credit agreement.[272] The position was made clear that, when a rearrangement order lapses, the credit provider is in no way bound to issue its claim on the basis of an amended credit agreement, and that only the bar against pursuing its contractual rights is lifted.[273] The position was later confirmed as correct by the Constitutional Court in *Ferris and Another v Firstrand Bank Ltd*.[274] The case law is clear that the consequences of a rearrangement order is not novation of the credit agreement. The question to be asked is whether it is at all possible to cure the default under a credit agreement if a credit agreement is subject to a rearrangement order.

5.5 Curing default on a credit agreement in terms of section 129(3)

5.5.1 Introduction

Assuming that *in duplum* is applied to a rearrangement order, the question is whether *in duplum* can be waived by curing the apparent default. One must start with considering that section 129(3) affords a consumer the right to remedy default under a credit agreement. Section 129(3), as amended, provides as follows:

> Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such agreement by paying to the credit provider all amounts

[270] 2011 (4) 597 (KZD) (2011-03-18) (hereinafter "Evans") par 36.
[271] *Evans* par 35; Scholtz ed par 11.3.3.6.
[272] *Evans* par 35; Scholtz ed par 11.3.3.6.
[273] *Evans* par 35; Scholtz ed par 11.3.3.6.
[274] [2013] ZACC 46 par 16; Scholtz ed par 11.3.3.6.

> that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.

The application of the *in duplum* rule is dependent on the consumer being in default under a credit agreement. However, it is factually possible for a consumer to remedy a default under a credit agreement by way of a restructuring order. This is not to be confused with the argument above, that the mere existence of the restructuring order remedies the default.

The situation that must be considered is when a consumer, through the payments on the debt rearrangement order, settles the arrears on the credit agreement. Due to the cascading effect employed by most debt counsellors, a consumer will often, after a few years, especially on a mortgage bond, pay much more than the original contractual instalment. It is not inconceivable that these increased payments may settle any arrears under the credit agreement. Factually, it may be possible for all of the arrears to be settled, but does this mean that the default has been remedied?

5.5.2 *Nkata*

The Constitutional Court considered the issue of a consumer remedying a default under a credit agreement in the matter of *Nkata*.[275] What is of importance from this judgment is the interpretation of "all amounts that are overdue", in section 129(3).[276] The decision in *Nkata* dealt with the interpretation of section 129(3) prior to the 2014 amendments.[277]

The point of departure is that one must prove that there is a default on the credit agreement subject to a restructuring order, that is, that there is a breach of the contractual terms and conditions. The most obvious contractual term that could be breached due to a rearrangement order is the servicing of a specific agreed monthly instalment. The payments in terms of the restructuring order will, at the very least, be for reduced instalments.[278] The reduced instalments will result in arrears under the credit agreement, and eventually trigger the acceleration clause in the credit

[275] See Ch 2 par 3.4.2 for a comprehensive discussion of *Nkata*.
[276] *Nkata* pars 108-109; Scholtz ed par 12.10.
[277] See the National Credit Amendment Act 19 of 2014, which became effective on 2015-03-13.
[278] S 86(7)(c)(ii).

agreement (if agreed on). An acceleration clause allows a credit provider to claim the entire outstanding balance when the consumer breaches the credit agreement.[279]

The majority judgment in *Nkata* was that, in spite of the acceleration clause, the consumer did not have to settle the full accelerated debt, but merely the arrears, to reinstate the credit agreement, in other words, to remedy the default.[280]

Traditionally, once the acceleration clause had been triggered, the full outstanding amount had to be paid by the consumer.[281] However, as was held in *Nkata*, this accelerated amount is not absolute.[282]

Consequently, it could be argued that, once the consumer subject to a restructuring order has settled the arrears, *in duplum* should no longer be calculated into the restructuring order, and that interest and other costs may be added again, as the consumer cured the default under section 129(3). I am of the view that this is incorrect, as the credit provider is prohibited by the debt rearrangement order from enforcing the credit agreement.[283]

5.6 2019 National Credit Amendment Act

As discussed above,[284] section 86(7)(c)(ii)(ccA) of the 2019 National Credit Amendment Act empowers a magistrate's court to determine the maximum rate of interest, fees, and other charges during debt review. The charges contemplated under section 101(1)(e), being the costs of credit insurance, are excluded.[285]

The purpose of *in duplum* is to limit the maximum amount of interest, fees, and other charges that may be collected from a consumer. Therefore, my interpretation of 86(7)(c)(ii)(ccA) of the 2019 National Credit Amendment Act is that *in duplum* must be applied to a debt review order.

279 Scholtz ed par 9.2.1.
280 *Nkata* pars 108-109; Scholtz ed par 12.10.
281 *Nkata* par 59.
282 *Nkata* pars 108-109; Scholtz ed par 12.10.
283 S 88(3).
284 Ch 3 par 3.5. See also Scholtz ed par 11.3.3.2.
285 See s 86(7)(c)(ii)(ccA) of the 2019 National Credit Amendment Act.

5.7 Preliminary findings

The practical example discussed in paragraph 5.2 demonstrates the result of the failure of the National Credit Act to regulate which rules, in this instance *in duplum*, must be applied by debt counselling software programs. The Task Team Agreements recommends the application of *in duplum*, but the guidelines are non-binding. Therefore, the debt counsellor is not legally bound to apply the rule, and the credit provider is not legally bound to accept the application of the rule. Uncertainty regarding the application of *in duplum* causes debt reviews to be referred back to courts for reconsideration, and further delays may result from applications being opposed by credit providers seeking exemption from the *in duplum* application.

The National Credit Act does not specifically confirm the application of *in duplum* to debt rearrangements. Therefore, the requirement for the application of section 103(5) is whether the consumer is in default under the credit agreement. The Tribunal decision of *Coetzee v Nedbank* held that a rearrangement order cures any default under a credit agreement, and that *in duplum* should not be applied to debt rearrangement orders. This decision is not correct.

For a consumer to cure default of all the original terms of the credit agreement whilst subject to a debt rearrangement order, it must be assumed that the terms of the debt rearrangement order are now the terms of the credit agreement. It is trite that a debt rearrangement order does not novate the terms of a credit agreement. The debt rearrangement order is only a bar against the credit provider enforcing the original terms of the credit agreement.

However, it is possible that a consumer may, whilst under debt rearrangement, settle the arrears and resume the contractual repayments. Especially if one considers section 129(3), it could be argued that *in duplum* is no longer applicable. However, section 129(3) is only applicable where debt enforcement has commenced, but the credit agreement has not been cancelled. In terms of section 88(3), the debt rearrangement order prohibits the credit provider from seeking debt enforcement, and, if debt enforcement proceedings cannot be instigated, the consumer cannot be entitled to the relief provided for in section 129(3).

Credit providers would prefer to not be subjected to *in duplum* during debt review proceedings, and will certainly continue to delay the finalisation of debt review proceedings by either opposing or seeking variation.

The 2019 National Credit Amendment Act may offer a solution, as the amount of interest, fees, and charges will, in the future, be determined by the magistrate's court under section 86(7)(c)(ii)(ccA), and this may be interpreted as confirmation of the application of *in duplum*. However, section 86(7)(c)(ii)(ccA) excludes the inclusion of credit insurance. Credit insurance is included in the calculation of *in duplum* under section 103(5), and this is an aspect that will have to be clarified as well.

In conclusion, neither the National Credit Act nor the 2019 National Credit Amendment Act confirms whether *in duplum* must be applied to debt rearrangement orders. *In duplum* is a valuable tool to assist those who have become over-indebted, and it is of the utmost importance that the legislature clarify the intention in terms of both of the aforementioned Acts.

6 Reckless credit

6.1 Introduction

The National Credit Act promotes responsible lending practices[286], and is an essential tool to prevent consumers from becoming over-indebted.[287] The National Credit Act prohibits the granting of reckless credit.[288] A reckless lending indicator report published in 2018 by a debt counsellor found that 2 255of 5 591 credit agreements of consumers seeking debt relief were reckless.[289]

Section 80(1) defines reckless credit according to three categories:

> (1) A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119 (4) –
>
> (a) the credit provider failed to conduct an assessment as required by section 81 (2), irrespective of what the outcome of such an assessment might have concluded at the time; or
> (b) the credit provider, having conducted an assessment as required by section 81 (2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that -
> (i) the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement; or
> (ii) entering into that credit agreement would make the consumer over-indebted.

[286] S 2; Scholtz ed par 11.6.1.
[287] Scholtz ed par 11.5.1.
[288] S 80; Scholtz ed par 11.6.2; Otto and Otto 89.
[289] "Debt counsellor flags high rates of apparent reckless lending" https://www.iol.co.za/personal-finance/debt/debt-counsellor-flags-high-rates-of-apparent-reckless-lending-16963393 (accessed 2019-04-11) (hereinafter "DebtSafe Reckless Lending Indicator").

There is no statutory obligation on a debt counsellor to investigate the possibility of reckless credit when conducting an over-indebtedness assessment, unless he was requested to do so by the consumer.[290] Section 86(6) of the Act states the following:

> (6) A debt counsellor who has accepted an application in terms of this section must determine, in the prescribed manner and within the prescribed time –
>
> (a) whether the consumer appears to be over-indebted; and
>
> (b) if the consumer seeks a declaration of reckless credit, whether any of the consumer's credit agreements appear to be reckless.

This part of the study is limited to the question whether a debt counsellor should investigate the possibility of reckless credit when conducting an over-indebtedness assessment.[291]

6.2 National Credit Act

6.2.1 General provisions

Section 83(1) of the National Credit Act empowers a magistrate's court to declare that a credit agreement reckless. Section 83(1) provides as follows:

> (1) Despite any provision of law or agreement to the contrary, in any court or Tribunal proceedings in which a credit agreement is being considered, the court or Tribunal, as the case may be, may declare that the credit agreement is reckless, as determined in accordance with this Part.

Section 86(7)(c)(i) empowers a debt counsellor to approach a magistrate's court to obtain a declaration of reckless credit in the following circumstances:

> (c) the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or both of the following orders—
>
> (i) that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless;

It is clear from section 86(6)(b) that only when required by the consumer must the debt counsellor investigate reckless credit. However, section 83(1) gives a magistrate's court or the Tribunal explicit powers to consider any credit agreement before it for

[290] S 86(6)(b); Scholtz ed par 11.5.1.

[291] For a comprehensive discussion of reckless credit, see Scholtz ed par 11.6; Boraine and Van Heerden "Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005" 2010 *THRHR* 650; Renke 2011 *THRHR* 208; Van Heerden and Boraine "The money or the box: perspectives on reckless credit in terms of the National Credit Act 34 of 2005" 2011 *De Jure* 392; Vessio "Beware the provider of reckless credit" 2009 *TSAR* 274.

possible reckless credit. The question to be answered is whether a magistrate hearing a debt rearrangement application under section 86 may consider the credit agreements for possible reckless lending.

6.2.2 Remedies for reckless credit

Section 83(2) and (3) of the National Credit Act describes the remedies available for reckless credit:

> (2) If a court or Tribunal declares that a credit agreement is reckless in terms of section 80(1)(*a*) or 80(1)(*b*)(i), the court or Tribunal, as the case may be, may make an order –
>
> (a) setting aside all or part of the consumer's rights and obligations under that agreement, as the court determines just and reasonable in the circumstances; or
>
> (b) suspending the force and effect of that credit agreement in accordance with subsection (3)(*b*)(i).
>
> (3) If a court or Tribunal, as the case may be, declares that a credit agreement is reckless in terms of section 80(1)(*b*)(ii), the court or Tribunal, as the case may be –
>
> (a) must further consider whether the consumer is over-indebted at the time of those proceedings; and
>
> (b) if the court or Tribunal, as the case may be, concludes that the consumer is over-indebted, the said court or Tribunal may make an order –
>
> (i) suspending the force and effect of that credit agreement until a date determined by the Court when making the order of suspension; and
>
> (ii) restructuring the consumer's obligations under any other credit agreements, in accordance with section 87.

The category of reckless credit will determine the remedy available.[292] The remedy to set aside the credit agreement is not available to the third category, and the remedy to restructure is not available to the first two categories.[293] Brits argues that all the remedies should be available to all the categories of reckless credit.[294] The aim of these remedies is to relieve the state of over-indebtedness of the victim. However, the Act also provides for measures to reprimand the guilty credit provider.[295]

Section 151(1) empowers the Tribunal to impose an administrative fine on a credit provider that has made itself guilty of prohibited conduct under the National Credit

[292] Brits "The National Credit Act's remedies for reckless credit in the mortgage context" 2018 (21) *PELJ* 7.
[293] Brits 2018 (21) *PELJ* 11.
[294] Brits 2018 (21) PELJ 11. See also discussion of case law in par 6.4.1, in which instance the magistrate's court ordered a restructuring order coupled with an order suspending the credit agreements declared reckless.
[295] Brits 2018 (21) *PELJ* 11.

Act.[296] The Tribunal is also empowered to de-register a credit provider found guilty of granting credit recklessly.[297]

6.3 The Task Team Agreements

The Task Team Agreements provides that:

> Debt Counsellors are obliged and encouraged, as part of the financial assessment, to identify reckless lending by Credit Providers and if such finding is made issue a proposal to the Magistrate Court [sic] to make an order, as per Section 86(7)(c)(i) of the NCA, that one or more of the consumer's credit agreements be declared reckless.[298]

The Task Team Agreements advises that the debt counsellor requires the following information to investigate reckless credit:

- proof of income of the consumer when the credit was granted[299];
- three months' bank statements prior to and subsequent to the granting of credit[300];
- the credit application completed by the consumer and the affordability assessment conducted by the credit provider[301]; and
- the credit agreement concluded between the consumer and credit provider.[302]

The proof of income and bank statements may be obtained from the consumer, and the credit application, affordability assessment, and credit agreement will be in possession of the credit provider, who, on receiving notice, must provide same to the debt counsellor within 20 businesses days.[303] The DebtSafe Reckless Lending Indicator revealed that, in most instances, credit providers fail to comply with the request of the debt counsellor for the documents required to investigate reckless lending.

[296] Brits 2018 (21) *PELJ* 12. *S*ee as an example of such a fine: *Shoprite*.
[297] S 44; Brits 2018 (21) *PELJ* 12.
[298] Task Team Agreements Annexure B 13.
[299] Task Team Agreements Annexure B 13.
[300] Task Team Agreements Annexure B 13.
[301] Task Team Agreements Annexure B 13.
[302] Task Team Agreements Annexure B 13.
[303] Task Team Agreements Annexure B 13. See further *Truworths Ltd and Others v Minister of Trade and Industry and Others* 2018 (3) SA 558 (WCC) 2018-03-16), where the affordability assessment per reg 23A(4), (5) and (7) where challenged and subsequently set aside. In such instance, one can therefore assume that proof of income and/or bank statements are thus no longer a requirement for the purposes of investigating reckless lending.

The position of the Regulator is clearly that reckless lending should be investigated by the debt counsellor during debt review and be referred to a magistrate's court for adjudication.[304] The Task Team Agreements recommends that, when the credit provider fails to provide the necessary information to conduct a reckless credit investigation, the debt counsellor's suspicion of reckless credit should be brought to the attention of the magistrate adjudicating the debt review.[305]

One must consider the practical implications of such a recommendation within the litigation arena. Let us assume that the debt counsellor brings a suspicion of reckless credit with no supporting documentation to the attention of a magistrate. The magistrate may then decide to make an order requiring the credit provider to either provide the documentation or defend the allegation.[306]

The credit provider is the party who has the most to lose in this instance.[307] The credit provider will instruct the best counsel money can buy to eloquently explain that the original assessment and agreements have been misplaced or were lost in a fire.[308] If there is the slightest possibility that the credit was, in fact, reckless, the credit provider will proceed to attack the debt review referral, because dismissal of same will ensure that the reckless lending investigation comes to naught.

When consumers apply for credit, they understate living expenses, to ensure that they appear to be financially capable of serving the loan.[309] In the event that any reckless credit is suspected, the credit provider will discredit the consumer in any manner possible.[310]

The debt counsellor is *dominus litis* in the debt review application, and his suspicion of reckless credit has now caused the credit provider to come before the court. The credit provider, especially if having been successful in having the debt review

[304] Task Team Agreements Annexure B 13.
[305] Task Team Agreements Annexure B 13.
[306] The order described is not given under any provision of the National Credit Act and, in my experience, is an oral direction to the debt counsellor to notify the credit provider to provide the document or defend reckless credit on request by the court.
[307] See as an example of such a fine: *Shoprite*.
[308] This is what transpired in *Absa Bank Limited v De Beer and Others* 2016 (3) SA 432 (2015-12-18) par 28 (hereinafter "*De Beer*"). See also the discussion of case law in par 6.4.2.
[309] *De Beer* par 45.
[310] See *Absa Bank v COE Family Trust and Others* 2012 (3) SA 184 (2010-09-01) par 6. See also the discussion of case law in par 6.4.1.

application dismissed, will request an order for the costs of entering an opposition.[311] Costs orders of this nature will deter debt counsellors from raising suspicions of reckless credit during debt review applications.

A final consideration is the additional costs that accompany an investigation of reckless lending. On 22 February 2018, the Regulator introduced a new fee category specifically for the investigation of reckless credit to the existing fee categories of debt counsellors.[312] This Reckless Lending Fee Category entails that, for a fee of R1 500, the consumer could request the debt counsellor to investigate the possibility of reckless credit.[313] The R1 500 includes the reckless credit assessment and the instruction to an attorney to draft an affidavit on the outcome of the assessment.[314] In September 2018, the Regulator gave notice of its intention to withdraw the Reckless Lending Fee Category, due to debt counsellors accepting the fee without conducting reckless credit assessments.[315] The Reckless Lending Fee Category has not been formally withdrawn by the Regulator.

6.4 Case law

6.4.1 *African Bank Limited v Neil Frans Roets and five others*[316]

African Bank appealed against the decision of the magistrate in the Magistrate's Court for the district of Madibeng (Ga-Rankuwa), in terms of which an account for which the debt counsellor (Roets) had applied for rearrangement was declared reckless in terms of section 80(1)(a).[317] The debt counsellor, in the application for debt rearrangement, stated that no order pertaining to reckless lending is sought, but the magistrate *mero motu* nevertheless investigated reckless lending.[318]

311 S 147 of the National Credit Act provides that each party will pay its own costs for proceedings before the Tribunal. However, there are circumstances under which a cost order may be made against the unsuccessful party.
312 Circular 1 of 2018 published by the Regulator, titled "The Debt Counselling Fee Guidelines 2018" dated Feb 2018 (hereinafter "Reckless Lending Fee Category").
313 Reckless Lending Fee Category.
314 Reckless Lending Fee Category.
315 Circular 8 of 2018 published by the Regulator, titled "Notice of Intention to withdraw the Reckless Lending Fee Category from the Debt Counselling Fee Guideline" dated Sep 2018.
316 Unreported judgment of the North West Division of the High Court in Mahikeng under case number CIV APP MG 13/16 (hereinafter "*African Bank*").
317 *African Bank* pars 1-2.
318 *African Bank* par 2.

In this matter, the consumer had declared substantially different expenses to the credit provider and the debt counsellor.[319] The consumer indicated to the debt counsellor that she paid rent in the amount of R1 900, but, to the credit provider, she had indicated that she lived with her parents.[320] The consumer declared an amount of R3 000 for groceries to the debt counsellor, but, to the credit provider, she had indicated that the amount was deducted from her salary.[321] In the debt review application, the consumer declared much higher living expenses than previously declared to the credit provider in the affordability assessment.[322] She also declared financial dependants to the debt counsellor, while, on the affordability assessment, she had indicated that she had no financial dependants.[323] The consumer also increased expenses previously declared.[324] The court held that, in this instance, the blame was on the consumer, and that section 81(2) was only applicable where the expenses raised concern.[325]

When considering the powers of the magistrate with regard to reckless credit, the court found that the proceedings before the magistrate were brought under section 86, and that the magistrate only had to deal with the debt review application.[326]

In casu, it was held that, under section 86, the debt counsellor did not have to obtain the credit agreement from the credit provider.[327] The debt counsellor is only required under section 86 to consider the financial position of the consumer.[328] The court *in casu* concluded that, as there was no credit agreement before the magistrate's court during the debt review application, the magistrate had exceeded his powers by *mero muto* making a finding regarding reckless credit,[329] and set aside the finding of reckless credit.[330]

[319] *African Bank* par 10.
[320] *African Bank* par 10.1.
[321] *African Bank* par 10.2.
[322] *African Bank* pars 10.3-10.5.
[323] *African Bank* pars 10.3-10.5.
[324] *African Bank* pars 10.3-10.5.
[325] *African Bank* par 11.
[326] *African Bank* par 15.
[327] *African Bank* par 15.
[328] *African Bank* par 15.
[329] *African Bank* pars 14-15.
[330] *African Bank* par 16.

6.4.2 *Mohibidu v African Bank Limited*[331]

The consumer, Mr Mohibidu, was placed under debt review, and a rearrangement order was granted in the Johannesburg Magistrate's Court on 25 March 2015.[332] On 4 November 2015, Mr Mohibidu directed a complaint to the Regulator:

> [E]ven when I'm still under debt review my arrears amount are just mounting."[333]
>
> "I'm currently over-indebted and I will like you[r] assistance to verify that the process of granting …[these] loans was correct".[334]

The Regulator interpreted Mr Mohibidu's complaint as being one of reckless credit.[335] On 24 August 2017, the Regulator decided not to refer the complaint to the Tribunal, and issued a notice of non-referral under section 139(1) of the National Credit Act.[336] Mr Mohibidu proceeded to apply for leave to directly refer his application to the Tribunal, and leave was granted on 3 December 2017.[337]

African Bank opposed the application to the Tribunal, and was represented by an advocate and an attorney.[338] African Bank raised various points *in limine* against the application of Mr Mohibidu.[339] The first point was that, during the debt review hearing, reckless credit was or should have been considered before the rearrangement order was granted.[340] Counsel for African Bank therefore submitted that, as the Magistrate's Court had already adjudicated on the credit agreements, Mr Mohibidu was barred from approaching the Tribunal.[341]

Secondly, counsel for African Bank submitted a technical point to the effect that Mr Mohibidu's referral was defective, as the referral failed to advise how the Regulator misdirected itself through issuing the non-referral.[342] Further, the referral also did not indicate that Mr Mohibidu sought relief against African Bank.

331 2018 ZANCT 29 [2018-03-29] (hereafter "*Mohibidu*").
332 *Mohibidu* pars 6-7.
333 *Mohibidu* par 7.
334 *Mohibidu* par 7.
335 *Mohibidu* par 8.
336 *Mohibidu* par 8. S 139(1) of the Act provides that, when a complaint appears to be frivolous or vexatious, or does not allege any facts that, if true, would constitute grounds for a remedy under the Act, a non-referral may be issued.
337 *Mohibidu* par 8. The Tribunal's referral process can be found in s 141 of the National Credit Act.
338 *Mohibidu* par 2.
339 *Mohibidu* par 10.
340 *Mohibidu* par 10.
341 *Mohibidu* par 10.
342 *Mohibidu* par 11.

The final point raised by counsel for African Bank was that the credit agreements were concluded prior to the introduction of the Regulator's Affordability Assessment Regulations.[343] The answering affidavit of African Bank set out the assessment mechanisms followed during the affordability assessment.[344] Mr Mohibidu did file a replying affidavit to address the answering affidavit.

Mr Mohibidu represented himself during the hearing.[345] Mr Mohibidu submitted that the debt counsellor had not investigated reckless credit, as his debt counsellor was not mandated to do so.[346] His debt counsellor had referred him to the Regulator.[347] Mr Mohibidu clarified that he wished for the Tribunal to consider the merits of his case against those of African Bank's case.[348] Mr Mohibidu stated that no replying affidavit was filed, as the answering affidavit contained no new information.[349] Further, he wanted the credit agreements to be declared reckless and the loans written off.[350]

The Tribunal found that Mr Mohibidu had failed to seek a declaration of reckless credit during his debt review application.[351] The Tribunal held that, in the alternative, the debt counsellor had found that the agreements were not reckless.[352] The view of the Tribunal was that the debt rearrangement order had been made on the recommendation of the debt counsellor, and that the Tribunal could not be used as a vehicle to reconsider the decision of the magistrate's court.[353]

The rearrangement order made no reference to reckless credit and, consequently, the Tribunal found that the debt counsellor had found that none of the credit agreements were reckless.[354] Furthermore, the Tribunal held that, during the debt review application, the consumer should have applied for an order pertaining to reckless credit.[355] The application of the consumer was dismissed.[356]

[343] *Mohibidu* par 12.
[344] *Mohibidu* par 12.
[345] *Mohibidu* par 2.
[346] *Mohibidu* par 15.
[347] *Mohibidu* par 15.
[348] *Mohibidu* par 17.
[349] *Mohibidu* par 17.
[350] *Mohibidu* par 18.
[351] *Mohibidu* par 22.
[352] *Mohibidu* par 22.
[353] *Mohibidu* par 22.
[354] *Mohibidu* par 22.
[355] *Mohibidu* par 22.
[356] *Mohibidu* par 23.

6.5 Examples from practice

To answer the question whether a debt counsellor must investigate reckless credit when making a determination, one would assume that section 86(6)(b) is explicit. However, the approach taken in magistrates' courts is slightly different, as can be seen from the following examples.

The debt review application in Case 9362/2016 before the Johannesburg Central Magistrate's Court was dismissed on 25 April 2016, with the only reason given by the magistrate being the failure of the debt counsellor to investigate reckless lending.[357]

The debt review applications in Cases 707/2016 and 52273/2015 before the Johannesburg Central Magistrate's Court were both dismissed. The magistrate provided reasons in terms of Magistrate's Court Rule 51(1).[358] In Cases 707/2016 and 52273/2015 the debt counsellors appeared before the court to give oral evidence, and the following was noted in paragraph 16 of the written reasons:

> As far as reckless credit is concerned Du Plessis took a very passive role in this regard. His approach is that he needs to be prompted from the consumer side or by the court to investigate reckless credit. Again his fear is expressed that he might incur unnecessary legal expenses and opposition from credit providers. There are no facts to substantiate these concerns of Du Plessis. It might be – and one is merely speculating – that Du Plessis previously had an uncomfortable experience this regard[sic]. More importantly it seems like it is accepted that the consumer is aware of the provisions dealing with reckless credit is unclear[sic]. The consumer also gave no reason to show he does not require an investigation into reckless credit.[359]

The debt review application in Case 241/2018 before the Johannesburg West Magistrate's Court, held at Roodepoort, was also dismissed, with one of the grounds captured in paragraph 8 of the Ruling as:

> The amount available for distribution after paying living expenses is R6 700.00. There are ten credit providers in this application. It was expected of the applicant to determine if any of the credit was granted recklessly. The monthly payment to the credit providers is R13 624.00.[360]

The aforementioned cases demonstrate the view of certain magistrates' courts, that debt counsellors are obligated to investigate reckless lending before referring a debt

[357] The original court file is available for public inspection at the Magistrate's Court for the district of Johannesburg Central, held at Johannesburg under case number 9362/2016.
[358] Case 707/2016 and Case 52273/2015. See Ch 2 par 3.5.
[359] Case 707/2016 and Case 52273/2015. See Ch 2 par 3.5.
[360] The original court file, containing a written judgment, is available for public inspection at the Magistrate's Court for the district of Johannesburg West, held at Roodepoort under case number 241/2018.

review application to court. It is uncertain how many debt review applications are postponed numerous times for such investigations. In *African Bank*, the magistrate's court application in Case 3071/2015 was heard in the Ga-Rankuwa Magistrate's Court for the district of Madibeng.[361] The application was postponed six times between 23 November 2015 and 4 July 2016, thus taking approximately eight months to finalise.[362]

6.6 The 2019 National Credit Amendment Act

Section 82A of the 2019 National Credit Amendment Act provides for the reporting and investigation of reckless credit agreements:

> (1) If during an assessment contemplated in section 86(6) there are reasonable grounds to suspect that a credit agreement included in that assessment is a reckless credit agreement, the debt counsellor must report that suspected reckless credit agreement to –
> (a) the National Credit Regulator where the debt counsellor rejects the application as contemplated in section 86(7)(a) or makes a recommendation contemplated in section 86(7)(b); or
> (b) the Magistrate's Court where the debt counsellor makes a recommendation contemplated in section 86(7)(c).
> (2) A credit provider must, within seven business days of receipt of a request and at a fee not exceeding the maximum prescribed fee, provide a debt counsellor with the following information requested in relation to the consumer concerned:
> (a) Relevant application for credit;
> (b) pre-agreement statement;
> (c) quote;
> (d) credit agreement entered into with the consumer;
> (e) documentation in support of steps taken in terms of section 81(2);
> (f) record of payments made; and
> (g) documentation in support of any steps taken after default by the consumer.

Section 82A of the 2019 National Credit Amendment Act will, in future, require that a debt counsellor consider reckless credit on every assessment under section 86(6). It is reasonable to conclude that reckless credit will have to be considered in every assessment, as the debt counsellor has the onus to prove that there were no reasonable grounds to suspect reckless lending in the instance where no referral is made.

Section 82A will address the issue of credit providers failing to provide documentation during the reckless credit investigations.

In my view, section 82A may halt *bona fide* negotiations between the debt counsellor and credit provider. The debt counsellor will, in future, have to negotiate concessions

[361] The original court file is available for public inspection at the Magistrate's Court for the district of Madibeng, held at Ga-Rankuwa under case number 3071/2015 (hereinafter "Case 3071/2015").
[362] Case 3071/2015, see Notice of Motion and granted Court Order.

and reinstatements with credit providers while the threat of a reckless credit finding looms over the credit provider.

It is also important to note that section 82A(4) only provides for the Tribunal to impose an administrative fine on a credit provider who fails to provide the documents referred to in section 82A(2):

> (4) The Tribunal may impose an administrative fine contemplated in section 151 where a credit provider intentionally fails to comply with subsection (2).

Section 82A(4) does not award a magistrate's court the power to impose an administrative fine for the non-compliance on the credit provider. A magistrate's court is also not empowered to impose an administrative fine (as provided for under section 151 of the National Credit Act) on a credit provider who has been found guilty of reckless credit.

6.7 Preliminary finding

The practical examples provided above demonstrate that certain magistrates set reckless credit investigations as a requirement for debt review, despite the National Credit Act clearly stating that reckless credit should only be investigated when prompted by the consumer. The recommendation of the Task Team Agreements to investigate reckless credit is only a guideline, and cannot triumph over the provisions of the NCA. In *African Bank*, it was confirmed that a magistrate may *mero muto* investigate reckless credit. However, the examples of cases tell a different story.

Debt counsellors are reluctant to investigate reckless credit, as they become exposed to militant litigation and having their debt review applications torn apart, along with the credibility of the consumers (see the attacks launched against the consumer in *African Bank*).[363] Credit providers will spare no expense to defend accusations of reckless credit. In *African Bank*, the loans that had been declared reckless and suspended had outstanding balances totalling R6 066.78.[364] No other order had been made against the credit provider, and, for R6 066.78, the credit provider incurred the legal expenses of an appeal.

[363] Ch 3 par 6.4.1.
[364] Case 3071/2015 Granted Order; *African Bank* par 1.

Considering the DebtSafe Reckless Lending Report, it is clear that consideration should be given to reckless lending, and that the incorporation of section 82A of the 2019 National Credit Amendment Act was prudent. Whilst the issue of documentation will be addressed by section 82A of the 2019 National Credit Amendment Act, there are various other concerns on which the 2019 National Credit Amendment Act is silent.

Firstly, as demonstrated by the demolition of Mr Mohibidu's claim of reckless credit on technical points raised by the advocate of the credit provider, the resources of debt counsellors and consumers cannot match the resources of credit providers. Credit providers will continue to deal with accusations of reckless credit under section 82A with technical points and allegations against the initial finding of over-indebtedness, to avoid being found guilty. The 2019 National Credit Amendment Act fails to create an arena in which debt counsellors and consumers wishing to present themselves can engage with credit providers on an equal footing. Secondly, the 2019 National Credit Amendment Act is silent on what the exact powers of the magistrates' courts will be in addressing reckless credit. There is uncertainty as to which remedies should be used by magistrates' courts. The Tribunal may levy administrative fines, but magistrates' courts have not been given the same powers under section 82A. There is also no reporting obligation on the magistrate's court towards the Tribunal or Regulator when orders regarding reckless credit are made. Therefore, reckless credit referred to the Regulator under section 82A(1)(a) may be more harshly punished than in the case of credit providers referred to the magistrate's court. Finally, debt counsellors may currently charge an additional fee for the investigation of reckless credit, due to the amount of additional work required. Withdrawal of the Reckless Lending Fee Category is pending. With the implementation of section 82A, a final decision regarding the Reckless Fee Category must be made by the Regulator, as debt counsellors will continue to require additional resources to investigate reckless lending. However, it is also important to note that, with the implementation of section 82A, all consumers will, in future, be required to pay more for debt counselling services if the Reckless Lending Fee Category is not withdrawn.

Under the National Credit Act, magistrates who *mero muto* order reckless credit investigations substantially delay debt review applications. However, the enactment of section 82A will bring debt review to a virtual halt if serious reconsideration is not given to the aspects of this process discussed in this chapter.

CHAPTER 4: OPINIONS, FINAL CONCLUSIONS AND RECOMMENDATIONS

1 General

1.1 Introduction

The National Credit Act established the debt review process as an alternative debt relief measure for South African consumers who have become over-indebted through credit agreements. However, statistics and National Credit Regulator reports show that the success of debt review as a debt relief measure is adversely affected by delays in the finalisation of debt review applications referred to magistrates' courts. This, in turn, has an adverse effect on one of the stated purposes of the NCA, namely to provide mechanisms to address over-indebtedness.[1]

The overall aim of this study was to evaluate how values embodied in industry guidelines, specifically the Task Team Agreements, and the interpretation of these guidelines in case law, challenge the interpretation and application of the National Credit Act with regard to debt review applications, which, in turn, cause delays in the finalisation of debt review applications.[2]

As discussed in paragraph 2 of Chapter 1, debt review is firstly dependent on a finding of over-indebtedness, and secondly on a re-arrangement proposal. This study evaluated select challenges under these two elements. The conclusions and recommendations are presented according to the structure followed in the study.

2 Determination of over-indebtedness

2.1 Introduction

This section discusses the findings and recommendations related to Research Objective 1: To discuss select factors that a debt counsellor must consider in determining over-indebtedness.

Section 78(3) of the National Credit Act requires that a debt counsellor consider the financial means, prospects, and obligations of a consumer in determining, on the preponderance of available information, whether a consumer is over-indebted.[3] The

[1] S 3(g).
[2] Ch 1 par 4.
[3] Ch 2 par 1.

Act provides a broad definition of financial means, prospects, and obligations, including income and any right to income, as well as the financial means, prospects, and obligations of any adult person within the consumer's immediate family.[4]

The study found that the interpretation of section 78(3) presents significant challenges to the finalisation of debt review applications, due to the interpretation of, specifically, "financial means" and "prospects" by the Task Team Agreements[5] and case law[6], which set unrealistic requirements for debt review applications. The study evaluated the consideration of spousal contributions, asset retention, and living expenses, in order to determine how these aspects delay the finalisation of debt review referrals.

2.2 Spousal contributions

2.2.1 Content summary

This part of the study focused on consumers married out of community of property who may, due to their marital dispensation, apply for debt review without their spouses.[7]

The study demonstrated that some magistrates, in reviewing consumers' debt review applications, require of the spouses of these consumers to make contributions.[8] Two pieces of legislation, the National Credit Act and the Matrimonial Property Act, were examined, and it was confirmed that a magistrate's court has no authority to make an order pertaining to matrimonial property.[9] The Task Team Agreements was found to be the only document confirming that spousal contributions should be considered during the debt review process.[10] However, the Task Team Agreements contains non-binding guidelines, and does not empower a magistrate's court to make orders pertaining to the spouses of consumers under debt review.[11] The study also discussed the provisions of the Insolvency Act that allow for the restriction of the property rights of a person due to the financial (insolvent) status of his spouse.[12] The aim was to

[4] Ch 2 par 1.
[5] Ch 2 pars 2.3, 3.3, and 4.4.
[6] Ch 2 pars 3.3-3.4.
[7] Ch 2 pars 2.1-2.3.
[8] Ch 2 pars 2.7-2.8.
[9] Ch 2 par 2.4.
[10] Ch 2 par 2.3.
[11] Ch 2 par 2.4.
[12] Ch 2 par 2.5.

ascertain whether it would be justifiable to impose a similar restriction on the rights of the spouse of a consumer under debt review, and to evaluate what the rights and obligations of such a spouse should be.[13]

2.2.2 Opinion

In my opinion, the consumer is the only party to the credit agreement, and he alone remains responsible for settlement of his debt, irrespective of whether he used his spouse's income to enhance his affordability rating.[14] Debt review must be a long-term solution for the consumer, and the rehabilitation of the consumer should not be derailed by the dissolution of a marriage or the unemployment of a spouse. However, one cannot deny that members in a household are dependent on each, and that, in the appropriate circumstances, a spousal contribution is not unreasonable.

However, my view is that the current practice being followed in magistrates' courts across South Africa, to, in assessing the debt review application, require of spouses to contribute, not only delays the finalisation of debt review referrals, but also infringes on the socio-economic rights of spouses.[15] The right to dignity, which embodies the right to housing, food, water, and a decent livelihood, is an example of such rights.[16] This practice is distinguishable from section 21 of the Insolvency Act, which allows for the infringement on the property rights of a spouse.[17] The right to dignity is embodied in section 10 of the Constitution, and is considered inalienable, as no person can distance himself from his right to be treated with human dignity, as a person cannot be considered non-human under the law.[18]

2.2.3 Recommendations

I recommend that the magistrates' courts' lack of authority with regard to the spouse of a consumer necessitates legislative amendment.

Based on my conclusion that spousal contribution is an infringement on the spouse's right to dignity, my recommendation is an amendment of section 78(3) of the NCA, to

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13 Ch 2 par 2.5.
14 See discussion of *Sonnenberg* and *Shoprite* in Ch 2 par 2.6.
15 Ch 2 pars 4.3.2-4.3.3.
16 Ch 2 par 4.3.
17 Ch 2 par 4.3.
18 Ch 2 par 4.3.

allow for the consideration of third party income and a contribution by the third party only in the event that said third party has consented to such consideration. The amendment should provide that, should a third party fail to make such a contribution, the consumer remains responsible for the settlement of his debt obligations, but may re-apply for an amended debt rearrangement. Such an amendment should also provide for such a third party to be notified of the application to court for a debt review, and allow the third party to participate without becoming subjected to the consequences of the debt review.

However, should an amendment be considered in terms of which spousal contribution becomes compulsory, the legislature will have to address the following lacunas in the National Credit Act:

- The lack of authority of magistrates' courts with regard to spousal contributions will have to be rectified.[19]
- The lack of obligations imposed on spouses (such as the right to disclose information to the debt counsellor) will have to be addressed.[20]
- The lack of rights to protect the financial status of the spouse requires consideration.[21] Provision will have to be made for the participation of the spouse in the debt review process. The debt counsellor will have to be obligated to notify the spouse of his recommendation, and will have to cite the spouse as a party to the application for debt review. Once the spouse is cited as a party to the application, he must be served with the court application, and may enter an opposition. However, the legislature will have to create an alternative opposition process for the spouse, to ensure that the spouse does not require legal representation and incur the accompanying costs. A solution may be to provide for an objection notification delivered to the debt counsellor by the spouse that obligates the debt counsellor to notify all the parties, including the court, if an application is pending, of the objection, and a second notification once a settlement has been reached;

[19] Ch 2 pars 2.4 and 2.8.
[20] Ch 2 pars 2.5 and 2.8.
[21] Ch 2 pars 2.5 and 2.8.

- The unclear definition of “financial means” in light of the meaning attributed to “financial means” under the Matrimonial Property Act[22] will have to be reformulated.

- The right to recourse for spouses married after 1 November 1984 will have to be reconsidered.[23] Currently, a spouse married after 1 November 1994 has no right to recourse for household necessities contributed in excess of his proportional responsibility.[24] However, as the spouse may be statutorily bound to contribute in excess of his proportional responsibility, such a spouse should have right of recourse upon dissolution of the marriage.

- Provision will have to be made for the amendment of court orders in the event that the spouse can no longer contribute, either due to a change in his financial status or the dissolution of the marriage.

With consideration of the aforementioned and the preliminary findings discussed in paragraph 2.8 of Chapter 2, my recommendation is that, as a general rule, spousal contributions should not be considered, and should only bear reference in instances where the consumer is (a) dependent on the contribution and (b) the spouse has consented to the contribution.

2.3 Asset retention

2.3.1 Content summary

The study found that certain magistrates have taken the position that, before applying for debt review, a consumer should first sell assets, specifically vehicles and homes.[25] The study confirmed that the National Credit Act does not make provision for the sale of an asset during debt review proceedings, but that a magistrate’s court has no power to order the sale of an asset during said proceedings.[26] However, due to the interpretation of section 78(3), there is legal precedent in interpreting “financial means”

[22] Ch 2 par 2.4.
[23] Ch 2 par 2.4.
[24] Ch 2 par 2.4.
[25] Ch 2 par 3.5.
[26] Ch 2 par 3.1.

to include assets and “prospects”, which has been interpreted to include the prospects of a consumer improving his financial position through the sale of assets.[27]

The study discussed the non-binding guidelines contained in the Task Team Agreements, which specifically recommend the sale of luxury assets.[28] From the practical examples discussed, it is evident that magistrates make reference to the luxurious nature of an asset.[29]

It was found that the National Credit Act does not provide a voluntary surrender process for consumers wishing to return goods under certain types of credit agreements, and that this surrender process may not be forced onto a consumer.[30] The case of *MFC v Joubert*, which is the *locus classicus* with regard to asset retention during debt review, was discussed to expose the judgment’s substantive weaknesses.[31] Two Constitutional Court cases, *Gundwana* and *Nkata*, confirmed that the sale of an asset should not be ordered without proper consideration, and should be considered against a less invasive alternative to settle the debt owed to the credit provider.[32]

2.3.2 Opinion

In my view, the purpose of the National Credit Act is not the liquidation of assets to benefit credit providers, but to establish a system of harmonised debt restructuring, with the eventual satisfaction of the consumer’s debt obligations as a priority.[33] In my view, the use of the word “eventual” in section 3(j) of the NCA emphasis that there should be a process over a period of time to satisfy debt obligations.

The Constitutional Court’s point of view in *Gundwana* and *Nkata* with regard to assets also emphasises asset retention and the re-arrangement of obligations without the accompanying sale of assets. Furthermore, it would not have been the intention of the legislature to make available two processes in terms of which consumers could relieve over-indebtedness through the sale of assets.

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27 Ch 2 par 3.1.
28 Ch 2 par 3.3.
29 Ch 2 par 3.5.
30 Ch 2 par 3.2.
31 Ch 2 par 3.2.
32 Ch 2 par 3.4.
33 S 3(i).

In my view, the forced sale of assets or the imposing of the requirement that debt counsellors must consider the sale of a property before the consumer is being confirmed as over-indebted, is not authorised in the NCA, and is a requirement imposed by magistrates who confuse debt review applications with proceedings for the voluntary surrender of an estate in terms of the Insolvency Act.[34]

In my view, the aforementioned unauthorised approach followed by magistrates results in delays in the finalisation of debt review applications, as consumers and debt counsellors must attempt to convince the court why an asset should not be sold. It is also an infringement on the consumer's constitutional right to property and, in the instance of a home, the consumer's constitutional right to housing.[35]

2.3.3 Recommendations

My recommendation is that the legislature introduce a cross-reference in the National Credit Act between the debt review process in terms of section 86 and the voluntary surrender process in terms of section 127, to confirm that a debt re-arrangement order does not bar a consumer from utilising the voluntary surrender process at a later stage. Currently, there is no such provision in either section 86 or section 127.

The said amendment should also clearly state that the sale of assets must not be attempted before the consumer is allowed to utilise debt re-arrangement as a remedy. The legislature should also regulate instances where an asset subject to a debt re-arrangement order is sold, to ensure that the consumer notifies his debt counsellor that the debt has been settled in order to allow for the remaining debt obligations (and any possible shortfall) to be restructured based on the consumer's updated financial position. Alternatively, provision should be made for the consumer to be issued with a clearance certificate as provided for in section 71 of the Act.

2.4 Living expenses

2.4.1 Content summary

The practical examples demonstrate that magistrates warp consumer budgets without consideration of any of the guidelines prescribed in the Task Team Agreements.[36] I

[34] Ch 2 par 3.3.
[35] Ch 2 par 3.4.3.
[36] Ch 2 par 4.6.

have taken the strong view that, due to the non-binding nature of the guidelines contained in the Task Team Agreements, they do not justify much consideration during debt review proceedings. However, there are instances where the Task Team Agreements guidelines offer valuable insight into how debt reviews should be conducted. One such an instance is in respect to living expenses, but any consideration of the Task Team Agreements should still remain subject to the National Credit Act. Magistrates choose to rely on the non-binding guidelines in the Task Team Agreements when certain questions arise (specifically in respect to spousal contributions[37] and asset retention[38]), but, as demonstrated by the practical examples discussed, no consideration is given to the Task Team Agreements during the consideration of the debt counsellor's proposed budget.[39]

The study confirmed that the party who is empowered under the NCA to propose a re-arranged budget is a debt counsellor, and that this budget is only a recommendation, not a factual representation of expenses.[40] The study also discussed the fact that the Task Team Agreements recommends the use of two calculations for the determination of a reasonable budget.[41] The first calculation is done to determine a minimum amount of the net income of the consumer that should be made available for debt repayment.[42] The second calculation is done to determine the percentage of the consumer's income that should be allowed for household items, financial services, and housing that will not form part of the amount available for debt repayment.[43] However, these calculations also require clarification, as discussed in paragraph 4.7 of chapter 2.

The study considered section 23(5) of the Insolvency Act, which allows an insolvent to forfeit a portion of his income to prove benefit to credit providers.[44] The case law pertaining to section 23(5) of the Insolvency Act confirms that courts are hesitant to allow such forfeiture, as it may infringe on the rights and obligations of the insolvent to provide basic necessities (such as food) for himself and his family.[45] The right to dignity

[37] Ch 4 par 2.2.
[38] Ch 4 par 2.3.
[39] Ch 2 par 4.6.
[40] Ch 2 par 4.2.
[41] Ch 2 par 4.4.
[42] Ch 2 par 4.4.
[43] Ch 2 par 4.4.
[44] Ch 2 par 4.3.
[45] Ch 2 par 4.3.3.

is an inalienable right, and a person cannot waive the right to basic necessities.[46] One of the core elements of the right to dignity is the recognition of socio-economic rights such as the right to housing, food, water, and a livelihood.[47]

2.4.2 Opinion

The manner in which certain magistrates approach budgets during debt review is void of logic, and results in matters being delayed due to what can only be concluded to be personal predispositions to the items on the debt counsellor's proposed budget, as no definitive guidelines are applied by magistrates in considering whether a budget is reasonable.

In my view, the extent to which magistrates lower living expenses is an infringement on the consumer's right to dignity and the accompanying socio-economic rights.

2.4.3 Recommendations

I am of the opinion that the review of a budget is an extremely difficult task, as the person reviewing the budget has predispositions regarding what a reasonable budget is, probable due to a comparison with his own monthly budget. My recommendation is that the National Credit Act be amended to provide for percentage-based recommendations similar to those contained in the Task Team Agreements.[48]

My view is that the review of the debt counsellor's budget must first consider if the consumer falls within the minimum percentage that should be made available for debt repayment. If that is the case, no detailed budget should be presented to the court. For example, if the consumer falls within an income group that requires that a minimum of 35% of the available income be made available for debt repayment, and the consumer makes available 35%, the debt counsellor should not be required to provide a detailed budget, except for the budget that the consumer provided during the debt review application process and on which the finding of over-indebtedness was made.

In the event that a consumer cannot afford to make available the minimum percentage for debt repayment, the debt counsellor must support the below-minimum percentage with a detailed amended budget, and, where any item falls outside the maximum

[46] Ch 2 par 4.3.3.
[47] Ch 2 par 4.3.3.
[48] Ch 2 pars 4.4.1 and 4.4.2.5.

percentage allowed per category (such as housing, financial services, and household items), vouchers and additional information should be presented to justify the below-minimum repayment. For instance, if the consumer falls within an income group that requires that a minimum of 35% of his income be made available for debt repayment and the consumer can only afford 28%, the debt counsellor should present a detailed re-worked budget to justify the below-minimum repayment.

3 Restructuring of debt obligations

3.1 Introduction

This section addresses Research Objective 2: To discuss select factors that magistrates should considered in determining whether the rearrangement proposal of a debt counsellor is fair.

Following a finding of over-indebtedness, a re-arrangement of the consumer's debt obligations or an order of reckless credit, or both, must be made an order of court in terms of section 87.[49] The study reviewed the calculation of restructuring proposals by means of specialised software systems, interest rate concessions granted by credit providers, the application of the *in duplum* rule, and reckless credit, to demonstrate how these aspects challenge and delay the finalisation of debt review referrals.

3.2 Software Systems

3.2.1 Content summary

The study found that debt counsellors calculate restructuring proposals using specialised software developed for this purpose.[50] The parameters for these software packages are recommended in the Task Team Agreements. However, the Task Team Agreements does not require compliance with specific rules – application of the rules is thus discretionary.[51] The Regulator attempted to harmonise the various software packages through the development of the Debt Counselling Rules System (DCRS).[52] However, the debt counselling industry raised concerns that the DCRS does not make provision for *in duplum*.[53] In another instance, the study found that a debt counsellor

[49] Ch 3 par 1.
[50] Ch 3 par 2.
[51] Ch 3 par 2.2.
[52] Ch 3 par 2.3.
[53] Ch 3 par 2.3.

who had been penalised with a cost order for her recommended re-arrangement had blamed the forced use of the guidelines of the Regulator and the DRCS for the proposal she had recommended to the court.[54]

3.2.2 Opinion

In my view, it is an omission that the National Credit Act does not regulate the software packages used to calculate amounts for debt restructuring proposals, and that there are no defined rules that a debt counsellor must apply to his restructuring proposals. I am of the opinion that many of the issues experienced in debt restructuring can be solved through standardisation of the rules applicable to debt counselling software packages.

3.2.3 Recommendations

The debt counsellor remains the party responsible for the presentation of a feasible restructuring proposal, irrespective of the software package he employed to calculate the amounts contained in the proposal. The integrity of the restructuring proposal is of utmost importance, and my recommendation is that these software packages be regulated through legislation. Certain rules must be made compulsory on all software packages as the minimum requirement for utilisation, such as the compulsory use of *in duplum*.

3.3 Interest rate concessions

3.3.1 Content summary

The study demonstrated that magistrates, without authority, force interest rate concessions by postponing debt review applications in order for debt counsellors to renegotiate terms with credit providers.[55] The National Credit Act does not provide for the reduction of interest rates during debt rearrangement.[56] However, the reduction of the contractually agreed interest rate is a powerful tool to assist a consumer to settle his debt obligations in a shorter period.[57]

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[54] Ch 3 par 2.4.
[55] Ch 3 par 3.4.
[56] Ch 3 par 3.1.
[57] Ch 3 par 3.1.

Therefore, credit providers and debt counsellors negotiate concessions on interest rates, which are then incorporated into the debt restructuring proposal.[58] The study found that, before a credit provider consents to a reduction in the interest rate, it first considers the repayment history of the consumer, the remaining period on the credit agreement, the outstanding balance, the initial cost of credit, and the suggested restructuring.[59]

It is important to note that the 2019 National Credit Amendment Act, in future, will empower a magistrate's court to unilaterally reduce the interest rate during debt rearrangement.[60]

3.3.2 Opinion

I am of the view that a blanket interest rate reduction on all credit agreements subject to debt re-arrangement, as provided for in the 2019 National Credit Amendment Act, will unjustly deprive credit providers financially. The 2019 National Credit Amendment Act fails to take into consideration any factors to justify whether a consumer should receive the benefit of an interest rate reduction. According to me, this may cause delays through credit providers objecting to the inclusion of credit agreements, as exclusion of the credit agreement will be the only manner in which the credit provider will be able to collect interest as contractually agreed.

3.3.3 Recommendations

My recommendation is that the unilateral amending authorised by the 2019 National Credit Amendment Act will not result in fair restructurings, and should be reconsidered. Unilateral interest rate reductions should be used as a penalty against credit providers who have not co-operated by failing to provide documentation during the debt review process (such as the information provided for in regulation 24(4)[61] or documentation to investigate reckless credit), or who have been found guilty of reckless credit.

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[58] Ch 3 par 3.2.
[59] Ch 3 par 3.4.
[60] Ch 3 par 3.5.
[61] The study did not discuss the obligations of credit providers during the over-indebtedness assessment. Reg24(4) provides that a debt counsellor may make a finding of over-indebtedness without confirmation from the credit provider regarding the outstanding balance, instalment, and other provisions of the credit agreement to be restructured. It is therefore a reasonable assumption that credit providers do not always co-operate in providing information to debt counsellors during the debt review process.

3.4 Repayment terms extensions

3.4.1 Content summary

The National Credit Act provides for the extension of repayment terms, but does not contain specified parameters within which extensions may be done.[62] The Credit Agreements Act previously provided defined repayment terms per type of credit agreement.[63] The Task Team Agreements have guidelines for repayment term extensions per type of credit agreement.[64] Examples from practice revealed that certain magistrates' courts apply the Task Team Agreements as an absolute, and the fact that a credit provider has consented to a repayment term beyond the guidelines of the Task Team Agreements is ignored.[65]

The 2019 National Credit Amendment Act, when it becomes effective, will provide that a magistrate may reduce the interest rate on a credit agreement referred for debt re-arrangement for a period of five years, or a period as will be prescribed by means of the Regulations.[66] The implication is that both the interest rates and repayment terms for debt re-arrangement will be pre-determined.

3.4.2 Opinion

A debt restructuring proposal should strive for the settlement of debt obligations in the shortest possible period. However, it is incorrect for magistrates to apply the Task Team Agreements as an absolute in lieu of giving recognition to the settlement reached between the parties. This becomes particularly important when one considers that the National Credit Act in section 138 provides for settlements reached during debt restructurings to be elevated to an order of court.

In my view, the 2019 National Credit Amendment Act refers to a rearrangement period of five years, or a period that will be prescribed for an interest rate concession only, and is not a bar against a longer debt re-arrangement.

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62 Ch 3 par 4.1.
63 Ch 3 par 4.2.
64 Ch 3 par 4.3.
65 Ch 3 par 4.5.
66 Ch 3 par 4.6.

3.4.3 Recommendations

My recommendation is that the National Credit Act (and the 2019 National Credit Amendment Act) be amended to clarify whether the implication of the 2019 National Credit Amendment Act is that debt re-arrangement may not exceed five years or a period to be determined. The legislature should also clarify the status of settlements reached between the credit provider, debt counsellor, and consumer, and provide for the incorporation of these settlements into debt rearrangement orders.

3.5 *In duplum*

3.5.1 Content summary

My research demonstrated that there is tension between credit providers wishing the application of *in duplum* to be exonerated from debt restructuring proposals.[67] Section 86 of the National Credit Act does not make provision for the application of *in duplum* to a debt restructuring proposal.[68] However, the Task Team Agreements recommends the application of *in duplum to* restructuring proposal software.[69]

Coetzee confirmed that debt re-arrangement cures default under the original credit agreement; therefore, credit agreements under rearrangement are not subject to the *in duplum* rule.[70] However, the study demonstrated that this is incorrect.[71]

The consumer must comply with the original terms of the credit agreement to cure default.[72] It is trite in South African credit law that a debt rearrangement order does not novate the terms of the credit agreement, and is only a bar against the credit provider enforcing its contractual remedies.[73] The study also discussed that section 129(3) is not applicable, due to the fact that section 129(3) requires that the credit provider had already taken legal action on the credit agreement, but not cancelled the credit agreement, in order for section 129(3) to be applicable.[74] The debt rearrangement order prohibits the credit provider taking any legal action.[75]

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67 Ch 3 par 5.2.
68 Ch 3 par 5.1.
69 Ch 3 par 5.3.2.
70 Ch 3 par 5.4.1.
71 Ch 3 pars 5.4.2-5.5.2.
72 Ch 3 pars 5.4.2-5.4.3.
73 Ch 3 par 5.4.3.
74 Ch 3 par 5.5.
75 Ch 3 par 5.3.3.1.

The 2019 National Credit Amendment Act will authorise a magistrate's court to determine the maximum rate of interest, fees, and charges during debt review.[76] However, credit insurance is excluded.[77]

3.5.2 Opinion

In my view, authors such as Kelly-Louw, Vessio, and Campbell are correct in noting that *in duplum* is a measure of debt relief for consumers.[78] As the National Credit Act does not explicitly exclude the application of *in duplum* to restructuring proposals, my view is that consumers should receive the benefit of this indirect debt relief measure. In my view, section 86(7)(c)(ii)(ccA) of the 2019 National Credit Amendment Act is the empowering provision for the application of *in duplum* to debt restructuring proposals.

3.5.3 Recommendations

The National Credit Act and the 2019 National Credit Amendment Act should be amended to clarify that *in duplum* should be applied to debt restructuring proposals. Clarity should also be given in respect to the cost of credit insurance, as, under section 103(5) of the National Credit Act, insurance is to be included for the purposes of *in duplum*, in contrast to section 86(7)(c)(ii)(ccA) of the 2019 National Credit Amendment Act.

3.6 Reckless credit

3.6.1 Content summary

The examples from practice demonstrated that certain magistrates will not entertain a debt review application if reckless lending has not been investigated, despite section 86(6)(b) clearly stating that such an investigation is only required when specifically requested by the consumer.[79]

The 2019 National Credit Amendment Act require that debt counsellors investigate reckless credit on all debt review applications.[80] Currently, and pending the enactment of the 2019 National Credit Amendment Act, the legal position under the National

[76] Ch 3 par 5.6.
[77] Ch 3 par 5.6.
[78] Ch 3 par 5.3.4.
[79] Ch 3 par 6.5.
[80] Ch 3 par 6.6.

Credit Act remains that, only when required by the consumer must a debt counsellor investigate reckless credit.[81]

The study discussed the judgment in *African Bank* to answer the question of whether a magistrate may *mero muto* investigate reckless credit.[82] The court in *African Bank* held that a magistrate is not empowered to order such an investigation during debt review proceedings.[83] The judgment also highlighted the fact that, when confronted with reckless credit, there is a tendency by the credit provider under suspicion of having granted reckless credit to attack the finding of over-indebtedness and/or proposed restructuring, rather than defending the allegation of reckless credit.[84] The second judgment discussed was that of the Tribunal in *Mohibidu*.[85] The Tribunal found that, during Mr Mohibidu's debt review application, he should have requested a reckless credit investigation, and could not access this remedy at a later stage.[86] Other facts from Mohibidu must also be highlighted. First, the credit provider was presented by an advocate, and the consumer had no legal representation.[87] The advocate on behalf of the credit provider in *Mohibidu* raised three technical points, based upon on which the application was dismissed.[88]

3.6.2 Opinion

My point of view is that, although reckless credit should be eradicated from lending practices, it should not cause the delay of debt review applications. The resources of credit providers will always outweigh the resources of debt counsellors and consumers. However, the credit provider has a right to be represented by persons of its choosing. The only manner to deal with reckless credit in a reasonable and swift manner in the context of debt reviews is to move away from a penalty-focussed view of credit providers, towards an approach in terms of which reckless credit becomes a negotiation tool.

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81 Ch 3 par 6.2.1.
82 Ch 3 par 6.4.1.
83 Ch 3 par 6.4.1.
84 Ch 3 par 6.4.1.
85 Ch 3 par 6.4.2.
86 Ch 3 par 6.4.2.
87 Ch 3 par 6.4.2.
88 Ch 3 par 6.4.2.

3.6.3 Recommendations

I recommend consideration of an amendment to the National Credit Act that provides for the utilisation of reckless credit as a negotiating tool during debt review proceedings. My recommendation is that reckless credit must be investigated by the debt counsellor in all instances, and, if reckless credit has occurred, that fact should be presented to the credit provider. The NCA should then empower the debt counsellor to negotiate a settlement with the credit provider, which will assist in alleviating the over-indebtedness of the consumer through, for example, a 0% interest rate or the reduction of the outstanding balance. If a settlement has been reached, the issue is settled. However, in the event that there is a dispute between the credit provider and the debt counsellor as to whether a credit agreement is reckless, the matter should be referred to the magistrate's court for adjudication.

The Act should also make provision for a reporting duty imposed on debt counsellors to notify the Regulator of the reckless credit, and how the issue was settled. The Regulator can thus keep record of all incidences of reckless credit across the country, and can easily identify when a specific credit provider is continuously being found to be in contravention of the Act. If this data is available to the Regulator, the necessary steps can be taken to engage with the credit provider, to assist with remedying of the contraventions. Should a credit provider fail to remedy its contraventions following intervention by the Regulator, the necessary penalty, such as de-registration of the credit provider or an administrative fine, could be imposed by the Tribunal.

4 Concluding remarks

The study demonstrated how industry guidelines, specifically the Task Team Agreements, challenge the application and interpretation of the National Credit Act in respect to selected aspects pertaining to the finding of over-indebtedness and the restructuring of debt obligations during debt review proceedings. This ultimately leads to debt review referrals not being finalised due to requests by magistrates that debt counsellors act in accordance with the Task Team Agreements, not the National Credit Act.

These guidelines of the Task Team Agreements are non-binding, and do not empower a magistrate's court to make certain orders. Magistrates choosing to apply non-binding guidelines over legislation undermines the rule of law – a cornerstone of our legal system. However, the Task Team Agreements does offer valuable insights that should

not be ignored. The correct manner of incorporating these aspects into our law is through amendment of the National Credit Act and its regulations.

As a final remark, considering the entire study, my concluding opinion is that magistrates require proper guidance on the correct application of the National Credit Act and the interrelation between the Act and the Task Team Agreements. Magistrates' courts are creatures of statute, and may only make orders the are empowered to make through legislation. Similarly, due to a lack of jurisdiction, magistrates' courts cannot assume the role of the Regulator by ordering debt counsellors and credit providers to comply with the Task Team Agreements.

I recommend that a national practice directive based on the National Credit Act only, be published for magistrates' courts to use as guideline in adjudicating debt review applications. The purpose of this directive will not be to reduce magistrates' courts to a rubber stamp or to reduce debt reviews to a checklist exercise, but to ensure improved legal certainty and, ultimately, prevent unnecessary delays in debt review referrals.

The continuation of the current practices in magistrates' courts of adjudicating debt review referrals according to own preferences undermines the rule of law. Section 1 of the Constitution elevates the rule of law to one of the cornerstones of, not only the legal system, but also a sovereign and democratic state, thereby making it salient in aspect of governance. Therefore, to be treated equally under the National Credit Act during the debt review process is a fundamental human right to which all consumers are entitled.

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