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AN APPLICATION FOR DEBT REVIEW DOES NOT CONSTITUTE AN ACT OF INSOLVENCY: *FIRST RAND BANK LTD v JANSE VAN RENSBURG*

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INTRODUCTION

The Insolvency Act 24 of 1936 ('the Insolvency Act') and the National Credit Act 34 of 2005 ('the NCA') both regulate, amongst other things, matters concerning debtors who are unable to pay their debts. Due to this overlap, there is an ever present danger that tensions may arise in the application of the two Acts in any given case. In the past few years the courts have had to resolve disputes touching on the inter-relationship between the two Acts in the context of sequestration and debt review (see the case of *Investec Bank Ltd v Mutemeri* 2010 (1) SA 265 (GSJ) as well as *Ex Parte Ford* 2009 (3) SA 376 (WCC); see also A Boraine & C van Heerden 'To sequestrate or not to sequestrate in view of the National Credit Act: a tale of two judgments' (2010) 13(3) *PELJ* 19; N Maghembe 'The Appellate Division has spoken — sequestration proceedings do not qualify as proceedings to enforce a credit agreement under the National Credit Act 34 of 2005: *Naidoo v ABSA Bank* 2010 (4) SA 597' (2011) 14(2) *PELJ* 171). The High Court's decision in the case of *First Rand Bank Limited v Janse van Rensburg* [2012] 2 All SA 186 (ECP) is one of the latest judgments in this respect. The court had to resolve the question whether an application by a debtor to be placed under debt review in terms of s 86 of the NCA constitutes an act of insolvency in terms of s 8*(g)* of the Insolvency Act. The judgment is significant because it clarifies an important aspect of the inter-play between the NCA and the Insolvency Act.

The issue in the *Van Rensburg* judgment brings to mind another closely related issue which, though not raised in this case, is likely to come before the courts in the future. The issue is whether an application for debt review that results in a debt re-arrangement constitutes an act of insolvency in terms of s 8*(e)* of the Insolvency Act. The *Van Rensburg* judgment is also significant in

that it clarifies a previous High Court decision in the case of *First Rand Bank Limited v Evans* 2011 (4) SA 597 (KZD) which could potentially have been misunderstood, so allowing the provisions of the Insolvency Act to be used by creditors to defeat the spirit and intent of the NCA. The *Van Rensburg* judgment also establishes the nature of the relationship between credit bureaus and consumers/debtors in the performance of the former's duties under the NCA.

THE FACTS AND THE DECISION IN THE *VAN RENSBURG* CASE

The facts of the *Van Rensburg* case were that the applicant, First Rand Bank Limited, applied for a provisional order of sequestration against the estates of Heinrich Janse van Rensburg and Azelle Janse van Rensburg — the respondents. (There were two separate applications, but the facts and the issues were the same in both cases. Hence the court delivered one judgment in respect of the two cases.) The respondents were married to each other out of community of property and they each held a 50 per cent membership in Niqua Juices CC ('the corporation'). In 2002 the corporation was lent and advanced funds by the applicant. Each of the respondents bound themselves to the applicant as sureties in respect of the indebtedness of the corporation to the applicant. The suretyship liability was secured by a general covering bond registered over an immoveable property owned by the respondents.

The sole basis upon which the applicant sought an order of sequestration in each case was that the respondents had committed an act of insolvency in terms of s 8*(g)* of the Insolvency Act. In terms of s 8*(g)* a debtor commits an act of insolvency if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts. The alleged act of insolvency in this case was that the respondents had each applied for an order in terms of s 86(7)*(c)* of the NCA for a declaration of over-indebtedness (*Van Rensburg* para 5). In essence, their application for debt review was viewed by the applicant as an act of insolvency. In support of its application the applicant relied on a consumer profile report issued by a credit bureau, in which it was reported that the respondents had applied for debt review.

The issue that the court had to decide was whether an application for debt review constitutes an act of insolvency in terms of s 8*(g)* of the Insolvency Act, and if so, whether the applicant had established the commission of such an act of insolvency (*Van Rensburg* para 7). Counsel for the applicant argued that an application to be placed under debt review in terms of s 86 of the NCA constituted an act of insolvency in terms of s 8*(g)* of the Insolvency Act. He further argued that the available evidence showed that such an application had in fact been made, and accordingly that each of the respondents had thereby committed an act of insolvency entitling the applicant to apply for the sequestration of their respective estates (*Van Rensburg* para 8).

Counsel for the applicant cited the *Evans* case (supra) as authority for the proposition that an application for debt review constitutes an act of

insolvency. In the *Evans* case the applicant had applied for an order sequestrating the respondent's estate on the grounds that the respondent had committed an act of insolvency in terms of s 8*(g)* of the Insolvency Act by addressing a letter to the applicant informing the latter that the respondent had been placed under debt review. It is worth noting that in the *Evans* case the respondent resisted the application for the sequestration of his estate by arguing that, amongst other things, s 88(3) of the NCA precluded a creditor from applying for the sequestration of his debtor's estate where the former had received notice of an application for debt review by the debtor (*Evans* (supra) para 24). It was further argued on behalf of the respondent that the provisions of s 8*(g)* of the Insolvency Act ought to be interpreted differently as a consequence of the enactment of the NCA to avoid a situation where a debtor who applied for debt review in terms of the NCA could be said to have committed an act of insolvency.

The court in the *Evans* case found that the NCA does not preclude a credit provider from bringing insolvency proceedings against a consumer/debtor's estate even where the consumer/debtor has already applied for debt review in terms of s 86 of the NCA. In coming to this conclusion the court in the *Evans* case followed the decision of the Supreme Court of Appeal in *Naidoo v ABSA Bank Ltd* 2010 (4) SA 597 (SCA) where the court, approving the reasoning of Trengove AJ in *Investec Bank Limited v Mutemeri* 2010 (1) SA 265 (GSJ), held, inter alia, that sequestration proceedings are not an endeavour to exercise, or enforce by litigation or other judicial process, any right or security under the credit agreement as referred to in s 88(3) of the NCA. Amongst other things s 88(3) of the NCA provides that a credit provider who receives notice of an application for debt review may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement.

In the *Evans* case the court also rejected the argument that s 8*(g)* of the Insolvency Act ought to be interpreted differently as a consequence of the enactment of the NCA to avoid a situation where a debtor who applied for debt review in terms of the NCA could be said to have committed an act of insolvency. In rejecting this contention Wallis J remarked in *Evans* (supra) para 21: 'As Caney AJ pointed out in *Madari v Cassim* [1950 (2) SA 35 (D)] a debtor who gave notice to his creditors of an intention to apply for an administration order under the Magistrates' Courts Act, which is an earlier form of debt rearrangement, was in precisely that situation.' Wallis J went on to hold that the letter addressed to the applicant by the respondent constituted an act of insolvency on the respondent's part in terms of s 8*(g)* of the Insolvency Act (*Evans* (supra) para 23).

In the *Van Rensburg* case the court rejected the applicant's contention that the *Evans* case was authority for the general proposition that the mere fact of an application for debt review in terms of the NCA constitutes compliance with the provisions of s 8*(g)* of the Insolvency Act. The court noted that the finding that the respondent had committed an act of insolvency in the *Evans* case turned upon the delivery by the respondent to the applicant (the

creditor) of a written notice drawing to the attention of the applicant that the respondent had been placed under debt review (*Van Rensburg* para 16). In this respect the court noted that in arriving at his conclusion in the *Evans* case, Wallis J's approach to the application of s 8*(g)* was consistent with a long line of authorities which dictate that when construing a written notice purporting to be a notice in terms of s 8*(g)*, a court is required to consider the terms of the written notice and, where appropriate, the circumstances in which the notice is given to a creditor (*Van Rensburg* para 15). The court stated that it was on this basis that Wallis J considered the content of the letter and, in the light of the facts and circumstances known to the creditor at the time, held that the letter constituted an act of insolvency as envisaged by s 8*(g)* of the Insolvency Act (*Van Rensburg* para 17).

The court pointed out that the judge in the *Evans* case had not been required to decide whether the mere fact that an application had been made for debt review in terms of the NCA constituted an act of insolvency, and that he had made no such findings in that respect (*Van Rensburg* para 18). It clarified that Wallis J's consideration, in the *Evans* case, of the effect of an application to be placed under administration in terms of s 74 of the Magistrates' Courts Act 32 of 1944 ('the Magistrates' Courts Act') took place in the context of evaluating the argument raised by the respondent to the effect that policy considerations underlying the enactment of the NCA favour the view that an application for debt review ought not to be construed as evidencing an act of insolvency. The court found that the remarks made by Wallis J in the *Evans* case to the effect that an applicant for debt review is not in a novel position since applicants for administration orders are in precisely the same position were obiter, and that Wallis J did not find that an application for debt review in terms of the NCA ipso facto constitutes an act of insolvency (*Van Rensburg* para 19).

Notably, the court in the *Van Rensburg* case went on to distinguish the procedure for applying for an administration order in terms of s 74 of the Magistrates' Courts Act from the procedure followed by a consumer/debtor applying for debt review in terms of s 86 of the NCA. It stated that in terms of s 74 of the Magistrates' Courts Act a debtor who is unable to meet his or her financial obligations or is unable to satisfy a judgment debt could bring an application before a magistrate's court for an order placing his estate under administration (*Van Rensburg* para 22). The court noted that what was significant with regard to the procedure for applying to be placed under administration was the fact that the applicant was required, amongst other things, to deliver a notice of the application to creditors (*Van Rensburg* para 23). The court pointed out the application itself therefore met the requirements of s 8*(g)* of the Insolvency Act; namely that there must be a notice in writing delivered to a creditor in which the debtor states that he or she is unable to meet his or her financial obligations (*Van Rensburg* para 24).

The court further noted that, to the extent that the authorities relating to applications for an administration order in terms of s 74 of the Magistrates' Courts Act suggest that the mere application fulfils criteria of s 8*(g)* of the Insolvency Act, these authorities are to be read in the context of the

particular procedure by which an administration order is sought (*Van Rensburg* para 25). It also noted that nevertheless, in determining whether the notice to the creditor amounts to an act of insolvency, the courts will have regard to the whole content of the application for an administration order to establish whether it conveys an unequivocal statement of inability to pay, and whether the creditor receiving the notice can reasonably conclude that the debtor is unable (rather than merely unwilling) pay his or her debts (*Van Rensburg* para 26).

On the other hand, the court pointed out that the procedure by which a debtor applies for debt review in terms of the NCA is different from that envisaged by s 74 of the Magistrates' Courts Act. The difference is that an application for debt review in terms of s 86 of the NCA (read with reg 24 of the Regulations promulgated in terms of the NCA) is made by the consumer/debtor to a registered debt counsellor, and it does not involve a notice given by the debtor to the creditor in which the debtor declares an inability to pay one or more of his debts (*Van Rensburg* para 27–8). The court reiterated that the notice of inability to pay envisaged by s 8*(g)* of the Insolvency Act must be given deliberately and with the intention of giving such notice. It stated that if the words of the notification do not convey an unequivocal statement of inability to meet a debtor's obligation, the fact that the creditor may have construed the notice in that manner does not render the notice one in terms of s 8*(g)* of the Insolvency Act (*Van Rensburg* para 28).

It is also important to note that in the *Van Rensburg* case the written notice which the applicant claimed was an act of insolvency for the purposes of s 8*(g)* of the Insolvency Act was not any written communication addressed by the respondents to the applicant. Rather, the applicant relied on a profile report issued by the credit bureau showing that the respondents made an application for debt review in terms of the NCA (*Van Rensburg* para 29). The court noted that the profile report provided no details of the terms of the application for debt review: it did not contain any reference to statements and declarations made by the debtor, and it contained no information upon which a creditor may determine that the debtor was indeed unequivocally stating an inability to pay. As a result, the court found that the profile report did not constitute a written notice as envisaged by s 8*(g)* of the Insolvency Act (*Van Rensburg* para 30).

Related to the above, and of equal importance, was the court's consideration of the application of the following principle:

> 'If an agent, on behalf of a debtor, writes a letter which amounts to an act of insolvency in terms of section 8*(g)* of the Act the court must be satisfied that the principal knew that the letter was being written in those terms and consented to it being so written.' (*Eli Spilkin (Pty) Ltd v Mather* 1970 (4) SA 22 (E) at 24A–B.)

In this respect the court noted that the written notice upon which the applicant relied on was communicated by a credit bureau rather than by the debtor himself (*Van Rensburg* case para 32). The court stated that credit bureaus are registered entities which engage in the business of trading

information in a credit market regulated by the NCA. These bureaus provide a service to both consumers and credit providers by providing information retained for that purpose (ibid). The court found that there was nothing in the applicant's papers to suggest the relevant credit bureaus were authorised by the respondents to make any declarations on behalf of the respondents, nor that they held such general authority in regard to the affairs of the respondents as would bind the respondents by any declarations made by the credit bureaus. Consequently, the court ruled that there was no basis for finding that the credit bureaus had acted on the basis of authority specifically conferred by the respondents nor on the basis of any general authority which could bind the respondents (*Van Rensburg* para 34).

EVALUATION OF THE DECISION

It is submitted that the court's reasoning on the issues arising in the *Van Rensburg* case cannot be faulted. The court was correct in rejecting both the applicant's contention that an application for debt review constitutes an act of insolvency in terms of s 8*(g)* of the Insolvency Act, as well as the applicant's reliance on the *Evans* case as authority for this proposition. If regard is had to what the courts have said about the requirements that must be met before an act or omission can constitute an act of insolvency under s 8*(g)* of the Insolvency Act, it becomes clear that an application for debt review per se cannot qualify as an act of insolvency.

To start with, the essence of s 8*(g)* of the Insolvency Act is that a debtor commits an act of insolvency if he gives notice in writing *to any one of his creditors* that he is unable to pay any of his debts. Therefore, to qualify as an act of insolvency the notice of inability to pay must be given to a person who is actually a creditor at the time (see Eberhard Bertelsmann, Roger G Evans, Adam Harris, Michelle Kelly-Louw, Anneli Loubser, Melanie Roestoff, Alastair Smith, Leonie Stander, Lee Steyn (edited by Chris Nagel) *Mars The Law of Insolvency in South Africa* 9 ed (2008) 98, quoting the case of *Wepner v Ericson* 1926 WLD 81). It is submitted that an application for debt review does not meet this requirement because s 86 of the NCA, read with reg 24 of the National Credit Regulations, 2006 (GN R489 *GG* 28864 of 31 May 2006) ('the regulations') obliges the consumer/debtor to make his application to a registered debt counsellor. This he or she does by submitting the prescribed Form 16 and supplying certain specified documents and information to the debt counsellor (see s 86(1) of the NCA and reg 24(1)*(a)*–*(c)* of the regulations). Upon receipt of the application the debt counsellor is obliged by s 86(4) of the NCA, as read with reg 24(2), to notify all credit providers that are listed in the application and every registered credit bureau of the application for debt review by delivering a completed Form 17.1.

It is worth noting that the application for debt review submitted by the debtor (Form 16) is not provided to the credit provider. Further, there is no requirement in either the NCA or the regulations that the consumer/debtor give notice of this application for debt review to any of his creditors. Rather,

the information provided to the credit provider is Form 17.1, which is a notice by the debt counsellor to the effect that an application for debt review has been received. It is clear that an application for debt review in terms of s 86 of the NCA, read with reg 24 of the regulations, is one made to a registered debt counsellor and not to the creditor. Therefore an application for debt review does not constitute an act of insolvency under s 8*(g)* of the Insolvency Act because it does not meet the requirement that the notice of inability to pay must be given to a person who is actually a creditor to the debtor at the time. The debt counsellor envisaged in the NCA cannot be a creditor to the consumer/debtor (see s 46(4)*(c)*(iii) and s 47(1) of the NCA).

Further, with regard to the notice of inability to pay, the courts have said that 'there must be something formal and deliberate, something done by the debtor with the consciousness that he is giving notice, and intended to be understood in that sense' (*Ex parte Oastler* (1884) 13 QBD 471). The test is whether a reasonable man receiving the notice would construe it as being the act of insolvency alleged (*Barlows (Eastern Province) Ltd v Bouwer* 1950 (4) SA 385 (E); see also *Court v Standard Bank of South Africa Ltd; Court v Bester NO* 1995 (3) SA 123 (A)). When a creditor receives Form 17.1 from the debt counsellor — remembering that the application for debt review (Form 16) is not delivered to the creditor — it cannot be said that this is something 'formal and deliberate, something done by the debtor with the consciousness that he is giving notice, and intended to be understood in that sense' (*Ex parte Oastler* (supra)). This is because it is not the debtor who completes and delivers Form 17.1 to the creditor. It follows from this that the application for debt review does not constitute an act of insolvency in terms of s 8*(g)* of the Insolvency Act, because it does not meet the requirement that it must be something formal and deliberate done by the debtor with the consciousness that he is giving notice, and with the intention that it be understood in that sense. In the light of the above it is submitted that the court was correct in rejecting the applicant's contention that an application for debt review constitutes an act of insolvency for the purposes of s 8*(g)* of the Insolvency Act.

Additionally, in rejecting the applicant's contention to the effect that an application for debt review constitutes an act of insolvency, the court in the *Van Rensburg* case ensured that the purposes of the NCA can work alongside the provisions of the Insolvency Act. For, had the applicant's proposition been accepted as a correct statement of the law, it would have defeated the spirit and purpose of the NCA. One of the purposes of the NCA is to address and prevent over-indebtedness of consumers (s 3*(g)* of the NCA). The Act provides a mechanism, in the form of the debt review procedure, for resolving over-indebtedness based on the principle of satisfaction by the consumer/debtor of all responsible financial obligations (s 3*(g)* read with s 86 of the NCA). By availing themselves of the debt review procedure, debtors may succeed in having their credit agreement debts rescheduled. In this way debtors can get some breathing space because their financial obligations may be re-arranged by extending the period of the debt agreement, reducing the amount of each payment due, or postponing during a specified period the

dates on which payments are due under the agreement (s 86(7)*(c)*(ii)*(aa)*–*(bb)* of the NCA. See also Boraine & Van Heerden op cit). However, if the position urged by applicant's counsel in the *Van Rensburg* case had been accepted, it would mean that anytime a debtor applied for debt relief he or she would, in effect, be committing an act of insolvency, thereby entitling a creditor to apply for the sequestration of the debtor's estate. Once that happened the debtor would effectively be denied the opportunity to make use of the debt review procedure.

The conclusion arrived at by the court ensures that a debtor who applies for debt review in terms of the NCA does not, by the mere fact of applying for debt review, place himself in an invidious position where he or she commits an act of insolvency in terms of the Insolvency Act. While the court's reasoning in the *Van Rensburg* case cannot be faulted, it is submitted that it does lead to a peculiar result, especially when taken together with the effect of the ruling in the *Evans* case. *Van Rensburg* holds that a debtor who applies for debt review in terms of s 86 of the NCA does not thereby commit an act of insolvency in terms of s 8*(g)* of the Insolvency Act. Yet, as a consequence of *Evans*, a debtor commits an act of insolvency in terms of s 8*(g)* of the Insolvency Act if the debtor takes the extra step of notifying his or her creditor in writing that he or she has applied for, or is under, debt review. This is notwithstanding the fact that the creditor would, in any event and without notice from the debtor, have been notified of the application for debt review by the debt counsellor in terms of s 86(4)*(b)* of the NCA.

In view of the fact that the courts have said that the NCA does not preclude a credit provider from bringing insolvency proceedings against a consumer/debtor's estate even where the consumer/debtor has already applied for debt review in terms of s 86 of the NCA (see *Investec Bank Limited v Mutemeri* (supra) and Maghembe op cit), it becomes vital that consumers/debtors who apply for, or who are under, debt review be on their guard to ensure that they do not inadvertently commit an act of insolvency in terms of s 8*(g)* of the Insolvency Act by notifying the creditor in writing of the fact that they have applied for, or are under, debt review. Neither must the consumer/debtor procure an agent, or any third party for that matter, to notify the creditor in writing of the application for debt review. This is so because the courts have said that a duly authorised agent acting with the knowledge and consent of the debtor can commit an act of insolvency on behalf of his principal (*Chenille Industries v Vorster* 1953 (2) SA 691 (O)).

If the consumer/debtor deems it necessary to notify the creditors of the fact that he or she has applied for, or is under debt review, one way of doing so without committing an act of insolvency in terms of s 8*(g)* of the Insolvency Act would be to do so orally. However, it must be borne in mind that doing so may provide the creditor with the evidence of actual insolvency (*Patel v Sonday* 1936 CPD 466 at 469). This may then give the creditor grounds to apply for the sequestration of the debtor's estate on the basis of actual insolvency. Therefore, it is best for a debtor who has applied for, or is under, debt review not to notify the creditors of this fact. Rather, once he or

she has applied for debt review, the debtor must let that process run its course, bearing in mind that the debt counsellor to whom the application is made is obliged by s 86(4)*(b)* of the NCA to give notice of the application for debt review to all credit providers listed in the application, as well as to every registered credit bureau. By virtue of this procedure the creditors will become aware that the debtor has applied for, or is under debt review, without the debtor having to communicate this personally.

The *Van Rensburg* judgment is also important because it clarifies the context, nature and import of the remarks of Wallis J in the *Evans* case regarding the effect of an application to be placed under administration in terms of s 74 of the Magistrates' Courts Act. Wallis J's remarks were to the effect that an applicant for debt review is not in a novel position since applicants for administration orders are in precisely the same position. It is perhaps this remark that caused the applicant's counsel in the *Van Rensburg* case to cite the *Evans* case as authority for the proposition that an application for debt review constitutes an act of insolvency for the purposes of s 8*(g)* of the Insolvency Act. The court in *Van Rensburg* was correct in saying that Wallis J's remarks were obiter, since he had not been called upon to decide whether the mere fact that an application had been made for debt review in terms of the NCA constituted an act of insolvency. The court clarified that Wallis J's remarks were made in the context of considering an argument advanced by the applicant in the *Evans* case to the effect that s 8*(g)* of the Insolvency Act ought to be interpreted differently in light of the provisions of the NCA.

The clarification as to the nature and import of the remarks made by Wallis J in the *Evans* case is welcome. It removes any confusion to which the remarks may give rise. Not only did the court clarify the remarks of Wallis J; it further removed any lingering cause for confusion by distinguishing the procedures to be followed when one applies for an administration order in terms of s 74 of the Magistrates' Court Act with that which applies when a person applies for debt review in terms of the NCA. The court's discussion of this distinction is significant. It helps to explain why earlier authorities such as the *Madari* case (supra), which suggested that the mere application for an administration order in terms s 74 of the Magistrates' Courts Act fulfils the criteria of s 8*(g)* of the Insolvency Act, must not be taken as authority for the proposition that an application for debt review in terms of the NCA, ipso facto, constitutes an act of insolvency. The court's discussion of the distinction also helps to contextualise, and hence clarify, the remarks of Wallis J in the *Evans* case, which remarks could easily be misinterpreted to mean that an application for debt review constitutes, ipso facto, an act of insolvency.

Another significant result of the *Van Rensburg* judgment is that it establishes the juristic nature of the role credit bureaus play in the performance of their reporting function vis-à-vis consumers/debtors. The court found that, in the absence of any evidence to the contrary, when a credit bureau reports to a credit provider the fact that a debtor has applied for debt

review, the credit bureau does not do so on behalf of the consumer/debtor. Rather, it acts as a principal in its own right and not as an agent of the consumer/debtor. Therefore, there can be no question of the credit bureau committing an act of insolvency as an agent for the consumer/debtor in such instances.

DEBT REVIEW AND SECTION 8*(e)* OF THE INSOLVENCY ACT

While the *Van Rensburg* judgment appears to have settled the question whether an application for debt review constitutes an act of insolvency for the purposes of s 8*(g)* of the Insolvency Act by answering that question in the negative, a closely related and interesting issue that did not arise in that case, but which may arise in the future, is the application of s 8*(e)* of the Insolvency Act in the context of debt review. The issue is whether a consumer/debtor who applies for debt review in terms of s 86 of the NCA commits an act of insolvency under s 8*(e)* of the Insolvency Act. The essence of s 8*(e)* of the Insolvency Act is that a debtor commits an act of insolvency if he makes, or offers to make, any arrangement with any of his creditors for releasing him wholly or in part from his debts. The question then is the following: could a case be made that a consumer/debtor commits an act of insolvency in terms of s 8*(e)* of the Insolvency Act where the debtor makes an application for a debt review which culminates in the re-arrangement of the debtor's financial obligations in terms of s 86(7)*(b)* read with s 86(8)*(a)* of the NCA? The answer to this question depends on whether an application for debt review which results in a re-arrangement of the debtor's financial obligations meets the requirements of s 8*(e)* of the Insolvency Act.

First of all, the consumer/debtor must make, or offer to make, an arrangement with any of his creditors for s 8*(e)* of the Insolvency Act to become relevant. In terms of s 86 of the NCA, when a debtor makes an application for a debt review to a debt counsellor, the latter is obliged by s 86(6) of the NCA to carry out an assessment to determine whether, amongst other things, the debtor is over-indebted. Section 86(7)*(b)* of the NCA further provides:

> 'If, as a result of the assessment conducted in terms of subsection (6), a debt counsellor reasonably concludes that 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*.' (Emphasis added.)

Section 86(8)*(a)* of the NCA also provides:

> '*If a debt counsellor makes a recommendation in terms of subsection (7)(b) and the consumer and each credit provider concerned accept that proposal*, the debt counsellor must record the proposal in the form of an order, and if it is consented to by the consumer and each credit provider concerned, file it as a consent order in terms of section 138.' (Emphasis added.)

In the light of the above provisions, if the consumer/debtor and the respective credit providers accept the debt counsellor's recommendation and

agree on a plan of debt re-arrangement, such a re-arrangement would appear to qualify as an arrangement for the purposes of s 8*(e)* of the Insolvency Act. However, the matter does not end there. The arrangement must meet all the requirements of s 8*(e)* to constitute an act of insolvency. The courts have said that to constitute an act of insolvency in terms of s 8*(e)* of the Insolvency Act, the debtor does not have to make the arrangement or offer personally; an offer or arrangement made by a third person or an agent would suffice provided it is clear that the representative acted with the knowledge and permission of the debtor (see *Walsh v Kruger* 1965(2) SA 756 (E) at 759). It is not clear from the wording of s 86(7)*(b)* read with s 86(8)*(a)* of the NCA just who comes up with the plan of debt re-arrangement. Is it the consumer/debtor working together with the respective creditors who come up with the plan, or is it the debt counsellor who draws the plan and then recommends it to the debtor and his creditors for their consideration and acceptance? If it is the former no problem arises because on that interpretation it is the consumer/debtor who makes an arrangement with his creditors for the purposes of s 8*(e)* of the Insolvency Act. However, if it is the debt counsellor who draws the plan, the question that arises is whether the debt counsellor acted with the knowledge and consent of the debtor, so that the requirement laid out in *Walsh v Kruger* (supra) can be met.

The problem is that s 86(7)*(b)* of the NCA provides that the debt counsellor 'may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement'. Section 86(8)*(a)* of the NCA further provides that 'if a debt counsellor makes a recommendation in terms of subsection (7)*(b)* and the consumer and each credit provider concerned accept that proposal, the debt counsellor must record the proposal in the form of an order . . .'. The use of the word 'proposal' — which means a plan or scheme — and the reference in s 86(8)*(a)* to the proposal being 'accepted' seems to imply that it is the debt counsellor who comes up with the plan, which the debt counsellor then recommends to the debtor and credit providers for their consideration and acceptance. It could also be argued, though, that all that s 86(7)*(b)* means is that the debt counsellor — without proposing a particular debt re-arrangement plan himself — simply recommends to the debtor and his creditors that they sit down together and consider coming up with a debt re-arrangement plan. It is submitted that the provisions of the NCA are ambiguous in this respect.

But getting bogged down in such interpretive issues may distract from the solution. It is worth noting that before a plan of debt re-arrangement pursuant to s 86(7)*(b)* read with s 86(8)*(a)* of the NCA can be effected, both the consumer/debtor and the creditors concerned must accept it. In other words, the debtor and the creditors have to consent to the plan. In the light of this it is submitted that it does not matter whether the plan of debt re-arrangement eventually agreed upon by the debtor and the credit providers is one proposed by the debtor personally or by the debt counsellor. For, the fact that the consumer/debtor gives his consent to the arrangement ensures that it meets the requirement laid down in *Walsh v Kruger*; namely

that, for the purposes of s 8*(e)* of the Insolvency Act, an offer or arrangement made by a third person or an agent would suffice, provided that it is clear that the representative acted with the knowledge and permission of the debtor. When a debtor applies to a debt counsellor for a debt review, one of the outcomes desired by the debtor is to have some of his financial obligations re-arranged. If the debt counsellor should come up with a plan of debt re-arrangement to which the debtor gives his consent, surely it cannot be denied that the debt counsellor acted with the knowledge and permission of the debtor?

It has also been said by the courts with regard to s 8*(e)* of the Insolvency Act that an arrangement or offer qualifies as an act of insolvency only if it is indicative of the debtor's inability to pay his debts, otherwise no deduction of the debtor's insolvency can be made (see Bertelsmman et al *Mars The Law of Insolvency* op cit at 96, quoting the case of *Laeveldse Koöperasie Bpk v Joubert* 1980 (3) SA 1117 (T)). This requirement is likely to pose the greatest obstacle for a creditor who seeks to sequestrate his debtors' estate on the basis that the debtor committed an act of insolvency by making an application for a debt review which culminated in the re-arrangement of the debtor's financial obligations in terms of s 86(7)*(b)* read with s 86(8)*(a)* of the NCA. It is submitted that the answer to the question whether the plan of debt re-arrangement as envisaged by s 86(7)*(b)* read with s 86(8)*(a)* is indicative of the debtor's inability to pay his debts depends on the facts of each case. The context in which a debt counsellor recommends a debt re-arrangement plan in terms of s 86(7)*(b)* of the NCA must be kept in mind. In terms of s 86(7)*(b)* the debt counsellor may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement where, upon application for debt review by the debtor, the debt counsellor has assessed the debtor's financial situation and has reasonably concluded that the consumer/debtor *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. In terms of s 79(1) of the NCA, 'a consumer is over-indebted if the preponderance of available information at the time of the 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 . . .'.

It follows from the above that the debt counsellor makes his recommendation in terms of s 86(7)*(b)* in circumstances where the debtor is not yet over-indebted. The fact that the debtor is experiencing or likely to experience difficulty in satisfying his debts in a timely manner does not necessarily mean that he is insolvent. Although this might point to impending insolvency, it is submitted that this cannot be taken as an indication of inability to pay one's debts. In the case of *Realizations Ltd v Ager* 1961 (4) SA 10 (N) at 12 the court said: 'The fact that a man cannot, at the moment, pay his debts does not mean that he is necessarily insolvent but is a factor which weighs very strongly against him, the fact that he cannot pay his debts . . .

generally means that he is insolvent, but not necessarily so.' In the light of this statement, it is submitted that the fact that a debtor consents to a plan of debt-rearrangement is not, by itself, indicative of the debtor's inability to pay his debts. The courts would have to evaluate the facts of each case to establish whether the plan of debt re-arrangement is indicative of a debtor's inability to pay his debts.

In addition to the requirement discussed above, it is worth noting that in terms of s 8*(e)* of the Insolvency Act the object of the offer or arrangement made by the debtor must be for releasing him wholly or partially from his debts (Robert Sharrock, Kathleen van der Linde & Alastair Smith *Hockly's Insolvency Law* 8 ed (2006) 36) . In *Mackay v Cahi* 1962 (4) SA 193 (O) at 206 the court held that an offer by a debtor who had offered to pay his creditors 25 cents in the Rand, subject to his being allowed extension of time to the end of the year to pay the balance, did not amount to an arrangement for releasing him wholly or partially from his debts. Therefore, a request to a creditor asking for an extension of time within which to pay the debt in full is not an act of insolvency (see Bertelsmann et al *Mars The Law of Insolvency* op cit at 96). In this respect it appears that the debt re-arrangement plan envisaged by s 86(7)*(b)* read with s 86(8)*(a)* of the NCA would not meet this requirement. The object of the debt counsellor's proposal under those sections of the NCA is not to release the debtor wholly or partially from his debts. Rather, the objective is to restructure the debts to make it possible for the debtor to pay them in full. In terms of s 3 of the NCA one of the purposes of the Act is to address and prevent over-indebtedness of consumers and to *provide mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations* (see further Boraine & Van Heerden op cit). Thus, when the debt counsellor undertakes a debt review upon application by a debtor, which review culminates in a proposal in terms of s 86(7)*(b)* read with s 86(8)*(a)* of the NCA, such a proposal is based on the principle of full satisfaction of the debtor's financial obligations, and not to release him from those obligations wholly or partially. For this reason, it is submitted that it is highly unlikely that the courts would find that a proposal by the debt counsellor in terms of s 86(7)*(c)* constitutes an act of insolvency in terms of s 8*(e)* of the Insolvency Act.

CONCLUSION

The *Van Rensburg* judgment succinctly answered the question whether an application for debt review constitutes an act of insolvency. In a well-reasoned judgment the court concluded that it does not. The judgment marks an important step in the resolution of the tension arising from the overlap between the Insolvency Act and the NCA. The conclusion ensures that a debtor who applies for debt review in terms of the NCA does not, by the mere fact of applying for debt review, place himself in an invidious position where he commits an act of insolvency in terms of s 8*(g)* of the Insolvency Act, and does not entitle the creditors to apply for the sequestra-

tion of his estate. However, a debtor who is or has applied for a debt review should be wary of how and what he, or his agent, communicates to any creditor. A debtor who writes to his or her creditor drawing the creditor's attention to the fact that the debtor, has been placed under debt review, may unwittingly commit an act of insolvency in terms of the finding in the *Evans* case.

The *Van Rensburg* judgment is also important because it clarifies the position in *Evans* case, since remarks made in *Evans* could be misconstrued to mean that an application for debt review constitutes, without more, an act of insolvency in terms of s 8*(g)* of the Insolvency Act. It also clarifies the nature of the relationship between credit bureaus and consumers/debtors with regard to the former's performance of their duties under the NCA by showing that credit bureaus are not agents of consumers/debtors. Hence a credit bureau cannot, without more, commit an act of insolvency on behalf of the consumer/debtor.

It remains a moot point whether a consumer/debtor who makes an application for a debt review which culminates in the re-arrangement of the debtor's financial obligations in terms of s 86(7)*(b)* read with s 86(8)*(a)* the NCA thereby commits an act of insolvency in terms of s 8*(e)* of the Insolvency Act. It is unlikely that the courts would find such an application to constitute an act of insolvency in terms of s 8*(e)*. The submission is premised on the fact that the debt re-arrangement as envisaged by the NCA is based on the principle of full satisfaction of the debtor's financial obligations, and therefore it does not meet the requirement of s 8*(e)* of the Insolvency Act that the objective of the arrangement must be to release the debtor wholly or partially from his financial obligations. Further, a debt re-arrangement pursuant to s 86(7)*(b)* read with s 86(8)*(a)* of the NCA is not, by itself, indicative of the debtor's inability to pay his debts. Accordingly it does not meet one of the requirements of s 8*(e)* of the Insolvency Act; viz, that the offer or arrangement must be indicative of the debtor's inability to pay his or her debts.