

The application of section 85 of the National Credit Act in an application for summary judgment

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OPSOMMING

Die toepassing van artikel 85 van die Nasionale Kredietwet in 'n aansoek om summier vonnis

Voor die inwerkingtreding van die Nasionale Kredietwet 34 van 2005 (NKW) in 2007 was dit ietwat ongehoord om in Suid-Afrika te hoor van wetgewing gerig op verbruikersbeskerming. Een van die NKW se hoofdoelstellings is die beskerming van skuldenaars. Skuldberading ingevolge artikel 86 is een van die wyses waarop die wetgewer aan sodanige beskerming uiting gee. Artikel 85 bepaal dat 'n hof, in enige verrigtinge waarin 'n kredietooreenkoms ter sprake kom en indien die skuldenaar beweer dat hy oorverskuldig is, die kredietooreenkoms na 'n skuldberader mag verwys of self die skuldenaar oorverskuldig verklaar en sy skuld herstruktureer. In die praktyk word artikel 85 hoofsaaklik by aansoeke om summier vonnis met betrekking tot ontroerende eiendom deur skuldenaars geopper. Artikel 85 verleen aan die hof die diskresie om die kredietooreenkoms na 'n skuldberader te verwys met die gevolg dat summier vonnis uitgestel of gewysig kan word. Die onus rus op die skuldenaar om die hof te oortuig om sodanige verwysing te beveel. Die hof het 'n aantal aspekte geïdentifiseer wat oorweeg moet word by die toepassing van die hof se diskresie. Hierdie artikel is 'n kritiese bespreking van artikel 85 asook die uitleg daarvan deur die hof.

1 Introduction

The National Credit Act (NCA)¹ came into operation at a time when consumer laws were somewhat unheard of in South Africa. Prior to the NCA, the Credit Agreements Act² and the Usury Act³ regulated the consumer credit industry and the only debt relief remedies available to the over-burdened consumer were sequestration⁴ and administration,⁵ which left a large portion of over-burdened consumers without an adequate remedy.

The introduction of the debt review process in section 86 of the NCA created an alternative remedy for over-indebted consumers. A duly registered debt counsellor is given the task to, firstly, determine whether the consumer is over-indebted, and secondly, to make a

1 34 of 2005.

2 75 of 1980.

3 73 of 1968.

4 In terms of the Insolvency Act 24 of 1936.

5 In terms of s 74 Magistrates' Courts Act 32 of 1944.

recommendation to court as to the restructuring of the consumer's debt.⁶ Since the inception of the debt review process in June 2007, more than 184,000 consumers have applied for debt review.⁷ This figure is not insignificant and reflects on South Africa's need for effective credit regulation and debt relief mechanisms.

One of the provisions pertaining to the debt review process introduced by the NCA is section 85. This section falls under Part D of Chapter 4⁸ which, *inter alia*, deals with over-indebtedness and reckless credit. Section 85 allows the court to either refer a matter to a debt counsellor or to declare the consumer over-indebted and make an order to restructure the consumer's debts.

Due to the nature of the remedy provided by section 85 and its wide application, it has been the subject of a number of High Court cases. Section 85 is often raised by the consumer in a summary judgment application involving execution against immovable property. This article focuses on the courts' application and interpretation of section 85 in such instances.

2 Interpretation and Purpose of the NCA

The NCA has been the subject of a great deal of criticism, particularly relating to the drafting and wording thereof. In *FirstRand Bank Ltd v Seyffert*⁹ Wallis J noted:

I share the general frustration of my judicial colleagues around the country at the lack of clarity that features at least in the parts of the NCA with which one is concerned in cases of the kind now before me. A court is forced to go round and round in loops from subsection to subsection, much like a dog chasing its tail.¹⁰

These ambiguities have led to a number of conflicting High Court decisions¹¹ and compelled the National Credit Regulator (NCR) to

6 Ss 86(6) & 86(7)(c).

7 "National Credit Regulator Debt Review Task Team" 2010 <http://ncr.org.za> (accessed 2011-09-15).

8 Ch 4 is titled "Consumer Credit Policy" and includes provisions on consumer rights, consumer credit information and records, the credit market, over-indebtedness and reckless credit.

9 2010 6 SA 429 (GSJ).

10 434. See also *Nedbank Ltd v The National Credit Regulator* 2011 3 SA 581 (SCA) par [2] in which Malan JA noted that the NCA cannot be described as the "best drafted Act of Parliament ever passed", and that there are a number of drafting errors and "untidy expressions" which make the NCA particularly difficult to interpret.

11 See *Standard Bank of SA Ltd v Kruger* 2010 4 SA 635 (GSJ); *SA Taxi Securitisation (Pty) Ltd v Nako* case no 19/2010 (ECB) (unreported); *Wesbank Ltd v Papier* Case no 14256/2010 (WCC) (unreported) in which the courts discuss the credit provider's right to terminate a debt review in terms of s 86(10) after the debt counsellors have set the matter down in the Magistrate's Court in terms of s 86(7)(c).

approach the North Gauteng High court for a declaratory order on certain provisions of the NCA.¹²

Section 2(1) of the NCA states that when interpreting the sections of the NCA effect must be given to the purposes of the NCA. It is thus important to first determine what the intention and purpose of the NCA is.

Section 3 of the NCA sets out three main purposes, namely, to promote and advance the social and economic welfare of South Africans; to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers.¹³

It is unarguable that the NCA was created for the protection of consumers.¹⁴ However, this is not the sole purpose of the NCA and thus the scale must not be unduly tipped in favour of the consumer, but a balancing of the respective interests should rather be sought.¹⁵ In *Seyffert*,¹⁶ Willis J held that the NCA has various objectives which must be balanced and that the NCA was designed for consumer protection but not to make South Africa a “debtors’ paradise”.¹⁷

In *Naidoo v Absa Bank Ltd*¹⁸ Cachalia JA discussed the difference between the wording of section 85 and section 130 of the NCA. He held that section 130 must be interpreted in accordance with that part and chapter in which it appears in the Act. He noted that section 85 is found in the part of the NCA that deals with the alleviation of over-indebtedness through the debt review process.¹⁹ It is submitted that, as with section 130, section 85 must also be interpreted in accordance with the part and chapter in which it appears.

One of the purposes of the NCA is to assist the over-indebted consumer. It is submitted that all provisions, especially those dealing with over-indebtedness, should be interpreted to give effect to this

12 *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP). This judgment was taken on appeal: see *Nedbank Ltd v The National Credit Regulator* 2011 3 SA 581 (SCA).

13 See Otto & Otto *The National Credit Act Explained* (2010) par 4.

14 See Scholtz *et al Guide to the National Credit Act* (loose leaf 2008) par 2 3.

15 In *Taxi Securitisation (Pty) Ltd v Nako* case no 19/2010 (ECB) (unreported) par 35 Kemp JA held that “[t]o interpret the NCA through the lenses of ‘the promotion and protection of consumers’” loses sight of the NCA’s other objectives.

16 *FirstRand Bank Ltd v Seyffert* 2010 6 SA 429 (GSJ).

17 *FirstRand Bank Ltd v Seyffert* 2010 6 SA 429 (GSJ) 434. See *Desert Star Trading 145 (Pty) Ltd v No 11 Flamboyant Edleen CC* 2011 2 SA 266 (SCA) 268 in which the court noted that consumer protection legislation, such as the NCA, seeks to achieve a balance between the interests of the credit provider and the consumer.

18 2010 4 SA 597 (SCA).

19 601–602.

purpose.²⁰ In doing so the court has to ensure that the consumer's rights are not unduly infringed upon in favour of the credit provider, and *vice versa*. The court should take into consideration the prospective loss of each party should an order be granted or refused.

3 A Closer Look at Section 85

3 1 General

Section 85 of the NCA provides:

Despite any provision of law or agreement to the contrary, in any Court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the Court may–

- (a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the Court in terms of section 86 (7); or
- (b) declare that the consumer is over-indebted, as determined in accordance with the Part, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness.

Section 85 is found in Part D of Chapter 4 of the NCA. Part D deals specifically with over-indebtedness and reckless credit. There is no limitation placed on section 85 and it thus enjoys a wide application.

3 2 “Despite any provision of law or agreement to the contrary”

Section 85 is applicable to any credit agreement which is subject to the NCA, despite what any other law, agreement or even any other provision of the NCA might state. The court is allowed to act in accordance with section 85 even if legal action has already commenced.²¹

The NCA provides for certain procedures that must be followed prior to debt enforcement. Section 129(1)(a) states that if a consumer is in default the credit provider *may* draw the default to the consumer's attention and propose that the consumer refers the matter to, *inter alia*, a debt counsellor. Although a section 129(1)(a) notice is not obligatory, section 130(1) requires a credit provider to deliver either a section 129(1)(a) or section 86(10)²² notice to the consumer prior to debt enforcement. Thus, should a consumer be in default the credit provider

20 See *FirstRand Bank Ltd v Olivier* 2008 JOL 22139 (SE) 6 where Erasmus J held that one of the purposes of the NCA is to “provide for the debt re-organisation of a person who is over-indebted,” and that the debt review process was constructed with this in mind.

21 See *Ex Parte Ford* 2009 3 SA 379 (WWC) 381 where Binns-Ward AJ notes that s 85 is wide enough to be applicable in an application for voluntary sequestration and that it is not limited to cases of debt enforcement.

22 The reference in s 130(1) to s 86(9) is wrong and should be to s 86(10). See *Scholtz et al* par 12 5.

is under no obligation to deliver a section 129(1)(a) notice to the consumer, but if the credit provider wishes to enforce the agreement then such a notice becomes compulsory, provided that section 86(10) does not apply.²³

Section 86(2) of the NCA states that if a credit provider has commenced with steps contemplated in section 129 to enforce an agreement, that agreement will be excluded from the debt review process. There has been much debate regarding the interpretation of section 86(2) and whether an agreement, for which a section 129(1)(a) notice has been sent, will result in that agreement being excluded from the debt review process.²⁴

The Supreme Court of Appeal, in *Nedbank Ltd v National Credit Regulator*,²⁵ has now confirmed that once a section 129(1)(a) notice has been given to the consumer to enforce the agreement, that agreement will be excluded from the debt review.²⁶ Malan JA held that in the event that the credit agreement is excluded from the debt review by section 86(2), a court, in which the credit agreement is being considered, may still make an order in terms of section 85 by either referring it to a debt counsellor or making an order declaring the consumer over-indebted.²⁷

In light of the above judgment, it is submitted that the courts will now be faced with far more section 85 applications. Consumers, who in the past were still able to include those agreements in the debt review, could now be left without a remedy other than to request the court for a referral in terms of section 85. A court may thus be placed in a position whereby the consumer, having responded to the section 129(1)(a) notice, cannot access the remedies provided by the NCA if the court fails to make a referral in terms of section 85.

The wide application of section 85 allows a consumer to request a court to refer the matter to a debt counsellor, or to declare the consumer over-indebted, in an application for summary judgment by the credit provider. It will allow the court to deny the credit provider judgment despite having followed all the requirements as set out in section 130 of the NCA. Section 85 places no limitation on who may bring such a

23 *Nedbank Ltd v The National Credit Regulator* 2011 3 SA 581 (SCA) par 8.

24 See Scholtz *et al* par 11 3 3 2 & 12 4 12. See Otto & Otto par 44 2.

25 2011 3 SA 581 (SCA).

26 *Nedbank Ltd v National Credit Regulator* 2011 3 SA 581 (SCA) par 14.

27 *Nedbank Ltd v National Credit Regulator* 2011 3 SA 581 (SCA) par 11. The effectiveness of the s 129(1)(a) notice will depend on the credit provider's willingness to negotiate prior to taking legal action. The NCA makes no provision for a procedure to be followed once a s 129(1)(a) notice has been sent. The credit provider is thus under no obligation to negotiate with the debt counsellor and may proceed to court if it is unsatisfied with the offer made by the debt counsellor. In reality, given the interpretation of s 86(2), s 129(1)(a) has not amended the *status quo* of pre-litigation procedures prior to the NCA. The NCA places no time restriction on the sending of a s 129(1)(a) notice. Therefore a consumer may be only one day in default before such a notice is sent. See also *Standard Bank of SA Ltd v Hales* 324.

request for referral to the court, but it is clear that it avails itself to the benefit of the consumer and thus it gives effect to the purpose of the NCA in addressing over-indebtedness.²⁸

It is submitted that the legislature was aware of the infringement that section 85 will have on the credit provider's contractual right to institute legal action against the consumer. The court's purpose is not to protect the credit provider's interests, but rather to decide whether it will be fair, in the given circumstance, to allow such an infringement.²⁹

3 3 “In any Court proceeding in which a credit agreement is being considered”

The wording of section 85 affords it very wide application and is applicable in any court proceeding provided that it is a credit agreement to which the NCA applies. In *Ex Parte Ford*,³⁰ Binns-Ward AJ noted that the scope of section 85 is wide enough to be applicable in an application for voluntary sequestration and that it is not limited to cases of debt enforcement.³¹ Section 85 would thus also be applicable in a hearing following a summary judgment application.

Rule 32(3) of the Uniform Rules of Court provides that upon the hearing for summary judgment the defendant must either provide security to the plaintiff or satisfy the court that he has a *bona fide* defence to the action.³²

When a consumer raises section 85 in a summary judgment application he is in fact admitting liability to the plaintiff and requesting the court to use its discretion in making an order in terms of section 85. Thus the consumer, in actual fact, does not meet the requirements as set out in Rule 32(3)(b) as he does not raise a defence. In *FirstRand Bank Ltd v Olivier*,³³ Erasmus J notes that in a summary judgment application, the defendant (consumer) raises a section 85 application as a remedy and that, although the application must still be *bona fide* and not a mere delaying tactic, it will be inappropriate to impose the requirements of Rule 32(3)(b) in such a case.³⁴

28 The consumer must address the court as to whether or not he received a s 129(1)(a) notice and whether he has responded thereto. The mere disregard of the notice may reflect negatively on the consumer's good faith. See *FirstRand Bank Ltd v Olivier* 11 and *Standard Bank of SA Ltd v Hales* 2009 3 SA 315 (D) 324–325.

29 In *FirstRand Bank v Olivier* 2008 JOL 22139 (SE) 11 Erasmus J noted that the NCA encroaches significantly on the credit provider's common law rights and that the court will only allow such an encroachment to the extent that it is justifiable whilst still promoting the purpose of the NCA.

30 2009 3 SA 379 (WWC).

31 *Ex parte Ford* 2009 3 SA 379 (WWC) 381.

32 Rule 32(3)(a) & (b).

33 2008 JOL 22139 (SE).

34 *FirstRand Bank Ltd v Olivier* 2008 JOL 22139 (SE) 16.

In *Standard Bank of SA Ltd v Panayiotts*³⁵ Masipa J disagreed with Erasmus J in *Olivier*³⁶ and held that the requirements of Rule 32 cannot be disregarded and that to ignore the requirements of Rule 32 will be grossly unfair towards the credit provider.³⁷

As noted above,³⁸ section 130 requires the credit provider to deliver either a section 129(1)(a) or section 86(10) notice to the consumer prior to debt enforcement. Section 86(10) provides:

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

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

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

Once a section 86(10) notice has been delivered and the prescribed time has lapsed the credit provider may institute legal action against the consumer in order to enforce the agreement.³⁹ In such a case section 85 may become applicable in two types of proceedings.

On the one hand, if the credit provider, after termination, approaches the court for the enforcement of the agreement, the consumer, raising section 85, will be able to request the enforcement court to either refer it back to the debt counsellor or to declare the consumer over-indebted and to restructure the consumer's debt obligations in terms of section 87.⁴⁰

On the other hand, if the debt counsellor had since the termination referred the consumer's debt review proposal, which includes the terminated agreement, to the Magistrate's Court in terms of section 86(7)(c), the debt counsellor may request the application court to declare the consumer over-indebted and to restructure the consumer's debt

35 2009 3 SA 363 (W).

36 2008 JOL 22139 (SE).

37 372–373.

38 See par 3.2.

39 S 130(1)(a) provides that the credit provider must wait ten business days after such a notice has been delivered to the consumer before proceeding with enforcement.

40 S 86(11) may also be used in such proceedings. If a credit provider has terminated the debt review in terms of s 86(10) and proceeds to enforce the agreement, s 86(11) allows the court in which the matter is being heard to make an order for the debt review to resume. S 85 provides the court with a wider discretion as it allows the court to declare the consumer over-indebted and restructure the consumer's debt obligations.

obligations in terms of section 87 including the terminated agreement.⁴¹

It is important to note that section 85 will only be applicable in cases where a credit agreement is being considered. Thus, the agreement being considered must fall within the definition of a credit agreement as defined in section 8⁴² of the NCA and not be excluded by section 4.⁴³

3 4 “If it is alleged that the consumer under a credit agreement is over-indebted”

In order for section 85 to be applied the consumer must “allege” that he is over-indebted. To allege means to make a statement that is not yet proven. It is thus submitted that the provision does not require a consumer to prove his over-indebtedness but merely to allege it.

However, in *Standard Bank v Panayiotts*, Masipa J held:

Clearly the mere allegation of over-indebtedness can never be sufficient. The test would be that such over-indebtedness must be established on a balance of probabilities.⁴⁴

Masipa J supported his argument with reference to section 79(1) in which the definition of over-indebtedness is set out. He held that section 79(1) provides that a consumer’s over-indebtedness must be determined with reference to “the preponderance of available information at the time a determination is made”.

For a consumer to be declared over-indebted he will have to satisfy the court that he is over-indebted in terms of section 79(1). However, it is submitted that section 85 does not require a consumer to prove to the court that he is over-indebted. The court is *not required to declare* the consumer over-indebted before section 85 can be applied.

Section 79(1) provides as follows:

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

41 If the credit provider has already proceeded with legal action, the court hearing the enforcement proceedings may use s 85 to adjourn the matter pending the final decision of the court adjudicating the debt review. See *SA Taxi Securitisation (Pty) Ltd v Ndobela* Case no 9162/2010 (GSJ) (unreported) par 16.

42 S 8 is entitled “Credit Agreements” and gives a closed list of the types of credit agreements to which the NCA applies and their definitions.

43 S 4 is entitled “Application of Act” and provides for agreements that will be excluded from the NCA. See Scholtz *et al* par 4.

44 *Standard Bank of SA Ltd v Panayiotts* 2009 3 SA 363 (W) 368. See also *FirstRand Bank Ltd v Swarts* Case no 15699/2009 (WCC) (unreported) par 7, where Cleaver J held that the consumer did not place sufficient evidence before the court to prove his over-indebtedness and that merely setting out his income and expenditure is not sufficient. See *BMW Financial Servicers (SA) (Pty) Ltd v Mudaly* 2010 5 SA 618 (KZN) 628–629.

will be⁴⁵ 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 payments.

Section 78(3) provides for the definition of “financial means, prospects and obligations” and states:

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 receive, 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) shares 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 reasonable estimated future revenue flow from that business purpose.

Regulation 24(7) provides factors that need to be considered in order to determine whether or not a consumer is over-indebted. This sub-regulation sets out the basic calculation of over-indebtedness.⁴⁶

Section 79(1) provides the definition of over-indebtedness. In order to declare a consumer over-indebted the requirements as set out in section 79 of the NCA must be met. Section 85 states that if it is “alleged” that the consumer is over indebted the court may make an order in terms of section 85(a) or section 85(b). These two subsections provide for different possible orders and it is important to distinguish between them.

Section 85(a) states that the court can refer the matter to a debt counsellor, with a request that the debt counsellor assesses the consumer's financial position and makes a recommendation to the court. Section 85(b) states that the court may make an order of over-indebtedness and restructure the consumer's debt. Thus, when a court

45 It is submitted that a consumer will also be over-indebted if, at the time when the determination is made, the information available indicates that the consumer will, in the near future, not be able to meet his financial obligations timeously. See Scholtz *et al* par 11 3 1 & 11 3 2.

46 Reg 24(7) provides that a consumer is over-indebted if his total monthly debt payments exceed the balance derived by deducting his living expenses from his net income. See Scholtz *et al* par 11 3 3 2.

makes a referral in terms of section 85(a) no order of over-indebtedness is made at the time of referral and thus over-indebtedness need not yet be proven.

It must be noted that section 79(1) of the NCA refers to “all the obligations under all the credit agreements to which the consumer is a party”, and thus requires a detailed determination having regard to the consumer’s full financial position. Section 86 read together with regulation 24 affords a debt counsellor the opportunity to make such a determination.⁴⁷

It is submitted that in case of a referral in terms of section 85(a) the court does not have to make a determination of over-indebtedness, but only needs to refer the matter to a debt counsellor, requesting the debt counsellor to report back to the court with such a determination and recommendation for the restructuring of the consumer’s debt. Upon receipt of such a determination and recommendation the court will be able to exercise its discretion informatively.

In *National Credit Regulator v Nedbank Ltd*,⁴⁸ Du Plessis J held that one of the debt counsellor’s duties in terms of section 86 of the NCA is to determine whether a consumer is over-indebted.⁴⁹ The debt counsellor, by referring a matter to court in terms of section 86(7)(c), is fulfilling a statutory obligation and due to his knowledge of the relevant facts should assist the court.⁵⁰ Thus, in making a referral to a debt counsellor in terms of section 85(a) the court is able to obtain the assistance of the debt counsellor in making a final order.

Section 85 still allows the court to use its discretion in making a referral in terms of section 85(a). A situation where a court is left without any real power to decide whether or not to make such a referral would lead to absurdities. The requirement of Rule 32(3) must still be adhered to and the consumer will have to satisfy the court that his request is *bona fide*.⁵¹

In the case of section 85(b) the court can declare the consumer over-indebted and make an order in terms of section 87. Thus, in terms of section 85(b) the court will have to be satisfied that the consumer is indeed over-indebted. In most cases the court will not be able to make an order in terms of section 85(b) if the consumer has not had an

47 See Roestoff *et al* “The Debt Counselling process – Closing the loopholes in the National Credit Act 34 of 2005” 2009 *PER* 269–373. Also see Scholtz *et al* par 11 3 3 2 for an overview of the debt review process.

48 2009 6 SA 295 (GNP).

49 301.

50 311 & 313.

51 In *Standard Bank of SA Ltd v Panayiotts* 2009 3 SA 363 (W) 370 Masipa J held that in a summary judgment rule 32(2) requires a consumer to raise a *bona fide* defence and that the same requirement is also applicable in a request by the consumer in terms of s 85 of the NCA.

opportunity to approach a debt counsellor prior to the summary judgment application.

In *Panayiotts*⁵² Masipa J held:

Having regard to the wording of section 79, such proof must inevitably involve details of *inter alia*, the consumer's financial means, prospects and obligations. Financial means would include not only income and expenses, but also assets and liabilities. Prospects would include prospects of improving the consumer's financial position, such as increases, and even, liquidating assets.⁵³

Section 78(3) makes no mention of a consumer's assets and liabilities. There is no indication in the NCA that the consumer has a duty to sell all realisable assets to settle his debts.⁵⁴ Debt review is not an application for sequestration and the same principles that apply to sequestration cannot be applied in an application for debt review. However, if a consumer's good faith is placed into question the court may consider the consumer's intention to sell luxury or unnecessary items.

3 5 “The Court may”

In *Olivier*⁵⁵ the court held that the use in section 85 of the word “may” indicates that the court is not required or compelled to give an order in terms of section 85 but that it has a discretion to make an order. This discretion allows the court to look at the various aspects of the case before it determines whether or not to make an order in terms of section 85.

It is submitted that if the consumer alleges, or even proves, his over-indebtedness the court will still have to use its discretion in making a referral in terms of section 85(a) or giving an order in terms of section 85(b). In *Hales*⁵⁶ Gorven J noted that if the legislature intended to oblige the court to take the steps contemplated in section 85 on proof of over-indebtedness, it would have made it clear.⁵⁷ Instead, the allegation of over-indebtedness merely opens the door for the court to use its discretion. It is not a mandatory provision.

When a court is requested to exercise its discretion in favour of one of the parties, the court must give due consideration as to the order being sought and the circumstances that merit such an order. A court cannot base its decision on speculated circumstances or outcomes but rather on

52 2009 3 SA 363 (W) 369.

53 366.

54 S 127 provides that a consumer may surrender the goods under an instalment agreement and that the proceeds of the sale of the goods must be used as payment towards the consumer's outstanding balance on the agreement. S 127 does not compel the consumer to return the goods, but merely allows for the procedure to follow should a consumer wish to do so.

55 *FirstRand Bank Ltd v Olivier* 2008 JOL 22139 (SE) 11–12.

56 *Standard Bank v Hales* 2009 3 SA 315 (D).

57 *Standard Bank of SA Ltd v Hales* 2009 3 SA 315 (D)321.

the evidence placed before it. In *First National Bank of SA Ltd v Myburgh*⁵⁸ Moosa J held that the court's discretion should not be exercised on the basis of speculation, but on the basis of the facts before the court.⁵⁹

For a court to declare a consumer over-indebted and to make an order in terms of section 87, the court must first be satisfied that the consumer is:

- (a) over indebted as set out in section 79(1), and
- (b) that the restructuring of the consumer's debt will relieve the consumer's over indebtedness without being unreasonable.

A court will not be able to make such an order if the consumer has not already been to a debt counsellor, who has assessed the consumer's over-indebtedness and designed a payment proposal setting out how all of the consumer's credit agreements will be settled.

If, at the time of an application for summary judgment, the consumer has not yet been to a debt counsellor it will be advisable for the court to make a section 85(a) referral to allow the debt counsellor to place detailed facts before the court, thus allowing the court to make an informed decision in using its discretion.

It is submitted that various factors should be considered before the court makes an order in terms of section 85. A court must be satisfied that the consumer who raised section 85 is doing so in good faith and not merely to delay the proceedings. It can be said that the court has to test the consumer's good faith in order to determine whether the court's discretion must be exercised in favour of the consumer.

3 5 1 *FirstRand Bank Ltd v Olivier*

In *Olivier* the plaintiff (credit provider) issued summons against the defendant (consumer) for payment of the outstanding amount on the consumer's mortgage agreement. At the time of judgment the consumer was living with his parents and renting out the property involved. In the application the consumer indicated that he had been making payments, although not always the full instalment. The consumer also set out a payment plan indicating that he would be able to pay the monthly instalment plus an additional monthly payment of R500.00 towards the arrears. The consumer was able to do so as his parents would be covering the majority of his living expenses.⁶⁰ The court refused the consumer's request and granted summary judgment in favour of the credit provider.

In his judgment, Erasmus J firstly considered the reason why the consumer did not respond to the section 129(1)(a) notice. He held that

58 2002 4 SA 176 (C).

59 *First National Bank of SA Ltd v Myburgh* 2002 4 SA 176 (C) 184.

60 *FirstRand Bank Ltd v Olivier* 2008 JOL 22139 (SE) 10.

because the debt review process was fairly new at the time, the court would not consider the consumer's failure to approach a debt counsellor prior to the receipt of the section 129(1)(a) notice, although this consideration would influence the court's discretion in normal circumstances.⁶¹

Erasmus J noted that once a section 129(1)(a) notice was sent, that agreement will be excluded from the debt review process in terms of section 86(2). The consumer then has two options, either to refer the matter to a debt counsellor to try and resolve the dispute or to wait for the credit provider to enforce legal proceedings and then request the court to declare the consumer over-indebted in terms of section 85.⁶²

In this case the consumer did not address the issue of the section 129(1)(a) notice and the court took this failure to mean that the consumer received the notice but failed to respond. Erasmus J held that once the 129(1)(a) notice was received the consumer should have attempted to resolve the dispute prior to approaching the court and that failure to do so placed the consumer in a negative light.⁶³

In *Standard Bank v Panayiotts*, Masipa J held that section 86(2) will prevent an agreement with pending legal action from being included in the debt review process, but that the court may nonetheless decide to refer the matter to a debt counsellor. The court must therefore be persuaded to use its discretion in favour of the consumer and the consumer will have to satisfy the court as to the reason why he or she did not approach a debt counsellor prior to litigation. The court will also have to consider whether the consumer wilfully ignored the section 129(1)(a) notice.⁶⁴

3 5 2 Standard Bank v Panayiotts

In *Panayiotts*⁶⁵ the plaintiff's (credit provider's) claim was for payment of the outstanding amount in terms of a mortgage agreement. The property involved was not the defendant's (consumer's) main residence. The property was kept for investment purposes and the consumer requested the court to make a referral in terms of section 85 to allow for "breathing room" in order to "catch up" his payments.⁶⁶

Masipa J noted that as the property was not the consumer's residence he would not be greatly prejudiced should it be sold.⁶⁷ In the particular case the property was not maintained properly and thus the value of the

61 11–13.

62 13. See also *Nedbank Ltd v National Credit Regulator* 2011 3 SA 581 (SCA) par 11.

63 *FirstRand Bank Ltd v Olivier* 2008 JOL 22139 (SE) 14–15.

64 *Standard Bank of South Africa Ltd v Panayiotts* 2009 3 SA 363 (W) 369.

65 *Standard Bank of South Africa Ltd v Panayiotts* 2009 3 SA 363 (W) 369.

66 371 & 375.

67 375.

property was depreciating. Masipa J held that the plaintiff could not be expected to sit by as its security was losing value:

[I]n the present case the long-term plans and intentions of the defendant to improve the home and make a profit cannot be allowed to rob the plaintiff of what it is legally entitled to – a judgment in its favour when the defendant has clearly shown no defence.⁶⁸

Masipa J held that if the credit provider is likely to be “greatly prejudiced” should the provisions of the NCA be implemented, the court must be hesitant to assist the consumer.⁶⁹ It is unclear when a credit provider would be “greatly prejudiced” and when the degree of prejudice will warrant a refusal to grant an order in favour of the consumer. It is submitted that a better approach would be to balance the respective interests of the parties. The NCA contains a number of provisions that limit a credit provider’s common-law contractual rights.⁷⁰ In dealing with a section 85 application the court must determine the prejudice to the respective parties should the request be granted or refused. What must be kept in mind is that the NCA was enacted mainly for the protection of consumers.⁷¹

3 5 3 Standard Bank of SA Ltd v Hales

In *Standard Bank of SA Ltd v Hales*⁷² the defendants (consumers) were summonsed for the outstanding balance on their mortgage agreement. The property concerned was the consumers’ main residence. The consumer raised section 85 during an application for summary judgment and requested the court to make a referral to a debt counsellor in terms of section 85(a).⁷³ At the time the consumers had been in default on their home loan for more or less 14 months.⁷⁴

Gorven J held that there are two factors that must be present in order for a court make a referral to a debt counsellor:

- (a) the proceedings in court must be with regard to a credit agreement; and
- (b) the consumer must allege that he is over-indebted.⁷⁵

68 *Ibid* 375.

69 *Ibid*.

70 Ss 89 & 90 provide a prohibition on the conclusion of certain agreements or the inclusion of certain provisions in a credit agreement. Ss 100–106 place limitations on interest, charges and fees that a credit provider may charge in a credit agreement. In terms of s 130 a credit provider must comply with certain procedural steps before commencing with legal action.

71 In *Absa Bank Ltd v Prochaska* 2009 2 SA 512 (D) 516 Naidu AJ held: “It is abundantly clear, in my view, that the Act has introduced innovative mechanisms and concepts directed more at the protection and in the interest of credit consumers than that of credit providers.”

72 2009 3 SA 315 (D).

73 *Standard Bank of SA Ltd v Hales* 2009 3 SA 315 (D) 317–318.

74 325.

75 319.

If these two factors are present it places a duty on the court to exercise its discretion.

Gorven J highlighted that section 3 of the NCA must be used as a backdrop against which all the provisions of the NCA should be interpreted. Thus, a court must apply its discretion in accordance with the purpose of the NCA. He held that the party that requests such a referral must place as much relevant material before the court as possible in order to persuade the court to use its discretion in his or her favour. The mere submission or even proof of over-indebtedness does not place a mandatory duty on the court to make an order in favour of the consumer and merely opens the door for the court to use its discretion.⁷⁶

Gorven J provided a number of factors that a consumer must mention to enable the court to exercise its discretion in terms of section 85.⁷⁷ The consumer must indicate:

- (a) how it came about that he defaulted under the agreement;
- (b) whether his financial position has changed and what he has done to remedy or minimise the default;
- (c) whether he was aware of debt counselling before he received the section 129(1)(a) notice, and if so, why he did not approach a debt counsellor before receiving the notice;
- (d) whether he has approached the plaintiff (credit provider) with a proposal to reschedule his debt before summons was issued against him;
- (e) how the other credit agreements, to which he is a party, arose and whether those agreements caused or increased the consumer's over-indebtedness; and
- (f) how the debt will be repaid as well as the potential for success of the debt rescheduling.

In his judgment, Gorven J addressed the consumers' dismal financial position and held that it would be unlikely that the consumers would be able to settle their debts, and held that:

it is difficult to see how a debt counsellor could make one of the remaining available recommendations in terms of section 86(7).⁷⁸

The consumers' request for a referral was denied and summary judgment was granted against them.

In the particular case the consumers requested the court to make an order in terms of section 85(a), to defer judgment and provide them with an opportunity to consult with a debt counsellor. Once a debt counsellor had been able to assess the situation, the court would have been able to

76 312–313.

77 324–325.

78 325.

make a determination as to how the debt would be repaid and what the potential for success of the debt rescheduling will be.

It is submitted that Gorven J erred in his assessment of the consumers' potential to repay their debts. As was noted above, the NCA provides the debt counsellor with certain mechanisms to enable him to do a proper over-indebtedness assessment. As part of such assessment the debt counsellor not only considers the consumer's income and credit obligations but also assists the consumer in creating a feasible budget to ensure that unnecessary luxury expenses are eradicated.⁷⁹ Regulation 24(7)(c) states that a consumer's minimum living expenses are based upon a budget provided by the consumer and adjusted by the debt counsellor with regard to certain guidelines issued by the National Credit Regulator.

After a detailed assessment has been conducted, the debt counsellor is able to draft a repayment proposal for the consumer, often using specialised computer software. Although the NCA does not require a debt counsellor to send such a payment proposal to the credit provider prior to approaching the Magistrates' Court, in practice this is the most common procedure.⁸⁰ The credit provider can then either accept or reject the proposal or, in certain circumstances, send a counter proposal. In this negotiation procedure the credit provider often reduces the interest rates, sometimes to as little as to 0%. Thus, in certain cases, although it may seem hopeless on the face thereof, a suitable repayment plan is created for the consumer enabling him to settle his debts. A court should thus be careful not to draw certain conclusions from the outset.

The court need not be left without discretion, but should ensure that its discretion is not based upon speculative conclusions.

3 5 4 The Right to Housing – Section 26 of the Constitution⁸¹

Section 26 of the Constitution provides that everyone has the right to have access to adequate housing. When a property, which is the consumer's main residence, is sold in execution it may have an impact on the consumer's access to adequate housing. When a consumer alleges that the granting of the sale in execution will infringe on his right to housing, the consumer must indicate how it will infringe upon this right. A mere allegation of infringement is not sufficient.⁸²

79 Haupt *et al* "Debt Counselling Principles and Guidelines" (2008) www.ncr.org.za/ 27–30 (accessed 2011-09-15).

80 Roestoff *et al* 2009 *PER* 272.

81 Constitution of the Republic of South Africa, 1996.

82 See *Standard Bank v Hales* 2009 3 SA 315 (D) 326 in which the court held that the defendants, who raised the possible infringement of their right to adequate housing, failed to indicate how an order of execution will infringe upon this right.

Taking execution against residential property to service debt was dealt with by the Constitutional Court in *Jaftha v Schoeman*.⁸³ This case involved the attachment of a debtor's residential home for the payment of a fairly small debt. Mokgoro J extensively discussed the interplay between the right to housing and the sale in execution of a residential home. Although this judgment was granted prior to the NCA, certain principles laid down in *Jaftha* are still worth mentioning.⁸⁴

Mokgoro J noted that the legitimacy of a sale in execution must be seen as a balancing process.⁸⁵ She held:

It should not be that the execution is either granted or the creditor does not recover the money owed. Every effort should be made to find creative alternatives which allow for debt recovery but which use execution only as a last resort.⁸⁶

Mokgoro J provided a number of factors that a court might consider before granting a sale in execution:⁸⁷

- (a) The amount or size of the debt.
- (b) The circumstances in which the debt arose.
- (c) The availability of alternatives for the recovery of the debt.
- (d) Any attempts made by the debtor to pay off the debt.
- (e) The debtor's financial circumstances.
- (f) Whether the debtor has a source of income.
- (g) Any other relevant factors that may present themselves in the particular case.⁸⁸

It is submitted that the NCA makes such an alternative to sale and execution available through the debt review process. A court should thoroughly consider these alternatives, together with the other factors, before granting an order whereby a consumer's residential home becomes executable.

It is submitted that, in exercising its discretion in a section 85 request, the court should place emphasis on the *bona fides* of the consumer. If a consumer has satisfied the court that the request is not a mere delaying tactic, the court should give the consumer the opportunity to access this remedy.

83 2005 2 SA 140 (CC). The facts in *Jaftha* relate to the sale in execution of a residential home for the payment of an unsecured debt. Mokgoro J noted (par 58) that the circumstances in which the debt was incurred must be taken into consideration and that if the property involved was for the security of a debt that would ordinarily warrant a sale in execution.

84 In *FirstRand Bank Ltd v Maleke* 2010 1 SA 143 (GSJ) 157 Claassen J noted that s 85(a) constitutes an "other alternative" as referred to by Mokgoro J in *Jaftha supra*.

85 *Jaftha v Schoeman* 2005 2 SA 140 (CC) 158 & 162.

86 162.

87 *Ibid.*

88 163.

In determining the consumer's good faith, it is submitted that the court can, *inter alia*, consider:

- (a) The consumer's financial position before and after default has occurred and what steps the consumer took in order to remedy the default.
- (b) The reason for the consumer's default.
- (c) Whether the consumer currently has a source of income.
- (d) The consumer's payment history for the account concerned as well as other credit agreements to which he is a party.
- (e) The consumer's attempt to negotiate with the credit provider before summons was issued as well as after.
- (f) The consumer's response to the section 129(1)(a) notice, and whether it was indeed received by the consumer.

The factors to be considered by the court will also depend on whether the court is requested to make a section 85(a) referral to a debt counsellor, or to make an order in terms of section 85(b), declaring the consumer over-indebted and restructuring the consumer's debt obligations.

3 6 The Application of Section 85(a)

Section 85(a) grants the court the power to delay final judgment and request a debt counsellor to first assess the consumer's financial circumstances and present the court with a recommendation for consideration.⁸⁹ In a referral in terms of section 85(a) the court would ideally only postpone the matter to a later date to afford the debt counsellor the opportunity to do a proper over-indebtedness assessment⁹⁰ and to make a proper recommendation to the court.⁹¹

The court may then consider the recommendation. If the consumer is not over-indebted the court may proceed in granting summary judgment against the consumer. If the consumer is over-indebted and a proposal has been provided by the debt counsellor, the court may either make an order to restructure the consumer's obligations in terms of section 86(7)(c) or reject the proposal and proceed to grant summary judgment against the consumer.

After the debt counsellor has made a recommendation to the court, the court is able to determine the consumer's ability to settle his debts and may then make an informed judgment.

The wording of section 85(a) does not indicate whether a full formal debt review procedure, in terms of section 86 read with regulation 24, must be followed. Section 85(a) seems to bypass the formal debt review procedures and proceeds to the final stages of the process where the debt

89 In *Standard Bank of SA v Hales* 2009 3 SA 315 (D) 320 the court held that recourse to s 85(a) is a dilatory plea as the debt counsellor is requested to make a recommendation to the court.

90 Reg 24.

91 S 86(7).

counsellor makes a recommendation to the court. As indicated above, there are a series of steps that the debt counsellor has to take in order to be able to make a recommendation. Thus, although a formal debt review process in terms of section 86 might not be required, the debt counsellor must be given sufficient time to finalise the recommendation.

If, after the referral, the consumer should apply to a debt counsellor in the prescribed manner and form to be declared over-indebted,⁹² the agreement, which was subject to summary judgment, might be excluded from the debt review in terms of section 86(2). In making a recommendation to the court, the debt counsellor should include the consumer's over-indebtedness assessment, indicating all the consumer's debt obligations, as well as a proposal on how these debt obligations are to be repaid.

Should the court then grant summary judgment against the consumer, the debt counsellor will have to proceed with the debt review process and make a recommendation to the Magistrate's Court in terms of section 86(7)(c), in which the judgment debt is excluded. However, if the court should grant the section 86(7) order in favour of the consumer and restructure the consumer's debt obligations, the process will be completed and the debt counsellor will not need to approach the Magistrate's Court.

In *Panayiotts*,⁹³ Masipa J held that the consumer failed to indicate to the court what payments would be made towards the credit provider.⁹⁴ At the time of summary judgment, the consumer did not have an opportunity to approach a debt counsellor with the specific agreement. Had the court awarded a section 85(a) referral it is submitted that the consumer would have been able to make such a submission to the court.

In *Hales*,⁹⁵ Gorven J noted that the consumer has to place a proposal before the court as to how the debt is to be paid, as well as the potential for success under debt review.⁹⁶ In this case the consumers requested the court to make a referral in terms of section 85(a). It is submitted that if the court requires the consumer, at time of summary judgment, to place a full recommendation before it, section 85(a) would be of little use. The court should utilise section 85(a) to obtain more comprehensive information regarding the consumer's financial position and then determine whether such a recommendation is feasible.

Section 85(a) states that a debt counsellor must make a recommendation to the "Court". In *Panayiotts*,⁹⁷ Masipa J held that "Court" referred to here, is not limited to the Magistrate's Court as it

92 S 86(1).

93 *Standard Bank of SA Ltd v Panayiotts* 2009 3 SA 363 (W).

94 374.

95 *Standard Bank of SA Ltd v Hales* 2009 3 SA 315 (D).

96 324.

97 2009 3 SA 363 (W).

placed no limitation on “Court”. It accordingly stated that if the High Court refers the matter to a debt counsellor, the recommendation must also be made to the High Court. The court will then, once it has received the recommendation, make an order in terms of section 86(7)(c).

It is submitted that should the case be postponed in a section 85(a) referral, the infringement on the credit provider’s contractual right is fairly marginal compared to the possible infringement on the consumer’s right to housing. Referring the matter to a debt counsellor does not deny the credit provider his contractual right to payment but only limits the contractual remedy of cancellation.

When determining whether to make a referral to a debt counsellor in terms of section 85(a), the court must avoid considering the prospects of success of the outcome thereof. The court should rather concentrate on the consumer’s good faith in making such a request to the court.

In making the referral the court is not required to declare the consumer over-indebted, and thus it is submitted, that in such a case the consumer need not prove over-indebtedness. Only upon the return of the debt counsellor’s recommendation will the court have to determine whether the consumer is indeed over-indebted. Section 86(7)(c) states that if the consumer is over-indebted, the debt counsellor can bring a recommendation to the court. At that stage the debt counsellor would have verified the consumer’s income and debt obligations (including their respective interest rates, monthly instalments and outstanding balances), and have adjusted the consumer’s living expenses to eliminate non-essentials. A far better view of the consumer’s financial position would then be revealed.⁹⁸

3 7 Application of Section 85(b)

Unlike section 85(a), section 85(b) allows the court to declare the consumer over-indebted and make an order in terms of section 87 to alleviate the consumer’s over-indebtedness. In such a case the consumer will have to prove his over-indebtedness and place before the court a recommendation as to how his debts will be settled. It is likely that such an order will only be possible in a case where a debt counsellor has already had an opportunity to assess the consumer’s financial position and is able to set the facts before the court.

If the court decides to make an order in terms of section 85(b) it would in all likelihood also deny the credit provider’s application for summary judgment. However, it may be possible for the court to grant summary judgment in favour of the credit provider and make an order in terms of section 87 against the consumer’s remaining debt obligations. Evidently

⁹⁸ As mentioned in par 3 2 above, a s 129(1)(a) notice will exclude an agreement from debt review in terms of s 86(2). If the parties fail to come to a suitable arrangement in terms of s 129(1)(a), s 85(a) will be the only available method of restructuring the agreement in terms of s 86.

the court may also deny the consumer's request entirely and grant summary judgment in favour of the credit provider.

It is submitted that section 85(b) could be raised in proceedings where the credit provider has terminated a consumer's debt review in terms of section 86(10) and proceeded to enforce the agreement. Section 85(b) can be raised as an alternative to or in conjunction with section 86(11). Section 86(11) provides that if a credit agreement has been terminated in terms of section 86(10) and the credit provider has proceeded to enforce the agreement, the Magistrate's Court hearing the matter may make an order that the debt review be resumed.

In these circumstances section 85(b) provides a more comprehensive order as it allows the court to make a final order for the restructuring of the consumer's debt. Section 86(11) only allows the court to order that the debt review resumes, after which the debt counsellor will have to bring an application to the Magistrate's Court for restructuring the consumer's debt obligations in terms of section 86(7)(c).

4 Concluding Remarks

The NCA has indeed brought with it a new wave of consumer protection. Its predecessor paid no attention to debt alleviation or over-indebtedness and as a result credit providers were left with very few obstacles in enforcing their credit agreements. The legislature saw a need for debt alleviation and introduced debt counselling as a solution to the over-indebtedness problem.

When faced with applying the provisions of the NCA, one must always do so with the purpose of the NCA as the backdrop. Section 85 is a provision that allows the courts to grant a deserving consumer the opportunity to settle their debts and get back on their feet. Section 85 does not pertain to the regulation of the credit industry, but to the protection of consumers. The debt alleviation mechanisms made available by the NCA must be used to achieve their purpose.

Section 85 has very wide application, and as a result places a great responsibility on the court to exercise its discretion wisely. The section was not enacted to be used as a delaying tactic for consumers that are evading their debt obligations, but rather for those consumers who have been able to satisfy the court that they are acting in good faith.

The court must ensure that, in applying their discretion, they are not biased, unreasonable or over-cautious. Each case must be assessed on its merits and, as far as possible and reasonable, be decided in favour of the consumer.