

# Section 85 of the National Credit Act 34 of 2005: thoughts on its scope and nature

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## OPSOMMING

### Artikel 85 van die Nasionale Kredietwet 34 van 2005: Gedagtes oor die Strekking en Aard Daarvan

Die Nasionale Kredietwet 34 van 2005 het groot omwentelinge in die Suid-Afrikaanse kredietlandskap meegebring deur die invoering van die skuldverligtingsremedies ten aansien van oorverskuldigheid en roekelose krediet. Dit is veral die konsep van oorverskuldigheid wat op 'n prosedurele vlak 'n wesenlike invloed het op 'n kredietverskaffer se reg op skuldinvordering. Die Nasionale Kredietwet bevat verskeie bepalings wat aan 'n verbruiker toegang tot die skuldheriensingsproses bied, naamlik artikel 86(1) wat voorsiening maak vir die verbruiker om vrywillig aansoek te doen om skuldheriensing, artikel 85 wat 'n hof magtig om in te gryp indien dit in enige verrigtinge beweer word dat 'n verbruiker oorverskuldig is, artikel 86(11) wat voorsiening maak vir hervatting van 'n skuldheriensing wat beëindig is, artikel 130(4)(c) wat toegang tot skuldheriensing bewerkstellig in gevalle waar die kredietverskaffer nie aan die bepalings van die Kredietwet voldoen het nie. Hierdie bydra ondersoek die aard van die bepalings in artikel 85 en die prosesregtelike interaksie daarvan met die ander bepalings in die Kredietwet wat betrekking het op skuldheriensing. Dit spreek aspekte aan soos wie die prosedure mag gebruik, asook op watter stadium en onder welke omstandighede dit gebruik mag word. Dit stel ook ondersoek in na die verskille tussen die diskresie van die hof, asook die hof se verwysings- en skuldherstruktureringsbevoegdhede, ingevolge artikel 85(a) en (b) onderskeidelik.

## 1 Introduction

The National Credit Act<sup>1</sup> (NCA) has introduced a myriad of changes into the South African credit landscape and has, especially since it came into full operation on 1 June 2007, thrown various interpretational curveballs at the legal profession, often as a result of poor draftsmanship. One such curveball relates to one of the most notable features of the NCA, namely the introduction in Part D of Chapter 4, of debt relief remedies for financially over-burdened consumers.<sup>2</sup> In this context the NCA has

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1 34 of 2005.

2 The introduction of these remedies was pre-empted by some of the stated objectives in s 3 NCA, namely s 3(c)(i), (ii) NCA, s 3(g) NCA. In terms of s 3(c)(i), (ii) NCA one of the purposes of the NCA is promoting responsibility in the credit market by encouraging responsible borrowing, avoidance of over-indebtedness and fulfillment of financial obligations by consumers; and discouraging reckless credit granting by credit providers and

introduced the concepts of “over-indebtedness”<sup>3</sup> and “reckless credit”<sup>4</sup> into South African credit law which concepts impact on both a substantive and procedural level. It is especially the concept of “over-indebtedness” that has taken centre stage within the realm of debt relief and which has led to the creation of a whole new body of case law dealing with various aspects where consumers claim to be over-indebted.<sup>5</sup>

“Over-indebtedness” is an issue that may be raised by a natural person<sup>6</sup> consumer in respect of a credit agreement to which the NCA applies in an attempt to access the debt relief provided for by the NCA.<sup>7</sup> In terms of section 79 of the NCA a consumer is over-indebted when the preponderance of available information at the time that a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, having regard to that consumer’s:

- (a) financial means, prospects and obligations;<sup>8</sup> and

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contractual default by consumers. A related purpose, in terms of s 3(g) NCA is addressing and preventing over-indebtedness of consumers and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations.

3 S 79 NCA read with ss 85, 86, 87, 88 NCA.

4 Ss 80-83 NCA. A detailed discussion of reckless credit is beyond the scope of this contribution. See further Boraine & Van Heerden “Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005” 2010 *THRHR* 1; Van Heerden & Boraine “The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005” 2011 *De Jure* 392.

5 Various interpretational issues have arisen especially in the context of termination of debt review. For an overview of the interpretational challenges posed by the sections relating to over-indebtedness and its associated remedies and the cases that dealt with these issues see Scholtz *et al Guide to the National Credit Act* (Service Issue 5) ch11. See also Otto “Die oorbelaste skuldverbruiker: die Nasionale Kredietwet bied geensins vrydom van skulde nie” 2010 *TSAR* 399.

6 It is specifically stated in s 78(1) NCA that Part D ch 4 NCA does not apply to a credit agreement in respect of which the consumer is a juristic person. In terms of s1 NCA a juristic person has an extended definition and includes a partnership, association or other body of persons, corporate or unincorporated, or a trust if there are three or more individual trustees, or the trustee itself is a juristic person, but does not include a *stokvel*.

7 See Scholtz *et al* par 11.1-11.3.

8 “Financial means, prospects and obligations” have an extended meaning in terms of s 78(3) NCA and includes:

“(a) income, or any right to receive income, regardless of the source, frequency or regularity of that income, other than income that the consumer or prospective consumer receives, has a right to receive, or holds in trust for another person;

(b) the financial means, prospects and obligations of any other adult person within the consumer’s immediate household, to the extent that the consumer, or prospective consumer, and that other person customarily –

(i) share their respective financial means; and

(ii) mutually bear their respective financial obligations; and

- (b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment.<sup>9</sup>

When a determination is to be made whether a consumer is over-indebted or not, the person making that determination must apply the aforementioned criteria as they exist at the time that the determination is made.<sup>10</sup>

A consumer who is over-indebted may apply voluntarily to a debt counsellor<sup>11</sup> to have his debt reviewed in terms of section 86 of the NCA. A detailed discussion of the debt counselling process in section 86 is beyond the scope of this article. Suffice to say that in brief it entails that the debt counsellor makes a determination regarding whether the consumer is over-indebted or not and if so, thereafter refers a proposal for rescheduling of the consumer's credit agreement debt to the magistrates court so that the court can decide whether or not to sanction the debt restructuring proposal by making it an order of court.<sup>12</sup> The Supreme Court of Appeal in *Nedbank Ltd v The National Credit Regulator*<sup>13</sup> has held that the section 86-procedure can however only be accessed in respect of a specific credit agreement if the credit provider has not yet delivered a section 129(1)(a)-notice<sup>14</sup> to the consumer in respect of that

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(c) if the consumer has or had a commercial purpose for applying or entering into a particular credit agreement, the reasonably estimated future revenue flow from that business purpose.

<sup>9</sup> S 79(1)(a), (b) NCA.

<sup>10</sup> S 79(2) NCA. See Scholtz *et al* par 11.3.2 where it is pointed out that this means that a consumer could have been in a financial position where he was able to afford the credit that was extended to him at the time that the credit agreement was entered into but that he became over-indebted at a later stage, for instance as a result of retrenchment. This position has to be distinguished from the situation where entering into a specific credit agreement was the trigger that immediately caused the consumer to become over-indebted, in which event the credit provider has engaged in reckless credit granting as contemplated in s 80(1)(b)(ii) NCA and in respect of which the determination is made with regard to the moment the credit agreement was entered into.

<sup>11</sup> A debt counsellor is a neutral person who is registered in terms of reg 44 NCA regulations (NCR) offering a service of debt counseling. See further Scholtz *et al* par 11.3.3.2(b).

<sup>12</sup> For a detailed discussion of the debt review process under s 86 NCA see Scholtz *et al* par 11.3.

<sup>13</sup> 2011 3 SA 581 (SCA).

<sup>14</sup> S 129(1)(a) NCA provides as follows: "If the consumer is in default under a credit agreement, the credit provider: may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date."

agreement.<sup>15</sup> The result will then be that the consumer will not be able to apply for debt review of the specific agreement in respect of which the section 129(1)(a)-notice was delivered but will still be able to have a comprehensive debt review of other credit agreements in respect of which no section 129(1)(a)-notices were delivered.<sup>16</sup> Thus the effect of the *Nedbank*-judgment makes it clear that a consumer who wants to make use of the debt review process in section 86 of the NCA has no time to fool around and that it is a process which must be accessed before litigation ensues and more specifically, before a section 129(1)(a)-notice is delivered in respect of a specific agreement. Time is therefore of the essence if a consumer wants to use the voluntary section 86-debt review procedure.

Where the consumer did not make haste with a voluntary debt review application under section 86 or where the credit provider had been quick to send a section 129(1)(a)-notice which effectively barred the consumer from applying for a section 86-debt review in respect of a specific credit agreement, one may wonder if that is the end of the consumer's chances to access the debt relief that the NCA offers to over-indebted consumers. It is however not only a consumer who has been unable to access the debt review process, prior to enforcement of a specific credit agreement, that may want to have the opportunity of debt review. In contrast to the aforementioned situation, where a consumer requires access to the process for the first time there may be instances where consumers who already had such access may want a debt review process which has been disregarded or terminated to continue. Thus, where a consumer has gone for debt review timeously but then had the unfortunate experience that the credit provider proceeded with enforcement without giving notice of termination of the debt review<sup>17</sup> such consumer will most likely want the opportunity to carry on with the debt review. Also, in those instances where a consumer had timeously applied for debt review prior to enforcement and the credit provider then terminated the debt review in accordance with section 86(10)<sup>18</sup> of the NCA, there will be instances

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15 This due to the bar contained in s 86(2) NCA which provides as follows: "An application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement, if at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement."

16 *Nedbank v National Credit Regulator* 20113 SA 581 (SCA) at par 14.

17 For instance because the credit provider for some or other reason did not know about the debt review or simply because he chose to ignore it or because he was erroneously of opinion that the consumer applied for debt review in an instance where debt review was not competent.

18 S 86(10) NCA provides that if a consumer is in default under a credit agreement that is being reviewed in terms of s 86 NCA, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to the consumer, the debt counsellor and the National Credit Regulator at any time at least 60 business days after the date on which the consumer applied for the debt review.

where the consumer might have a problem with the termination and would want to carry on with the debt review.<sup>19</sup>

Section 85 of the NCA appears to provide consumers with yet another opportunity for debt review or a declaration of over-indebtedness and thus another opportunity at obtaining debt relief. It is entitled “Court may declare and relieve over-indebtedness” and provides as follows:<sup>20</sup>

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 a 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); [<sup>21</sup>] or
- (b) declare that the consumer is over-indebted, as determined in accordance with this Part,<sup>[22]</sup> and make any order contemplated in section 87<sup>23</sup> to relieve the consumer’s over-indebtedness.

A few other aspects need to be noted in the context of section 85. Firstly, a consumer who has alleged in court that he is over-indebted is prohibited by section 88(1) to incur any further charges under a credit facility or enter into any further credit agreement,<sup>24</sup> other than a consolidation agreement until one of the following events has occurred:

- (a) The debt counsellor rejects the application and the prescribed time for direct filing in terms of section 86(9) has expired without the consumer having so applied.
- (b) The court has determined that the consumer is not over-indebted, or has rejected a debt counsellor’s proposal or the consumer’s application.
- (c) A court having made an order or the consumer and credit provider’s having made an agreement re-arranging the consumer’s obligations, all the consumer’s obligations under the credit agreements as re-arranged are fulfilled, unless the consumer fulfilled the obligations by way of a consolidation agreement.

Section 88(3) further provides that, subject to section 86(9) and (10), a credit provider who *receives notice* of court proceedings contemplated in

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19 For instance because the credit provider did not co-operate in the debt review in good faith. See *Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga* 2011 1 SA 374 (WCC).

20 Emphases added.

21 See par 6 1 below.

22 Part D Ch 4 NCA.

23 See par 6 2 below.

24 S 88(4) NCA states that if a credit provider enters into a credit agreement, other than a consolidation agreement contemplated in s 88 NCA, with a consumer who has applied for a debt re-arrangement and that re-arrangement still subsists, all or part of the new credit agreement may be declared to be reckless credit whether or not the circumstances set out in s 80 NCA apply. In addition s 88(5) NCA provides that if a consumer applies for or enters into a credit agreement contrary to s 88 NCA, the provisions of Part D Ch 4 NCA will never apply to that agreement. See further *Scholtz et al* par 11.4.

section 83 or 85, may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until:

- (a) the consumer is in default under the credit agreement; and
- (b) one of the following has occurred:
  - (i) an event contemplated in section 88(1)(a) through (c);
  - (ii) the consumer defaults on any obligation in terms of a re-arrangement between the consumer and credit providers, or ordered by a court or the Tribunal.

The question however arises whether section 85 can only be used where the consumer has not applied for debt review prior to enforcement of a credit agreement or whether it has a wider scope of application than that. The nature of the remedy, the discretion of the court and the powers of the court under section 85 are also issues that require consideration. The purpose of this discussion is therefore to investigate the scope and nature of section 85 in order to determine when, under which circumstances and by whom it may be invoked and what its implications are in terms of relief and procedure.

## 2 Who May Invoke Section 85?

As indicated in the introduction, various scenarios may occur within the context of post-enforcement access (or re-access) to debt review. Scenario one is where the consumer did not at any stage prior to enforcement apply for debt review. In scenario two the consumer did apply for debt review but the credit provider proceeded to enforce the relevant credit agreement without first terminating the debt review. Thus the credit provider failed to comply with section 86(10)<sup>25</sup> at all. Scenario three is where the credit provider terminated a pending debt review in accordance with section 86(10) but the credit provider failed to act in good faith.

Scenario three appears to have a relatively straightforward solution: If a consumer has applied for debt review in terms of section 86 prior to receiving a section 129(1)(a)-notice in respect of a specific credit agreement, such debt review can be terminated by the credit provider in accordance with section 86(10) of the NCA and the credit provider may then proceed to enforce the agreement after the lapse of certain prescribed time periods.<sup>26</sup> A consumer who is aggrieved by such termination may then in terms of section 86(11)<sup>27</sup> request the enforcement court to order the debt review to *resume* on any conditions

<sup>25</sup> See n 18 above.

<sup>26</sup> See s 130(1) NCA.

<sup>27</sup> S 86(11) NCA provides that if a credit provider who has given notice to terminate a debt review in accordance with s 86(10) NCA proceeds to enforce that agreement in terms of Part C Ch 6 NCA, the magistrate's court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances.

the court considers to be just in the circumstances. It is submitted that the enforcement court can also *suo motu* make a section 86(11)-order.<sup>28</sup> It should further be noted that section 86(11) does not set out a list of reasons for concluding that the termination of the debt review justifies a resumption of the review – thus it appears that the section can apply where the termination was not *bona fide* but also where the termination itself was not procedurally sound, for example it was done prematurely or there was something wrong with the notice or the manner in which it was delivered.

However, when one has regard to the wording of section 85, it is clear that it contains no reference to the “resumption” of a debt review. It merely provides for two options, namely that the court may refer the matter directly to a debt counsellor for purposes of a debt review and recommendation in terms of section 86(7)<sup>29</sup> or that the court itself declares the consumer over-indebted and make an order contemplated in section 87<sup>30</sup> to relieve the consumer’s over-indebtedness. There is of course also a third implied option, suggested by the use of the word “may”, namely that the court has the discretion to refuse to exercise any of the aforementioned two options.<sup>31</sup>

In view of the aforementioned, it is submitted that section 85 obviously does not have the same purpose as section 86(11) as it would mean that the legislature duplicated a section in the NCA which is highly unlikely. In any event the wording of section 85 clearly differs from that of section 86(11) which provides an opportunity for a consumer whose debt review was terminated to re-access the debt review procedure by allowing for the resumption of a terminated debt review. It may thus be asked whether section 85 provides a remedy in the case of a debt review contemplated in scenarios one and two as indicated above or whether its reach is limited to one of those scenarios only.

Where a consumer has applied for debt review section 129(1)(b)<sup>32</sup> makes it clear that a credit provider may not enforce a credit agreement that is subject to such debt review before first delivering to the consumer a notice in terms of section 86(10). Where there was non-compliance with this requirement because the credit provider enforced the credit agreement without first terminating the debt review (thus as contemplated in scenario two above) such non-compliance is addressed by section 130(4)(c) which provides as follows:

- (4) In any proceedings contemplated in this section, if the court determines that ...

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28 See Scholtz par 11.3.3.3.

29 See the discussion in par 6.1 below.

30 See the discussion in par 6.2 below.

31 See the discussion of the court’s discretion in par 5 below.

32 S 129(1)(b) NCA provides that subject to s 130(2) NCA, a credit provider “may not commence any legal proceedings to enforce the credit agreement before: first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be.”

- (c) the credit agreement is subject to a pending debt review in terms of Part D of Chapter 4, the court *may* (my emphasis) –
  - (i) adjourn the matter, pending a final determination of the debt review proceedings;
  - (ii) order the debt counsellor to report directly to the court, and thereafter make an order contemplated in section 85(b); or
  - (iii) if the credit agreement is the only credit agreement to which the consumer is a party, order the debt counsellor to discontinue the debt review proceedings, and make an order contemplated in section 85(b).

It is submitted that in this instance the discretion of the court as indicated by the word “may” refers to a discretion by the court to choose one of the three options set out in section 130(4)(c)(i),(ii) and (iii) respectively once it is evident that the credit agreement that is being enforced is still subject to a pending debt review (a debt review which has not been terminated in accordance with section 86(10)). Clearly where a court finds that a credit agreement that is being enforced<sup>33</sup> is actually still subject to a valid pending debt review<sup>34</sup> it would not be competent for such court to exercise a discretion to the effect that it has a choice whether to order that the consumer may not continue with the debt review anymore. In this instance the consumer voluntarily applied for debt review under section 86(1) and the fact that the NCA requires such debt review to be duly terminated prior to enforcement cannot just be negated by the court as such a situation would merely serve to facilitate abuse and encourage non-compliance with the required delivery of a section 86(10)-notice prior to enforcement. Sight should not be lost of the fact that section 129(1)(b) read with section 86(10) gives the consumer a right to notice of termination of a debt review prior to enforcement. What is at stake under section 130(4)(c) is the consumer’s right to receive such notice of termination which is different from the situation where the court has to determine whether such termination should be allowed or whether there should be a resumption of the debt review, as is done under section 86(11). However, as will become more clear from the discussion below, the discretion in section 85 is in essence a discretion which entails choosing whether to tell a consumer that he cannot go for debt review or allowing him to access the debt review process whether before a debt counsellor under section 85(a) or having a “blitzreview” and subsequent declaration of over-indebtedness by the court under section 85(b). Thus it is submitted that the scope for application of section 85 is of necessity confined to those instances where there was no prior

33 It should be noted that s 130(4)(c) NCA is part of s 130 NCA which bears the title “Debt procedures in a court” thus signifying that the proceedings mentioned in s 130 NCA are enforcement proceedings.

34 Ie a debt review that was validly undertaken. Where it is clear that the consumer was never entitled to apply for debt review because for instance the credit agreement fell outside the scope of application of the NCA or because the consumer is a juristic person that is barred from applying for debt review it is submitted that such application is a nullity from its inception and it can thus not in such instance be regarded as a “pending” debt review.

debt review application before enforcement of a credit agreement. It is thus a consumer who did not or was unable to access the voluntary debt review process under section 86 before delivery of a section 129(1)(a)-notice who is afforded *locus standi* to invoke the provisions of section 85.

However, in *Standard Bank of South Africa Ltd v Kallides*<sup>35</sup> the court indicated that the process under section 85 is to be contrasted with that in terms of section 86 of the NCA “in which the consumer has the *right* (my emphasis), subject to the NCA, to initiate debt review proceedings, and ultimately to apply, in the manner expressly provided, for a debt rearrangement order.”<sup>36</sup> The court pointed out that one of the considerations to which a court will have regard in determining whether to act in terms of section 85 will be the reason for the consumer’s failure to have availed himself of section 86.<sup>37</sup> It emphasised that the scheme of the NCA is directed at striking a balance between the rights of credit providers and consumers and to encourage fulfilment by consumers of their contractual obligations.<sup>38</sup> According to the court it was not the intention of the legislature that the machinery of the NCA be used to provide a basis for consumers to wilfully or negligently delay, or unreasonably thwart the enforcement by credit providers of their contractual rights.<sup>39</sup>

The court remarked that the process contemplated in terms of both section 85 and section 86 is directed at obtaining the consideration of a recommendation by a debt counsellor in terms of section 86(7) and/or the making an order of the nature provided for in section 87.<sup>40</sup> Binns-Ward J then significantly stated:

Notwithstanding the breadth of the opening words to s85 of the NCA, reference to the broader context of the statute impels the conclusion that the section was not intended to provide a repetition of the process already provided for in terms of s86, *or to draw back within the ambit of debt review debts already excluded therefrom by the operation of other provisions of the NCA, such as s86(2),86(10) or s88(3)* (my emphasis).<sup>41</sup>

In view of the abovementioned conclusion that section 85 is directed at situations where a debtor who has not previously accessed the debt

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35 Unreported WCC case no 1061/2012.

36 Par 7.

37 *Ibid.*

38 *Ibid.*

39 *Ibid.* In this regard the court referred to s 86(2) NCA which precludes a credit agreement in respect of which a s129(1)(a)-notice was delivered from being included in a debt review and s 86(10) NCA which provides for termination of a credit agreement in certain circumstances. The court also referred to s 88(3) NCA which allows a credit provider to enforce its rights in respect of a credit agreement if a consumer is in default of a rearrangement order.

40 *Ibid.*

41 Par 8. The court indicated that to construe s 85 NCA otherwise would be conducive to the most unwholesome circularity, at odds with basic principle.

review process, it is submitted that the aforesaid *dictum* by Binns Ward J is correct insofar as it indicates that the legislature did not intend to provide a repetition of the process already provided for in section 86 or to draw back into the ambit of debt review debts already excluded therefrom by section 86(10) (for which section 86(11) is the appropriate remedy) or section 88(3)<sup>42</sup> (which implies that the consumer had already gone through a debt review which resulted in a debt restructuring order but the consumer failed to comply with the terms of such order). It can however not be agreed that a debtor who was precluded by section 86(2) to apply for debt review pursuant to delivery of a section 129(1)(a)-notice cannot use section 85 in order to attempt to access the debt review process for the first time.<sup>43</sup> It is submitted that in the context of the legislature's lenient approach to debt relief as evidenced by the provisions relating to voluntary debt review applications as well as the opportunity for resumption of a terminated debt review or continuance of a pending debt review that was negated, it could not have been the legislature's intention to provide such a small window of opportunity, namely the often brief period before a section 129(1)(a)-notice is delivered to a consumer, whereafter the debt relief remedy is forever foreclosed to a consumer who did not or was not able to voluntarily apply for debt review. Rather, it is submitted, the purpose of section 85 is to act as an "abuse-filter" to ensure that a consumer (who may or may not be actually over-indebted and who merely wants to delay enforcement) does not abuse his failure to voluntarily apply for debt review to perpetuate and compound delay of enforcement by attempting, at a later stage, to access the debt review process again in circumstances where it is clear that he is not entitled to debt relief – especially if such disentitlement is based on the fact that he is so over-indebted that debt review will not cure his debt problem.

### 3 Requirements for and Stage at Which Section 85 May be Invoked

From the wording of section 85 it is clear that the provisions of this section only apply in respect of credit agreement debt to which the NCA

42 S 88(3) NCA provides as follows: "subject to section 86(9) and 100, a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86(4)(b)(i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until –  
 (a) the consumer is in default under the credit agreement; and  
 (b) one of the following has occurred:  
 (i) An event contemplated in subsection (1)(a) through to (c); or  
 (ii) the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and the credit providers, or ordered by a court or the Tribunal.

43 See also the remarks by Malan JA in *Seyffert v Firstrand Bank Ltd* [2012] ZASCA 81.

applies<sup>44</sup> and may only be invoked in the course of court proceedings (thus action or application proceedings) in which a credit agreement *is being considered*.<sup>45</sup> Due to the use of the word “court” these proceedings may be high court or magistrate court proceedings.<sup>46</sup> The point is that there must be some or other kind of court proceedings during which section 85 can be invoked. It should also be noted that the provision refers to *any* proceedings in which a credit agreement *is being considered* which, it is submitted, is a wider concept than proceedings in which a credit agreement *is being enforced*. This begs the question whether these “proceedings” contemplated in section 85 should be confined to enforcement proceedings by the credit provider or whether the consumer may also bring a substantive application to court wherein he claims to be over-indebted but not having applied for debt review and then uses these self-initiated proceedings to request the court to make one of the orders provided for in section 85(a) or (b). It is submitted that the essence of a debt review or declaration of over-indebtedness as contemplated by section 85 is that it is preceded by a *decision by a court* allowing the debt review or declaring the consumer over-indebted. Such a decision may clearly be made by a court during enforcement proceedings in respect of a credit agreement to which the NCA applies if it is alleged that a consumer is over-indebted. There is however nothing in the wording of section 85 to suggest that this is an opportunity which is reserved for enforcement proceedings only unless one interprets the words “court proceedings in which a credit agreement is being considered” to be confined to enforcement proceedings. Where a consumer brings a substantive application indicating that he is a party to a credit agreement and provides detail of such credit agreement to the court and further indicates that he is over-indebted but has been foreclosed from voluntarily accessing the debt review process as a result of delivery of a section 129(1)(a)-notice, such proceedings may very well qualify as proceedings in which a credit agreement is “considered”. It is thus submitted that a consumer who did not have the opportunity to apply for debt review prior to receipt of a section 129(1)(a)-notice would be able to bring a substantive application to court for relief in terms of section 85 and need not necessarily wait until he has been sued by the credit provider in order to raise his over-indebtedness during enforcement proceedings in a bid to obtain relief in terms of section 85. In any event, in terms of cost and delay it makes sense that a consumer who is really over-indebted and whose debt woes can be cured by debt review should be allowed to access the debt review process and/or obtain a declaration of over-indebtedness and concomitant debt relief sooner rather than later. However it is conceded that in practice an out-of-pocket consumer who is in arrears under a credit agreement will usually not be in a financial position to bring a substantive application prior to

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44 *Standard Bank of South Africa Ltd v Hales* 2009 3 SA 315 (D).

45 *Scholtz et al* par 11.3.3.5.

46 See further *Scholtz et al* par 11.3.3.5.

enforcement but will rather invoke section 85 only once enforcement proceedings have been instituted in respect of that credit agreement.

It is further clear that the provisions of section 85 can only be invoked once there is an *allegation of over-indebtedness* in court proceedings in which a credit agreement is being considered. This means that in default judgment proceedings where there is no defence put forward by the defendant because he failed to file a notice of intention to defend to a summons or failed to enter a plea, there will be no allegation of over-indebtedness and section 85 can thus not be invoked *suo motu* by a court.<sup>47</sup> The fact that a credit agreement to which the NCA applies is being considered *together with* the aforesaid allegation of over-indebtedness thus becomes the trigger for the exercise of the discretion of the court to either refer the matter for debt review or to declare the consumer over-indebted and reschedule his debts itself or to dismiss the request for relief in terms of section 85. Both of these requirements, the application of the NCA to the credit agreement and the allegation of over-indebtedness, must be present before section 85 finds application.

Where a credit agreement to which the NCA applies is enforced it will generally imply that a section 129(1)(a)-notice was delivered to the consumer prior to such enforcement.<sup>48</sup> This means that a consumer who did not apply for debt review before delivery of the section 129(1)(a)-notice will have forfeited his opportunity to access the debt review process voluntarily via section 86 prior to debt enforcement. It may however be that such consumer is indeed over-indebted and has an acceptable explanation for his failure to voluntarily apply for debt review under section 86 prior to delivery of the section 129(1)(a)-notice. Section 85 then provides a procedure to enable him to access a court-sanctioned debt review which entails a “pre-approval process” that acts as an abuse-filter and that is absent in the case where the debtor voluntarily applies for debt review prior to delivery of a section 129(1)(a)-notice. Obviously this opportunity for a possible second chance to access the debt review process comes at a price given that by such time the consumer has usually already been drawn into the costly web of litigation and his over-indebtedness may have significantly increased. Furthermore, as indicated hereinafter, the consumer is not automatically entitled to an order in terms of section 85 and the fact that he has failed to voluntarily apply for a debt review may possibly be held against him in the absence of an acceptable explanation.

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47 *Firstrand Bank Ltd v Maleke* 2010 1 SA 143(GSJ).

48 In instances where the consumer had not yet applied for debt review under s 86 NCA.

## 4 Initial Observations Regarding Section 85-proceedings

The allegations regarding the consumer's over-indebtedness during court proceedings may for instance be made in an opposing affidavit (in the event of a summary judgment application) or in a special plea or plea or it may apparently even be made whilst the consumer is testifying at trial. Section 85 gives no express indication of a cut-off point *during* court proceedings after which section 85 may no longer be invoked. An overview of the applicable case law suggests that section 85 is usually raised at summary judgment stage when the consumer files an opposing affidavit.<sup>49</sup> Section 85 however does not specifically require that a substantive application must be made to court to request it to invoke the relief under the section. It appears that if for instance, the consumer makes sufficiently substantiated allegations in his opposing affidavit during a summary judgment application, to the effect that he is over-indebted, a separate substantive application will not be necessary and the court can exercise its discretion whether to grant relief under section 85 or not, based on the allegations regarding over-indebtedness that are made in such opposing affidavit. It further appears that where an allegation of over-indebtedness is made during court proceedings the court does not necessarily have to wait for the consumer to request that the court invokes its discretion in terms of section 85 but that the court may *suo motu*, based on the allegation of over-indebtedness, decide to invoke such discretion. It is however submitted that in practice the consumer will usually request the court to make an order in terms of section 85 and as indicated, such request is usually made during summary judgment proceedings. It should be noted though that the power of the court to invoke its discretion *suo motu* is based on the fact that an allegation was made that the consumer is over-indebted: if there is no such specific allegation, such as in default judgment proceedings, there is no basis upon which the court can invoke its discretion in terms of section 85.

In this regard it was held by Binns-Ward J in *Standard Bank of South Africa Ltd v Kallides*<sup>50</sup> that there is nothing in the wording of section 85 that contemplates the making of an application to invoke its operation.<sup>51</sup> The court stated that on the contrary, the trigger to the operation of section 85 is the allegation in the context of any court proceedings in which a credit agreement is being considered that the consumer in terms of the agreement is over-indebted.<sup>52</sup> It indicated that the allegation in question would be one made integrally in the context of pending

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49 See for example *First Rand Bank Ltd v Olivier* 2009 3 SA 353 (SE); *Standard Bank of South Africa Ltd v Hales* 2009 3 SA 315 (D); *Firststrand Bank Ltd v Kallides* unreported WCC case no 1061/2012.

50 Unreported WCC case no 1061/2012.

51 Par 6.

52 *Ibid.*

proceedings in which the terms or existence of a credit agreement is relevant.<sup>53</sup> The court remarked that the wording of the provision, which has a wide import, holds in contemplation the intervention of the courts in the course of court proceedings, incidentally and *mero motu*, in circumstances in which the criteria provided in terms of the section are present.<sup>54</sup> It indicated that a court would act in terms of the provision in such a case if it were of the view that the achievement of the object of the NCA and the just determination of the matter at hand would be assisted by such an intervention.<sup>55</sup> The court thus held that while it would be open to any party to the proceedings to argue and suggest that the court should act in terms of section 85, the provision does not contemplate a substantive application to that end.<sup>56</sup>

Where a consumer for instance merely raises the issue of over-indebtedness in his affidavit opposing summary judgment (which, as indicated, appears from case law to be the moment at which section 85 is usually invoked) without providing sufficient detail under oath regarding such over-indebtedness and the reasons why he failed to voluntarily apply for debt review under section 86, he runs the risk as discussed hereinafter, of the court either refusing to invoke the provisions of section 85 or exercising its discretion against and dismissing the request for debt review in terms of section 85(a) or a declaration of over-indebtedness in terms of section 85(b).

## 5 Discretion and Powers of the Court

Where there are court proceedings in which a credit agreement to which the NCA applies is being considered *and* there is an allegation that the consumer is over-indebted, the court is afforded a discretion to make an order in terms of section 85.<sup>57</sup> This means that a consumer does not have an automatic right to an order in terms of either section 85(a) or (b)

53 *Ibid.* The court indicated that such allegation may be made either in a pleading, or an affidavit, or even in the course of *viva voce* evidence.

54 Par 6 (with reference to *Ex parte Ford* 2009 3 SA 376 (WCC)).

55 Par 6.

56 *Ibid.* See however *SA Taxi Securitisation Pty Ltd v Ndobela* unreported GSJ case no 9162/2010 where the court refused to grant an order in terms of s 85 NCA because it indicated that there was no application before it.

57 S 85 NCA provides that the court “may” make an order in terms of s 85(a)/(b) NCA. See also *Firststrand Bank Ltd v Olivier* 2009 3 SA 353 (SEC); *Standard Bank Ltd v Hales* 2009 3 SA 315 (D) par 7. The earlier view I expressed in Van Heerden & Lotz “Over-indebtedness and discretion of debt counsellor to refer to debt counsellor: *Standard Bank Ltd v Hales* 2009 3 SA 315 (D)” 2010 *THRHR* 502 that the court has both a discretion to invoke section 85 and a discretion to make the orders contemplated in s 85(a)/(b) NCA has been revisited and I have amended my view. I am now of the opinion that once there are court proceedings in which a credit agreement is being considered and there is an allegation of over-indebtedness the court does not have a discretion to act in terms of s 85 NCA but must do so if so requested. Thus the discretion of the court is limited to the orders it may make or refuse under section 85(a)/(b) NCA.

merely because he is allegedly over-indebted in respect of a credit agreement to which the NCA applies and has for some or other reason not applied for voluntary debt review under section 86 before delivery of a section 129(1)(a)-notice.<sup>58</sup> Obviously the court's discretion must be exercised judicially<sup>59</sup> which means that the court must be appraised of sufficient facts on the basis of which it can exercise such discretion.<sup>60</sup> It is further submitted that this discretion should be exercised in the context of the purposes of the NCA which should act as a backdrop to the exercise of the discretion.<sup>61</sup> Here section 3(i) which provides that one of the purposes of the NCA is "providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements" is especially relevant.

In the context of the court's discretion it is further important to note that section 85(a) and (b) provide for distinct orders: In terms of section 85(a) the court may refer the matter directly to a debt counsellor for debt review and a subsequent recommendation to the court in terms of section 86(7), whereas section 85(b) requires the court itself to declare the consumer over-indebted and make any order contemplated in section 87 to relieve the consumer's over-indebtedness. The information required for the exercise of the discretion in terms of section 85(a) may thus in certain respects be different to the information required for exercising its discretion for purposes of section 85(b). Under section 85(a) the information should be of such a nature that it will enable a court to decide whether the consumer should be allowed to go for debt review whereas under section 85(b) the information should be such that the court can decide on the basis thereof whether to declare the consumer over-indebted. It is submitted that the fact that all the reported cases deal with section 85(a) indicates that the court itself will usually not be inclined to assess the consumers affairs and declare a consumer over-indebted and also that consumers who make use of section 85 usually have a number of credit agreements which necessitate a comprehensive debt review.

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58 *Ibid.*

59 In *Standard Bank Ltd v Hales* 2009 3 SA 315 (D) par 12 the court, with reference to *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 3 SA 310 (NmS) and *First National Bank of SA Ltd v Myburg* 2002 4 SA 176 (C) confirmed that the discretion in terms of s 85 NCA should not be exercised capriciously or upon any wrong principle or on the basis of conjecture or speculation, but for substantial reasons on the material before the court.

60 *Firstrand Bank Ltd v Olivier* 2009 3 SA 315 (D) 359D-H. See also *Standard Bank Ltd v Hales* 2009 3 SA 315 (D) where the court stated (par 12): "Therefore the party seeking the referral to a debt counsellor must provide as much as possible relevant information to assist the court in exercising its discretion as the court must have regard to a conspectus of the material."

61 See s 2(1) NCA which requires the NCA to be interpreted in a manner that gives effect to the purposes of the NCA as set out in s 3 NCA.

## 5 1 The Discretion of the Court in Terms of Section 85(a)

A court is not required, for purposes of section 85(a), to make an initial declaration regarding whether a consumer is over-indebted or not. All that is required is that the court should refer the matter to a debt counsellor to conduct a debt review and make a recommendation to court in terms of section 86(7). It must however be borne in mind that although over-indebtedness is not a defence on the merits to any claim by a credit provider in respect of a credit agreement, it has a dilatory effect which, if not properly controlled, may have very negative consequences in terms of time and costs and prospects of debt recovery for a credit provider who seeks to enforce a credit agreement.<sup>62</sup> The NCA has further introduced the voluntary debt review process under section 86 so that consumers can voluntarily and pro-actively deal with their debt situation outside the costly litigation process.<sup>63</sup> Unfortunately debt review is not a panacea for every consumer's debt predicament and there may be instances in which a consumer's debt situation is so dire that debt review will yield no solution. Regardless of the amount of sympathy one may feel for such a consumer, section 3(d) of the NCA promotes the striking of a balance between the interests of the consumer and the credit provider and it is submitted that in such an instance the credit provider should be allowed to enforce his debt failing which the stability of the South African economy may be threatened.

In *Standard Bank Ltd v Hales*<sup>64</sup> the court held that an admission of over-indebtedness *per se* will be unable to convince the court to exercise its discretion favourably by referring a matter to a debt counsellor in terms of section 85(a). The court held that if such admission of over-indebtedness constituted adequate evidence for a debt review referral, section 85(a) would have been worded differently by obliging the court to take the steps in section 85(a) instead of giving the court a discretion to do so.<sup>65</sup> Thus Gorven J held that the *fact* (as *in casu* where the parties were *ad idem* that the consumer was over-indebted), as opposed to the *allegation* of over-indebtedness, is a factor to be taken into account, but is not decisive.<sup>66</sup>

It is thus submitted that where it is clear that the NCA applies to a specific credit agreement and it is alleged in proceedings in which such

62 See Scholtz *et al* par 11.3.3.5. See also *Standard Bank of South Africa Ltd v Hales* 2009 3 SA 315 (D); *Nedbank Ltd v National Credit Regulator* 2011 3 SA 581 (SCA).

63 In *Firstrand Bank Ltd v Olivier* 2009 3 SA 353 (SEC) the court indicated (359A-B) that as it appeared that the NCA would encourage a consumer to approach a debt counsellor before the credit provider approaches the court in terms of ss 129, 130 NCA, it is the duty of the court to discourage consumers from failing to approach a debt counsellor and to discourage them from waiting until the credit provider institutes court proceedings before applying to court for debt relief under the NCA.

64 2009 3 SA 315 (D) par 13.

65 *Ibid.*

66 *Ibid.*

credit agreement is being considered that the consumer is over-indebted, the court that is required to exercise its discretion in terms of section 85 or that itself invokes such discretion, will have to scrutinise the allegations of over-indebtedness made by the consumer to establish whether they are probably true. If the consumer appears to be probably over-indebted the court may then decide whether it would be appropriate to make an order in terms of section 85(a). In exercising its discretion the court must however not facilitate abuse of its own procedure by a debtor who alleges and indeed appears to be over-indebted but whose financial woes cannot be cured by debt review. A debt review must therefore not be ordered where it will serve no purpose other than to delay enforcement. Thus even where it is clear that a consumer is definitely over-indebted his over-indebtedness *per se* should not entitle him to a referral to a debt counsellor in the absence of an indication that the debt counsellor may probably come up with an economically feasible debt restructuring proposal.<sup>67</sup> If the legislature had intended that a mere allegation of over-indebtedness would be the consumer's post-enforcement ticket to debt review there would have been no need to provide a cut-off point in section 86(2) after which a consumer could no more voluntarily and without the initial scrutiny by a court enter the debt review process.

Section 85(a) itself is silent on any factors to be considered for purposes of exercising the discretion to refer a matter to a debt counsellor.<sup>68</sup> The discretion under section 85(a) has been addressed in a number of cases, most notably *Firststrand Bank Ltd v Olivier*;<sup>69</sup> *Standard Bank of South Africa Ltd v Hales*;<sup>70</sup> and to a limited extent in *Firststrand Bank Ltd v Kallides*.<sup>71</sup>

*Firststrand Bank Ltd v Olivier*<sup>72</sup> was decided quite some time before the decision in *Nedbank Ltd v National Credit Regulator*<sup>73</sup> which laid down the principle that the effect of section 86(2) of the NCA was that delivery of a section 129(1)(a)-notice constituted a bar to a voluntary debt review application under section 86. The consumer in the *Olivier*-matter failed to voluntarily apply for debt review prior to the issue of summons.<sup>74</sup> The court in the *Olivier*-case indicated that the following considerations are important in the exercise of the court's discretion under section 85(a):

- (a) the fact that the consumer did not apply for debt review prior to the issue of summons

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67 See *Firststrand Bank Ltd v Seyffert* 2010 6 SA 429 (GS); *Seyffert v Firststrand Bank Ltd* [2012] ZASCA 81; *BMW Financial Services v Mudaly* 2010 5 SA 618 (KZD); *Firststrand Bank Ltd v Evans* 2011 4 SA 597 (KZD).

68 Van Heerden & Lotz 2010 *THRHR* 502 511.

69 2009 3 SA 353 (SE).

70 2009 3 SA 315 (D).

71 Unreported WCC case no 1061/2012.

72 2009 3 SA 353 (SE).

73 2011 3 SA 581 (SCA).

74 Par 3.

- (b) having failed to avail himself of that procedure the consumer must explain that failure to the court
- (c) the consumer's action in awaiting legal debt enforcement by the plaintiff rather than voluntarily taking steps to have himself declared over-indebted, amounts to abuse of court in view of the following factors:
  - (i) the NCA provides a simple, inexpensive and effective procedure for debt restructuring in section 86;
  - (ii) these provisions were obviously designed to expedite and to simplify the procedure relating to debt restructuring;
  - (iii) these procedures are furthermore designed to avoid the necessity of parties having to resort to the far more costly procedure of applying to the high court for relief;
  - (iv) it is also undesirable that the high court has to deal with frequent applications for debt restructuring, very much along the lines of a sitting in terms of section 65 of the Magistrates Court Act<sup>75</sup>

However the court was not prepared to fail the consumer for not having acted timeously under section 86(1) of the NCA mainly because the NCA was still new at that stage and it was unclear whether the consumer had sufficient time before receiving the section 129(1)(a) notice to voluntarily apply for debt review.<sup>76</sup>

In *Standard Bank Ltd v Panayiotts*<sup>77</sup> the court agreed with the approach adopted in the *Olivier*-case. The court held that considerations of fairness require that the circumstances of both the consumer and credit provider be given equal consideration.<sup>78</sup> It cautioned that courts should be reluctant to assist the consumer when it is clear that the credit provider is likely to be greatly prejudiced where the protection measures afforded by the NCA is implemented.<sup>79</sup>

*Standard Bank of South Africa Ltd v Hales*<sup>80</sup> served before the court well after the NCA had come into operation but before the decision on section 86(2) in *Nedbank Ltd v National Credit Regulator*.<sup>81</sup> The court in *Hales* however accorded section 86(2) basically the same interpretation as it

75 32 of 1944.

76 Par 16. See further Van Heerden & Lotz 2010 *THRHR* 502.

77 2009 3 SA 363 (W).

78 375B-C. The court held that the NCA does not intend that a consumer may claim to be over-indebted whilst at the same time retaining possession of the goods that form the subject-matter of the agreement and held further that such goods should be sold. See also *Standard Bank of South Africa Ltd v Albert Campher* unreported ECG case no 5081/2009 (par 14) where the court held that it needed not consider whether an appropriate case has been made out for the exercise of its discretion in terms of s 85 NCA because *in casu* the credit provider's claim was for the return of a motor vehicle, the ownership of which vested in the credit provider in accordance with the terms of the agreement and which served as security for payment of the amounts due in terms of that agreement.

79 375E.

80 2009 3 SA 315 (D).

81 Par 4.

was later given in the *Nedbank*-matter.<sup>82</sup> In the *Hales*-matter the consumer had applied for debt review under section 86(1) approximately one month after the delivery of an application for summary judgment and it was conceded that the debt review application was a nullity due to the provisions of section 86(2).<sup>83</sup>

In addition to the factors raised in the *Olivier*-case, it was submitted on behalf of the credit provider in the *Hales*-matter that the court's discretion in terms of section 85(a) should be exercised *against* the defendant for the following reasons:

- (a) there was no explanation for the delay in the application for debt review under section 86;
- (b) there was no explanation for the dishonest defence (that the consumers did not receive a section 129(1)(a)-notice) which was raised in their affidavit resisting summary judgment;
- (c) the defence raised was clearly designed to frustrate the plaintiff in obtaining judgment and foreclosing on the immovable property
- (d) if one deducted from the monthly expenses of the consumers that amount which would be required to service the mortgage bond, they would be living within their means and would not be over-indebted, and
- (e) the defendants had not paid any instalments for 14 months.

It was further submitted on behalf of the credit provider that the consumers failure to apply for debt review voluntarily after receiving the section 129(1)(a)-notice constituted an abuse of the court process as contemplated in the *Olivier*-case.<sup>84</sup> The court however disagreed because it interpreted section 86 and 129 to mean that after receipt of a section 129-notice, a consumer is barred by section 86(2) from applying for debt review under section 86(1).<sup>85</sup> Thus it concluded that if section 86 had been utilised no resort could (now) have been had to section 85 since the debt counsellor would already have made a recommendation in terms of section 86(7).<sup>86</sup> The court indicated that cogent reasons<sup>87</sup> may have been present why section 85(a) was raised only at the present stage of the proceedings and that there may be circumstances where, even if no referral to a debt counsellor was made in terms of section 129, one of the other steps mentioned in that section was taken which did not satisfy a genuine complaint of the consumer.<sup>88</sup>

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82 *Ibid.*

83 *Ibid.*

84 *Hales* par 21.

85 It indicated that the referral could then only be one in terms of s 129(1) NCA and could not result in a declaration of over-indebtedness and the other steps as set out in s 86 NCA. The debt counsellor's attempts would then be limited to resolving the dispute or bringing the payments up to date, as provided for in s 129(1) NCA.

86 *Ibid.*

87 Such as the failure to reach an agreement after having referred the matter to a debt counsellor.

88 Par 21.

The court however pointed out that *in casu* the consumers failed to provide it with certain relevant minimum information which one would have expected them to place before the court.<sup>89</sup> They did not explain how it came about that they defaulted under the agreement or whether their financial situation had changed or what steps they took to minimise or remedy their default.<sup>90</sup> They did not indicate whether before receipt of the section 129(1)(a)-notice, they were aware of the provisions of section 86, and if so, why they did not make application under section 86(1) for debt review.<sup>91</sup> They also did not mention whether they approached the credit provider at any stage with proposals to reschedule the debt or any other proposals.<sup>92</sup> They failed to explain when their indebtedness arose and did not indicate whether it arose after they had defaulted on their indebtedness to the credit provider and thus incurred further monthly expenses which further reduced their ability to service the mortgage bond.<sup>93</sup> The consumers also did not indicate how, when the excess of expenditure over income amounted to just more than the entire instalment due to the credit provider, it would be feasible to reschedule the debt, with or without the temporary suspension of instalments.<sup>94</sup>

In this matter the consumers also abruptly stopped making payments of their bond instalments and the court pointed out that there was no initial reduction in the payment of the instalment, giving an indication of an attempt to meet their instalments.<sup>95</sup> The court indicated that, in fact, it appeared from the monthly commitments of the consumers that, *even without the bond instalments*, they would be marginally over-indebted, thus evidencing little potential to successfully reschedule the indebtedness under the mortgage bond.<sup>96</sup> No evidence was presented on behalf of the consumers of how the term of the mortgage bond was to be increased if a far lesser amount than their monthly instalment was to be paid and it appeared that there was no feasible way of rescheduling the mortgage bond debt.<sup>97</sup> They already failed to pay any bond instalments for 14 months and according to the court a further suspension of instalments was only likely to increase their indebtedness in the absence

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89 Par 22.

90 *Ibid.*

91 *Ibid.*

92 *Ibid.*

93 *Ibid.*

94 *Ibid.*

95 Par 23.

96 *Ibid.* The court indicated that it is further important to note that, even ignoring the other monthly amounts required to service their debt commitments, the defendants would only have an amount of R1,342.20 to pay towards their mortgage bond indebtedness. This would leave a shortfall to the plaintiff of R8,692.74 without taking into account their overdraft indebtedness as well as their indebtedness to the municipality and Wesbank.

97 *Ibid.*

of additional income.<sup>98</sup> The consumers further failed to mention any additional income as a possibility.<sup>99</sup> The court therefore held that if it was not feasible to extend the mortgage bond debt or for the consumers to recover financially after a further suspension of instalments, it was difficult to see how a debt counsellor could make one of the remaining recommendations in section 86(7).<sup>100</sup>

The court also found the credit provider's conduct to be relevant in the exercise of its discretion: The credit provider had scrupulously complied with the provisions of the NCA and did not even proceed as soon as it was entitled to do so but after the delivery of the section 129(1)(a)-notice to the consumers it waited some months before it instituted action.<sup>101</sup>

In *Standard Bank Ltd v Kallides*<sup>102</sup> a summary judgment application served before Binns-Ward J consequent upon an order made earlier by Dlodlo J that the summary judgment application be postponed *sine die* and that it must be reinstated only after the determination of an application in terms of section 85 of the NCA. It appeared that the credit agreement debt in issue had been the subject of a debt review in terms of section 86 of the NCA but that such debt review was terminated by the credit provider.<sup>103</sup> The consumer however alleged in his opposing affidavit that he and his debt counsellor had "caused an application in terms of section 85(a) [of the NCA] to be brought against" the credit provider which application would be issued and served simultaneously with his opposing affidavit to the summary judgment proceedings.<sup>104</sup> In brief the consumer indicated in his opposing affidavit in the summary judgment proceedings that his "bona fide defence"<sup>105</sup> was that he was over-indebted. He indicated that he had approached a debt counsellor who found him to be over-indebted and instructed him to make certain payments in accordance with a debt restructuring proposal but that the debt counsellor did not distribute these payments to his creditors.<sup>106</sup>

Binns-Ward J indicated that these allegations by the consumer did not make out a defence but they did however make out a basis for asking the court to exercise its discretion against granting summary judgment.<sup>107</sup> The purported section 85-application was brought by way of interlocutory proceedings in the action and the principal affidavit was

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98 *Ibid.*

99 *Ibid.*

100 *Ibid.*

101 Par 24.

102 Unreported WCC case no 1061/2012.

103 Par 2. The court inferred this from the allegation that the credit provider had delivered notices in terms of s 86(10) NCA.

104 Par 3.

105 *Ibid.*

106 *Ibid.* The consumer indicated that he became suspicious and started making payments directly to his creditors and also approached a new debt counsellor.

107 *Ibid.*

filed by the new debt counsellor.<sup>108</sup> The latter affidavit set out the history of the matter at length pertaining to the previous debt counsellor's failure to distribute the consumers payments to his creditors.<sup>109</sup> It also indicated that the consumer was over-indebted and was a suitable candidate for debt review.<sup>110</sup>

As the court in the *Kallides*-matter was correctly of the opinion that the appropriate application that should have been brought in *casu*, was for the debt review to resume in terms of section 86(11),<sup>111</sup> it focused on the distinction between sections 85 and 86.<sup>112</sup> Apart from stating that the consumer who wants to invoke section 85 will have to explain why he did not avail himself of the procedure under section 86, the court did not deal with any further with the discretion of the court under section 85.

In *Andrews v Nedbank Ltd*<sup>113</sup> the court indicated that the fact that the legislature did not enumerate factors or circumstances which should be considered by the court when called upon to exercise its discretion in terms of section 85 must necessarily mean that the court should exercise a judicial discretion with due regard to all the relevant facts placed before it, including the purpose of the NCA. *In casu* the court pointed out that it was abundantly clear that the consumer's over-indebtedness was largely due to the relevant credit agreement and that his ability to satisfy all his peculiar financial obligations in the peculiar circumstances of the case was suspect.<sup>114</sup>

The aforementioned cases however illustrate that in order to enable the court to exercise its discretion judicially and to make sure the consumer is not merely raising the issue of over-indebtedness for purposes of delay with no real intention or feasible prospect of obtaining debt relief and eventually satisfying his obligations towards the credit provider, the consumer must as a minimum disclose the following information to the court (for instance either in his opposing affidavit at summary judgment stage or by way of a substantive application):

- (a) facts that indicate that the consumer is *probably* over-indebted

108 Par 4. The debt counsellor pointed out in his affidavit that the credit provider who instituted the enforcement proceedings *in casu* was the only credit provider who took action against the consumer as a result of the non-distribution of payments by the consumer's previous debt counsellor. No objections were received by the remaining credit providers to whom the consumer had personally started making payments after he became suspicious about his previous debt counsellor's failure to pay money over to his credit providers.

109 Parr 12-19 of the affidavit of the new debt counsellor (Barkhuizen).

110 Parr 23-29 of the new debt counsellor's affidavit.

111 Parr 10, 11. The court thus treated the application purportedly made in terms of s 85 NCA as one in substance made in terms of s 86(11) NCA.

112 Parr 7, 8.

113 2012 3 SA 82 (ECG) par 13.

114 Par 22. The consumer was not permanently employed – he had secured employment for six months only.

- (b) an acceptable explanation of why the consumer did not access the voluntary debt review process prior to delivery of the section 129(1)(a)-notice (Here the credit provider's conduct may be relevant eg that the credit provider sent a section 129(1)(a)-notice immediately upon default and refused to entertain any submissions by the consumer)
- (c) detail of how the consumer became over-indebted<sup>115</sup>
- (d) the consumer must provide details of any payments or debt repayment proposals or debt restructuring proposals he has made to the credit provider or any other interactions he had with the credit provider in an attempt to address his default and debt position
- (e) details of the consumer's total debt situation
- (f) details of the consumer's income
- (g) the stage of the proceedings at which section 85 is invoked (a consumer who is over-indebted and genuinely wishes to access debt relief via debt review will usually at least raise the issue at summary judgment stage – if it is raised at a much later stage such as at trial, the court should consider the possibility of abuse).
- (h) a reasonable explanation as to why he did not access the voluntary debt review procedure (for example because the credit provider acted promptly upon his the consumer's first default and sent him a section 129(1)(a)-notice before he could approach a debt counsellor)
- (i) facts that indicate that his financial position is such that in all probability the debt counsellor who conducts the debt review will be able to come up with an economically feasible debt rescheduling proposal.

All these factors play a role but, absent clear abuse, it is submitted that the possibility that a debt review will yield an economically feasible debt restructuring proposal is pivotal in the exercise of the court's discretion under section 85(a). Obviously the fact that a consumer is employed or has a source of income from which he is able to service his debt is important but not decisive. Lack of employment or a steady income may however lead to the exercise of the section 85(a) discretion (and also the discretion in terms of section 85(b) as discussed below) against the consumer.

## **5 2 The Discretion of the Court in Terms of Section 85(b)**

Section 85(b) envisages a different situation than section 85(a). It does not require a prior referral by the court to a debt counsellor but entitles the court to go ahead and declare that the consumer is over-indebted and to make any order contemplated in section 87 to relieve the consumer's over-indebtedness. It should thus be clear to the court that the consumer is actually over-indebted as opposed to probably over-indebted. It may consequently be asked in which circumstances the court will make a

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<sup>115</sup> To make sure that the consumer is not abusing credit and then attempting to rely on the debt relief measures in the NCA to facilitate further abuse. This detail regarding how the consumer became over-indebted may also serve to reveal any reckless credit granting.

section 85(b) order? It is submitted that the courts, and especially the high courts where no such procedures as those in terms of section 65 or 74 of the Magistrates Court Act<sup>116</sup> exist, are not equipped to conduct a comprehensive debt review on the same scale as a debt review conducted by a debt counsellor. Judges and magistrates do not have the time to phone credit providers or engage in correspondence with them or to busy themselves with all sorts of calculations. However it appears that the legislature has contemplated that there may be an instance where a court can declare a consumer over-indebted without first referring the matter to a debt counsellor for a debt review. Although not explicitly stated, when regard is had to section 130(4)(c)(iii) (which also empowers a court to make an order as contemplated in section 85(b) in the instance that a pending debt review in respect of one credit agreement is disregarded by a credit provider who seeks to enforce the credit agreement) such situation appears to be where a consumer has only one credit agreement. It is doubtful whether section 85(b) will be used much in practice. The reported cases all deal with requests in terms of section 85(a). This is probably because it is very unlikely that a consumer who is over-indebted will have only one credit agreement – usually they have quite a number thereof. It is also likely that it is because a court, which is not equipped to be doing debt reviews, will rather use its discretion to make a referral under section 85(a) where the consumer's debt position can be properly reviewed by a debt counsellor in accordance with a process that requires extensive engagement with the consumer and credit providers. In any event, declaring a consumer over-indebted, even if that consumer only has one credit agreement, is a far wider exercise than merely considering that one specific credit agreement and actually entails an evaluation of the consumer's total debt position and repayment ability. It is actually not the type of task that a judge or magistrate who is a judicial officer and not a debt investigator, should busy themselves with.

Although it is submitted that section 85(b) will find limited, if any, application in practice, this discussion will be incomplete without considering the situation further should it happen that a court decide to act in terms of section 85(b). Thus, insofar as the exercise of the court's discretion in terms of section 85(b) is concerned, it is submitted that the followings aspects are relevant:

- (a) Information from which it is clear that the consumer is over-indebted.
- (b) The consumer must provide an acceptable explanation of why he did not use the voluntary debt review process under section 86 ( Here the credit provider's conduct may be relevant, for instance that the credit provider sent a section 129(1)(a)-notice immediately upon default and refused to entertain any submissions by the consumer).
- (c) The consumer must provide an explanation of how his indebtedness arose.<sup>117</sup>

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116 32 of 1944.

117 See the remarks at n 105 above.

- (d) The consumer must provide details of any payments or debt repayment proposals or debt restructuring proposals he has made to the credit provider or any other interactions he had with the credit provider in an attempt to address his default and debt position.
- (e) Details of the consumer's total debt situation.
- (f) Detail of the consumer's income.
- (g) The stage of the proceedings at which section 85 is invoked.
- (h) The consumer must only have one credit agreement.
- (i) It must be clear to the court that the consumer is over-indebted and that it is not necessary to refer the matter to a debt counsellor to determine whether the consumer is over-indebted because the debt counsellor will come to the exact same conclusion and it will just create unnecessary delay.
- (j) The debtor's indebtedness must be such and his financial position must be such that the court will be able to do an economically feasible restructuring of the consumer's credit agreement debt.

Also in the context of the discretion in terms of section 85(b) the question whether the over-indebted consumer's credit agreement debt can be economically restructured, is pivotally important.

## 6 Powers of Court

### 6 1 Powers of the Court Under Section 85(a)

Where the court decides to exercise its discretion against a referral under section 85(a) it can then grant the relief sought by the credit provider in the specific proceedings if otherwise all the requirements for such relief are met. Thus, in summary judgment proceedings a court can then grant summary judgment in the absence of any *bona fide* defence on the merits.

Where the court however exercises its discretion in favour of a referral in terms of section 85(a) it is submitted that the court proceedings in which the consumer's over-indebtedness was alleged and section 85 was invoked will have to be postponed either *sine die* or preferably for a specified time period pending the finalization of the debt review by the debt counsellor. There is only one section in the NCA that describes the process that the debt counsellor will have to follow to conduct a debt review, namely section 86 and it is submitted that in the case of a referral in terms of section 85(a) the debt counsellor will thus have to follow the procedure as set out in section 86. This submission appears to be strengthened by the statement in section 85(a) that the debt counsellor must make a recommendation to the court in terms of section 86(7)(c). It further appears that section 85(a) contemplates that the debt counsellor, after having conducted the debt review, must make his recommendation to the same court that made the section 85(a) order.

A recommendation by a debt counsellor in terms of section 86(7)(c) may either be that the consumer is not over-indebted<sup>118</sup> or that he is not yet over-indebted but nevertheless experiencing, or likely to experience, difficulty satisfying all his obligations under his credit agreements in a timely manner<sup>119</sup> or that he is definitely over-indebted. Where the debt counsellor finds that the consumer is not over-indebted it appears that such consumer would then have the right to approach the court, with leave, for a declaration of over-indebtedness as envisaged by section 86(9) of the NCA.<sup>120</sup> If the consumer fails to approach the court for a declaration of over-indebtedness within the time period allowed for such application by the consumer, the court may then grant the relief to which the court proceedings in which the over-indebtedness was raised pertains, such as for instance summary judgment against the consumer. Where the debt counsellor finds that the consumer is not yet over-indebted but likely to become over-indebted in the near future as contemplated in section 86(7)(b) he is obliged to first attempt to obtain a voluntary debt rescheduling agreement between the consumer and his credit providers which agreement must then be made a consent order.<sup>121</sup> If such a voluntary agreement cannot be reached the debt counsellor must refer the matter to the court together with his debt rescheduling proposal.<sup>122</sup> Where the debt counsellor's determination reveals that the consumer is already over-indebted the NCA requires that the matter be referred to court with a debt rescheduling proposal.<sup>123</sup> Thus in the case of a determination in terms of section 86(7)(b) that does not result in a consented rescheduling agreement as well as in the event of a finding of over-indebtedness as contemplated in section 86(7)(c), the court has the discretion<sup>124</sup> to make a debt rescheduling order as contemplated in section 86(7)(c), namely:

- (i) that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless;
- (ii) that one or more of the consumer's obligations be re-arranged by
  - (aa) extending the period of the agreement and reducing the amount of each payment accordingly;
  - (bb) postponing during a specified period the dates on which payments are due under the agreement;
  - (cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or

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118 S 86(7)(a) NCA.

119 S 86(7)(b) NCA.

120 See Scholtz *et al* par 11.3.3 for a discussion of the position where the debt counsellor finds that the consumer is not over-indebted.

121 S 86(7)(b) NCA read with s 86(8)(a) NCA.

122 S 86(8)(b) NCA.

123 S 86(7)(c) NCA.

124 It is submitted that the use of the word "may" points toward a discretion.

- (dd) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6.

The rescheduling powers in terms of section 86(7)(c)(ii) does however not enable a court to write off interest.<sup>125</sup> With regard to the power of the court to declare a credit agreement reckless as contemplated in section 86(7)(c)(i) it is submitted that this order implies that the court can also grant relief in respect of such reckless credit agreements in view thereof that section 130(4)(a) provides that where a court determines that a credit agreement was reckless it *must* make an order contemplated in section 83 (being the section that sets out the various forms of debt relief in regard to reckless credit).

In *Collett v Firstrand Bank Ltd*<sup>126</sup> the court observed that one of the differences between section 85 and section 86 is that in terms of section 85 a credit provider does not have the right to terminate the debt review. This view was also taken in *Standard Bank of South Africa Ltd v Kallides*<sup>127</sup> where the court remarked that it is no cause for surprise as the process under section 85(a) occurs at the instance and under the direction of the court and once an order is made under section 85(b), enforcement proceedings by the credit provider might ensue only in the circumstances provided in terms of section 88(3) of the NCA. Although this statement appears to be correct in the context of a declaration of over-indebtedness and debt rescheduling pursuant to section 88(3), it can however not be agreed that merely because a debt review is conducted as a result of a section 85(a) order it means that such debt review cannot be terminated by a credit provider. In essence, as indicated above, the debt counsellor conducting the debt review will follow the very same process as under section 86 unless specifically directed otherwise by a court. As indicated above, section 88(3) indicates specifically that when a credit provider receives notice of court proceedings contemplated in section 85 the credit provider may not enforce the credit agreement until the consumer is in default and one of the events contemplated in section 88(1) has occurred. This provision is however subject to section 86(10) and it is therefore submitted that where a debt counsellor is conducting a debt review pursuant to section 85(a) which in essence entails the same procedure as under section 86, that termination of such review would be competent should the debt counsellor for instance fail to make a recommendation timeously or should the debt counsellor and /or consumer act in bad faith.

It is thus submitted that where the court exercises its discretion in favour of a referral to a debt counsellor it would be prudent for the court to indicate a specific date by which the debt counsellor should make its

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<sup>125</sup> See Scholtz *et al* par 11.3.3.3. Where the court recalculates the consumers obligations under s 86(7)(c)(ii)(dd) NCA it may however have a bearing on the amount of interest charged.

<sup>126</sup> 2011 4 SA 508 (SCA) par 11. See also *Seyffert & Seyffert v Firstrand Bank Ltd* [2012] ZASCA 81.

<sup>127</sup> Unreported WCC case no 1061/2012.

recommendation to court and to postpone the proceedings during which section 85 was raised to such date. The court should then indicate in its order that if the debt counsellor fails to make its recommendation to the court on the date as indicated, the credit provider may terminate the debt review and approach the court for relief in terms of the postponed proceedings on the same papers. Where the court makes no order indicating the date by which the debt counsellor should make his recommendation to court but merely postpones the proceedings *sine die* it is submitted that it will have the effect that the debt counsellor will be afforded the normal time period for the debt review as contemplated in section 86(6) read with regulation 24(6) and section 86(10) and that the credit provider will then be able to terminate such debt review in accordance with section 86(10) within 60 business days after the court referred the matter for debt review and set the postponed proceedings down for hearing.

## 6 2 Powers of Court Under Section 85(b)

Where a court exercises its discretion against making an order in terms of section 85(b), it can grant the relief sought by the credit provider if all the requirements for such relief are met. If for instance the credit provider has applied for summary judgment the court may then grant the summary judgment in the absence of *a bona fide* defence on the merits.

As indicated, a court will only be able to declare a consumer over-indebted if it is apprised of sufficient information to support such finding of over-indebtedness. A declaration of over-indebtedness thus has to be supported by the facts of a specific matter. It appears that section 85(b) implies that in such instance the court can make an assessment of whether the debtor is actually over-indebted and can also make a declaration regarding reckless credit where applicable and grant relief appropriate to such reckless credit granting and/or over-indebtedness.<sup>128</sup> Section 87(b) is relevant with regard to the powers that a court can exercise in terms of section 85(b) and provides that a court may

- (b) make:
  - (i) an order declaring any credit agreement to be reckless, and an order contemplated in section 83(2)<sup>129</sup> or (3)<sup>130</sup>

<sup>128</sup> S 87 NCA.

<sup>129</sup> S 83(2) NCA provides that if a court declares that a credit agreement is reckless in terms of s 80(1)(a) NCA or s 80(1)(b)(i) NCA, the court may make an order (a) setting aside all or part of the consumer's rights and obligations under *that* agreement, as the court determines just and reasonable in the circumstances; or (b) suspending the force and effect of *that* credit agreement in accordance with subs (3)(b)(i).

<sup>130</sup> S 83(3) NCA provides for the suspension of the reckless credit agreement and an order for re-arrangement of the consumer's obligations under any other credit agreements in accordance with s 87 NCA.

- (ii) an order re-arranging the consumer's obligations in any manner contemplated in section 86(7)(c)(ii);<sup>131</sup> or
- (iii) both orders contemplated in subparagraph (i) and (ii).

Thus where the court finds that reckless credit granting occurred it can set the specific "reckless" credit agreement aside in whole or in part in terms of section 83(2) or it can suspend the force and effect of that credit agreement in accordance with section 83(2) read with section 84 of the NCA.<sup>132</sup> In addition it may also make a debt restructuring order re-arranging any of the consumer's obligations in any manner contemplated in section 86(7)(c)(ii). However, it is submitted that given that section 85(b) appears to envisage a declaration of over-indebtedness in respect of one agreement only it means that if the court decides that the over-indebtedness of the consumer was the result of reckless credit granting then the court can only either make the order in section 87(b)(i) relating to setting aside or suspension *or* it can make the order in section 87(b)(ii) – because if the court makes the order in respect of section 87(b)(i), there is no other credit agreement debt left that can be rearranged.

It is further submitted that in the instance where the consumer has only one credit agreement but has been unable to access the voluntary debt review process under section 86, such consumer will be able to ask the court for relief in terms of section 85(a) alternatively in terms of section 85(b).

Where the court has, however, exercised its discretion in favour of declaring the agreement over-indebted in terms of section 85(b) the matter does not follow the debt review path set out in section 86 and termination in terms of section 86(10) is not competent. Once the court has made a debt re-arrangement order as contemplated in section 87 the effect of section 88(3) of the NCA kicks in with the result that the court proceedings during which the allegation of over-indebtedness was made will be suspended for as long as the consumer abides by the terms of the debt rearrangement order. It is submitted that it would be prudent for a court to make an order that the aforesaid proceedings are suspended pending compliance by the consumer with the re-arrangement order or that it is postponed *sine die* pending compliance with such order and that upon non-compliance the credit provider may approach the court on the same papers for an order in terms of the said court proceedings.

## 7 Conclusion

Section 85 of the NCA serves to facilitate access to debt review and debt restructuring alternatively a declaration of over-indebtedness and

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<sup>131</sup> See par 6 1 above.

<sup>132</sup> For a detailed discussion of these powers of the court to deal with reckless credit granting see Boraine & Van Heerden 2010 *THRHR* 1; Van Heerden & Boraine 2011 *De Jure* 392.

subsequent debt relief by the court without the necessity of debt review by a debt counsellor. It appears that the section is limited in its application insofar as it is only to the avail of a consumer who has not yet applied for debt review prior to delivery of a section 129(1)(a)-notice by the credit provider. Essentially the section gives effect to the legislature's intention that the debt relief measures relating to over-indebtedness should be available to consumers even after enforcement of a credit agreement has commenced. Sight should however not be lost of the fact that the NCA also has the purpose of educating consumers and promoting responsibility in the credit market. Encouraging consumers to pro-actively deal with their over-indebtedness outside the cost confines of debt enforcement proceedings contribute towards consumer education and a sustainable credit market and it is for this reason that consumers are encouraged to make use of the voluntary debt review process in section 86 of the NCA.

Section 85 however also acts as a filter to prevent abuse of process by consumers and thus the discretion afforded to the court under both section 85(a) and section 85(b) requires the consumer to explain why he did not use the voluntary debt review process under section 86 and to present information that indicates that his credit agreement debt can be economically restructured. The invocation of section 85 should thus not be yet another dilatory feat in the consumer's attempts to delay enforcement but should be used as a tool in attaining the purpose of satisfying the consumer's debt obligations. It should not serve to perpetuate the consumer's debt predicament whilst frustrating the credit provider's legitimate debt enforcement attempts but should be used responsibly to attain a balanced debt relief solution which observes the interest of the consumer as well as that of the credit provider.