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86(10) OF THE *NATIONAL CREDIT ACT* 34 OF 2005**

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## PERSPECTIVES ON THE TERMINATION OF DEBT REVIEW IN TERMS OF SECTION 86(10) OF THE *NATIONAL CREDIT ACT* 34 OF 2005

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### 1 Introduction

*The National Credit Act* 34 of 2005 (the NCA)<sup>1</sup> aims to address and prevent the over-indebtedness of consumers and to provide mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible obligations.<sup>2</sup> In this regard it provides *inter alia* for the mechanism of debt review during which a debt counsellor reviews the debt situation of a consumer in order to determine if the consumer is over-indebted and to attempt to assist the consumer in obtaining debt relief in the form of a consensual debt re-arrangement agreement<sup>3</sup> or court-ordered debt re-structuring.<sup>4</sup> During this process the consumer and credit providers concerned are obliged to comply with any reasonable requests by the debt counsellor to facilitate the evaluation of the consumer's state of indebtedness and the prospects of responsible debt re-arrangement, and to participate in good faith in the review and any negotiations designed to result in responsible debt re-arrangement.<sup>5</sup>

In terms of section 86(6) of the NCA read together with regulation 24(6) of the National Credit Regulations, a debt counsellor has thirty business days after receiving an application for debt review from a consumer within which to make a determination of whether the consumer is over-indebted<sup>6</sup> or not yet over-indebted but likely to ex-

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<sup>1</sup> All references to sections are to the *National Credit Act* 34 of 2005 (NCA) unless otherwise indicated.

<sup>2</sup> Section 3(g) and (i). See also s 79 for a definition of over-indebtedness.

<sup>3</sup> Section 86(7)(b).

<sup>4</sup> Section 86(7)(c).

<sup>5</sup> Section 86(5)(a) and (b).

<sup>6</sup> Section 86(7)(a). See further s 86(9). In such instance the consumer may, with leave of the magistrate's court, apply directly to the magistrate's court, in the prescribed manner and form, for an order in terms of s 86(7)(c). See further reg 26.

perience difficulty in satisfying all of his or her obligations in a timely manner.<sup>7</sup> If the consumer seeks a declaration of reckless credit, the debt counsellor also has to determine if any of the consumer's credit agreements appear to be reckless.<sup>8</sup> Having made a determination as aforesaid, the debt counsellor has to take certain steps to achieve the appropriate debt relief for the consumer.

In those instances where the consumer is found to be not yet over-indebted but likely to experience problems in future, the debt counsellor may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement.<sup>9</sup> If such recommendation is accepted by the consumer and each credit provider concerned, the debt counsellor must<sup>10</sup> record the proposal in the form of an order, and if it is consented to by the consumer and each credit provider concerned, file it with the court as a consent order in terms of section 138.<sup>11</sup> Where the debt counsellor makes a determination that the consumer is indeed over-indebted, he or she may<sup>12</sup> issue a proposal recommending that the magistrate's court make an order declaring one or more of the consumer's credit agreements to be reckless credit<sup>13</sup> and/or rearranging one or more of the consumer's credit agreement obligations.<sup>14</sup> This referral of the recommendation to court is made in the form of an application in terms of Magistrate's Court Rule 55.<sup>15</sup> It was further held in *Changing Tides 17 (Pty) Ltd v Erasmus*<sup>16</sup> that a debt counsellor is required to act

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<sup>7</sup> Section 86(7)(b). It should be noted that a debt counsellor cannot declare a consumer over-indebted. In terms of s 85 of the NCA only a court can declare a consumer over-indebted.

<sup>8</sup> Section 86(6)(b).

<sup>9</sup> Section 86(7)(b).

<sup>10</sup> The language of the provision is peremptory and does not afford the debt counsellor any discretion.

<sup>11</sup> Section 86(8)(a).

<sup>12</sup> It is submitted that where the consumer's over-indebtedness is so dire that no responsible debt re-structuring recommendation is possible but only eg a negative proposal, the debt counsellor is not obliged to refer the matter to a magistrate's court with a recommendation for debt re-structuring.

<sup>13</sup> Section 86(7)(c)(i).

<sup>14</sup> Section 86(7)(c)(ii). The powers of the court are limited to the following methods of re-arrangement: "(a) Extending the period of the agreement and reducing the amount of each payment due accordingly; (b) postponing during a specified period the dates on which payments are due under the agreement; (c) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or (d) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6."

<sup>15</sup> *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP) 310-311, 320.

<sup>16</sup> *Changing Tides 17 (Pty) Ltd v Erasmus; Changing Tides 17 (Pty) Ltd v Cleophas; Changing Tides 17 (Pty) Ltd v Frederick* (18153/09, 14229/09 11973/09) 2009 ZAWCHC 175 (hereafter *Changing Tides 17 (Pty) Ltd v Erasmus*).

with expedition in matters in which an application by the debt counsellor to the magistrate's court is concerned.<sup>17</sup>

A pending debt review has serious consequences. It bars a consumer from entering into further credit agreements<sup>18</sup> and creates a moratorium on debt enforcement by the credit provider.<sup>19</sup> However, a debt review in terms of section 86 does not end or lapse automatically on the non-happening of a specific event or the expiry of a specific time period such as the thirty business-day period referred to above.<sup>20</sup>

Before a credit provider can enforce a credit agreement that is the subject of a pending debt review, the debt review must be terminated in accordance with section 86(10)<sup>21</sup> and certain other requirements must be met, *inter alia* that ten business days should have lapsed since delivery of the notice of termination.<sup>22</sup>

Section 86(10) does not set out specific grounds for the termination of debt review and merely provides that a credit provider may terminate a debt review in the prescribed manner where the consumer is in default with a credit agreement "that is being reviewed in terms of this section". Such termination may take place only after at least sixty business days have lapsed after the date on which the consumer applied for debt review in terms of section 86(1). Thus, section 86(10) read together with section 86(6) and regulation 24(6) has the effect that a debt counsellor has *at least* sixty *business* days to fulfil his duties in terms of section 86 and not thirty business days as might appear at first glance.<sup>23</sup> It is submitted that the intention of the legislature appears to be that the debt counsellor has thirty business days to make the determination as provided for in section 86(6) and that the recommendation to court must then be made within thirty business days thereafter.<sup>24</sup> Notice of the termination

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<sup>17</sup> With reference to the observation by Du Plessis J in *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP) 305 that "matters of over-indebtedness are by nature urgent and require speedy resolution".

<sup>18</sup> Section 88(1).

<sup>19</sup> Section 88(3).

<sup>20</sup> *Coetzee v Nedbank Ltd* 2010 JOL 26260 (KZD).

<sup>21</sup> Section 88(3).

<sup>22</sup> Section 130(1)(a).

<sup>23</sup> As per s 86(6) read together with reg 24(6).

<sup>24</sup> See also *Changing Tides 17 (Pty) Ltd v Erasmus* para 30 where the court stated: "My summary of the relevant provisions above makes it clear that a debt review conducted strictly in accordance with the regulations should, within a period of 60 business days, have resulted in either a

has to be given to the consumer, the debt counsellor and the National Credit Regulator.<sup>25</sup> It should be noted that there is no prescribed form for termination of a debt review in the regulations.<sup>26</sup>

The section 86(10) procedure appears to be a unilateral procedure available to a credit provider. However, a consumer against whom a pending debt review was terminated is not without redress as section 86(11) provides that if a credit provider who has in terms of section 86(10) given notice to terminate a debt review as contemplated in section 86 proceeds to enforce the agreement in terms of Part C of Chapter 6, the magistrate's court hearing the matter may order that the debt review resume on any conditions that the court considers to be just in the circumstances. A notice of termination in accordance with section 86(10) is thus a prerequisite for the operation of section 86(11). It is submitted that the wording of section 86(11) indicates that this section may be invoked only once the credit provider has proceeded to enforce the credit agreement and that the appropriate court to approach in this regard is the court in which the credit agreement is being enforced.

If a debt review is incorrectly terminated in accordance with section 86(10), the enforcement proceedings instituted thereafter will be unlawful and premature.

In practice the debt review process - and specifically the termination thereof - is problematic as there appears to be uncertainty, as a result of the sparse provisions of section 86(10), regarding exactly when a debt review can be terminated. Uncertainty exists regarding the scope of a debt review and whether it should be afforded a narrow or broad interpretation, which will inevitably affect the cut-off date for termination. It may be asked if the sixty business-day period referred to in section 86(10) should be interpreted to give a credit provider a right to terminate a debt review unilaterally as a matter of course after the lapse of sixty business days from the date of application for debt review as long as the credit provider is able to show that the requirements set by section 86(10), namely default and the lapse of the appropriate number of days, have been met. Or should section 86(10) be interpreted to suggest

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rejection of the debt review application, or the institution of an application by the debt counsellor to the magistrate's court in terms of either s 86(7)(c) or s 86(8)(b) of the NCA."

<sup>25</sup> Section 86(10).

<sup>26</sup> Scholtz *et al Credit Act* para 11.

that the termination procedure is available only with regard to the termination of a specific procedure and that its invocation is subject to a cut-off time which *also* depends on whether such procedure has been completed or not, and not merely on whether or not there is default and a lapse of sixty business days? Thus, in the latter regard, the proposition is that section 86(10) is applicable only to a specific procedure, namely a credit agreement "that is being reviewed in terms of section 86", and in order to determine if section 86(10) was applied correctly it should first be ascertained if it can be said that the relevant credit agreement meets the requirement of "being reviewed" in terms of section 86 before one moves to the next part of the enquiry, which relates to default and the expiry of sixty business days. On this construction the emphasis should thus firstly be on the process that is being terminated and thereafter on the requirements for termination.

Currently case law is divided on the question of whether or not a debt review can be terminated once a debt counsellor, having made a determination, has referred the matter to a magistrate's court with a recommendation in terms of section 86(8)(b) or 86(7)(c) but before the matter is actually heard by the court in terms of section 87.

It was recently held in *Standard Bank of South Africa Ltd v Kruger*<sup>27</sup> that in those instances where a debt counsellor has lodged an application to a magistrate's court for purposes of debt re-structuring within sixty days from the date on which the consumer has applied for debt review, the credit provider may not terminate the debt review in terms of section 86(10) despite the fact that the application for re-structuring has not been heard by the court within the aforesaid sixty days. The court premised its judgment on the view that termination in terms of section 86 is competent only in respect of the actual debt review process that is conducted by the debt counsellor and that the referral to court in terms of section 86(8)(b) for a hearing falls outside the ambit of such termination as it is done in accordance with section 87 of the NCA.<sup>28</sup> The court also referred to section 129(2) of the NCA, which provides that section 129(1), which *inter alia* requires a section 86(10) notice to be delivered prior to enforcement, does not apply to a credit agreement that is subject to a debt re-structuring order or to proceedings in a court that could result in such an order, and

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<sup>27</sup> *Standard Bank of South Africa Ltd v Kruger* 2010 4 SA 635 (GSJ).

<sup>28</sup> *Standard Bank of South Africa Ltd v Kruger* 2010 4 SA 635 (GSJ) paras 13, 14.

indicated that a referral by a debt counsellor falls in the latter category, thus indicating that a notice to terminate in terms of section 86(10) would be incompetent once a debt counsellor has made such a referral.<sup>29</sup> Kathree-Setiloane AJ further stated:

I am of the view that any contrary interpretation in terms of which a credit provider would be entitled to terminate the debt review process after a period of 60 days, despite it having been referred to a magistrate's court, would lead to an absurdity in that any delay by any party to such application, any delay occasioned at the instance of the court or even any delay due to unforeseen circumstances would deprive the consumer of the opportunity to have that matter properly determined by that court.<sup>30</sup>

In *SA Taxi Securitisation v Nako*<sup>31</sup> the court reached a different conclusion. In *Nako* it was held that section 129(2) does not preclude a credit provider from instituting legal proceedings where a debt counsellor has referred a matter to the magistrate's court, which proceedings could result in a debt re-structuring order. The court held that section 129(2) merely renders redundant the provision of a notice recommending a consumer to refer a matter to a debt counsellor, as the matter has already been referred to a debt counsellor.<sup>32</sup>

Kemp AJ further criticised *Kruger* by stating that section 87 is dependent on a proposal in terms of section 86 and that to argue that the words "that is being reviewed in terms of this section" in section 86(10) refer only to a debt review by a debt counsellor loses sight of this fact. He held that the argument as put forward in *Kruger* also loses sight of the protection provided by section 86(11) and specifically the words "hearing the matter" contained therein.

According to Kemp AJ it would have been unnecessary to include the words "hearing the matter" in section 86(11) if the judge in *Kruger* was correct, as these words refer to a matter pending before the magistrate's court and on *Kruger's* construction there would have been no matter before it in terms of section 86(10).<sup>33</sup> Thus Kemp AJ was

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<sup>29</sup> *Standard Bank of South Africa Ltd v Kruger* 2010 4 SA 635 (GSJ) para 26.

<sup>30</sup> *Standard Bank of South Africa Ltd v Kruger* 2010 4 SA 635 (GSJ) para 15.

<sup>31</sup> *SA Taxi Securitisation (Pty) Ltd v Nako* (19/2010, 21/2010, 22/2010, 77/2010, 89/2010, 104/2010 & 842/2010) 2010 ZAECBHC 4 (hereafter *SA Taxi Securitisation v Nako*).

<sup>32</sup> *SA Taxi Securitisation v Nako* para 10.

<sup>33</sup> *SA Taxi Securitisation v Nako* para 43.

of the opinion that the court referred to in section 86(11) is the court before which the debt restructuring proposal is serving.

Subsequent to *Nako*, the issue of termination of debt review in terms of section 86(10) was considered by Kathree-Setiloane AJ in *South African Taxi Securitisation (Pty) Ltd v Matlala*<sup>34</sup> in which she disagreed with the interpretation of Kemp AJ in *Nako* of "hearing the matter" as mentioned in section 86(11). She indicated that in her opinion these words refer to the court in which the credit agreement is being enforced and not the court to which the debt review has been referred in terms of section 87 of the NCA.<sup>35</sup> According to her, Kemp AJ misunderstood section 129 and failed to give proper consideration to section 129(2) of the NCA.<sup>36</sup> She referred to *National Credit Regulator v Nedbank* where it was stated that a debt re-structuring referral by a debt counsellor has to be made by means of an application in terms of Magistrate's Court Rule 55 and that service of such referral must be done in accordance with Magistrate's Court Rule 9. She then concluded that the service and not merely the issuing of a referral on the credit provider would constitute a referral to the magistrate's court in terms of section 86(8)(b) or 86(7)(c).<sup>37</sup>

In *Firststrand Bank Ltd v Evans*<sup>38</sup> Eksteen J considered the conflicting judgements by Kathree-Setiloane AJ and Kemp AJ. He indicated that the role of the debt counsellor conducting a debt review in terms of section 86 is not completed by mere reference of his or her debt re-structuring recommendation to the magistrate's court, but that the debt review process that is regulated by section 86 continues until the magistrate's court makes an order in terms of section 87.<sup>39</sup> According to him the more plausible interpretation of the words "that is being reviewed in terms of this section" is that they are used to distinguish the process in section 86 from that in sections 83 and 85.<sup>40</sup> He remarked that he was unable to find anything in the structure of section

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<sup>34</sup> *SA Taxi Securitisation (Pty) Ltd v Matlala* (6359/2010) 2010 ZAGPJHC 70.

<sup>35</sup> *SA Taxi Securitisation (Pty) Ltd v Matlala* (6359/2010) 2010 ZAGPJHC 70 para 9.

<sup>36</sup> *SA Taxi Securitisation (Pty) Ltd v Matlala* (6359/2010) 2010 ZAGPJHC 70 para 13.

<sup>37</sup> *SA Taxi Securitisation (Pty) Ltd v Matlala* (6359/2010) 2010 ZAGPJHC 70 para 14.

<sup>38</sup> *Firststrand Bank Ltd v Evans* (1693/2010) 2010 ZAECPEHC 55. Eksteen J delivered a similar judgment a few days later in *Firststrand Bank Ltd v Collett* (Case No. 1819/2010 (ECC) unreported).

<sup>39</sup> *Firststrand Bank Ltd v Evans* (1693/2010) 2010 ZAECPEHC 55 paras 18, 19. Eksteen J relied on *National Credit Regulator v Nedbank Ltd* 2009 6)SA 295 (GNP) for the latter opinion.

<sup>40</sup> *Firststrand Bank Ltd v Evans* (1693/2010) 2010 ZAECPEHC 55 para 20.



86 or of the NCA in its entirety that is indicative of an intention on the part of the legislature to limit the right of a credit provider under section 86(10) to the process prior to the reference to the magistrate's court.<sup>41</sup> He was consequently of the opinion that the credit provider's right to terminate a debt review in terms of section 86(10) continues until the magistrate's court has made an order in terms of section 87.<sup>42</sup> In support of his opinion Eksteen J referred to section 86(11) and the words "the magistrate's court hearing the matter" and interpreted it, based on similar terminology employed in section 86(8)(b), to be a reference to the magistrate's court to which the matter has been referred for a hearing in terms of section 86(8)(b).<sup>43</sup> He remarked that the jurisdiction provided for in section 86(11) is specifically restricted to a magistrate's court and that it is only the magistrate's court which conducts a hearing and provides judicial oversight over the debt review process that would have before it all of the information the consumer was required to provide in terms of regulation 24 and which is required in order to exercise a discretion as to whether or not the debt review should resume.<sup>44</sup> Accordingly the consumer is not prejudiced by the right of the credit provider to terminate a debt review in terms of section 86(10) as the consumer's rights are fully protected by section 86(11). Eksteen J, however, remarked that a credit provider does not have *carte blanche* to terminate a debt review in terms of section 86(10) and that such termination would be inappropriate where the referral to the magistrate's court is prosecuted with due efficacy.<sup>45</sup>

The controversy continued with the South Gauteng High Court decision in *Firststrand Bank Ltd v Seyffert*.<sup>46</sup> Willis J indicated that to the extent that Kathree-Setiloane AJ over-emphasised the protection of the consumer as a purpose of the NCA in her conclusions in the cases of *Kruger* and *Matlala*, as previously mentioned, she was clearly wrong.<sup>47</sup> In particular he disagreed with her that by reason of the provisions of section 129(2) of the NCA, a notice to terminate in terms of section 86(10) of the

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<sup>41</sup> *Firststrand Bank Ltd v Evans* (1693/2010) 2010 ZAECPEHC 55 para 20.

<sup>42</sup> *Firststrand Bank Ltd v Evans* (1693/2010) 2010 ZAECPEHC 55 para 20.

<sup>43</sup> *Firststrand Bank Ltd v Evans* (1693/2010) 2010 ZAECPEHC 55 para 25.

<sup>44</sup> *Firststrand Bank Ltd v Evans* (1693/2010) 2010 ZAECPEHC 55 paras 26-29.

<sup>45</sup> *Firststrand Bank Ltd v Evans* (1693/2010) 2010 ZAECPEHC 55 para 30.

<sup>46</sup> *Firststrand Bank Ltd v Seyffert* (212862/2010) 2010 ZAGPJHC 88.

<sup>47</sup> *Firststrand Bank Ltd v Seyffert* (212862/2010) 2010 ZAGPJHC 88 para 14. From the facts of the case it appears that the respondents, on opposition to an application for summary judgment, claimed that the relevant credit agreements were subject to debt review. If the debt review had actually reached the stage of being referred to the magistrate's court for a debt restructuring order is not clear.

NCA is incompetent once a debt counsellor has referred a debt review to a magistrate's court for determination.<sup>48</sup> He indicated that section 129(2) merely exonerates a credit provider from having to notify a consumer that he or she has a right to approach a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction where the consumer has already taken such steps.<sup>49</sup> According to Willis J, a plain reading of section 86(10), especially when read together with section 86(11), makes it clear that the giving of notice by the credit provider to a consumer to terminate a process of debt review does not necessarily terminate that process of debt review but *may* have this consequence.<sup>50</sup> He remarked that it all depends on the extent to which the parties show good faith to one another, have sensible, fair and reasonable proposals and actively engage with one another to find realistic solutions to a particular consumer's problems.<sup>51</sup>

Apparently the issue regarding the exact cut-off date for termination has been referred to a full bench for decision.<sup>52</sup> The discussion that follows therefore focuses on determining at which stage a debt review may be terminated. Issues influencing termination and other issues relevant to termination are also addressed.

## **2 The meaning of "a credit agreement that is being reviewed in terms of this section"**

A debt review can take place subsequent to an application by the consumer in terms of section 86 and because of court proceedings in terms of sections 83<sup>53</sup> and 85.<sup>54</sup>

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<sup>48</sup> *Firststrand Bank Ltd v Seyffert* (212862/2010) 2010 ZAGPJHC 88 para 14.

<sup>49</sup> *Firststrand Bank Ltd v Seyffert* (212862/2010) 2010 ZAGPJHC 88 para 14.

<sup>50</sup> *Firststrand Bank Ltd v Seyffert* (212862/2010) 2010 ZAGPJHC 88 para 13; emphasis added.

<sup>51</sup> *Firststrand Bank Ltd v Seyffert* (212862/2010) 2010 ZAGPJHC 88 para 13.

<sup>52</sup> *Wesbank v Martin* (13564/2010) 2010 ZAWCHC 173 para 9. Unfortunately, it is not stated in which matter the referral to a full bench has been done. The authors are also aware of an application for a declaratory order regarding the termination of debt review filed by the National Credit Regulator against South African Taxi Securitisation (Pty) Ltd under case no. 20491/2010 in the South Gauteng High Court. At the time of writing, the respondent had not yet filed its opposing papers.

<sup>53</sup> Section 83(1) provides that despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, the court may declare that the credit agreement is reckless. One of the implications of such a declaration is that the court may restructure the consumer's debts (see s 83(2)(b)(ii)) which will inevitably entail some form of debt review before a restructuring method can be devised.

<sup>54</sup> Section 85 provides that "despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may (a) refer the matter directly to a debt

Hence, the words "a credit agreement that is being reviewed in terms of this section" as they appear in section 86(10) may serve to distinguish section 86 proceedings from those envisaged in sections 83 and 85, but they may also serve the further purpose of indicating the scope of a section 86 debt review that would qualify such debt review as one that can be terminated.

It is submitted that by establishing in which instances the NCA requires a section 86(10) notice to be delivered prior to enforcement, it might be possible, through a process of elimination, to shed more light on what the legislature meant by "a credit agreement that is being reviewed in terms of this section" in section 86(10), and to determine whether these words have a narrow meaning referring only to the process conducted by the debt counsellor or whether they should be interpreted broadly to also include the situation where the matter has already been referred to court with a recommendation.

The following sections are relevant in this regard:

## **2.1 Section 129**

Section 129 deals with pre-debt enforcement procedures. Section 129(1)(b) provides that subject to section 130(2),<sup>55</sup> a credit provider may not commence any legal proceedings to enforce a credit agreement before first providing to the consumer a notice in terms of section 129(1)(a)<sup>56</sup> or in terms of section 86(10), as the case may be, and meeting any further requirements as set out in section 130.

Section 130 deals with debt procedures in a court and provides as follows:

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counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to court in terms of section 86(7); or (b) declare that the consumer is over-indebted, as determined in accordance with Part D of Chapter 4, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness".

<sup>55</sup> This section deals with the enforcement of the remaining obligations under a credit agreement.

<sup>56</sup> In terms of s 129(1)(a) a credit provider is obliged, as a required procedure before enforcement, if a consumer is in default with a credit agreement, to draw the default to the consumer's attention 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.

- (1) Subject to subsection (2), a credit provider may approach a court for an order to enforce a credit agreement *only* [our emphasis] if, at the time the consumer is in default and has been in default under that credit agreement for at least 20 (twenty) business days and
  - (a) at least 10 (ten) business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9)<sup>57</sup> or section 129(1), as the case may be;
  - (b) in the case of a notice contemplated in section 129(1), the consumer has
    - (i) not responded to that notice; or
    - (ii) responded to the notice by rejecting the credit provider's proposals; and
  - (c) in the case of an instalment agreement, secured loan or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127.

Section 129(1)(b) read with section 130(1) thus creates the impression that in respect of a consumer who has opted to apply for debt review, it is always a prerequisite for enforcement that a section 86(10) notice should first have been delivered and *inter alia* that ten business days should have lapsed since delivery of such notice. It may, however, be asked if, in the context of a consumer who opted to apply for debt review, it is indeed always necessary to give a section 86(10) notice prior to enforcement.

It should further be noted that although section 130(1)(a) requires ten business days to elapse after delivery of the section 86(10) notice, it does not require any response by the consumer as in the case of a section 129(1)(a) notice. It may therefore be asked what the purpose of this requirement in respect of a section 86(10) notice is.

## **2.2 Section 129(2) and section 130(4)(c) and (e)**

It is submitted that the provisions of sections 129(1)(b) and section 130(1) cannot be construed properly unless they are read together with section 129(2) and section 130(4)(c) and (e).

Section 129(2) states that section 129(1) does not apply to a credit agreement that is subject to a debt re-structuring order, *or to proceedings in a court that could result in such an order* (our emphasis). Thus, where a debt re-structuring order is already in place and the consumer defaults on such an order, a section 86(10) notice appears

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<sup>57</sup> This reference is wrong and should be to s 86(10). See Scholtz *et al Credit Act* para 12.7.3.

not to be required prior to enforcement. Similarly, in respect of proceedings in a court that could result in such an order, termination in terms of section 86(10) prior to enforcement is also not competent. It is submitted that the kind of proceedings that would qualify as "proceedings in a court that could result in a debt re-structuring order" would be an as yet unheard application to court by a debt counsellor recommending a debt re-structuring of a consumer's credit agreement debt.<sup>58</sup>

The provisions of section 88(3) are also of relevance in determining in which instances, with regard to a consumer who has opted to apply for debt review, a section 86(10) notice is required prior to enforcement.

Section 88(3) provides that subject to sections 86(9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83<sup>59</sup> or 85,<sup>60</sup> or notice in terms of section 86(4)(b)(i),<sup>61</sup> 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<sup>62</sup>
- (b) one of the following has occurred:
  - (i) an event contemplated in section 88(1)(a) to (c); or
  - (ii) the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal.

The events referred to in section 88(3)(b)(i), are listed in section 88(1)(a) to (c):

- (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; or
- (c) a court having made an order or the consumer or credit providers 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.

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<sup>58</sup> This is also the opinion of Kathree-Setiloane J in *Standard Bank of South Africa Ltd v Kruger* 2010 4 SA 635 (GSJ) para 24. See, however, the dissenting opinion of Willis J in *Firstrand Bank Ltd v Seyffert* (212862/2010) 2010 ZAGPJHC 88 para 14.

<sup>59</sup> This refers to proceedings regarding reckless credit.

<sup>60</sup> This refers to proceedings in which an allegation of reckless credit is made.

<sup>61</sup> This is the notice that debt review has been applied for by the consumer.

<sup>62</sup> As the subsections are joined by "and", ss (a) and (b)(i) have to be read together and ss (a) and (b)(ii) have to be read together.

If one reads section 88(3) in context it becomes clear that the words "subject to section 86(10)" that appear at the beginning of section 88(3) apply only to the termination of a pending debt review and not to each of the instances mentioned in section 88(3). The reason for this statement is as follows.

Having regard to the situations mentioned in section 88(3)(a) and (b)(i) it is clear that in respect of a defaulting consumer whose application for debt review has been rejected by a debt counsellor and who has not approached a court timeously, there is no debt review to terminate, so it logically follows that section 86(10) is not applicable. Similarly, where the court has determined that the consumer is not over-indebted, or has rejected the debt counsellor's proposal or the consumer's application, no debt review exists that can be terminated and section 86(10) thus also does not apply. Clearly in the case where a consumer has fulfilled all of his or her obligations under a court-ordered debt re-arrangement or a re-arrangement agreement between a consumer and credit providers, there is no debt review in existence that has to be terminated in accordance with section 86(10).

With regard to section 88(3)(a) read together with section 88(3)(b)(ii) it is also clear that these provisions deal with a situation where a re-arrangement agreement between the consumer and the credit providers already exists or where a court has already made a debt re-arrangement order, and there is thus no credit agreement that "is being reviewed" at this stage as the review would have occurred prior to the agreement or court order. Thus, if the consumer fails to pay in terms of such a re-arrangement agreement or court-ordered re-structuring, section 86(10) also does not apply.

It can therefore be concluded that in the instances specifically listed in section 88(3)(a) and (b)(i) and (ii) a credit provider is not required to deliver a section 86(10) notice prior to enforcement.<sup>63</sup> It appears that such a notice would be necessary only where the consumer has given notice of an application for debt review in accordance

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<sup>63</sup> See also *Firststrand Bank Ltd v Fillis* 2010 6 SA 565 (ECP) para 16 where the court held: "It follows...that once the jurisdictional requirements set out in section 88(3)(a) co-exists with any one of the jurisdictional requirements set out in section 88(3)(b), the credit provider is at liberty to proceed and to exercise and enforce by litigation or other judicial process, any right or security under his credit agreement and without further notice".

with section 86(4)(b)(i) and such a debt review is still pending (ie, the debt counsellor has not yet applied to court for a debt restructuring order on the credit providers).

Finally the provisions of section 130(4) should also be borne in mind. Section 130(4)(c) provides that if, in any debt proceedings in a court as contemplated in section 130, the court determines that the credit agreement is subject to a pending debt review in terms of Part D of Chapter 4, the court may:<sup>64</sup>

- (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 to make an order contemplated in section 85(b);<sup>65</sup> 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 the provisions of section 130(4)(c) will apply to the situation where a credit provider unlawfully enforced a credit agreement that was the subject of a pending debt review without first having terminated the pending debt review in terms of section 86(10).<sup>66</sup>

Section 130(4)(e) provides that if in any debt proceedings in a court as contemplated in section 130 the court determines that the credit agreement is either suspended or is subject to a debt re-arrangement order or agreement and the consumer has complied with that order or agreement, the court has no discretion and must dismiss the matter. The implication of this provision is that a credit provider will not be able to send the consumer a section 86(10) notice prior to enforcement and that the provisions of section 88(3) have to be met before enforcement can lawfully take place in respect of such a situation. Thus, once a debt re-structuring order is in effect, termination in terms of section 86(10) is no longer competent.

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<sup>64</sup> The court has a discretion to make this order.

<sup>65</sup> Section 85 provides as follows: "Despite any provision in law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may (a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of section 86(7); or (b) declare that the consumer is over-indebted, as determined in accordance with this Part, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness".

<sup>66</sup> Where there was a termination of a pending debt review in terms of s 86(10), it would have afforded the consumer the opportunity to access the safeguard provision s 86(11).

### 2.3 Conclusion

The following conclusions may be drawn from the above. Where a consumer has applied for debt review in terms of section 86(1), a credit provider who seeks to enforce a credit agreement that is the subject of such a review may in principle terminate the debt review in accordance with section 86(10) after the lapse of sixty business days provided that the consumer is in default. The credit provider may then proceed with enforcement once ten business days after delivery of the section 86(10) notice have lapsed and provided the other requirements set by section 130(2) are met. Where the debt review has been terminated in accordance with section 86(10) the consumer may avail him- or herself of the provisions of section 86(11) to have the debt review resumed. Where, however, a credit provider attempts to enforce a credit agreement that is the subject of a pending debt review without first terminating the debt review in accordance with section 86(10), the provisions of section 130(4)(c) apply and the court has a discretion to make an order as provided for in the said section, which in essence has the effect that the debt review will be resumed or that the court itself can make an order contemplated in section 85(b).<sup>67</sup> Where a court has already made a debt re-structuring order, the credit provider is not entitled to enforce the credit agreement as a result of the provisions of section 129(2) and will be able to proceed with enforcement only if the provisions of section 88(3)(a) and (b)(ii) are met. Should a credit provider attempt to enforce a credit agreement in respect of which a re-structuring order or re-arrangement agreement is in place in circumstances where the consumer is not in default, section 130(4)(e) will apply and the court will be obliged to dismiss the matter.

It is thus clear that section 86(10) applies only to a pending debt review and that this excludes the situation where a debt re-arrangement agreement or debt re-structuring order is already in place. It is further submitted that the wording of section 129(2) indicates that section 86(10) is not applicable to proceedings in a court that can result in a debt restructuring order and that once the debt counsellor refers a matter to court with a recommendation, it qualifies as such a proceeding. It should further be

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<sup>67</sup> Where a court deals with a matter in accordance with s 85(b), termination of debt review in terms of s 86(10) is excluded as such a credit agreement is not a credit agreement which is being reviewed in terms of s 86.



noted that the regulations define debt counselling as "performing the functions contemplated in section 86 of the Act", thus equating debt counselling with debt review in terms of section 86. It is submitted that debt review, also known as debt counselling, in terms of section 86 is a function undertaken exclusively by a debt counsellor and refers to the process that entails the review of the consumer's debt, the determination regarding over-indebtedness and reckless credit, and the making of a recommendation to court.<sup>68</sup> Where the court calls upon the debt counsellor to answer questions regarding the proposed debt re-structuring, it is submitted that the debt counsellor is merely assisting the court in deciding whether it should grant the debt re-structuring order or not. It should further be noted that nowhere in section 86 is it mentioned that the court is considered to be conducting a debt review when a matter is referred to it in terms of section 86(8)(b) or (c). One may consequently infer that once the matter has been referred to the court by the debt counsellor with a recommendation regarding debt re-structuring, any further process cannot be construed as debt review in terms of section 86. When the court considers a debt restructuring application referred to it in accordance with section 86, it does so by means of a "hearing" at which it considers information presented as a result of a debt review that was completed by a debt counsellor. The court itself does not conduct a debt review, but merely considers the debt restructuring proposal that is the result of the previously conducted debt review in order to determine if the proposed method of debt restructuring is feasible and if it should exercise its discretion in favour of granting a debt restructuring order. It is submitted that once a debt counsellor has referred a matter to court for the purposes of section 86(8)(b) or 86(7)(c), it thus effectively brings an end to the credit provider's opportunity to apply the provisions of section 86(10) as it can no longer be said that the credit agreement "is being reviewed" in terms of section 86.

It is further submitted that such a referral entails that it should be brought to the credit provider's notice and that this situation occurs the moment that the debt counsellor serves on the credit provider (as opposed to merely issuing) an application to

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<sup>68</sup> See *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP) 313 where the court indicated that a debt counsellor may be called upon to assist the court if it has questions regarding the recommendation for debt re-structuring. It is submitted that a debt counsellor who assists the court in such a manner is not conducting a debt review but merely assisting the court to decide if it should grant the debt re-structuring order.

court in terms of either section 86(8)(b) or 86(7)(c) as this would create legal certainty regarding the exact moment when termination in terms of section 86(10) is no longer competent.<sup>69</sup>

Support for this submission may by analogy be found in *ABSA Bank v Shaik*,<sup>70</sup> where the court had to decide when it can be said that a credit provider has "approached the court" for purposes of section 130(3) of the NCA. Gildenhuis J favourably referred amongst others to a judgment of Thirion J in *Mills v Skanwell Finance (Pty) Ltd*<sup>71</sup> where, after an extensive analysis of the old authorities, the court came to the conclusion that, at common law, proceedings were considered to have commenced not from the mere issue of a summons but from the time of service thereof.

The court decided that section 130(3) must be "given an interpretation which will align it with the common law, unless a contrary intention on the part of the legislature is apparent".<sup>72</sup> The court found no compelling reasons of equity to prefer the date of issue of a summons to the date of service as the date on which the plaintiff has "approached the court".<sup>73</sup>

Gildenhuis J further held that a consumer is invited through a section 129(1) letter to apply to a debt counsellor for a debt review and that the invitation is not infinite. However, the court stated that it "cannot imagine that the legislature could have had a cut-off date in mind which is unknown to the defendant". The defendant will find out that the plaintiff has "approached the court" only when the summons is served on him.<sup>74</sup>

In another recent decision, *Nedbank Ltd v Mokhonoana*,<sup>75</sup> Ellis AJ also held, within the context of debt enforcement, that to "commence any legal proceedings to enforce the agreement" in section 129(1)(a) and to "approach a court for an order en-

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<sup>69</sup> See also *SA Taxi Securitisation (Pty) Ltd v Matlala* (6359/2010) 2010 ZAGPJHC 70 para 16.

<sup>70</sup> *ABSA Bank Ltd v Shaik* (09/8065) 2009 ZAGPHC 58

<sup>71</sup> *Mills v Skanwell Finance (Pty) Ltd* 1981 3 SA 84 (N).

<sup>72</sup> *ABSA Bank Ltd v Shaik* (09/8065) 2009 ZAGPHC 58 para 16.

<sup>73</sup> *ABSA Bank Ltd v Shaik* (09/8065) 2009 ZAGPHC 58 para 17.

<sup>74</sup> *ABSA Bank Ltd v Shaik* (09/8065) 2009 ZAGPHC 58 para 17.

<sup>75</sup> *Nedbank Ltd v Mokhonoana* 2010 5 SA 551 (GNP).

forcing" in section 130(2) refer to the service of a summons and not the mere issuing thereof, as in the latter instance legal uncertainty will abound.<sup>76</sup>

Even though the context in which *Shaik* and *Mokhonoana* were decided differs from that which is investigated in this discussion, namely when it can be said that a debt counsellor has referred a matter to court for the purposes of section 86(8)(b) or 86(7)(c), the same arguments hold true. The common law should be followed unless it is apparent that the legislature had a different intention in mind. It is submitted that a contrary intention is not evident *in casu*. Further, a credit provider will be informed that a debt counsellor has referred a matter to court for purposes of section 86 and that the debt review is over only when the application has been served on such credit provider. Once this has happened it is submitted that "proceedings in a court that could result in such an order" as contemplated in section 129(2) have commenced and that section 86(10) no longer finds application.

Regarding the fact that section 130(1) requires ten business days to lapse after delivery of a section 86(10) notice before the credit provider may proceed with enforcement, it was held by Binns-Ward AJ in *Changing Tides 17 (Pty) Ltd*<sup>77</sup> that the evident purpose of a notice by a credit provider in terms of section 86(10) of the NCA is to enable the consumer and/or the debt counsellor to bring an urgent application to a magistrate in terms of section 86(7)(c), or 86(8)(b) if that has not already by then been done, alternatively, if such an application is already pending, to approach the magistrate for an order in terms of section 86(11) of the NCA that the debt review should be resumed.<sup>78</sup> In a subsequent judgment, *Wesbank Ltd v Martin*,<sup>79</sup> Binns-Ward J held that the effect of a notice given in terms of section 86(10) is in fact not *ipso facto* to terminate the debt review but rather to afford the debt counsellor a period of notice within which to take steps in terms of section 86(7)(c) or 86(8)(b), alter-

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<sup>76</sup> *Nedbank Ltd v Mokhonoana* 2010 5 SA 551 (GNP) para 14.

<sup>77</sup> *Changing Tides 17 (Pty) Ltd v Erasmus; Changing Tides 17 (Pty) Ltd v Cleophas; Changing Tides 17 (Pty) Ltd v Frederick* (18153/09, 14229/09 11973/09) 2009 ZAWCHC 175 (hereafter *Changing Tides 17 (Pty) Ltd v Erasmus*).

<sup>78</sup> *Changing Tides 17 (Pty) Ltd v Erasmus* para 32.

<sup>79</sup> *Wesbank v Martin* (13564/2010) 2010 ZAWCHC 173.

natively section 86(11) as aforesaid.<sup>80</sup> If the ten business day-period then expires without the said steps having been taken by the debt counsellor, the credit provider may proceed with enforcement. Thus, although it is apparent when one reads section 86(10) together with section 130(1)(a) that a specific time period has to lapse between the delivery of a section 86(10) notice to terminate a debt review and the subsequent enforcement of the specific credit agreement in respect of which the debt review has been terminated, neither section 86(10) nor section 130(1)(a) contains any express indication of what should happen in the time period provided for between termination and enforcement.<sup>81</sup> It is a well-known principle of the construction of statutes that the legislature does not intend to make purposeless or meaningless legislation and the courts will thus have to afford some meaning or purpose to this time period. Insofar as section 86(11) is concerned, it appears that this section may be invoked only *after* the credit provider has proceeded to enforce the agreement, thus implying that an application in terms of section 86(11) may not be made in the ten business days between the delivery of the section 86(10) notice and its enforcement.

It is thus submitted that the court in *Standard Bank of South Africa Ltd v Kruger* is correct in its view that once a debt counsellor has made a recommendation to a magistrate's court, termination in terms of section 86(10) is no longer competent; and insofar as it held that the consumer should not be prejudiced as a result of delays occasioned by the courts themselves in that the roll in respect of debt re-structuring applications may be backlogged.

It is to be noted that after submission of this article for publication, but prior to the publication thereof, a full bench in the Western Cape High court held in the matter of *Wesbank v Papier*<sup>82</sup> that once a debt restructuring proposal has been referred to court, termination is no longer competent.

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<sup>80</sup> *Wesbank v Martin* (13564/2010) 2010 ZAWCHC 173 para 7 read together with para 12. Cf also the opinion of Willis J in *Firststrand Bank Ltd v Seyffert* (212862/2010) 2010 ZAGPJHC 88 para 14 that the s 86(10) notice does not necessarily terminate the process of debt review.

<sup>81</sup> Section 130(1)(b), which follows just after s 130(1)(a), gives a clear indication of what has to happen after receipt of a s 129(1)(a) notice, but fails to give any indication of what is expected to occur after receipt of a s 86(10) notice.

<sup>82</sup> *Wesbank v Deon Winston Papier and the National Credit Regulator* (Case No. 14256/10 (WCC) unreported). See also van Heerden and Coetzee 2011 *De Jure*.

Once a debt counsellor has served an application in terms of section 86(8)(b) or 86(7)(c) on a credit provider and prior to the hearing of such an application, there appears to be a "limbo" period during which the credit provider cannot enforce the credit agreement since section 86(10) is no longer competent and a situation as set out in section 88(3)(a) and(b)(i) and(ii) has not yet arisen. This "limbo" period may in certain instances last for many months, making it extremely prejudicial to a credit provider who is often not receiving any payment from the consumer who plans to start making further payments once ordered to do so by court in terms of the debt restructuring order only. In practice, instances do occur where debt counsellors and consumers abuse the process and the apparent backlog by enrolling debt restructuring applications many months into the future, thereby securing the consumer a payment holiday although the court would have been able to hear the matter on an earlier date. This unfortunate practice should have been foreseen by the legislature and an appropriate remedy should have been incorporated into section 86. However, this has not been done and the unfortunate credit provider's option appears to be to address the problem by accessing the remedy of deregistration of a *mala fide* debt counsellor.

### **3 Issues that may influence termination of a pending debt review**

During the course of a pending debt review various situations may occur that may influence the termination of the debt review, namely:

#### **3.1 Failure to provide sufficient information**

When considering the termination of a debt review it is clearly important to determine on which date the consumer applied for such a debt review as the date influences the calculation of the sixty business days referred to in section 86(10). In this regard it was held in *BMW Financial Services (Pty) Ltd v Donkin*<sup>83</sup> that:

Accepting that substantial compliance with s 86(1) read with reg 24(1)(b) and form 16 referred to therein is sufficient and that something less than completing form 16 in all respects or something less than providing all the information required by reg

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<sup>83</sup> *BMW Financial Services (Pty) Ltd v Donkin* 2009 6 SA 63 (KZD) 73-74.

24(1)(b) may be acceptable, information essential to enable the debt counsellor to contact credit bureaux and credit providers with sufficient information relating to the person seeking a debt review must nevertheless be supplied. That information would include the applicant's name, identity number, physical and postal address, telephone numbers, name of employer, a breakdown of the applicant's income, living expenses, debts and their nature and the identity of creditors. It should also contain a declaration and undertaking to commit to debt re-structuring as required by reg 24(b)(vi) and a consent in terms of reg 24 (b)(vii) to a credit bureau check being done. If this information is not given, the application does not amount to the making of an application for debt review.

It is therefore submitted that where a consumer has not furnished at least the information as required in *Donkin*, he or she will, despite having approached a debt counsellor, not be regarded as having applied for debt review. A credit provider who has already sent the consumer a section 129 notice in respect of which the appropriate time periods have already lapsed, will in such instance be entitled to proceed with debt enforcement. As there is no debt review application, there is nothing to terminate in terms of section 86(10).

However, it appears that in practice a credit provider will usually become aware of the fact that a consumer applied for debt review only on receipt of Form 17.1, which does not mention the exact date on which the consumer actually applied for debt review. Credit providers will therefore usually calculate the notice period for purposes of section 86(10) with reference to the date on Form 17.1, while it is submitted that they can actually ascertain from the debt counsellor the exact date of the consumer's application for debt review as set out in *Donkin* and use that date for the purposes of section 86(10).

### **3.2 Failure to deliver a Form 17.1**

Section 86(4) read together with regulation 24(2) obliges a debt counsellor to notify all of the credit providers in the prescribed manner and form, specifically by delivery of a completed Form 17.1, within five business days after receiving the application for debt review, that he or she has received an application for debt review from the consumer. However, section 86 does not provide a specific sanction for non-compliance with this duty.<sup>84</sup> Given the fact that a credit provider will usually not know

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<sup>84</sup> Roestoff 2009 *Obiter* 432.

that a consumer has applied for debt review unless the credit provider is notified of the fact by delivery of the Form 17.1, it is conceivable that credit providers who have sent consumers section 129(1)(a) notices in respect of which the time limits have expired will, in the absence of the delivery of a Form 17.1, assume that they are entitled to proceed with debt enforcement. It will of course then happen that on receipt of the summons the consumer will claim that debt enforcement is not competent as he or she is under debt review, and the court will thus exercise its powers in terms of section 130(4)(c), alternatively in terms of section 85. It seems that in this instance the debt counsellor is to blame for this undesirable situation and it is submitted that a court would be entitled to make a cost order against him or her.<sup>85</sup>

Where, for instance, the consumer or debt counsellor informs the credit provider that the consumer has applied for debt review but no Form 17.1 is delivered, the credit provider will not be entitled to proceed with enforcement immediately but will have to wait for the lapse of sixty business days from the date on which the application for debt review was made in order to terminate such a review in accordance with section 86(10).

### **3.3 Failure to deliver a Form 17.2**

Once a debt counsellor has made a determination regarding the consumer's state of over-indebtedness, he or she is obliged to submit a Form 17.2 to all of the affected credit providers and credit bureaux within five business days. Once again section 86 provides no sanction for non-compliance with this duty.<sup>86</sup> Thus it is submitted that where the debt counsellor delivers a Form 17.1 to a credit provider but thereafter fails to notify the credit provider of the outcome of the assessment, the credit provider has to wait for the expiry of sixty business days since the date of the application for debt review before the debt review can be terminated in accordance with section 86(10) and enforcement proceedings may be instituted. It is submitted that this will also apply where the debt counsellor fails to make any proposals to a credit provider in accordance with section 86(7)(b).

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<sup>85</sup> See *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP) 311 regarding the possibility of adverse cost orders against debt counsellors.

<sup>86</sup> Roestoff 2009 *Obiter* 432.

### **3.4 *Where the debt counsellor does not make any recommendation to court after having determined that the consumer is over-indebted***

Although it appears to be standard practice, it should be noted that the NCA does not explicitly require the debt counsellor who determines that a consumer is indeed over-indebted to approach the credit provider with proposals prior to making a recommendation to a magistrate's court regarding re-structuring of the consumers' credit agreements.<sup>87</sup> However, the NCA requires a debt counsellor to make a recommendation to court in the circumstances set out in section 86(8)(b) and 86(7)(c) and it is thus the debt counsellor's duty to ensure that an application is made to court for the aforesaid purposes within the time allowed by the NCA, which, as submitted above, should ideally be before expiry of sixty business days since the consumer applied to the debt counsellor for debt review. Thus, it is submitted that where no application for referral of the matter to a magistrate's court for the purposes of debt re-structuring is served on the credit provider, the debt review may be terminated after expiry of sixty business days after the defaulting consumer applied for the said debt review.

### **3.5 *Negative debt re-structuring proposals***

One of the stated objectives of the NCA is the eventual satisfaction of all of the obligations for which a consumer is responsible under credit agreements.<sup>88</sup> It is submitted that the strange phenomenon that is occurring in practice in terms of which debt counsellors submit "negative" proposals to credit providers, for example, that an amount of minus Rx be offered towards payment of the debt, clearly amounts to an abuse of the debt review process and cannot be regarded as constituting a "proposal" for the purposes of section 86, as it cannot contribute to the repayment of the debt and the eventual satisfaction of the consumer's obligations. It is therefore submitted that in those instances where a negative proposal is received the credit provider is entitled to disregard it and treat the matter on the same basis as if no pro-

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<sup>87</sup> See s 86(7)(c) as well as *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP) 306-307.

<sup>88</sup> Section 3(i).



posal had been received. It is submitted that in such an instance the credit provider cannot be regarded as breaching the duty of good faith as set out in section 86(5). Such a debt review may then be terminated after the expiry of sixty business days since the defaulting consumer applied for the same.

#### **4 Other problems relating to the termination of debt review**

Due to a lack of more comprehensive provisions regulating the debt review process, the process, as indicated above, is open to abuse by unscrupulous consumers and debt counsellors and the mere fact that a specific debt review may have been duly terminated in terms of section 86(10) often does not dispose of a problematic situation.

A problem that arises in the context of debt review is that the number of times that a consumer may apply for debt review is not limited. In practice it happens occasionally that a consumer consults a debt counsellor who notifies the credit provider by means of a Form 17.1 that an application for debt review has been made, thus creating a moratorium on enforcement. After a couple of weeks the consumer then ends the mandate of the debt counsellor and applies to another debt counsellor for debt review. The question subsequently arises as to when the credit provider may terminate the review - is it after the lapse of sixty business days from the date of the first application for debt review or the lapse of sixty business days after the second application was made? What will the position be if the consumer approaches a third or fourth debt counsellor for debt review? It is submitted that due to the abuse that may be occasioned by the absence of a limitation on the number of times that a consumer may apply for debt review, section 86(10) should be restrictively interpreted to refer to the first time that a consumer applied for debt review. It is submitted that the consumer is in any event adequately protected by the provisions of section 86(11), alternatively section 85, should the debt be enforced.

A further question that arises is whether or not a consumer whose debt review has been terminated but against whom enforcement proceedings have not yet been instituted may apply for debt review afresh, as it appears that this situation also occurs in practice. It is submitted that such latitude would defeat the objects of the NCA, spe-

cifically with regard to the eventual satisfaction of all of the consumer's obligations, as it would enable the consumer to obtain an extended moratorium on enforcement of his or her credit agreement debt. Thus it is submitted that once a debt review in respect of a specific credit agreement has been duly terminated in accordance with section 86(10), a consumer is not entitled to apply afresh for debt review in respect of such an agreement in an attempt to thwart enforcement.

It appears that it is not only consumers and debt counsellors who abuse the debt review process, but that some credit providers are also guilty of abuse. As indicated above, section 86(5)(a) expressly obliges consumers and credit providers to comply with any reasonable requests by the debt counsellor to facilitate the evaluation of the consumer's state of indebtedness and the prospects of responsible debt re-arrangement.<sup>89</sup> They are also required to co-operate in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement.<sup>90</sup> The question therefore arises if a credit provider who, for example, does not comply with requests for balances and who does not respond to proposals made on behalf of the consumer, is entitled to do nothing and wait out sixty business days from the date of the application for debt review and then terminate the debt review if no referral has at that time been made to court.

In the recent judgment of *SA Taxi Securitisation (Pty) Ltd v Mbatha*<sup>91</sup> the court indicated that the NCA does not appear to impose any sanction on a credit provider who does not participate in the debt review process in good faith.<sup>92</sup> The court held that section 86(10) contains no limitation on the credit provider's right to give notice under section 86 (10), provided that the consumer is in default and sixty business days have elapsed since the debt review process commenced.<sup>93</sup> According to the court, the credit provider's right to terminate a debt review does not appear to be reciprocal to the obligation to deal in good faith under section 86(5).<sup>94</sup> The court indicated that if a credit provider fails to comply with the good faith provisions, a magistrate may in terms of section 86(11) order that the debt review resume, resulting in the credit pro-

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<sup>89</sup> Section 86(5)(a).

<sup>90</sup> Section 86(5)(b).

<sup>91</sup> *SA Taxi Securitisation (Pty) Ltd v Mbatha* 2011 1 SA 310 (GSJ).

<sup>92</sup> *SA Taxi Securitisation (Pty) Ltd v Mbatha* 2011 1 SA 310 (GSJ) para 60.

<sup>93</sup> *SA Taxi Securitisation (Pty) Ltd v Mbatha* 2011 1 SA 310 (GSJ) para 63.

<sup>94</sup> *SA Taxi Securitisation (Pty) Ltd v Mbatha* 2011 1 SA 310 (GSJ) para 63.

vider having to wait another sixty days before he is able to terminate the debt review.<sup>95</sup>

However, it is clear that a credit provider who fails to co-operate in a debt review on a good faith basis is directly contravening the objectives of the NCA and that this would constitute good grounds for a court to rule that a debt review that has been terminated on the aforesaid basis should resume in terms of section 86(11). A credit provider who, for instance, as a matter of policy continuously fails to provide certificates of balance when requested to do so by a debt counsellor could be reported to the National Credit Regulator, who might issue a compliance notice to the credit provider and, in the event of non-compliance, may even apply to the National Consumer Tribunal for deregistration of such a credit provider.

It has recently been held in *Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga*<sup>96</sup> that it is necessary to imply a proviso into section 86(10) to the effect that the credit provider may terminate a debt review only if he is acting in good faith.<sup>97</sup>

## 5 Additional recourse

It is submitted that, in addition to the termination of the debt review in permitted circumstances, a credit provider who is dissatisfied with a debt counsellor who does not fulfil his or her duties in terms of the NCA may lodge a complaint with the National Credit Regulator.<sup>98</sup> The latter will then investigate the matter<sup>99</sup> and issue a compliance notice to the debt counsellor concerned if he or she is found to be in contravention of the NCA.<sup>100</sup> Should a debt counsellor persist in such prohibited conduct or if the National Credit Regulator constantly receives complaints relating to the same debt counsellor, it will in all probability refer the matter to the National Consumer Tribunal with a request for deregistration.<sup>101</sup>

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<sup>95</sup> *SA Taxi Securitisation (Pty) Ltd v Mbatha* 2011 1 SA 310 (GSJ) para 64.

<sup>96</sup> *Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga* 2011 1 SA 374 (WCC).

<sup>97</sup> *Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga* 2011 1 SA 374 (WCC) para 15.

<sup>98</sup> Section 15(b) read together with s 136(1).

<sup>99</sup> Section 15(d) read together with s 139(1)(c).

<sup>100</sup> Section 55 read together with s 15(e).

<sup>101</sup> Section 15 (i) read together with s 57(1) and s 150(g).

## 6 Final observations

The proliferation of reported cases on the termination of a debt review in terms of section 86(10) is a clear indication of the inadequate draftsmanship employed in respect of the NCA, which has on many occasions given rise to problems of interpretation. It is, however, submitted that despite this poor draftsmanship an interpretation of the said section in terms of which a credit provider would be able to terminate a debt review unilaterally at the stage where the debt counsellor has already served an application for a debt re-structuring proposal/recommendation to be considered by the court is legally untenable. One cannot help but wonder what the purpose of a referral to court by a debt counsellor would be if credit providers are effectively, by means of a broad interpretation of section 86, allowed to pre-empt the discretion of the court by terminating the process where the application for debt restructuring has already been referred to court. It is further submitted that section 86(11) does not aid the broad interpretation of section 86, which allows termination of a debt review at this late stage, because if section 86(11) is interpreted to refer only to the court hearing the application for debt restructuring it presupposes that section 86(10) can be employed to terminate a debt review in respect only of a matter which has already been referred to such a court, and thus effectively bars credit providers from using section 86(10) in cases where the debt review does not progress as a result of, for example, a failure by the debt counsellor to make an assessment as required in terms of section 86(6).

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### **List of abbreviations**

NCA            *National Credit Act*