IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~.

(3) REVISED.

21/08/2009
DATE

SIGNATURE

Case No: 19638/2008

Date heard: 02/03/2009

Date of judgment: 21/08/2009

In the matter between:

THE NATIONAL CREDIT REGULATOR	Applicant
and	
NEDBANK LIMITED	First Respondent
FIRSTRAND BANK LIMITED	Second Respondent
STANDARD BANK OF SOUTH AFRICA LIMITED	Third Respondent
ABSA BANK LIMITED	Fourth Respondent
THE CREDIT PROVIDERS' ASSOCIATION	Fifth Respondent
THE FURNITURE TRADERS ASSOCIATION	Sixth Respondent
RETAIL MOTOR INDUSTRY ASSOCIATION	Seventh Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Eighth Respondent
THE MINISTER OF TRADE AND INDUSTRY	Ninth Respondent

THE DEBT COUNSELLORS ASSOCIATION

OF SOUTH AFRICA Tenth Respondent

ONECOR (PTY) LTD Eleventh Respondent

JOAHN ERIK JUSELIUS Twelfth Respondent

JUDGMENT

DU PLESSIS J:

The applicant, the National Credit Regulator established under section 12 of the **National Credit Act, 34 of 2005** ("the Act"), seeks a number of declaratory orders aimed at clarifying interpretational difficulties that those who work with the Act experience in practice. The applicant has joined as respondents the major South African banks, two organisations whose members are credit providers in terms of the Act and the members of the national executive who have an interest. The eleventh respondent is a credit provider who was joined at its request. The twelfth respondent is a debt counsellor in terms of the Act and he was also joined at his request. The first to sixth and also the eleventh respondents have launched counter applications in which they respectively seek different declaratory orders. The first to sixth[1], eleventh and twelfth respondents briefed counsel to appear on their behalf.

[1] Mr Kuper SC and Mr Cane appeared for the first to sixth respondents, but the first respondent in addition briefed Van Loggenberg SC to appear on its behalf. Similarly, Mr Farber SC and Ms Konstantinides appeared for the second respondent and Mr Meyer for the fourth respondent.

In his answering affidavit the twelfth respondent questioned the applicant's *locus standi* to bring this application and the court's power to grant the declaratory relief. In argument, however, all the parties were agreed that the applicant has the necessary *locus standi* to seek the relief and that this court has the power to grant the declaratory orders sought. (See section 16(1)(b)(ii) of the Act.) I should point out that the relief sought relate to real issues that have arisen in practice.

Overview of *Part D* of Chapter 4

Most of the declaratory orders sought originate from difficulties with the practical application of *Part D* of Chapter 4 of the Act. Before I deal with the specific problems that arise in practice, a brief overview of the relevant sections of *Part D* will be helpful.

Part D introduces into our law the concepts of "over-indebtedness" and "reckless credit" that are applicable to certain specified credit agreements.[2] Both these concepts are carefully defined in the Act.[3] For present purposes, however, their meanings may be taken to be self evident. *Part D* also provides for mechanisms to prevent reckless credit.[4]

[2] Section 78 excludes certain credit agreements from the operation of *Part D*.
[3] Sections 79 and 80.
[4] Sections 81 and 82.

In terms of section 83 a court may "in any court proceedings in which a credit agreement is being considered ... declare that the credit agreement is reckless ...". Having made such a declaration, the court has certain powers set out in section 83(2), (3) and (4). One of the powers, to be exercised in specified circumstances, is to "suspend the force and effect of the credit agreement". Section 84 specifies the effect of such a suspension.

A court may also, under section 85(b) declare that a consumer[5] is over-indebted. It may then make certain orders to relieve the over-indebtedness. The orders that the court can make are specified in section 87.

The Act also provides for the registration of "debt counsellors" as part of the "consumer credit industry regulation" structure.[6] Section 86 introduces a procedure whereby a consumer "may apply to a debt counsellor ... to have the consumer declared over-indebted"[7]. It is this procedure (applications to debt counsellors to be declared over-indebted) that causes most of the practical problems that the parties seek to address by way of the present application. I shall presently set out in detail the procedure provided for in the Act. Before I do that, I must point out that, if it is alleged in the course of any court proceedings

[5] The term "consumer" is defined in section 1 of the Act. It is for present purposes sufficient to regard the person who has received credit as the consumer.
[6] See the heading to Chapter 3 of the Act and sections 45 to 47 that deal, among others, with the registration of debut counselors.
[7] Section 86(1).

that a consumer is over-indebted, the court may, in stead of declaring the consumer over-indebted, refer the matter to a debt counsellor.[8]

Applications to debt counsellors for debt review.

I have pointed out that a "consumer may apply to a debt counsellor ... to have the consumer declared over-indebted".[9] A debt counsellor who receives such an application must, among other necessary steps, notify all credit providers that are listed in the application.[10] The debt counsellor must take certain other preliminary steps[11]. The consumer and each credit provider listed in the application must "comply with any reasonable request by the debt counsellor to facilitate the evaluation of the consumer's state of indebtedness and the prospects for responsible debt re-arrangement"[12]. The consumer and the credit providers are also enjoined to "participate in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement'.[13]

Having notified the relevant credit providers and having gathered the necessary information, the debt counsellor must "determine, in the prescribed manner and within the prescribed time ... whether the consumer appears to be

[8] Section 85(a).
[9] Section 86(1).
[10] 86(4)(b)(i).
[11] See section 86(3) and (4).
[12] Section 86(5)(a).
[13] Section 86(5)(b).

over-indebted"[14] and, "if the consumer seeks a declaration of reckless credit, whether any of the consumer's credit agreements appear to be reckless".[15]

Section 86(7) provides for three possible findings that the debt counsellor could make. First, if the debt counsellor "reasonably concludes that ... the consumer is not over-indebted, the debt counsellor must reject" the consumer's application to be declared over-indebted.[16] In such event "the consumer, with leave of the Magistrate's Court, may apply directly to the Magistrate's Court, in the prescribed manner and form, for" an order to the effect that one or more of his or her credit agreements are reckless and for an order that his or her obligations be re-arranged[17]. (It is of note that section 86(7)(c) specifies the manner in which obligations may be re-arranged.)

In the second place, the debt counsellor might find that, although the consumer is not over-indebted, he or she is "nevertheless experiencing, or is likely to experience, difficulty satisfying" in time all his or her obligations under credit agreements. In such event the debt counsellor "may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement".[18] (I shall refer to this possibility as "a voluntary re-arrangement".)

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[14] Section 86(6)(a).
[15] Section 86(6)(b).
[16] Section 86(7)(a).
[17] Section 86(9) read with section 86(7)(c).
[18] Section 86(7)(b).

The third possible finding that the debt counsellor could make on the consumer's application to be declared over-indebted is that the consumer is indeed over-indebted. If that is the finding, the debt counsellor "may issue a proposal recommending that the Magistrate's Court makes either or both of the following orders ..."[19]: An order "that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded[20] that those agreements appear to be reckless".[21] Having found that the consumer is over-indebted, the debt counsellor may also recommend that the Magistrate's Court makes an order that "one or more of the consumer's obligations be re-arranged" in one of a number of specified ways.[22] (I shall refer to this as "a re-arrangement by the court".)

I return to the second possible finding that the debt counsellor could make, that is that "the consumer is not over-indebted, but is nevertheless experiencing, or is likely to experience, difficulty satisfying all the consumer's obligations under credit agreements in a timely manner".[23] If the debt counsellor makes such a finding and "the consumer and each credit provider concerned accept" the debt counsellor's proposal for a voluntary re-arrangement, "the debt counsellor must record the proposal in the form of an order, and if it is consented to by the consumer and each credit provider concerned, file it as a consent order in terms

[19] Section 86(7)(c).
[20] In addition to the finding that the consumer appears to be over-indebted.
[21] Section 86(7)(c)(i).
[22] Section 86(7)(c)(ii).
[23] Section 86(7)(b).

of section 138".[24] (For present purposes it is sufficient to state that section 138 provides that a court can make a consent order without hearing any evidence.) If the requirements for a consent order do not apply, the "debt counsellor must refer the matter to the Magistrate's Court with the recommendation" for a voluntary re-arrangement.[25] In terms of section 87(1)(a) the Magistrate's Court whereto the matter has been referred, "must conduct a hearing and ... may reject the recommendation ...". The court may also make "an order declaring any credit agreement to be reckless, and an order contemplated in section 83(2) or (3) ...".[26] The court may in addition make an order re-arranging the consumer's obligations "in any manner contemplated in section 86(7)(c)(ii)".[27] In brief, section 86(8) provides for a procedure whereby a voluntary re-arrangement can be converted into a re-arrangement by the court.

Section 86(10) provides for a credit provider to withdraw from the debt re-arrangement ("debt review") process. Under section 87(11) a Magistrate's Court may, however, in certain circumstances order the debt review to resume.

I shall now consider each of the declaratory orders sought, but not necessarily in the order that they appear in the notice of motion and the counter applications.

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[24] Section 86(8)(a).
[25] Section 86(8)(b).
[26] Section 87(1)(b)(i).
[27] Section 87(1)(b)(ii) and (iii).

Consideration of the relief sought

The applicant's prayer 1.15: On a proper interpretation of section 86(8)(b), it applies in the circumstances contemplated in section 86(7)(c).

I have pointed out that a consumer's application to a debt counsellor to have the former declared over-indebted can, according to section 86(7), have three possible outcomes:

- The debt counsellor may find that the consumer is not over-indebted (finding 1).
- The debt counsellor may find that, although the consumer is not over-indebted, he or she is experiencing, or is likely to experience, difficulties satisfying his or her obligations (finding 2).
- The debt counsellor may find that the consumer is over-indebted (finding 3).

If the debt counsellor makes finding 1, he or she must reject the application but the consumer may approach the Magistrate's Court for relief.[28] If the debt counsellor makes finding 2, he or she must initiate a process aimed at a voluntary debt re-arrangement plan.[29] If he or she makes finding

[28] Section 86(7)(b) and 86(9).
[29] Section 86(7)(b).

3, the debut counsellor must "issue a proposal recommending that the Magistrate's Court" make an appropriate order.[30]

Following finding 3, section 86(7) thus requires of the debt counsellor to seek an order from the Magistrate's Court. There is, however, no express provision in the Act as to how the recommendation comes before the Magistrate's Court. There is also no provision as to the procedure that the court must adopt upon receipt of a recommendation. That is one part of the problem that the applicant seeks to address with the order quoted above.

The rest of the applicant's problem stems from section 86(8)(b). Section 86(8) provides:

"If a debt counsellor makes a recommendation in terms of subsection (7) (b)[31] and—

(a) the consumer and each credit provider concerned accept that proposal, the debt counsellor must record the proposal in the form of an order, and if it is consented to by the consumer and each credit provider concerned, file it as a consent order in terms of section 138; or

(b) if paragraph (a) does not apply, the debt counsellor must refer the matter to the Magistrate's Court with the recommendation."

[30] Section 86(7)(c).
[31] A voluntary re-arrangement that follows finding 2.

The problem is this: Section 86(8)(b) provides for a recommendation in terms of section 86(7)(b) (a case of finding 2) to be referred to the Magistrate's Court. Section 86(8)(b), however, makes no provision for a recommendation[32] following finding 3 to be referred to the Magistrate's Court. That, the applicant contends, is a hiatus that can and must be cleared by a proper interpretation of section 86(8)(b).

The first to sixth respondents agree that there is a hiatus, but contend that it goes somewhat further than contended for by the applicant. They accordingly seek a somewhat wider declaratory order. I shall deal with that in due course. The eleventh respondent does not oppose the order that the applicant seeks.

The twelfth respondent contends that the omission from section 86(8)(b) of a reference to section 86(7)(c) (finding 3) is deliberate. He opposes the order sought.

Following on a finding in terms of section 86(7)(c) that the consumer is over-indebted (fining 3), the debt counsellor must issue a proposal for the Magistrate's Court to make an order. It follows by necessary implication that the debt counsellor "must refer the matter to the Magistrate's Court with the

[32] A recommendation for re-arrangement by the court following finding 3.

recommendation".[33] Accordingly I conclude that the very words of section 86(8)(b) are necessarily implied by section 86(7)(c).

Is it in the circumstances appropriate or necessary to grant the declaratory order? To answer that question, reference must be made to section 87(1) that provides:

> "If a debt counsellor makes a proposal to the Magistrate's Court in terms of section 86(8)(b), or a consumer applies to the Magistrate's Court in terms of section 86(9)[34], the Magistrate's Court must conduct a hearing and, having regard to the proposal and information before it and the consumer's financial means, prospects and obligations, may—
>
> (a) reject the recommendation or application as the case may be; or
>
> (b) make—
>
> (i) an order declaring any credit agreement to be reckless, and an order contemplated in section 83 (2) or (3), if the Magistrate's Court concludes that the agreement is reckless;
>
> (ii) an order re-arranging the consumer's obligations in any manner contemplated in section 86 (7) (c) (ii); or
>
> (iii) both orders contemplated in subparagraph (i) and (ii)."

[33] The quoted words are those of section 86(8)(b). On a literal reading of the Act, section 86(8)(b) does not apply in the case of finding 3.
[34] That is an application directly to the Magistrate's Court by a consumer who has been found not to be over-indebted (finding 1).

It is in the present context important to note that section 87(1) requires of the Magistrate's Court to "conduct a hearing" and to make the relevant orders "having regard to the proposal and information before it and the consumer's financial means, prospects and obligations". Because section 87(1) refers only to section 86(8)(b) (finding 2) and section 86(9) (a direct application following finding 1), some might argue that the requirement to conduct a hearing does not apply to matters that are referred to the Magistrate's Court under section 86(7)(c) (finding 3, that the consumer is over-indebted).

For the twelfth respondent it was submitted that the legislature deliberately did not require a hearing in regard to matters referred to it under section 86(7)(c) (following finding 3, that the consumer is over-indebted). The argument was developed as follows: Matters in which the consumer is over-indebted are by nature urgent. Such matters have, under section 86, been considered by a debt counsellor before they come to the Magistrate's Court. In the circumstances a requirement that the Magistrate's Court must conduct a hearing is unnecessary and undesirable.

I cannot agree with the argument advanced for the twelfth respondent. In my view section 86(7)(c) requires cases of over-indebtedness to be referred to the Magistrate's Court so as to ensure judicial oversight of the entire process. A Magistrate's Court can only provide such oversight if it conducts a hearing and has regard to at least the matters referred to in section 87(1). It follows that by

necessary implication the procedure set out in section 87(1) applies also to cases coming before the Magistrate's Court under section 86(7)(c). In order to avoid any misunderstanding in that regard, the declaratory order must be made.

As regards the argument that matters of over-indebtedness are by nature urgent and require speedy resolution, I agree with the basic submission. The same, however, applies to cases where the consumer approached the court directly (section 86(9), and cases where the consumer is experiencing or is likely to experience difficulty meeting his or her obligations (section 86(7)(b)). I can find no valid reason for distinguishing between the different procedures once the matter goes to the Magistrate's Court.

The first to sixth respondents submitted that the provisions of section 86(8)(a)[35] should also apply to cases where the consumer was found to be over-indebted (finding 3). I do not agree. A finding of over-indebtedness (section 86(7)(c), sets in motion a debt re-arrangement process that is not voluntary. Should the parties thereafter settle the matter and agree on a re-arrangement plan, nothing prevents them from seeking a consent order. For that purpose, section 86(8)(a) is unnecessary.

In the result an order in terms of prayer 1.15 must be granted.

[35] Consent orders in cases of successful voluntary re-arrangement.

The applicant's prayer 1.4: "In discharging his or her duties under section 87 of the Act the relevant magistrate fulfils an administrative as opposed to a judicial role and consequently he or she must: (1) comply with the relevant provisions of the Constitution and the Promotion of Administrative Justice Act, 2000 ("PAJA"); (2) devise appropriate procedures which will facilitate an inexpensive, fair and expeditious hearing in terms of section 87 of the Act."

The essential question that this relief raises is whether a Magistrate's Court to whom a matter has been referred under section 86 fulfils a judicial or an administrative function.

Sections 86 and 87 of the Act consistently refer to the "Magistrate's Court" and not to "the magistrate" or "a magistrate". In my view that in itself goes a long way towards providing an answer to the question posed (See the instructive reasoning of Coetzee J in **Briel v Van Zyl; Rolenyathe v Lupton-Smith 1985 (4) SA 163 (T)** at 167C to 168G). I have not been referred to authority where a court, as opposed to a person who may sometimes preside in a court, was held to perform an administrative function. There is in my view no reason to infer that, by having a matter referred to a court, the purpose of the Act really is to have it referred, not to a court but to an administrative tribunal or functionary. On the contrary.

Section 1 of PAJA defines administrative action. PAJA excludes from that definition "the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution". The Magistrate's Court is one of the courts referred to in section 166[36] of the **Constitution of the Republic of South Africa, 1996**. It follows that for the purpose of the present inquiry, the question is whether the judicial officer (magistrate) who presides in a Magistrate's Court whereto a matter has been referred performs a judicial function when he or she deals with the matter.

It must be borne in mind that, apart from requests for consent orders, matters that are referred to the Magistrate's Court under sections 86 and 87 will in many, if not most, cases be contentious. While either the consumer or one or more of the credit providers might agree with the debt counsellor's proposal, it is probable that either or both might not so agree. In applications under section 86(9) the very reason for the application is a rejected contention that the consumer is over-indebted.

A magistrate dealing with a matter referred to the Magistrate's Court is called upon to make a number of possible findings on contentious matters. He or she must decide whether to accept or reject the debt counsellor's recommendation in respect of the consumer's application.[37] That of necessity involves a finding as to whether the consumer is over-indebted or not. If it is

[36] Section 166(d) of the Constitution.
[37] Section 87(1)(a).

found that the consumer is over-indebted, the magistrate will have to consider whether the consumer's obligations must be re-arranged.[38] The magistrate will then also have to consider how, having regard to the provisions of section 86(7)(c)(ii)(aa) to (dd), the re-arrangement is to be structured.

Each of the findings mentioned involves a consideration of the relevant evidence, the making of factual findings, a consideration of the relevant statutory and other legal provisions, rules and principles and, finally an application of the law to the facts. The findings will in most cases be aimed at resolving one or more disputes between two or more parties. To resolve disputes, and generally to make findings based on the application of law to the facts, are the essential elements of a judicial function. (See **Old Mutual Life Assurance Co (SA) Ltd v Pension Fund Adjudicator 2007 (3) SA 458 (C)** at para. 12.)

I conclude that in discharging his or her duties under section 87 of the Act the relevant magistrate fulfils a judicial role. Prayer 1.4 must accordingly be dismissed.

The applicant's prayer 1.2: In circumstances where section 86(8)(b) of the Act applies, a debt counsellor is obliged to refer his or her recommendation to a Magistrates' Court and the magistrate to whom the matter is allocated is in terms of section 87 obliged to conduct a

[38] Section 87(1)(b)(ii); 86(7)(c)(ii).

hearing and make an order contemplated in either section 87(1)(a) or section 87(1)(b) of the Act.

In the course of considering the previous two orders sought, I have already dealt with the central question that this prayer poses. If the parties concerned are unable to agree on a voluntary re-arrangement, the debt counsellor "must", in terms of section 86(8)(b) refer the matter to the Magistrate's Court. For the reasons already stated, the same applies when the debt counsellor finds that the consumer is over-indebted. Also for the reasons already stated, the Magistrate's Court must conduct a hearing.

Although section 87(1) provides that the Magistrate's Court "may" act either in terms of section 87(1)(a) ("reject the recommendation or application") or in terms of section 87(1)(b) (grant the orders mentioned in the subsection), the orders mentioned in section 87(1) are the only ones that the Magistrate's Court can make. That is so because the Magistrate's Court is may only decide matters "determined by an Act of Parliament". Put differently, a Magistrate's Court only has such powers as have been conferred upon it by an Act of Parliament.[39]

In order to address a concern raised on the second respondent's behalf, I wish to make it plain that the relief to be granted in regard to prayer 1.2 does not in any way deal with the form that the hearing must take or with the procedure that the Magistrate's Court must adopt.

[39] I shall discuss the aspect more fully when I deal with the applicant's prayer 1.3.

An order in terms of prayer 1.2 must be granted.

The applicant's prayer 1.3: The power of a Magistrates' Court to conduct a hearing in terms of section 87 of the Act and to make appropriate orders in consequence thereof is derived from section 87 read with section 86 of the Act and is not derived from the Magistrates' Courts Act, 32 of 1944.

This prayer and prayer 1.1 address the following essential issue: What procedure is to be followed when a matter is referred to the Magistrate's Court under sections 86 and 87. The respondents, on the one hand, contend that the Rules of the Magistrates' Courts ("the Rules") must be followed. In order to reflect that contention, the first to sixth respondents seek a different declaratory order that I shall deal with in due course. The applicant, on the other hand, contends that the **Magistrates' Courts Act, 32 of 1944** and the Rules do not apply. I shall first deal with the narrow issue that the applicant's prayer 1.3 raises, namely from which act does the Magistrate's Court derive the relevant powers?

It has long been settled law that Magistrates' Courts are a creature of statute and as such "have no inherent jurisdiction …. The jurisdiction of magistrates' courts must be deduced from the four corners of the statute under

which they are constituted".[40] This proposition predates our Constitution and needs some adjustment to reflect the legality principle[41] in and supremacy of the Constitution.[42] In terms of section 166(d) of the Constitution the Magistrates' Courts are part of the country's judicial system. Section 170 of the Constitution provides that "Magistrates' Courts … may decide any matter determined by an Act of Parliament" (My emphasis). Accordingly, the proposition must now be stated to be that the jurisdiction of the Magistrates' Courts must be deduced from an Act of Parliament.

There is in my view no doubt that the powers under discussion are derived from the Act. That is confirmed by section 29(1) of the Magistrates' Courts Act that provides that "Subject to the provisions of this Act and the National Credit Act, 2005, the court, in respect of causes of action, shall have jurisdiction in" a variety of matters that are listed in the section. (The underlining is mine.)

For the respondents it was argued, with reference to **Rutenberg v Magistrate, Wynberg and Another**[43], that the Magistrates' Courts derive the power in question from the Act, but always through its constituting act, the Magistrates' Courts Act. In view of the provisions of the Constitution that I have referred to, such a construction seems to me to be unnecessarily cumbersome.

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[40] **Connolly v Ferguson 1909 TS** at 195. And see **Rutenberg v Magistrate, Wynberg and Another 1997 (4) SA 735 (C)** at 750G to 751A; **Ndamase v Functions 4 All 2004 (5) 604 (SCA)** at para. 5.
[41] Section 1(c) of the Constitution.
[42] Sections 1(c) and 2 of the Constitution.
[43] **1997 (4) SA 735 (C)**.

The conclusion that the power is derived from the Act, however, does not entitle the applicant to the order it seeks. While the order, as it stands might be a correct statement of the law, it does not address the dispute between the parties, that is, whether the Magistrates' Courts Act and the Rules apply to matters referred to the Magistrate's Court under sections 86 and 87. The real issue is apparent from the first to sixth respondents' counter application wherein the following declaratory order is sought: **"The power of a Magistrate's Court to conduct a hearing in terms of section 87of the Act and to make appropriate orders in consequence thereof is derived from section 87 read with section 86 of the Act, and the Magistrates' Court Act and the Rules govern the procedure by which it may conduct itself in so doing**". I shall later deal with the counter application. I now proceed to the question whether the Magistrates' Court Act and the Rules apply to referrals in terms of section 86.

For the applicant Mr Loxton submitted that by requiring of a debt counsellor to "refer"[44] a "recommendation"[45] to the Magistrate's Court, the Act's purpose was to create a *sui generis* procedure not governed by the Magistrates' Court Act and the Rules. That purpose, counsel submitted, can be inferred from the use in the Act of the word "refer" as opposed to "apply", the word used in section 86(9). Counsel for the twelfth respondent argued to the same effect.

[44] Section 86(8)(b)
[45] Sections 86(7)(c) and 86(8)(b).

Counsel for the first to sixth respondents pointed out that the consumer's application to the debt counsellor in terms of section 86(1) of the Act initiates the entire debt review process. According to the argument, the consumer's initial application is referred to the Magistrate's Court in a "seamless progression". Accordingly, the argument concluded, the consumer is the applicant in the matter before the Magistrate's Court and his or her initial application must comply with the Rules. It is convenient first to deal with the argument for the respondents.

The immediate difficulty with the respondents' argument is that the consumer's application in terms of section 86(1) is made to the debt counsellor and not to the court. Moreover, it is not the consumer who determines whether his application is to be referred to the court and what information is to be put before the court: The debt counsellor refers "the matter"[46] to the court with his or her recommendation. The procedure is not one whereby the consumer, as *dominus litis* applies to the court and decides what evidence to put before the court. The consumer is not the "gedingvoerder" or "master of the suit".[47]

I conclude that the referral of a matter to the Magistrate's Court under section 86, 86(8)(b) in particular, constitutes an extraordinary procedure[48] created by the Act. The procedure is out of the ordinary because it concerns a *lis* or suit between the consumer and his or her credit providers but the initiative to

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[46] Section 86(8)(b) requires "the matter" and not "the application" to be referred to the Magistrate's Court.
[47] **Hiemsta and Gonin: Drietalige Regswoordeboek** (2nd ed.) *s.v.* "dominus litis".
[48] I advisedly do not use the terms "*sui generis*" or "unique" because there are similar proceedings. Interpreader proceedings come to mind.

refer it to the court is taken by a third party, the debt counsellor who acts as *pro forma* applicant. I say that the procedure concerns a suit because, by applying to be declared over-indebted, the consumer is seeking at least a re-arrangement of one or more of his or her obligations. That entails, or may entail, a failure to comply with the terms of agreements with credit providers. Other issues may also arise. The procedure also is out of the ordinary because the debt counsellor is by law required, in given circumstances, to refer the matter to the Magistrate's Court or, put differently, to apply to the court.

Does it follow from the fact that the procedure is created by the Act and is out of the ordinary that the Magistrates' Courts Act and the Rules do not apply? As a general proposition, court rules are promulgated to regulate the conduct of proceedings of the court in question.[49] Since the enactment of the **Rules Board for Courts of Law Act, 107 of 1985** rules for the Magistrates' Courts are made, amended and repealed by the Rules Board for Courts of Law that exercises the power, subject to requirements contained in the said act, "with a view to the efficient, expeditious and uniform administration of justice".[50] Put differently, the Rules prescribe the manner in which matters are brought before the court and the manner in which the court then deals with them. I shall assume without finding that Parliament may by way of legislation prescribe procedures that differ

[49] See the headings to the rules of the Supreme Court of Appeal and to the rules of the Provincial Divisions of the High Court in **Harms: Civil Procedure in the Supreme Court**, Volume 2, p. 1003 and p. 1037. **Venter v Du Plessis 1980 (3) SA 151 (T)** at 152A.
[50] Section 6 of the Rules Board for Courts of Law Act.

from the Rules. Where, however, there is no such prescription, the relevant rules of the Magistrate's Court must be followed.

The consumer's initial application must be in a form prescribed by regulation[51]. A consumer who applies directly to the Magistrate's Court under section 86(9) must also do so "in the prescribed manner and form".[52] Section 86(8)(b)[53] obliges a debt counsellor to refer certain matters to the Magistrate's Court but does not prescribed any procedure. It follows that in such cases the Magistrates' Courts Act and the Rules apply. Counsel for the respondents submitted, and I agree, that the debt counsellor's referral constitutes an application to the court.[54] The appropriate rule to follow therefore is Rule 55 of the Rules that deal with applications to the Magistrates' Courts. The appropriate form to follow is Form "No. 1 (Notice of Application (General Form)" that appears in Annexure 1 to the Rules. In this regard it is useful to bear in mind that "the forms contained in Annexure 1 may be used with such variation a circumstances require".[55]

In the result I propose to make an order in accordance with prayer 1.3 of the first to sixth respondents' counter application.

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[51] Section 86(1).
[52] The form prescribed is NCR Form 18. It resembles Form 1 prescribed for applications under the Rules.
[53] And, as I have held above, section 86(7)(c).
[54] From this it must not be inferred that the debt counselor becomes a party to the proceedings in the ordinary sense. I shall deal with that aspect later.
[55] There are exceptions that are presently irrelevant. See Rule 1(2)(a).

> **Applicant's prayer 1.1: "A referral of a recommendation by a debt counsellor to a Magistrate's Court in terms of section 86(8)(b) of the Act does not constitute an application for the purposes of the Magistrates' Courts Act, 32 of 1944 or the Rules of Court promulgated thereunder and consequently a debt counsellor referring such a recommendation to a Magistrate's Court in terms of that section is not required to comply with the Magistrates' Courts Act or the Rules**.

For reasons that have been given above, this order must be refused. In terms of prayer 1.1 of their counter application the first to sixth respondents seek an order in the following terms: "**A matter referred by a debt counsellor to a Magistrate's Court under section 86(8)(b) of the Act is an application within the meaning of sections 86 and 87 of the Act and falls to be treated as such in terms of Rule 55 of the Rules."** Also for the reasons already given an order in these exact terms cannot be granted. I propose to make an order in the following terms: "**A referral by a debt counsellor to a Magistrate's Court under section 86(8)(b) (and section 86(7)(c)) of the National Credit Act, 2005 is an application within the meaning of the Magistrates' Courts Act, 1944 and the Rules of the Magistrates' Courts and falls to be treated as such in terms of Rule 55 of the Rules."**

The applicant's prayer 1.5: "The Rules relating to costs and the principles which apply generally to the award of costs in applications made under such Rules do not apply to hearings conducted in terms of section 87 of the Act and in particular, the general rule that costs follow the result does not apply to a debt counsellor whose recommendation is rejected by a Magistrates' Court".

In view of what I have stated above, a debt counsellor who refers a matter to the Magistrate's Court is the applicant in the proceedings before the Magistrate's Court. Viewing the matter formalistically, the debt counsellor's application might be said to be unsuccessful if the court does not follow his or her recommendation. It has happened in practice that magistrates have order debt counsellors in such circumstances to pay the costs of the application. It is such adverse costs orders that the applicant seeks to address by way of its prayer 1.5.

Rule 33 of the Rules deal extensively with costs. I quote only Rule 33(1): "The court in giving judgment or in making any order, including any adjournment or amendment, may award such costs as may be just". By way of their counter application the first to sixth respondents seek the following order: "**Rule 33 of the Magistrates' Courts Rules is applicable to applications under section 86 and 87 of the National Credit Act, 2005**".

I shall address costs orders adverse to debt counsellors in the following paragraphs. For the reasons that I have given, a referral to the Magistrate's Court constitutes an application in terms of the Magistrates' Courts Act and the Rules. The principles relating to costs in respect of applications therefore also apply to the procedure under consideration. Subject to what I say about costs orders adverse to debt counsellors, an order must be made in accordance with the first to sixth respondents' counter application.

A debt counsellor who refers an application to the court under section 86(8)(b) (and 86(7)(c)) is not a litigant in the ordinary sense. By referring a matter to the court and by making a recommendation, he or she fulfils a statutory obligation. There is ample authority for the proposition that a statutory functionary who, in the process of fulfilling his or her statutory function, is involved in court proceedings, is not ordinarily ordered to pay the costs of any other party. Adverse costs orders against such functionaries are ordinarily only made where the functionary acted improperly or with *mala fides*.[56] The practical problems that prompted the applicant to seek the order under consideration probably resulted from a failure to apply this salutary principle.

In the result I propose to make an order in accordance with the one that the first to sixth respondents seek, but to add the following introductory words: "**Bearing in mind that the debt counsellor fulfils a statutory obligation, …"**.

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[56] **Coetzeestroom Estate and G. M. Co. v Registrar of Deeds 1902 TS 216**; **Fourie v Celliers NO 1978 (4) SA 163 (O)** at 166; **Die Meester v Joubert en Andere 1981 (4) SA 211 (A)**.

The applicant's prayer 1.6: "Service of any recommendation or other document contemplated in sections 86 or 87 of the Act may, with the agreement of the affected parties, be by way of fax or email."

A debt counsellor who receives an application under section 86(1) must, pertaining to notification, "notify, in the prescribed manner and form"[57] all the relevant credit providers and every credit bureau of the application. The manner and form of this notification have been prescribed in the Regulations[58] and need not detain us. As regards notice to affected parties of the referral (application) to the Magistrate's Court, there is no provision in the Act. In view of what I have already stated, the referral (application) is governed by the Rules and must be served on affected parties in terms of the Rules. There is, however, no reason in law why all or some of the affected parties cannot agree to waive service in terms of the Rules and to agree on a different form of notification. I have been informed that there are magistrates who hold the view that the parties to an application cannot agree on a form of service different from that prescribed by the Rules. With that I cannot agree and in view thereof the order sought in terms of prayer 1.6 must be made.

In their counter application the first to sixth respondents seek an order in the following terms: "**Rule 9 of the Magistrates' Courts' Rules is applicable to**

[57] Section 86(4)(b).
[58] Regulation 24(2) and (5).

the service of documents for the purpose of the reference and hearing contemplated in sections 86(8)(b) and 87 of the National Credit Act". For reasons already stated, this proposition is also correct and for the sake of clarity, this must also be reflected in the order that is granted.

In the result, I propose to grant an order in the following terms: "**Rule 9 of the Magistrates' Courts' Rules pertaining to service are applicable to the service of process, any recommendation and other documents for the purpose of the referral and hearing contemplated in sections 86(7)(c), 86(8)(b) and 87 of the National Credit Act, 2005 but Service of any such documents may, with the agreement of the affected parties, be by way of fax or email**."

> **The applicant's prayer 1.7: "A debt counsellor who refers a proposal to a Magistrates' Court in terms of section 86(8)(b) is entitled to adduce evidence and advance argument in support of his or her recommendation in any hearing under section 87**"

The first to sixth respondents contend that an order in the following terms will better reflect the role of the debt counsellor: "**A debt counsellor who refers a proposal to a Magistrate's Court in terms of section 86(8)(b) of the National Credit Act has a duty to assist the court and should be available**

and able to render such assistance by way of furnishing evidence as to the proposal as referred by him or to answer any queries raised by the Court."

If regard is had to the debt counsellor's functions in terms of section 86, his or her role is that of a neutral functionary who does not seek to advance any particular party's cause. In view thereof, the order that the respondents seek is indeed more reflective of the debt counsellor's role. There is, however, no reason why the debt counsellor should not make submissions regarding his or her proposal. In view of the investigation that he or she undertakes in terms of section 86, the debt counsellor will have knowledge of the relevant facts and submissions to explain the proposal will no doubt assist the court.

In order more accurately to reflect to provisions of the Act and the remarks I have made, I propose to make an order as follows: "A **debt counsellor who refers a matter to the Magistrate's Court in terms of sections 86(7)(c) and 86(8)(b) of the National Credit Act, 2005 has a duty to assist the court and should be available and able to render such assistance by way of furnishing evidence or making submissions as to his or her proposal or to answer any queries raised by the Court**."

The applicant's prayer 1.8: "Any Magistrates' Court to which a debt counsellor elects in terms of section 86(8)(b) of the Act to refer a

recommendation for hearing under section 87 has jurisdiction to conduct such hearing."

The relief that the applicant seeks by way of this order is premised on its contention that the Magistrates' Courts Act does not apply to the procedure under consideration. I have already found otherwise. Accordingly, the question of jurisdiction must be decided with reference to the Magistrates' Courts Act.

The general rule regarding jurisdiction "is *actor sequitur forum rei*. The plaintiff (or applicant) ascertains where the defendant (respondent) resides, goes to his forum, and serves him with the summons (notice of motion) there".[59] Having regard to this general rule, an applicant must bring his or her application in the Magistrate's Court that has jurisdiction in respect of the person of the respondent[60]. If there are more than one respondent, the application must ordinarily be brought in a Magistrate's Court[61] that has jurisdiction over all the respondents.

I have held that in the debt review proceedings under section 86(7)(c), 86(8)(b) and 87 the debt counsellor who refers the matter to the Magistrate's Court is the applicant. The consumer and his or her credit providers are the respondents. The practical problem that the applicant points out is that there are

[59] **Sciacero & Co v Central South African Railways 1910 TPD 119** at 121.
[60] There are exceptions that are not now relevant.
[61] Other considerations sometimes apply in the High Court.

many cases in which one Magistrate's Court will not have jurisdiction in respect of the person of all the respondents.

In my view the problem that the applicant points out is more apparent than real. Section 28 of the Magistrates' Courts Act deals with the court's jurisdiction in respect of persons. In section 28(1) the grounds upon which a court will have jurisdiction in respect of a person are listed. Presently of importance is the introductory part of section 28(1) that reads: "Saving any other jurisdiction assigned to a court by this Act or by any other law, the persons in respect of whom the court shall have jurisdiction shall be the following and no other...". (The underlining is mine.) The answer to the applicant's perceived problem lies, in my view, in the underlined words. In terms of section 86(8)(b) of the Act the debt counsellor must refer the matter to "the Magistrate's Court" as opposed to "a Magistrate's Court". The express purpose of the Act is that the debt counsellor must refer the matter to a particular Magistrate's Court, not any Magistrate's Court of his or her choice. I agree with Mr Van Loggerenberg who appeared for the first respondent that the appropriate Magistrate's Court is the one having jurisdiction in respect of the person of the consumer. That is so because the essential purpose of the debt review procedure is to protect the consumer who is over-indebted or to whom reckless credit was granted. If the relevant Magistrate's Court does not in terms of section 28 of the Magistrate's Court Act have jurisdiction over the person of all the relevant credit providers, it does not follow that no Magistrate's Court has jurisdiction to deal with the matter. To hold

otherwise would defeat the purpose of the Act, namely to have debt review proceedings dealt with by the Magistrates' Courts.

To summarise: **In order to give effect to the express purpose of the Act in respect of debt review procedures, the term "the Magistrate's Court" where it appears in sections 86(7)(c), 86(8)(b) and 87 of the Act must be interpreted to mean "the Magistrate's Court having jurisdiction in respect of the person of the consumer"**. The relief sought in the applicant's prayer 1.8 must accordingly be refused.

> **The applicant's prayer 1.9: "There is no monetary limit upon the jurisdiction of the Magistrates' Courts to hear a referral under section 87 of the National Credit Act, 2005**".

The first to sixth and the eleventh respondents consent to the order albeit that they differ as to the reasons why it should be granted. I have held that the power to deal with referrals under section 86 of the Act is derived from the Act. The Magistrates" Courts Act and the Rules govern the procedure to be followed because the Act makes no provision for it. It is in the Act, therefore, that limits to the jurisdiction of the Magistrate's Court must be sought.

The Act expressly provides that matters be referred to the Magistrate's Court and makes no mention of a monetary limit to that court's jurisdiction. In the

circumstances there is no basis for holding that there is a monetary limit to the relevant jurisdiction of the Magistrate's Court. To hold otherwise would defeat the purpose of the Act.

> **The applicant's prayer 1.11: "Where a debt counsellor refers a recommendation to a Magistrates' Court that it find that a credit agreement is reckless, or a consumer makes an application to such court in terms of section 86(9), and the court finds that the credit agreement concerned is reckless, it may make an order under section 87(1)(b)(i) read with section 83(2)(a) setting aside all or part of the consumer's obligations under the credit agreement and may in terms of such order reduce the total amount payable under such agreemen**t.

In terms of their counter application the first to sixth respondents seek the following order: "**Where a debt counsellor refers a recommendation to a Magistrate's Court that it find that a credit agreement is reckless, or a consumer makes an application to such court in terms of section 86(9) of the National Credit Act, 2005, and the court finds that the credit agreement concerned is reckless:**

(a) upon the grounds that the credit provider has not complied with sections 80(1)[62] and 80(1)(b)(ii)[63], the Court may make the orders contemplated in section 83(2);

(b) upon the grounds that the credit provider has not complied with 80(1)(b)(ii), and the consumer is found to be over-indebted at the time of those court proceedings, the Court may make the orders referred to in sections 83(3)(b)(i) and (ii)".

The applicant concedes that an order in accordance with the respondents' counter application should issue. There are, however, typing errors in the relief that the respondents seek. In paragraph (a) of the order "section 80(1)" should read "section 80(1)(a). I explain.

For reasons that I have set out earlier, the Magistrate's Court has in relation to debt restructuring no power beyond that provided for in the Act. When a matter has been referred to the Magistrate's Court in terms of section 86(8)(b) or section 86(7)(c)[64], the court has the power to "declare any agreement to be reckless".[65] The same applies to applications by the consumer in terms of section 86(9).[66] In terms of section 87(1)(b)(i) the court may then make "an order contemplated in section 83(2) or (3)".[67]

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[62] For reasons that follow this should read (section 80(1)(a).
[63] This should read "section 80(1)(b)(i).
[64] See the consideration of the applicant's prayer 1.15 above and also the provisions of section 83(1).
[65] Section 87(1)(b)(i) and also section 83(1).
[66] See the introductory part of section 87(1).
[67] Section 87(1)(b)(i).

The first power that the court has in terms of section 87(1)(b)(i) is to make an order in terms of section 83(2) which provides:

> "If a court declares that a credit agreement is reckless in terms of section 80 (1) (a) or 80 (1) (b) (i), 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 subsection (3) (b) (i)."

It is this power that the respondents sought to reflect in paragraph (a) of the order. As is apparent from the introductory part of section 83(2) the reference to "section 80(1)" in paragraph (a) of the order should read "section 80(1)(a)". Similarly, the reference to section 80(1)(b)(ii) should be "section 80(1)(b)(i)'. I shall amend the order accordingly.

Paragraph (b) of the order sought correctly reflects the provisions of section 83(3) which embodies the second power granted in terms of section 87(1)(b)(i).

All this may well be confusing. At the risk of making the confusion even worse, I would stress the following: The Magistrate's Court that finds any credit agreement reckless only has the powers provided for in the Act. It does not have

a general power to interfere with the contractual obligations and rights of any party to a credit agreement. The order that I propose to issue seeks no more than to paraphrase the relevant powers that the Act gives to the Magistrate's Court.

> **The applicant's prayer 1.12: "A magistrates' Court making an order in terms of section 87 may, with the consent of the consumer and pursuant to a recommendation by the debt counsellor, issue an order of the nature contemplated in rule 65J[68] of the Rules, attaching the emoluments of the consumer and obliging him or her to make periodic payments to the credit provider**."

The powers of the Magistrate's Court upon a referral are to be found in the Act. There is no provision for the making of an order in terms of section 65J of the Magistrates' Courts Act that deals with emoluments attachment orders. The order sought must accordingly be refused.

> **The applicant's prayer 1.14: "A failure to conclude negotiations arising from a proposal or counterproposal made by a credit provider in response to a recommendation or proposal by a debt counsellor in terms of section 86(7)(a)[69] or (b)[70] of the Act does not**

[68] This should read "section 65J of the Magistrates' Courts Act, 1944".
[69] This should read (b). Subsection (a) provides for the rejection (refusal) of the consumer's application.
[70] This should read (c).

preclude such debt counsellor from exercising his or her powers under section 86(8)"

The first to sixth respondents seek an order in the following terms: "**The debt counsellor may not refer a recommendation or a proposal made in terms of section 86(7)(b) or (c) of the Act to the Magistrate's Court unless and until he reasonably concludes that any negotiations being conducted are not in good faith, have terminated or are unlikely to result in a responsible debt re-arrangement**."

In order to consider the issue raised by the relief sought here, a brief overview of the process will be helpful. When a debt counsellor receives a consumer's application to be declared over-indebted, the debt counsellor must assess the consumer's position. The consumer and credit providers must assist in this assessment process.[71] Within the prescribed time[72] the debt counsellor must determine whether the consumer appears to be over-indebted or not. In terms of Regulation 24(6) the debt counsellor must make the determination within 30 business days after receiving the consumer's application. If the counsellor determines that the consumer is not over-indebted the application is rejected.[73] If the counsellor concludes that the consumer is over-indebted, the former may issue a proposal and refer that to the Magistrate's Court. If the debt counsellor concludes that the consumer is not over-indebted "but is experiencing,

[71] Sections 86(1) and (5).
[72] The introductory part of section 86(7)(a).
[73] Section 86(7)(a)

or is likely to experience, difficulty satisfying all the consumer's obligations" the counsellor "may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement".[74] I have termed this possibility "voluntary re-arrangement".

From the above analysis it follows that the Act provides for negotiations only in the event of a finding that the consumer is not over-indebted but is experiencing, or is likely to experience, difficulty satisfying all his or her obligations in time. Nothing prevents the debt counsellor, the consumer and credit providers from entering into negotiations in the case of an over-indebted consumer whose matter has been referred to the court. Such negotiations, however, are not prescribed by the Act. They are settlement negotiations.

Section 86(8) provides:

"If a debt counsellor makes a recommendation in terms of subsection (7) (b) and—

(a) the consumer and each credit provider concerned accept that proposal, the debt counsellor must record the proposal in the form of an order, and if it is consented to by the consumer and each credit provider concerned, file it as a consent order in terms of section 138; or

(b) if paragraph (a) does not apply, the debt counsellor must refer the matter to the Magistrate's Court with the recommendation."

[74] Section 86(7)(b).

From section 86(8)(b) it is clear that the debt-counsellor may only refer a case of voluntary re-arrangement to the court "if paragraph (a) does not apply". Put differently, the debt counsellor may only refer the matter to the court if the process of voluntary re-arrangement did not culminate in an agreement by the consumer and each credit provider.

The question as to when it can be said that the consumer and each credit provider do not agree to the voluntary re-arrangement is one of fact to be decided in each case. What, however, is in my view clear is that the debt counsellor may only refer a case of attempted voluntary debt re-arrangement to the court if he or she is satisfied that no agreement has been reached, either because a party has rejected the proposed re-arrangement or because there is no reasonable prospect that an agreement will be reached. Put differently, the debt counsellor may only refer a case of attempted voluntary re-arrangement to the court if he or she is satisfied that negotiations have been concluded or are leading nowhere. The order that the applicant seeks cannot be made.

I need to address an issue that has been raised. In terms of section 86(10) certain credit providers can "at any time at least 60 business days after the time on which the consumer applied for the debt review". I have been informed that credit providers delay the negotiation process with a view to exercising their rights under section 86(10). If a debt counsellor concludes that a credit provider is not negotiating in good faith, he or she will on that basis also

conclude that negotiations are leading nowhere. A note of warning might be appropriate: Debt counsellors should be careful before reaching such a conclusion and it will probable be advisable to inform the relevant credit provider that it is the view of the debt counsellor that the former is not negotiating in good faith and that the matter will be referred to the court. Hasty and unreasonable conclusions on the part of the debt counsellor might result in adverse costs orders.

As regards the counter application, I deem it unwise to issue such an order. It attempts, albeit adequately my view, to define circumstances under which it could be said that no agreement has been reached. As that will depend on the facts of each case, a definition should not be attempted.

As regards prayer 1.14 the application and counter application must be refused.

Prayer 1.13: "The reference in section 86(2) to the taking of a step in terms of section 129 to enforce a credit agreement is a reference to the commencement of legal proceedings mentioned in section 129(1)(b) and does not include steps taken in terms of section 129(1)(a) of the National Credit Act, 2005".

In terms of section 86(2) an application in terms of section 86(1) “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”. Section 129 prescribes certain steps that a credit provider must take before a debt is enforced. Section 129(1) provides:

> “if the consumer is in default under a credit agreement, the credit p rovider—
>
> (a) 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; and
>
> (b) subject to section 130 (2), may not commence any legal proceedings to enforce the agreement before—
>
> (i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86 (10), as the case may be; and
>
> (ii) meeting any further requirements set out in section 130.””

All the parties before this court agreed that this order must be made. In the result I have not had full argument thereon. In my view the purpose of section 86(2) is to ensure that consumers do not apply in terms of section 86(2) to be

declared over-indebted only to frustrate a credit provider who has already started to enforce a credit agreement under which the consumer is in default. While section 129(1)(a) envisages alternative dispute resolution and "a plan to bring payments under the agreement up to date", it does not envisage general debt re-structuring under section 86 and 87. Moreover, even the steps set out in section 129(1)(a) are preliminary to debt enforcement. I am not satisfied that the parties are correct in their interpretation of section 86(2). In the absence of full argument, and in view thereof that there are many other persons with an interest in this order, I deem it unwise[75] to say more than that. In the exercise of my discretion, the order will not be granted.

Applicant's prayer 1.10: "On a proper interpretation of section 103(5) read with section 101(1)(b) to (g) of the National Credit Act:

(a) the amounts contemplated in sections 101(1)(b) to (g) which accrue while the consumer is in default may not exceed, in aggregate, the unpaid balance of the principal debt when the default occurred;

(b) once the total charges referred to in section 101(1)(b) to (g) equal the amount of the unpaid balance, no further charges may be levied;

(c) once the total charges referred to in sections 101(1)(b) to (g) equal the amount of the unpaid balance, payments

[75] I have not been referred to it and I was unable to obtain a copy thereof, but I seem to recollect that I have given a judgment on this very point.

made by a consumer thereafter during a period of default do not have the effect of permitting the credit provider to charge further interest while such default persists".

Section 103(5) of the Act provides as follows: "Despite any provision of the common law or a credit agreement to the contrary, the amounts contemplated in section 101 (1) (b) to (g) that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the default occurs." It is unnecessary to quote sections 101(1)(b) to (g) that section 103(5) refers to. Section 101 deals with "cost of credit" and in subsection 1(b) to (g) lists the admissible components of such cost being an initiation fee, a service fee, interest, cost of credit insurance, default administration charges and collection costs.

For the respondents, other than the twelfth respondent, it was argued that section 103(5) operates similar to the common law rule of *in duplum*. "The effect of the *in duplum* rule is that interest stops running when the unpaid interest equals the outstanding capital. When the debtor repays a part of the interest the quantum of the outstanding interest reduces below the amount of the outstanding capital. Interest again runs until it equals the capital amount."[76] The respondents contend that if section 103(5) is interpreted in conformity to the common law, then the effect of section 103(5) is only to create a moratorium on the payment of

[76] **Commissioner for SA Inland Revenue Service v Woulidga 2000 (1) SA 600 (C)** at 611J.

the cost of credit while the consumer is in default. They further contend that the subsection does not affect the underlying obligation to make payment. Once he or she purges the default, all the cost of credit may be levied again. The first to sixth respondents seek a declaratory order to reflect their contention.

In my view the respondents' contention flies in the face of the clear wording of section 103(5). First, the subsection makes it plain that it applies despite "any provision of the common law" which includes the *in duplum* rule. In the second place it is the amounts "that accrue" during the default that "may not, in aggregate, exceed the unpaid balance". During the period of default no more than the stated maximum can accrue. Put differently, the consumer's indebtedness in respect of cost of credit cannot grow[77] by more than the stated maximum.

An order in terms of the applicant's prayer 1.10 must therefore be made.

The nature of the eleventh respondent's counter application is such that it has been dealt with in the course of this judgment.

As regards costs, all the parties have enjoyed mixed success and defeat. Moreover, all acted in the public interest and in my view no costs order should be made.

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[77] **The Concise Oxford Dictionary**.

In the result the following order is made:

It is declared that:

1. On a proper interpretation of section 86(8)(b), it applies in the circumstances contemplated in section 86(7)(c).
2. In circumstances where section 86(8)(b) of the Act applies, a debt counsellor is obliged to refer his or her recommendation to a Magistrates' Court and the magistrate to whom the matter is allocated is in terms of section 87 obliged to conduct a hearing and make an order contemplated in either section 87(1)(a) or section 87(1)(b) of the National Credit Act, 2005.
3. The power of a Magistrate's Court to conduct a hearing in terms of section 87of the National Credit Act, 2005 and to make appropriate orders in consequence thereof is derived from section 87 read with section 86 of the said Act, and the Magistrates' Courts Act, 1944 and the Rules of the Magistrates' Courts govern the procedure by which it may conduct itself in so doing.
4. A referral by a debt counsellor to a Magistrate's Court under section 86(8)(b) (and section 86(7)(c)) of the National Credit Act, 2005 is an application within the meaning of the Magistrates' Courts Act, 1944 and the Rules of the Magistrates' Courts and falls to be treated as such in terms of Rule 55 of the Rules.
5. Rule 33 of the Magistrates' Courts Rules is applicable to applications under section 86 and 87 of the National Credit Act, 2005.

6. Bearing in mind that the debt counsellor fulfils a statutory obligation, Rule 33 of the Magistrates' Courts' Rules is applicable to applications under section 86 and 87 of the National Credit Act, 2005.
7. Rule 9 of the Magistrates' Courts' Rules pertaining to service are applicable to the service of process, any recommendation and other documents for the purpose of the referral and hearing contemplated in sections 86(7)(c), 86(8)(b) and 87 of the National Credit Act, 2005 but service of any such documents may, with the agreement of the affected parties, be by way of fax or email.
8. A debt counsellor who refers a matter to the Magistrate's Court in terms of sections 86(7)(c) and 86(8)(b) of the National Credit Act, 2005 has a duty to assist the court and should be available and able to render such assistance by way of furnishing evidence or making submissions as to his or her proposal or to answer any queries raised by the Court.
9. There is no monetary limit upon the jurisdiction of the Magistrates' Courts to hear a referral under section 87 of the National Credit Act, 2005.
10. Where a debt counsellor refers a recommendation to a Magistrate's Court that it find that a credit agreement is reckless, or a consumer makes an application to such court in terms of section 86(9) of the National Credit Act, 2005, and the court finds that the credit agreement concerned is reckless

48

(a) upon the grounds that the credit provider has not complied with sections 80(1)(a) and 80(1)(b)(i), the Court may make the orders contemplated in section 83(2);

(b) upon the grounds that the credit provider has not complied with 80(1)(b)(ii), and the consumer is found to be over-indebted at the time of those court proceedings, the Court may make the orders referred to in sections 83(3)(b)(i) and (ii)

11. On a proper interpretation of section 103(5) read with section 101(1)(b) to (g) of the National Credit Act, 2005:

(a) the amounts contemplated in sections 101(1)(b) to (g) which accrue while the consumer is in default may not exceed, in aggregate, the unpaid balance of the principal debt when the default occurred;

(b) once the total charges referred to in section 101(1)(b) to (g) equal the amount of the unpaid balance, no further charges may be levied;

(c) once the total charges referred to in sections 101(1)(b) to (g) equal the amount of the unpaid balance, payments made by a consumer thereafter during a period of default do not have the effect of permitting the credit provider to charge further interest while such default persists.

B.R. du Plessis

Judge of the High Court

B.R. du Plessis

Judge of the High Court

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Fourth Respondent:	Jay Motohbi Inc.
	C/O Savage Jooste and Adams
	C/O Savage Jooste and Adams
	141 Boshoff Street
	Nieuw Muckleneuck
	PRETORIA
	Adv. G.H. Meyer
On behalf of the Fifth and	

Sixth Respondent:	Routledge Modisa C/O Adams & Adams 1140 Prospect Street Hatfield Pretoria
On behalf of the Eighth and Ninth Respondents:	The State Attorney 8th Floor, Bothongo Heights 167 Andries Street PRETORIA
On behalf of the Eleventh Respondent:	Coombe & Associates Cnr. Watloo & Flamink Streets Silverton PRETORIA Adv. P.F. Louw SC

Adv. S. Gouws

On behalf of the

Twelfth Respondent: Booysens & CO Inc.

C/O Velile Tinto & Assoc. Inc

Tinto House

Cnr. Hans Strijdom & Disselboom

Wapadrand

Pretoria

Adv. KJ. Kemp SC