THE OBJECTIVE OF PROVIDING DEBT RELIEF TO OVER-INDEBTED CONSUMERS AND THE INTERPRETATION OF SECTION 85 OF THE NATIONAL CREDIT ACT

***Firstrand Bank Ltd v Govender* [2014] JOL 31572 (ECP)**

OPSOMMING

Die doelwit om skuldverligting aan skuldoortrokke verbruikers te bied en die uitleg van artikel 85 van die "National Credit Act"

Artikel 85 van die "National Credit Act" bied aan verbruikers die geleentheid om skuldverligting ingevolge die Wet te bekom selfs nadat 'n kredietgewer met stappe vir skuldafdwinging begin het. Ingevolge artikel 85 mag 'n hof in enige hofverrigtinge waar 'n kredietooreenkoms oorweeg word en dit beweer word dat die verbruiker skuldoortrokke is, die aangeleentheid na 'n skuldberader verwys ten einde 'n aanbeveling aan die hof met betrekking tot die moontlike herstrukturering van die verbruiker se skuldverpligtinge ingevolge die kredietooreenkoms te maak. In die alternatief mag sodanige hof self die verbruiker skuldoortrokke verklaar en 'n bevel vir die herstrukturering van die verbruiker se skuldverpligtinge verleen. *Firstrand Bank v Govender* is een van verskeie beslissings waar die hof in 'n aansoek om summiere vonnis geweier het om sy diskresie ingevolge artikel 85 ten gunste van die verbruiker uit te oefen. Sodoende het die hof die verbruiker van sy laaste geleentheid om die beskerming en skuldverligting ingevolge die Wet te bekom, ontneem. In teenstelling met die Insolvensiewet wat nie daarop gemik is om skuldverligting aan verbruikers te bied nie, is een van die hoofdoelwitte van die Wet juis om verbruikers te beskerm deur vir skuldverligtingsprosedures voorsiening te maak. Die vraag ontstaan dus in watter mate hierdie feit die uitleg van artikel 85 raak en die doel van hierdie vonnisbespreking is derhalwe om die beslissing in *Govender* in die lig van hierdie kewessie te ontleed en te evalueer. Die outeur se gevolgtrekking is dat ons howe se skuldeiser-geörienteerde benadering tot die uitleg van artikel 85 nie met die grondliggende doelwit van die Wet om verbruikers se belange te beskerm en te bevorder, strook nie en dat die howe daarteen moet waak om verbruikers onredelik van hul geleentheid om die skuldverligting ingevolge artikel 85 te bekom, te ontneem.

1 Introduction

The National Credit Act 34 of 2005 (NCA) affords over-indebted consumers the opportunity to voluntarily apply to a debt counsellor for debt review and thus, to eventually obtain debt relief if the court decides to exercise its discretion in favour of the consumer by granting an order for the re-arranging of the consumer's debt obligations (ss 86(1), (7) and 87(1)(b), (2)). However, once the consumer is in default in respect of a specific credit agreement and the credit provider has delivered a notice to the consumer in which the default is brought to his or her notice and a proposal is made that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud, with the intent that any dispute under the agreement be resolved or that a plan should be developed to bring the payments up to date (see s 129(1)(a)), the debt relief in terms of section 86 would no longer be available to the consumer in respect of such agreement (see s 86(2) and *Nedbank Ltd v The National Credit Regulator* 2011 3 SA 581 (SCA) para 14). Nevertheless, this is not the end of the road for such a consumer as section 85 of the NCA further protects and assists consumers by affording them the opportunity to obtain the debt relief provided for in terms of sections 86 and 87 even after enforcement of the credit agreement has commenced. Section 85 provides as follows:

> "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–
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> (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
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> (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."

Firstrand Bank v Govender 2014 JOL 31572 (ECP) is one of several decisions in which the court, in an application for summary judgment, declined to exercise its discretion in favour of the consumer in terms of section 85(a). In this case a section 129(1)(a) notice had already been delivered to the consumer and the option of applying for debt review in terms of section 86(1) was therefore no longer available to the consumer. By refusing to exercise its discretion in terms of section 85(a) in favour of the consumer, the court effectively deprived the consumer of his last chance to obtain the protection and debt relief afforded to him by the NCA.

More than a decade ago, the consumer debt committee of the International Federation of Insolvency Practitioners (INSOL International) published a report with the aim of providing a resource for countries undertaking law reform with regard to the debt problems of consumer debtors. The committee's objective was to undertake a survey of consumer insolvency systems throughout the world and then to deduce the underlying principles upon which consumer insolvency systems should be based (see the preface to INSOL International *Consumer debt report: Report of findings and recommendations* (2001) and the discussion of these principles and recommendations by Roestoff and Renke "Solving the problem of overspending by individuals: International guidelines" 2003 *Obiter* 1). One of the important principles deduced by the committee was that consumer credit risks should be allocated on a fair and equitable basis to interested parties and, in this regard, the committee recommended (see INSOL *Report* 15):

> "There should be a fair allocation of risk between debtor and creditors in a predictable and equitable way. The system should not be abusive to debtors and not necessarily designed just to protect and maximise value for creditors. It should contain a balanced approach to give the debtor the possibility of a second chance."

However, despite the world-wide trend to assist and accommodate over-indebted consumers and to strive for a balance among the competing interests of debtors and creditors, the South African consumer insolvency system has remained exceptionally creditor-orientated (see Roestoff and Renke 2; Working Group on the Treatment of the Insolvency of Natural Persons *Report on the treatment of the insolvency of natural persons* (Insolvency and Creditor/Debtor Regimes Task Force, World Bank 2012 – available at http://bit.ly/Oft3hp; Boraine and Roestoff "Revisiting the state of consumer insolvency in South Africa after twenty years: The courts' approach, international guidelines and an appeal for urgent law reform Part 1" 2014 *THRHR* 351). The South African Insolvency Act 34 of 1936 requires proof of an advantage to creditors in sequestration applications and, as a result, our courts have hitherto generally shown an extremely unsympathetic attitude as regards consumer debtors' interests when sequestration applications were brought to obtain the debt relief afforded by the Insolvency Act (see s 129(1)(b) which provides for a discharge of all pre-sequestration debt as one of the effects of a rehabilitation order and Boraine and Roestoff 354). On several occasions our courts have emphasised the legislator's intention that the Insolvency Act's procedures are supposed to convey a benefit to creditors and that the Act's main aim is not to bring relief to harassed and unfortunate debtors (see, eg, *Ex parte Arntzen* 2013 1 SA 49 (KZP) para 13). Our courts have thus far, not been eager to grant the orders provided for in section 85 in order to allow the consumer the opportunity of obtaining the debt relief provided for by the NCA. In fact, I am not aware of any decision in respect of enforcement proceedings where the court was willing to exercise its discretion in terms of section 85 in favour of the consumer.

Nonetheless, in contrast to the Insolvency Act, it should be noted that it is indeed a core objective of the NCA to protect consumers by providing mechanisms for debt relief (see s 3(g) and (i) and the discussion in para 4 1 below). Section 85 has clearly been introduced to achieve this objective. The question accordingly arises as to how this fact should affect the interpretation of section 85 and the aim of this discussion is to analyse and evaluate the decision in *Govender* in light of this issue. Since the decision in *Govender* concerned the interpretation of the court's discretion in terms of section 85(a), this discussion will, for the most part, focus on the interpretation of this specific sub-section.

2 Facts and decision

The relevant facts were as follows: The plaintiff, a registered bank and credit provider in terms of the NCA, entered into a loan agreement with the defendant in 2005 to enable the defendant to purchase immovable property. A bond in favour of the defendant was registered over the property (para 1). On 19 February 2013 a notice in terms of section 129(1)(a) of the NCA was delivered to the defendant (para 3) and on 11 March 2013 the plaintiff issued summons against the defendant in which it alleged that the defendant had breached the loan agreement. As a result of an express term in the agreement, the full outstanding amount due under the loan became due and payable together with interest. The plaintiff therefore sought judgment in the sum of R563 355,80 together with interest thereon. The defendant entered an appearance to defend and the notice of opposition prompted an application for summary judgment (para 3).

The defendant filed a brief affidavit to resist summary judgment and purported to raise three defences, *inter alia*, "that the defendant was under the protection of the NCA in that he applied for debt review pursuant to the provisions of section 86 of the NCA" (para 4). (The other two defences raised (see paras 6–11) are not relevant for this discussion and are not entertained further.)

The defendant alleged that the plaintiff served a section 129 notice on him which advised him "to seek help from amongst other a debt counsellor, within 10 days of receipt of the letter". He further alleged that on 5 March 2013, the tenth business day after receipt of the notice, he indeed approached a debt counsellor and "applied to be placed under Debt Review". Within five days of the date thereof, the debt counsellor registered him to their system and a Form 17.1 was sent to the applicant on 12 March 2013 (para 13). The defendant thus contended that the plaintiff acted prematurely in issuing summons as the defendant had complied with the plaintiff's request to consult a debt counsellor within 10 days of receipt of the section 129(1)(a) notice (para 14). However, Eksteen J held that the defendant misconstrued the letter sent to him. Referring to the decision of the Supreme Court of Appeal in *Nedbank* para 14 and *Standard Bank of South Africa Ltd v Hales* 2009 3 SA 315 (D) para 19, Eksteen J explained as follows (para 15):

> "He was not invited to 'seek help from amongst other a debt counsellor'. What the defendant was invited to do is to refer the credit agreement to a debt counsellor, alternatively a dispute resolution agent, consumer court or ombud with the intention either to resolve a dispute which may exist under the credit agreement in issue, or to develop and agree on a plan to bring the payments under the credit agreement up to date. This is not what the defendant attempted to do. On the contrary, the express averments set out in the affidavit indicate that the defendant sought to include the home loan agreement in a debt review process pursuant to the provisions of section 86 of the NCA. This he cannot do. Once a section 129(1)(a) notice has been delivered it is not competent for the debt in issue, being the home loan account, to form part of any debt review pursuant to the provisions of section 86 of the NCA . . . His reference to the debt counsellor, at least in respect of the agreement in issue, is accordingly a nullity and can have no impact on these proceedings."

Eksteen J consequently held that the defendant had not made out a defence in respect of the claim as envisaged in High Court rule 32. However, the court granted a request to postpone the matter in order to enable the defendant to file a supplementary affidavit to lay a foundation upon which the court could exercise its discretion in terms of section 85 of the NCA (para 16).

Regarding the nature of the court's discretion in terms of section 85, Eksteen J (para 21) endorsed Erasmus J's decision in *Firstrand Bank Ltd v Olivier* 2009 3 SA 353 (SE) para 14, namely, that

> "[a] court is not obliged to act simply on the defendant's allegation of over-indebtedness, but 'may' make an appropriate order in terms of para (a) or (b). The court will exercise this discretion judicially with due regard to the objectives of the NCA which, in the present regard, is to assist the overburdened consumer to rehabilitate his affairs. In doing so, the Act makes significant inroads into the credit provider's common-law rights, as well as its constitutional right of access to the courts (s 34 of the Constitution of the Republic of South Africa Act 108 of 1996). The court will restrict the statutory limitation of the credit provider's rights to the extent that it is reasonable and justifiable to do so in our democratic order while promoting the objects of the NCA".

Referring to the decision in *Hales* para 13, that the protection of the consumer

is not the sole purpose of the NCA and that no prioritisation is provided for, Eksteen J agreed with the above approach (para 21). According to Eksteen J (para 22) it accords with the sentiment expressed by Cameron J in *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) para 40 where the court confirmed the following *dictum* of the Supreme Court of Appeal in *Nedbank* para 3: "The interpretation of the NCA calls for a careful balancing of the competing interests sought to be protected, and not for a consideration of only the interests of either the consumer or the credit provider."

Eksteen J indicated that the discretion which section 85 confers upon a court arises when a credit agreement is considered in proceedings before it and it is further alleged by the consumer that he is over-indebted. Once these two jurisdictional facts co-exist, the discretion arises. The court furthermore pointed out that the discretion is conferred upon the court despite "any provision of law or agreement to the contrary" which means that a general debt review may still follow if the court exercises its discretion in terms of section 85 despite the fact that the plaintiff has commenced proceedings to enforce the credit agreement by issuing a section 129 notice (para 23). As the two jurisdictional facts mentioned above did in fact co-exist, the court held that it was indeed empowered to exercise a discretion in terms of section 85 (para 24).

It was argued on behalf of the defendant that in the event of a referral in terms of section 85(a), the court does not have to make a determination of over-indebtedness, but only needs to refer the matter to a debt counsellor who would report back to the court with a determination and recommendation for the restructuring of the consumer's debt obligations. The court will thus only be able to exercise its discretion informatively when it receives such determination and recommendation from the debt counsellor. Accordingly, it was argued that the consumer is not required to make allegations of fact relating to his alleged over-indebtedness. However, Eksteen J rejected this argument as he was of the view that it failed to appreciate the nature of the summary judgment proceedings (para 25).

Eksteen J conceded that the court need not, at this stage, make a determination of over-indebtedness (para 26). Regarding the approach of the court in exercising its discretion in summary judgment proceedings, Eksteen J referred to the observation of Colman J in *Breitenbach v Fiat SA (Edms) Bpk* 1976 2 SA 226 (T) 229 that the court has to exercise a discretion which

> "is not to be exercised capriciously, so as to deprive a plaintiff of summary judgment when he ought to have that relief . . . The discretion should not be exercised against a plaintiff on the basis of mere conjecture or speculation. It should be exercised on the basis of material before the Court".

Eksteen J stated that the above comments find equal application where a defendant requests a court to exercise its discretion under section 85 (para 27). With reference to the decision of Erasmus J in *Olivier* (para 20), Eksteen J held that the defendant must set out sufficient facts to enable the court to exercise the discretion conferred upon it, and to satisfy itself that the application for referral is *bona fide* and not made as a delaying tactic (para 28). With reference to section 79 of the NCA, which contains the definition of "over-indebtedness" (see para 29), Eksteen J explained the standard required from the defendant as follows (para 30):

> "In order to enable the court to assess the *bona fides* of the defendant and to determine, *prima facie*, whether or not the appeal on section 85 is a mere delaying tactic, it is required of a defendant to take the Court into his confidence and set out

> sufficient information to enable the Court to assess whether there is a reasonable prospect that he may be found to be over-indebted, including the extent of his financial means and commitments. He should set out sufficient particularity of his current liabilities and must take the Court into his confidence in respect of his financial means, including his current earnings and investments, and his monthly living expenses. He should set out particulars of his financial prospects in the foreseeable future so as to enable the Court to determine whether there is a reasonable prospect that he will be able to rehabilitate his affairs within a reasonable period. This may require him to deal with the circumstances which gave rise to his default and the extent of the change which has since occurred, if any, in his financial affairs."

Eksteen J was of the view that the defendant had fallen dismally short of the required standard. As regards the circumstances which gave rise to his default and over-indebtedness, the defendant explained that his employer experienced financial difficulties and that he was not paid timeously or correctly (para 31). In this regard, the court stated (para 32):

> "This explanation is extremely coy. He does not tell the Court what he was entitled to under his contract of employment nor what the extent of his employer's default was. He does not give any indication of the extent of the delay in payments nor of the obligations which he was required to meet at the time. He does not tell us what assets or investments he had which he could have utilised to meet these obligations nor why, if such assets existed, he did not realise them to settle his debt. In all he had not taken the Court into his confidence as to the particulars of the history which gave rise to his default."

As regards the extent of change which occurred since his default, the defendant stated that he had managed to acquire a position with a neurological firm as an operation and marketing manager (para 33). However, Eksteen J was of the opinion that this information was of no assistance as the defendant did not explain how his present earnings compared to what he previously earned (para 34).

The defendant further declared that he had always been aware of debt counselling and his right to approach a debt counsellor. He stated that he had been unaware that a consumer was obliged to approach a debt counsellor before receiving the section 129(1)(a) notice. He stated that he had always been under the impression that the notice was merely a demand and that a consumer could consult a debt counsellor after receiving the notice (para 35). Eksteen J criticised the defendant as follows (para 36):

> "What the defendant fails to explain is why he did not approach a debt counsellor at the time of his default and why he chose to sit back and wait for a 'demand' before seeking any re-arrangement in his affairs. He acknowledges that he did not, in response to the section 129(1)(a) notice, approach the plaintiff with a proposal to reschedule his debt."

As regards the evidence pertaining to the defendant's ability to repay the debt and the potential for success of debt rescheduling, the defendant stated that he was committed to a repayment of 80% of his original bond repayment, which according to the Debt Counselling Rules System would serve as a viable proposal under the debt review. The defendant further stated that an annual escalation of 8% of the repayment would also be possible (para 37). However, Eksteen J was of the view that this was not a firm proposal, as it was subject to his debt counsellor's final proposal and the proposed annual escalation of 8% was offered as a mere "possibility". The court furthermore found that there was no particularity to enable the court to assess whether there was a prospect that he could afford

to make the proposed payment or of the potential for success of debt counselling in general (para 38).

Eksteen J finally regarded the information placed before the court to be insufficient to satisfy the court of the *bona fides* of the defendant and, as a result, the court was not convinced that the application for relief in terms of section 85 was not merely a delaying tactic. The court thus declined to exercise its discretion in favour of the defendant and held that the plaintiff was entitled to judgment (para 39).

The plaintiff also sought an order declaring the immovable property to be executable (para 40). In the summons the defendant's attention was drawn to section 26(1) of the Constitution of the Republic of South Africa, 1996 which accords everyone the right to have access to adequate housing. In addition, the defendant's attention was also drawn to section 26(3) and the provisions of rule 46(1)(a)(ii) of the High Court Rules in terms of which a person may not be evicted from his or her home, or his or her home may not be sold in execution unless the court has ordered execution after consideration of all relevant circumstances. The defendant was also invited to place facts and submissions before the court to enable the court to consider them in terms of rule 46(1)(a)(ii), but this invitation was not taken up by the defendant in his affidavit (paras 41–42). However, in his supplementary affidavit the defendant stated as follows (para 42):

> "If the property is sold in execution it will have an impact on my access to adequate housing. It is virtually impossible in the present financial environment to obtain a mortgage bond and I do not have the resources to place a deposit or offer security. In order for me to rent a house for my family (wife and 2 minor children) and myself, the estate agents would require a credit bureax [*sic*] check and I will not qualify for rental."

Eksteen J pointed out that the defendant did not place any information before the court regarding the original purchase price, the current value of the home and the economic standing of the suburb in which it was situated. The court was also not informed of its size or the facilities which it offered. Eksteen J accordingly found that he was unable to judge the standard of the housing which was in issue. The court furthermore pointed out that the allegations in the plaintiff's particulars of claim that the defendant concluded the credit agreement in order to acquire or to improve the property were not disputed. Referring to *Standard Bank of South Africa Ltd v Saunderson* 2006 2 SA 264 (SCA), Eksteen J thus held that the defendant did not show that an infringement of his right to "adequate housing" as opposed to housing *per se*, would occur (paras 44–49).

Eksteen J was also referred to the Constitutional Court decision in *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) where Mokgoro J said (para 59):

> "The balancing should not be seen as an all or nothing process. It should not be that the execution is either granted or the creditor does not recover the money owed. Every effort should be made to find creative alternatives which allow for debt recovery but which use execution only as a last resort."

Eksteen J stated that those comments were, in his view, correct. The court also pointed out that the Supreme Court of Appeal in *Saunderson* "recognised . . . that it was more easily possible to contemplate a court delaying execution where there was a real prospect that the debt might yet be paid". Eksteen J had no doubt that section 85 of the NCA indeed provides such a mechanism. However, the court finally held that the relevant circumstances in *Govender*, namely, the paucity of information which was placed before the court and the court's resultant decision not to exercise its discretion in the defendant's favour, justified an order declaring the property executable (para 51).

3 Relevant issues

The issues in *Govender* which are relevant for purposes of this discussion are as follows:

(a) What the purposes of the NCA entail and how it should influence the interpretation of section 85.

(b) To what extent the consumer may in enforcement proceedings still rely on the protection provided for by the debt review process in terms of section 86 where a section 129 notice has already been delivered and further to this, the extent to which the failure of the consumer to approach a debt counsellor before debt enforcement may be a factor that could influence the court in exercising its discretion under section 85.

(c) What the discretion of the court in terms of section 85 entails.

(d) How the fact that the credit provider invoked his remedy of summary judgment impacts on the consumer's application in terms of section 85 and what should be regarded as sufficient information to be placed before the court in order to convince the court to exercise its discretion in favour of the consumer.

(e) The application of section 26 of the Constitution to the facts *in casu* and the interplay between this provision and section 85.

4 Discussion and analysis

4 1 Section 85 and the purposes of the NCA

Section 85 clearly gives expression to the objective of consumer protection and the legislature's intention to allow the consumer the opportunity to access the debt review process even after debt enforcement proceedings has commenced (Van Heerden "Section 85 of the National Credit Act 34 of 2005: Thoughts on its scope and nature" 2013 *De Jure* 968 997). In *Govender* (paras 21–22), Eksteen J referred to the importance of balancing the competing interests of the consumer and the credit provider when interpreting the NCA's provisions and it appears that the court favoured an interpretation directed at an equal consideration of the interests of both the consumer and the credit provider. Eksteen J referred to the decision in *Hales* (para 13) where Gorven J rejected the submission on behalf of the consumers that "the sole, or at least chief, purpose of the NCA is to provide protection for consumers". Gorven J was of the view that no prioritisation is provided for and whilst consumer protection is a clear object, it is but one factor in the purposes of the NCA.

Section 2(1) of the NCA provides that its provisions must be interpreted in a manner that gives effect to the purposes set out in section 3 and section 85 must therefore, clearly be interpreted in light of these purposes. However, in order to ascertain the intention of the legislator, section 3 should be considered and interpreted as a whole. Section 3 states that the purposes of the NCA are

> "to promote and advance the social and economic welfare of South Africans, to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by –
>
> (a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;

(b) ensuring consistent treatment of different credit products and different credit providers;
(c) promoting responsibility in the credit market by –
  (i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and
  (ii) discouraging reckless credit granting by credit providers and contractual default by consumers;
(d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
(e) addressing and correcting imbalances in negotiating power between consumers and credit providers by –
  (i) providing consumers with education about credit and consumer rights;
  (ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; and
  (iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;
(f) improving consumer credit information and reporting and regulation of credit bureaux;
(g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction of all responsible financial obligations;
(h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and
(i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements".

When considering section 3 as a whole it should be evident that the purposes of the NCA are mainly directed at the protection of the consumer (see the observation of the Constitutional Court in *Sebola* para 40 that "[t]he main objective is to protect consumers" and see also *Rossouw v FirstRand Bank Ltd* 2010 6 SA 439 (SCA) para 17). Moreover, when considering the general structure of the NCA it is apparent that the NCA's core objective is the protection and promotion of consumers' interests (see *Standard Bank of South Africa Ltd v Kruger*; *Standard Bank of South Africa Ltd v Pretorius* unreported GSJ case nos 45438/2009 and 39057/2009 para 11) and as observed by Naidu AJ in *Absa Bank Ltd v Prochaska* 2009 2 SA 512 (D) para 21, "[i]t is abundantly clear . . . that the Act has introduced innovative mechanisms and concepts directed more at the protection and in the interests of credit consumers than of credit providers".

The NCA strives to balance the inequalities arising from the unequal bargaining power between large credit providers on the one hand and consumers on the other hand (see s 3(e)). This is clearly an attempt to make a clean break from the creditor-orientated past when consumer credit legislation made no mentionable provision for consumers' rights to protection and debt relief (cf *Sebola* para 38; *Firstrand Bank Ltd v Maleke* 2010 1 SA 143 (GSJ) para 3; *Absa Bank Ltd v Myburgh* 2009 3 SA 340 (T) para 23; *Prochaska* para 15; and see also Otto and Otto *The National Credit Act explained* (2013) para 2 3 and Kelly-Louw "The prevention and alleviation of consumer over-indebtedness" 2008 *SA Merc LJ* 200 204–205). Thus, although it is true that the NCA aims to safeguard the interests of credit providers by, *inter alia*, "balancing the respective rights and responsibilities of credit providers and consumers" (s 3(d)) and by promoting the "principle of satisfaction by the consumer of all responsible financial obligations" (s 3(g) and (i)) our courts should obviously not revert to the pro-creditor

past by over-protecting and over-emphasising the rights and interests of credit providers. As indicated by Cameron J in *Sebola* para 40, the interests of credit providers should definitely not be overlooked when interpreting the NCA's provisions. However, it is submitted that the core objective of the NCA to protect and assist the consumer in obtaining debt relief should be the point of departure and main issue to be considered when interpreting section 85 and the discretion it affords to our courts.

4 2 Protection in terms of section 86 and failure to approach debt counsellor

Section 86(2) of the NCA provides that an application for debt review in terms of section 86

> "may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of the application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement".

Several commentators are of the view that the legislator's reference to section 129 in section 86(2) is a reference to the commencement of legal proceedings mentioned in section 129(1)(b) to enforce an obligation arising from a credit agreement. Accordingly it is suggested that a consumer cannot be precluded from applying for debt review in respect of a specific credit agreement after receipt of a section 129(1)(a) notice (see, eg, Boraine and Renke "Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005 Part 2" 2008 *De Jure* 1 9; Otto "Die oorbelaste skuldverbruiker: Die Nasionale Kredietwet verleen geensins onbeperkte vrydom van skulde nie" 2010 *TSAR* 399 405). However, as indicated by Eksteen J in *Govender*, subsequent to the decision of the Supreme Court of Appeal in *Nedbank* the section 86 procedure can only be accessed in respect of a specific credit agreement if the credit provider has not yet delivered the section 129(1)(a) notice. The Supreme Court of Appeal held that delivery of a section 129(1)(a) notice in respect of a specific credit agreement bars a section 86(1) debt review in respect of such an agreement. The current position is thus that a consumer no longer enjoys the protection of section 86 in respect of a specific credit agreement once a section 129(1)(a) notice has been delivered in respect of that credit agreement.

It should thus be clear that a consumer's failure to apply for debt review *subsequent* to a section 129(1)(a) notice, but prior to enforcement can no longer negatively affect his or her application under section 85 (see, eg, *Olivier* para 16 and *Standard Bank of South Africa Ltd v Panayiotts* para 28 which was decided a few years before the Supreme Court of Appeal's decision in *Nedbank* where the court was of the view that such failure may influence the court to exercise its discretion under s 85 against the consumer). However, from the decision in *Govender* it appears that the consumer is expected to provide an explanation as to why he or she did not, after receiving the section 129(1)(a) notice, avail him- or herself of the opportunity to approach the debt counsellor for the purposes provided for in section 129(1)(a). It should be noted that, since the decision of the Supreme Court of Appeal in *Nedbank*, the debt counsellor may only be approached for the limited purposes set out in section 129(1)(a) when a section 129 notice has been delivered to the consumer. Beshe J's decision in *Absa Bank Ltd v Noqayi* [2014] JOL 32468 (ECP) para 10, namely, that the consumer's failure to approach the debt counsellor for purposes of debt review is an important factor in convincing the court to exercise its discretion against the consumer, is therefore

clearly incorrect (see also Van Heerden in Scholtz *et al Guide to the National Credit Act* (2014) para 11 3 3 5 fn 400). The reasons for requiring the consumer to approach the debt counsellor are thus not to access the voluntary debt review process under section 86, but clearly to attempt to negotiate a solution for the consumer's debt problems rather than having to resort to the expensive procedure of applying to the High Court for relief.

It is submitted that the court's stringent approach in *Govender* as regards the consumer's duty to approach a debt counsellor is not in keeping with the core objective of the NCA to protect and promote consumers' interests. Eksteen J regarded the consumer's reference to the debt counsellor for a section 86(1) debt review as a "nullity" which could have "no impact" on the proceedings (para 15). The court thus disregarded the consumer's effort to approach a debt counsellor because he consulted the debt counsellor for the incorrect purposes (namely, a section 86(1) debt review). However, the court also disregarded the consumer's explanation that he was unaware that he had to approach a debt counsellor for a section 86(1) debt review before the section 129(1)(a) notice, but regarded the consumer's failure to explain why he did not approach the debt counsellor for a section 86(1) debt review already at the time of his default (and thus, before delivery of the section 129(1)(a) notice) as a significant factor in its eventual decision to decline to exercise its discretion in terms of section 85 in favour of the consumer (paras 35–36). Moreover, the failure of the consumer to approach the credit provider with a proposal for debt re-arrangement was also seen in a negative light (see *Govender* para 36).

It should be noted that the current position as regards the interaction between sections 86(2) and 129(1)(a), has changed after the coming into operation of the National Credit Amendment Act 19 of 2014 (NCAA on 13 March 2015) (see Van Heerden in Scholtz *et al* para 11.3.3.1). Section 26(a) of the NCAA amends section 86(2) to read as follows:

> "An application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 130 to enforce that agreement."

The effect of the amendment will therefore be that delivery of a section 129(1)(a) notice as in *Govender*, will no longer be a bar to an application for debt review in terms of section 86(1) and thus, the opportunity to obtain the debt relief provided for by the NCA. However, a consumer who has not applied voluntarily for debt review in terms of section 86 before enforcement proceedings have commenced, will be required to explain his or her failure to approach a debt counsellor for debt review when requesting the court to exercise its discretion in terms of section 85 in his or her favour (see Van Heerden in Scholtz *et al* para 11 3 3 5 fn 400).

4 3 Discretion in terms of section 85

Section 85 clearly confers a discretion on the court to make any of the orders provided for in this section. However, section 85 does not provide any indication on how this discretion should be exercised or which factors should be considered in exercising the discretion (see Van Heerden and Lötz "Over-indebtedness and discretion of court to refer to debt counsellor *Standard Bank Ltd v Hales* 2009 3 SA 315 (D)" 2010 *THRHR* 502 511). As indicated by Eksteen J in *Govender* (para 23), it merely provides that the pre-requisites for the discretion to arise are, firstly, that an allegation of over-indebtedness must be made, and secondly, that it should be made in any court proceedings in which a credit agreement is being considered.

In *Govender* para 21 Eksteen J endorsed the general viewpoint of our courts that the discretion must be exercised judicially with due regard to the objectives of the NCA and that it entails a general discretion which does not oblige the court to exercise the discretion simply on the basis of an allegation of over-indebtedness. In *Hales* Gorven J held (para 13) that section 85 confers such a general discretion upon the court even where the over-indebtedness of the consumer was an established fact. In *BMW Financial Services (SA) (Pty) Ltd v Donkin* 2009 6 SA 63 (KZD) para 20 fn 9, Wallis J expressed a reservation as to whether there is a general discretion or whether section 85 confers a "power combined with a duty" on the court to exercise the power if the consumer is indeed over-indebted. After further consideration (in *BMW Financial Services (SA) (Pty) Ltd Mudaly* 2010 5 SA 618 (KZD) para 36) Wallis J indicated that he was of the view that his earlier reservation was misplaced. Since a rearrangement of the consumer's obligations is in terms of the provisions of the NCA (*inter alia* s 87(1)(a)) not a necessary outcome of over-indebtedness, Wallis J was of the opinion that a court, when seized of a case of over-indebtedness under section 85, must similarly be entitled to refuse any order. Wallis J's initial reservation as regards the nature of the courts' discretion under section 85 arose from the following statement in *Schwartz v Schwartz* 1984 4 SA 467 (A) 473, where Corbett JA explained this "power combined with a duty" as follows:

> "A statutory enactment conferring a power in permissive language may nevertheless have to be construed as making it the duty of the person or authority in whom the power is reposed to exercise that power when the conditions prescribed as justifying its exercise have been satisfied. Whether an enactment should be so construed depends on, *inter alia*, the language in which it is couched, the context in which it appears, *the general scope and object of the legislation*, the nature of the thing empowered to be done and the person or persons for whose benefit the power is to be exercised" (emphasis added).

In light of the apparent core objective of section 85 and the NCA in general to protect consumers and to assist them to rehabilitate their affairs, it may be argued that the nature of the discretion afforded to the court under section 85 should indeed be construed to involve a "power combined with a duty" (see the observations of Corbett JA emphasised above). Due to this core objective it could be argued further that the court, in the absence of special circumstances, would ordinarily be bound to exercise its discretion in favour of the consumer where the pre-requisites for the arising of the discretion are satisfied (cf *Firstrand Bank v Evans* 2011 4 SA 597 (KZD) para 27 as regards the court's discretion in compulsory sequestration applications). Special circumstances that would justify the court to decline to exercise its discretion in favour of the consumer would, it is submitted, for example be clear indications of the *mala fides* of the consumer, for instance where the consumer has been irresponsible and reckless in taking up credit (cf s 3(c)(i) of the NCA) or where it is glaringly obvious that debt rearrangement would not provide a workable solution for the consumer's debt problems (see, eg, the facts in *Mudaly* para 37ff).

As regards the orders the court may make in terms of section 85, the NCA provides for two possible options. In terms of section 85(a), the court may decide to allow the consumer the opportunity of accessing the debt review process and eventually obtaining a restructuring order in terms of section 87 by referring the matter to a debt counsellor for evaluation of the consumer's circumstances and a recommendation under section 86(7). In this instance, it would appear that the legislator intended that the court should be given the discretion to leave the

matter in the hands of the debt counsellor who would obviously be in a better position to evaluate the consumer's financial situation and to eventually make a recommendation to the court as regards the consumer's over-indebtedness and a possible rearrangement of the consumer's obligations. The court thus does not have to make a final decision as regards the over-indebtedness of the consumer or the possible rearrangement of the consumer's debt obligations. Upon receipt of such determination and recommendation the court will thus be able to exercise its discretion informatively (cf Kreuser "The application of section 85 of the National Credit Act in an application for summary judgement" 2012 *De Jure* 1 10). Section 85(b), on the other hand, empowers the court to declare that the consumer is over-indebted and to allow the consumer the opportunity to access the debt review process without referring the matter to a debt counsellor. It would appear that the legislator's intention was that the court should be empowered to make the orders under section 85(b) when there is sufficient and detailed information before the court to enable it to make a final decision as regards the consumer's over-indebtedness and the feasibility of debt rearrangement as a solution to the consumer's debt problems, while section 85(a) should be applicable when there is insufficient information before the court as regards the consumer's financial situation and uncertainty as to whether the consumer is over-indebted or not. It would furthermore appear that the legislator's intention in section 85(a) was to assist the court in its investigation as to the prospect of debt review being a feasible option to protect the consumer and to cure his or her debt problems (cf Kreuser 10).

The upshot of the above interpretation is thus that it is not expected of the consumer to provide the court with detailed and comprehensive information as regards his or her over-indebtedness, financial affairs or the feasibility of debt restructuring, as it is clearly not expected from the court, at this stage, to make any final decision as regards these issues. This construction of section 85(a) and (b) accords with the argument advocated on behalf of the consumer in *Govender* (see para 25) but was rejected by Eksteen J as the court was of the view that it failed to appreciate the nature of the proceedings, namely, summary judgment proceedings. The question thus arises as to how the invocation of its remedy of summary judgment by the credit provider impacts on the consumer's application in terms of section 85 (see Van Heerden in Scholtz *et al* para 12.16).

4 4 Section 85, summary judgment and sufficient information

Summary judgment is a remedy which is available to a plaintiff where the defendant has delivered a notice of intention to defend, but the plaintiff is of the opinion that there is no *bona fide* defence to the action and that the notice of intention to defend has been delivered solely for the purposes of delay (High Court rule 32(1) and (2)). A defendant against whom a summary judgment application is brought may respond to the application by *inter alia* satisfying the court by affidavit that he or she has a *bona fide* defence to the action. The affidavit must further disclose fully the nature and grounds of the defence and the material facts relied upon (rule 32(3)(b)). Nonetheless, in terms of sub-rule (5) the court *may* enter summary judgment for the plaintiff if the defendant did not satisfy the court as provided for in rule 32(3)(b). Thus, even if the defendant's affidavit did not measure up fully to the requirements of the sub-rule, the court may still refuse to grant summary judgment if it thinks fit (see *Breitenbach* 229; Van Loggerenberg *Erasmus Superior court practice* (1994ff) B1-229 and authorities cited).

The fact that the defendant is required to "satisfy" the court of his defence and to set out "fully" the nature and grounds of the defence, have apparently moved our courts, in applications in terms of section 85, to require the consumer to place detailed and comprehensive information before the court as regards the consumer's alleged over-indebtedness and financial affairs (see *Hales* para 22 and Otto 2010 *TSAR* 407). According to case law, the main consideration is that the consumer should satisfy the court that debt rearrangement would indeed provide a feasible solution for his or her debt situation and eventually lead to a full satisfaction of all debt obligations owed to the credit provider (*Hales* para 22 and see Van Heerden 2013 *De Jure* 968 990). The consumer is also required to satisfy the court that he or she is indeed over-indebted (*Panayiotts* para 55; *Mudaly* para 26). The consumer must also give a sufficient explanation of how his default arose, whether or not he or she approached the debt counsellor and/or credit provider with proposals to repay his or her debt, and if not, give a satisfactory explanation for this failure (see the discussion in para 4 2 above). The consumer must, furthermore, provide a detailed exposition of his or her financial affairs and prospects (*Hales* para 23; *Andrews v Nedbank* 2012 3 SA 82 (ECG) para 18).

In *Govender*, Eksteen J indicated that the requirements of High Court rule 32 apply when a consumer requests the court in terms of section 85 to exercise its discretion in his or her favour (para 27). The court required the consumer to set out comprehensive particularity as regards his alleged over-indebtedness and financial affairs and prospects (see paras 31–38). Such detailed information would, according to the court, constitute "sufficient" information to satisfy the court that the application in terms of section 85 is *bona fide* and not made as a delaying tactic (paras 29–30).

However, it should be noted that "satisfy" in rule 32(3)(b) does not mean "prove" (cf Van Loggerenberg B1-221) and it is thus not incumbent on the defendant in a summary judgment application to formulate his opposition with the precision that would be required of a plea (cf *Maharaj v Barclays National Bank Ltd* 1976 1 SA 418 (A) 425ff; Van Heerden and Roestoff "Over-indebtedness under the National Credit Act as a *bona fide* defence to summary judgment" 2014 *THRHR* 276 278–279). In this regard, the following observation of Colman J in *Breitenbach* 228 in respect of the wording of rule 32(3)(b) is relevant:

> "It must be accepted that the sub-rule was not intended to demand the impossible. It cannot, therefore be given its literal meaning when it requires the defendant to satisfy the Court of the *bona fides* of his defence. It will suffice, it seems to me, if the defendant swears to a *defence, valid in law, in a manner which is not inherently and seriously unconvincing*.
>
> Another provision of the sub-rule which causes difficulty, is the requirement that in the defendant's affidavit the nature and grounds of his defence, and the material facts relied upon therefor, are to be disclosed 'fully'. A literal reading of that requirement would impose upon a defendant the duty of setting out in his affidavit the full details of all the evidence which he proposes to rely upon in resisting the plaintiff's claim at the trial. It is inconceivable, however, that the draftsman of the Rule intended to place that burden upon a defendant. I respectfully agree . . . that *the word 'fully' should not be given its literal meaning*" (emphasis added).

As regards the basis on which the court is supposed to approach the exercise of its discretion under section 85(a), Gorven J in *Hales* paras 10–12 held that there

is no onus on the consumer to discharge when he or she seeks an order in terms of section 85(a). In *Collett v Firstrand Bank Ltd* 2011 4 SA 508 (SCA) para 18 the Supreme Court of Appeal held that over-indebtedness in itself is not a defence on the merits in respect of a claim for payment of money. The consumer, therefore, does not raise a defence to the credit provider's application for summary judgment, but meets the application with a request to refer the matter to a debt counsellor in terms of section 85(a) on the basis of the consumer's over-indebtedness (*Olivier* para 20) and it is therefore, at most, a dilatory plea.

Although the provisions of rule 32 cannot be disregarded completely when an application under section 85 is raised in the context of summary judgment proceedings (see *Panayiotts* para 53), I am not convinced that it was the intention of the legislator to penalise consumers who do not provide the court with the detailed information which case law currently requires from them. If the legislator intended that the consumer should be required to provide detailed and comprehensive information regarding his financial affairs and prospects, the provision in terms of section 85(a) would be superfluous as the court would then be able to exercise its discretion under section 85(b) (see also Kreuser 19). As regards the issue of what is to be regarded as "sufficient information", it is thus submitted that the consumer should place as much relevant information as possible in a manner which is not "inherently and seriously unconvincing" before the court in order to satisfy the court as to his or her *bona fides*. The consumer should not be required to provide full details of all information that would be essential to enable the debt counsellor to assess the consumer's financial situation and the feasibility of debt restructuring (see Colman J's observations in *Breitenbach* 228 quoted above). The consumer should also not be required to actually prove his or her over-indebtedness as this is also an issue which would be addressed by the debt counsellor when he conducts the evaluation of the consumer's financial affairs. It is submitted that such an interpretation of section 85 would be in line with the core objective of section 3 and the NCA to protect and assist the over-burdened consumer to obtain the debt relief provided for by the NCA.

As explained by the court in *Standard Bank of South Africa Ltd v Kallides* unreported WCC case no 1061/2012 para 7, it was obviously not the intention of the legislator that consumers should be allowed to utilise the procedures provided for in the NCA to unreasonably delay or thwart the right of credit providers to enforce their contractual rights. However, it is also true that credit providers' interests should not be unreasonably preferred by a downright refusal of an order in terms of section 85 when there is the slightest doubt regarding the consumer's over-indebtedness and the feasibility of debt review as a solution for the consumer's over-indebtedness. Therefore, unless there are definite indications of *mala fides* on the side of the consumer, it is submitted that the court should give the consumer the benefit of the doubt and exercise its discretion in favour of the consumer to refer the matter to a debt counsellor who would be in a better position to conduct a proper and comprehensive investigation into the feasibility of debt review as a measure to address and resolve the consumer's over-indebtedness. As pointed out by Kreuser (16), the NCA provides the debt counsellor with certain mechanisms to enable him or her to do a proper over-indebtedness assessment. It is not only the consumer's income and debt obligations that are considered as the debt counsellor is also supposed to assist the consumer in creating a feasible budget by, *inter alia*, excluding unnecessary luxury expenses (see reg 24(7)(c) of the regulations made in terms of the National Credit Act *GG* 28864 of 31 May 2006); and see Roestoff *et al* "The debt

counselling process – Closing the loopholes in the National Credit Act 34 of 2005" 2009 *PER* 247 as to what the debt review process entails in practice). The debt counsellor is thus clearly in a better position to make a decision as regards the consumer's potential to eventually pay back all his or her debt. Kreuser (16) explains as follows:

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

In *Govender* there were no apparent indications of the consumer being *mala fide* in his application for relief under section 85. As regards the circumstances which gave rise to his default, there were no indications of him incurring unnecessary debt recklessly. The facts indicate that the consumer had a source of income and the fact that he consulted a debt counsellor after the section 129(1)(a) notice (albeit for the incorrect purpose), points towards his *bona fides* and intent to find a solution for his debt problems. Moreover, there were also no glaringly obvious indications that debt restructuring would not provide a feasible solution or that the credit provider would not eventually receive full payment under the credit agreement. A referral to a debt counsellor in terms of section 85(a) would furthermore, not mean that the credit provider would be deprived of his right to full payment (Kreuser 20) and the credit provider's interests in this regard would be further protected by an order that the summary judgment proceedings be postponed and that the debt counsellor should make his recommendation to the court on a specific date (cf Van Heerden and Roestoff 281).

4 5 Section 85 and section 26 of the Constitution

The submissions made to the court in *Govender* regarding the circumstances which may impact on section 26 of the Constitution indicate, it is submitted, that a sale in execution of the consumer's home would indeed have rendered him and his family homeless. The consumer submitted that the current financial environment and his dismal financial situation would not have allowed him to rent or to purchase a new house (para 42). Despite the uncertainty regarding the standard of housing, which was the court's main consideration in finding that the consumer has not shown an infringement of his right to adequate housing (para 49), it thus appears that the consumer would not have had the means of obtaining alternative adequate housing and his section 26 right therefore appears to have been infringed (cf Van Heerden and Lötz 515 and 516).

In *Jaftha* para 55, Mokgoro J concluded that judicial oversight prior to execution is essential to prevent unjustified execution against the homes of people. In this regard, she referred to several factors that would be relevant to the exercise of judicial oversight (paras 56–60). Mokgoro J stated, *inter alia*:

> "If there are *other reasonable ways in which the debt can be paid* an order permitting a sale in execution will ordinarily be undesirable. If the requirements of the Rules have been complied with and if there is *no other reasonable way by*

> *which the debt may be satisfied*, an order authorising the sale in execution may ordinarily be appropriate *unless the ordering of that sale in the circumstances of the case would be grossly disproportionate*. This would be so if the interests of the judgment creditor in obtaining payment are significantly less than the interests of the judgment debtor in security of tenure in his or her home, *particularly if the sale of the home is likely to render the judgment debtor and his or her family completely homeless*" (para 56, emphasis added; see also para 59).

Eksteen J found that section 85 did indeed constitute such "other reasonable ways" by which the "debt may be satisfied" (see para 51). However, he pointed out that he had already (before considering the application of section 26 of the Constitution) come to the conclusion that he was unable to exercise his discretion in terms of section 85(a) in favour of the consumer as the consumer failed to provide sufficient information regarding his financial affairs and the potential of success of debt restructuring. According to the court, these circumstances therefore justified an order declaring the property executable. In light of the fact that one of the clear purposes of the NCA is "to afford a debtor a reasonable opportunity to discharge a debt on terms that may be less onerous than may otherwise be the case" and the decision in *Jaftha* indicating "a wariness about persons losing their homes", it is submitted that it would have been an appropriate exercise of the court's discretion in *Govender* not to make an order declaring the property in question executable (see the observations of Willis J in *Firstrand Bank Ltd v Seyffert* 2010 6 SA 429 (GSJ) para 17). However, I believe that the possible infringement of the consumer's section 26 right and the fact that section 85 provides an alternative mechanism for debt recovery are factors which should have been considered already at the stage when the court was requested to exercise its discretion in terms of section 85 (*contra* Van Heerden and Lötz 516). On this basis, the court could have exercised its discretion in favour of the consumer to postpone summary judgment and to refer the matter to a debt counsellor.

In *Jaftha*, Mokgoro J indicated that a consideration of the legitimacy of a sale in execution must be seen as a balancing process (para 42). She explained as follows: "There will be many instances where execution will be unjustifiable because the advantage that attaches to a creditor who seeks execution will be far outweighed by the immense prejudice and hardship caused to the debtor" (para 43).

It is submitted that the importance of balancing the rights and interests of the individual parties was not properly considered by the court in *Govender*. The ordering of execution in *Govender* may, in the words of Mokgoro J, indeed be regarded as "grossly disproportionate". As explained earlier (para 4 4 above), a referral to a debt counsellor in terms of section 85(a) would not deprive the credit provider of his right to full payment. In *Govender*, the refusal to exercise the discretion in terms of section 85(a) in favour of the consumer and the subsequent ordering of execution have resulted in the consumer and his family losing their home, while the exercise of the discretion in favour of the consumer could possibly have resulted in a satisfactory solution whereby the credit provider could have ultimately received full payment of the outstanding balance and the consumer could have retained his home.

5 Conclusion

From the above discussion of *Govender* and other case law it should be clear that our courts are not willing to exercise their discretion in terms of section 85(a) in favour of the consumer, unless comprehensive evidence is provided to satisfy the court that debt restructuring in terms of the NCA would indeed provide a feasible

solution to the consumer's problems and ultimately, full satisfaction of all debt obligations owed to the credit provider. Our courts' unwillingness in this regard probably reflects the general view that the debt review process is ineffective in practice. The process of debt review has frequently been regarded as ineffective in providing adequate debt relief to over-indebted consumers, in particular because it requires full satisfaction of all debt obligations and does not, in contrast with most foreign consumer insolvency systems' income restructuring measures, provide for any discharge of debt obligations. Several commentators have thus called for the urgent reform of the South African consumer insolvency system in this regard (see Boraine and Roestoff 353–354 and sources cited in fn 17).

Nonetheless, it is submitted that our courts' present creditor-orientated approach regarding the interpretation of section 85 is not in line with the core objective of the NCA to protect and promote consumers' interests. The consumer should not unreasonably be deprived of his or her opportunity under section 85 to obtain debt relief and, as pointed out by Kreuser (21): "The court must ensure that, in applying their discretion, they are not biased, unreasonable or over-cautious. Each case must be assessed on it [*sic*] merits and, as far as possible and reasonable, be decided in favour of the consumer."

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