NATIONAL CREDIT REGULATOR VERSUS NEDBANK LTD AND THE PRACTICE OF DEBT COUNSELLING IN SOUTH AFRICA

ISSN 1727-3781

2010 VOLUME 13 No 2

NATIONAL CREDIT REGULATOR VERSUS NEDBANK LTD AND THE PRACTICE OF DEBT COUNSELLING IN SOUTH AFRICA

DW de Villiers*

1 Introduction

The National Credit Regulator[1] approached the then Transvaal Provincial Division of the High Court (TPD) in 2008 by way of a notice of motion. The Regulator prayed in terms of Section 16(1)(b) of the *National Credit Act*[2] for the proper interpretation of certain sections of the same Act. Those sections related mainly to the practice of debt review, and more particularly the role of a magistrate when hearing a proposal referred to the Magistrate's Court by a debt counsellor.[3]

The implementation of debt review mechanisms provided for in Sections 86 and 87 of the NCA led to conflicting views, as expressed by debt counsellors, the Regulator, the major banks and magistrates. Uncertainty and confusion with regard to the proper interpretation of these two sections of the NCA followed.[4] Contradictory decisions given by magistrates also hindered the effective application of the NCA as regards debt restructuring.[5] It was even possible that there were serious shortcomings in the NCA itself, which should be addressed by appropriate amendments of the Act.[6]

The Regulator therefore lodged an application to obtain clarity on some of the difficulties that debt counsellors experience in practice.[7] The matter was heard in the

* Dawid de Villiers MA (Stell) LLB DTh (UNISA) MCom (Pret). Attorney and debt counsellor, University of Pretoria Law Clinic, University of Pretoria.

1 Established under section 12 of the National Credit Act, 34 of 2005.

2 34 of 2005 (hereafter NCA).

3 Applicant's heads of argument to the National Credit Regulator's application for a declaratory order in terms of S 16 of the NCA, *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP) (hereafter Heads) para 2.

4 Heads para 17.

5 Founding affidavit in the notice of motion, *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP) (hereafter Founding affidavit) 7.

6 Founding affidavit 7.

7 *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP) (hereafter Declarator) 299.

TPD on 2 March 2009 and judgment was handed down by Du Plessis J on 21 August 2009.[8]

2 Critical analysis of the declaratory order

The Regulator sought fifteen declaratory orders.[9] The first nine prayers related to the role of a magistrate hearing matters referred to him under Sections 86 and 87 of the NCA and the applicability of the *Magistrate's Courts Act*[10] and its Rules. The tenth to fifteenth prayers dealt with a number of practical issues and other interpretive difficulties that are, strictly speaking, not dependent on a finding regarding the role or power of a magistrate and the applicability of the MCA and its Rules.[11]

This article analyses the prayers and the resulting orders critically in three sections for the sake of expediency, namely:

- those prayers that deal with the NCA and the Magistrate's Court;
- those prayers that deal with the role of the debt counsellor in debt restructuring; and
- those prayers that deal with the application procedure to the Magistrate's Court.

2.1 Sections 86 and 87 of the NCA and the Magistrate's Court

Although these prayers concern mostly civil procedure and do not impact directly on the debt counsellor's business as such, they involve the support structure without which no debt restructuring can be viable.

2.1.1 Procedure after a Section 86(7)(c) finding

Section 86 is silent on the procedure a debt counsellor should follow after he/she has 'issued' a proposal recommending that the Magistrate's Court make orders as

8 Declarator 295.
9 Heads para 30.
10 32 of 1944 (hereafter MCA).
11 Heads para 32.

contemplated in Sections 86(7)(c)(i) and (ii). The applicant submitted that although Section 86(8) does not refer to the procedure to be followed when a recommendation in terms of Section 86(7)(c) is made,[12] Section 86(8)(b) should apply in such a case, and that the debt counsellor should refer the recommendation to the Magistrate's Court for a hearing under Section 87.[13] Order 1 in terms of Prayer 15 was granted, thereby closing a hiatus in the NCA's formulation of Section 86(8):

> On a proper interpretation of section 86(8)(b), it applies in the circumstances contemplated in section 86(7)(c).

The first to sixth respondents submitted that the provisions of Section 86(8)(a) should also apply to cases in which the consumer was found to be over-indebted. The Court points out that a finding of over-indebtedness in terms of Section 86(7)(c) sets in motion a debt re-arrangement process that is not voluntary.[14] Should the parties settle the matter and agree on a re-arrangement plan, nothing prevents them from seeking a consent order. However, for settlement negotiations to take place, Section 86(8)(a) is not explicitly required.

In light of the spirit of the Act that all parties participate in good faith,[15] it is submitted that credit providers' response to debt-restructuring proposals in terms of Section 86(7)(c) should be requested prior to applying to court for an order in terms of Section 87. If the proposal is accepted by the credit providers, a consent order by the Magistrate's Court can be obtained. In Haupt, Roestoff and Erasmus,[16] it is proposed *contra curiam* that Section 86(8)(a) be amended to provide for this option and to clarify any uncertainty in this regard.

Regulation 3 of the Draft Debt Counselling Regulations[17] addresses the same issue pertaining to the procedure when a proposal in terms of Section 86(7)(c) is referred

12 S 86(8) only pertains to a recommendation in terms of Section 86(7)(b), while S 86(9) pertains to the procedure initiated when the debt counsellor rejects the debt review application in terms of S 86(7)(a).
13 Scholtz *et al Guide* para 14–17.
14 Declarator 305.
15 See S 86(4).
16 www.ncr.org.za 95.
17 GN R503 in GG 32229 of 15 May 2009.

to court. Regulation 3 provides that the debt counsellor must lodge the proposal through Form B, which must be filed as soon as it has been delivered to the consumer and credit providers. Such a proposal must be substantiated by a written statement, which must contain the information set out in Sub-regulation 2. The credit providers affected must be informed that they may oppose the proposal by filing a notice[18] through Form C with the clerk of the court and deliver a copy to the debt counsellor.[19]

While the Draft Regulations give more clarity, Roestoff *et al*[20] submit that an amended Section 86(8) should allow for a contested recommendation to be made in terms of Section 86(7)(c) and alternatively a consent order to be obtained, should all credit providers agree to a restructuring proposal in terms of Section 86(7)(c). The new Section 86(8) should add Subsection (7)(c) as an option to Subsection (7)(b).

The above change affects findings made in terms of Sections 86(7)(b) and 86(7)(c). In both cases, it would then be possible to acquire either a consent order or a restructuring order when the proposal is contested.

2.1.2 Judicial or administrative role of the Magistrate's Court

In Prayer 4 of its notice of motion,[21] the Regulator sought an order declaring that in the discharge of his/her duties under Section 87 of the NCA, the relevant magistrate fulfils an administrative role as opposed to a judicial role. Consequently he/she must comply with the provisions of the *Constitution of the Republic of South Africa, 1996*[22] and the *Promotion of Administrative Justice Act*,[23] and must devise appropriate procedures that would facilitate an inexpensive, fair and expeditious hearing in terms of Section 87 of the NCA.[24] The respondents contended on the other hand that a magistrate fulfilled a judicial and not an administrative role.[25]

18 Draft Regulation 3(4) stipulates the required content and the manner in which and when the notice must be delivered.
19 Roestoff *et al* 2009 *PER* 274.
20 Roestoff *et al* 291.
21 Notice of motion 3.
22 Hereafter *Constitution*.
23 3 of 2000.
24 Heads para 42; Scholtz *et al* para 11–28.
25 Heads para 43.

The Court points out that 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.[26] The magistrate must decide whether to accept or reject the debt counsellor's recommendation with respect to the consumer's application. If it is found that the consumer is over-indebted, the magistrate will have to consider whether the consumer's obligations must be re-arranged. With regard to the provisions of Section 86(7)(c)(ii), the magistrate will then also have to consider the manner in which the re-arrangement is to be structured.[27]

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.[28] In most cases, the findings will aim to resolve one or more disputes between two or more parties. The essential elements of a judicial function are resolving disputes and generally making findings based on the application of law to the facts.[29] Accordingly, the Court found that in discharging his/her duties under Section 87 of the Act the relevant magistrate fulfilled a judicial role. Prayer 4 was accordingly dismissed.[30]

In light of other orders granted by the Declarator, this decision makes sense. The applicant's reasons for requesting a more administrative procedure were clear, namely speed, simplicity and costs. However, the Court arguments were also convincing that the function of the magistrate is more judicial in nature and not only administrative. Apparently, there is no precedent for the so-called administrative hearing procedure in the Magistrate's Court, and the statute does not allow the flexibility to 'create' such a *sui generis* process.[31] It is submitted that another body, for example a tribunal, should be used for this purpose. It is common knowledge that the National Consumer Tribunal can also issue consent orders.[32]

26 Declarator 306.
27 Declarator 306.
28 Declarator 306.
29 *Old Mutual Life Assurance Co SA Ltd v Pension Fund Adjudicator* 2007 3 SA 458 (C) para 12.
30 Declarator 306.
31 Declarator 307.
32 NCA S 27(a)(i).

2.1.3 The NCA and the powers of the Magistrate's Court

In Prayer 3 of its notice of motion,[33] the Regulator submits that the magistrate to whom a recommendation has been referred by a debt counsellor derives his/her power from the NCA and not from the MCA.

The Court[34] contended that Prayers 1 and 3 address the same essential issue of the procedure to be followed when a matter is referred to the Magistrate's Court under Sections 86 and 87. The respondents argued that the Rules of the Magistrate's Courts be followed and sought a different declaratory order.[35] The applicant, on the other hand, contended that the MCA and the Rules do not apply. The narrow question that Prayer 3 raises is: from which act does the Magistrate's Court derive its relevant powers?[36]

The proposition can be made that the jurisdiction of the Magistrate's Courts must be deduced from an Act of Parliament. The powers under discussion are derived from the Act. This, according to the Court, is confirmed by Section 29(1) of the MCA, which 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.[37]

However, the conclusion that the powers are partly derived from the NCA does not entitle the applicant to the order it seeks, the Court pointed out. The prayer does not address the dispute between the parties, that is, whether the MCA and the Rules apply to matters referred to the Magistrate's Court under Sections 86 and 87.[38] The real issue is apparent from the first to sixth respondents' counter-application.[39] The question remains whether the MCA and the Rules do apply to referrals in terms of Section 86.[40]

33 Notice of Motion 2.
34 Declarator 307.
35 Declarator 307.
36 Declarator 307.
37 Declarator 308.
38 Declarator 308.
39 Declarator 308.
40 Declarator 308.

The Court conceded that the referral of a matter to the Magistrate's Court under Section 86(8)(b), in particular, constitutes an extraordinary procedure created by the Act.[41] The procedure is out of the ordinary because it concerns a *lis* or suit between the consumer and his/her credit providers, but the initiative to refer it to court is taken by a third party, the debt counsellor who acts as *pro forma* applicant.[42] 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/her obligations. That entails, or may entail, a failure to comply with the terms of agreements with credit providers.

The fact that the procedure is out of the ordinary does not necessarily imply that the MCA and the Rules do not apply here.[43] These Rules prescribe the manner in which matters are brought before court and the manner in which the Court then deals with them. It is assumed that Parliament by way of legislation may prescribe procedures that differ from the Rules. However, if there is no such prescription, the relevant Rules of the Magistrate's Court must be followed.[44]

The consumer's initial application for debt review must be in a form prescribed by the present Regulation 24. A consumer who applies directly to the Magistrate's Court under Section 86(9) must also do so in the prescribed manner and by Form 18.[45] Section 86(8)(b) obliges a debt counsellor to refer certain matters to the Magistrate's Court, but does not prescribe any procedure. It follows that in such cases the MCA and the Rules apply.[46] In the result the Court made an Order 3 in accordance with Prayer 3 of the first to sixth respondents' counter-application:

> The power of a Magistrate's Court to conduct a hearing in terms of section 87 of 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 Magistrate's Courts Act, 1944 and the Rules of the Magistrate's Courts govern the procedure by which it may conduct itself in so doing.

41 Declarator 309.
42 Declarator 309.
43 Declarator 309.
44 Declarator 310.
45 Reg 26.
46 Reg 26.

This order is to be understood in light of the dismissal of Prayer 4 above. It is obvious that the Court, after declining the call for an administrative hearing procedure, now has to explain which procedure should in fact be used. The Court's argument is that the MCA and its Rules are the basis for any proceedings, although the NCA also has to be taken into account. Since the Magistrate's Court has no inherent discretion to vary and adapt, the incumbent and well-known procedures have to be applied. The process can still be called a "hearing", but has to be confined within the statute and provision of the Rules.

2.1.4 A referral is not an application

In Prayer 1 of its notice of motion,[47] the Regulator sought an order declaring that a referral of a recommendation by a debt counsellor to a Magistrate's Court in terms of Section 86(8)(b) of the NCA does not constitute an application for the purposes of the MCA or the Rules. This is another strategy furnished by the Regulator to stay clear of the cumbersome and, in their opinion, the purpose-defeating application procedure.

The applicant argued that Section 86(8)(b) of the NCA does not explicitly require a debt counsellor to make an application to a Magistrate's Court.[48] A debt counsellor is authorised under Section 86(7)(c) of the NCA to issue a proposal recommending that a Magistrate's Court make either or both of certain defined orders. In terms of Section 86(8)(b) of the NCA, a debt counsellor must refer the matter to the Magistrate's Court with his/her recommendation. Section 86(8)(b) makes no reference to an application, but mentions a referral. By contrast, Section 86(9) permits a consumer whose application to a debt counsellor has been rejected by such debt counsellor to *apply* to a Magistrate's Court for an order contemplated in Section 86(7)(c) of the NCA. The legislature has drawn a distinction between the words "application" and "recommendation" in a number of sections, including Sections 87(1)(a) and 88(1)(b).

47 Notice of notion 2.
48 Heads para 36.

It follows, according to the applicant,[49] that *if* the referral by a debt counsellor of his/her recommendation to a Magistrate's Court is not an application for the purposes of the MCA, such referral does not need to comply with the MCA or its Rules, more particularly, with Rule 55. The Court did not entertain the applicant's arguments[50] and made the following Order 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 Magistrate's Courts Act, 1944 and the Rules of the Magistrate's Courts and falls to be treated as such in terms of Rule 55 of the Rules.

It is submitted that no alternative *sui generis* method was put in place by the NCA. This order enhances Order 3 above and implies that for the moment the Magistrate's Court can only be approached in terms of Sections 86 and 87 by utilising the application procedure, already set out by Rule 55 of the Court.[51] Credit providers are to be cited as respondents, who in their turn can reply per affidavit to the relief sought against them.[52]

Draft Regulations 4(9) and 4(10), if indeed applicable in respect of referrals in terms of Section 86(7)(c), address the issue of the Act being silent on the procedure to be employed in court when a 'hearing' takes place.[53] Draft Regulation 4(9) reads:

> (9) A hearing contemplated in sub regulation (8) shall be administrative in nature and shall be conducted expeditiously in accordance with section 33(1) of the Constitution of the Republic of South Africa.

It is obvious that the stipulations of the Draft Regulations are in direct contrast with Court Orders 4 and 3.[54] The regulations, relying on just administration in terms of Section 33(1) of the *Constitution*, attempt to keep the hearing administrative in

49 Heads para 37.
50 Declarator 310.
51 Roestoff *et al* 277.
52 Da Silva *et al* www.ncr.org.za 49.
53 Draft Regulations 4(9) and 4(10).
54 See above and section 2.1.3.

nature and not judicial. Section 33(1) provides as follows:[55] "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

Administrative action is preferred in the Draft Regulations, since it tends to be faster, easier and less costly. Some factors do benefit the process and especially support the already exhausted customer. So, for example, no legal representation is needed, questions may be asked of the parties by the presiding officer, costs are minimal, no cross-examination can take place and a determination must be made in thirty days.[56]

This discrepancy may cause a major confusion in legal practice. It is submitted that the Rules Board should attempt to develop a *sui generis* procedure for matters referred to the Magistrate's Court in terms of Sections 86 and 87 of the NCA, which is less cumbersome than the one prescribed in Rule 55.

According to Loots,[57] the Rules Board is proposing changes to the Rules of the Magistrate's Courts. A new sub-rule has been devised that will indicate the documentation that should be included in the application. Since the declaratory order emphasised the principle of judicial oversight of all debt arrangements, the amended Rules will require a *magistrate* to decide on any orders for default judgment in terms of Section 58 of the MCA and even for judgment by consent. The clerk of the court will then not be entitled to issue these orders on his/her own.

2.1.5 Powers of the Magistrate's Court

In Prayer 2 of its notice of motion,[58] the Regulator sought an order declaring that the debt counsellor "must", in terms of Section 86(8)(b), refer the matter to the Magistrate's Court, should the parties have been unable to agree on a voluntary re-arrangement. The same reasons for granting Order 1 above apply should the debt

55 *Constitution* S 33(1).
56 Draft Regulations 4(10).
57 "Proposed changes".
58 Notice of motion 2.

counsellor find that the consumer is over-indebted. The Magistrate's Court must conduct a hearing, the Court affirmed.[59]

Section 87(1) provides that the Magistrate's Court "may" *either* in terms of Section 87(1)(a) *reject* the recommendation/application *or* in terms of Section 87(1)(b) *grant* the orders mentioned, the Court elucidated.[60] These orders are the only ones that the Magistrate's Court can make. The reason for this is that the Magistrate's Court may only decide on matters "determined by an Act of Parliament". Put differently, a Magistrate's Court only has those powers that were conferred by an Act of Parliament.[61]

It is noted that the relief granted with regard to Prayer 2 does not address the form that the hearing must take or the procedure that the *Magistrate's Court* must adopt. This aspect has been also dealt with by the Court in Orders 3 and 4 above.[62] An Order 2 in terms of Prayer 2 was granted as follows:

> In circumstances where section 86(8)(b) of the Act applies, a debt counsellor is obliged to refer his or her recommendation to a Magistrate's 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.

The rationale for Prayer 2 is not clear; it appears to state the obvious. Sections 86 and 87 of the NCA are not ambiguous. Perhaps some confusion in debt review practice is addressed by this order. Notably, however, the Court[63] does not shy away from using the word "hearing", which is typical of the NCA's vocabulary.

2.1.6 Remarks

The orders discussed above confirmed the application of the MCA and its Rules to debt review. Since there is at present no *sui generis* procedure provided for in the NCA, it is submitted that the Court's approach is correct. However, the result is that

59 Declarator 307.
60 Declarator 307.
61 Declarator 307.
62 See the discussion in Sections 2.1.3 and 2.1.4 above.
63 Declarator 307.

the over-indebted consumer is not supported to the degree the NCA would set out to attain.[64] A Rule 55 procedure can be cumbersome and costly, while the NCA envisaged a fast and relatively inexpensive process.

2.2 The debt counsellor and the Court

This group of prayers deals specifically with the unique role of the debt counsellor with regard to debt review proceedings before the Court.

2.2.1 Role of the debt counsellor

In Prayer 7 of its notice of motion,[65] the Regulator seeks an order declaring that a debt counsellor who refers a proposal to a Magistrate's Court in terms of Section 86(8)(b) is entitled to adduce evidence and present arguments in support of his/her recommendation in any hearing under Section 87. The Regulator submits that Section 87 of the NCA implies an informal inquisitorial hearing, rather than a formal adversarial one. In other words, a magistrate should initiate, direct and control the proceedings, thereby permitting the debt counsellor to adduce evidence and advance arguments in support of his/her recommendation.[66] All parties agreed in principle that a debt counsellor should be entitled at a hearing to furnish evidence before a magistrate to explain his/her recommendation.[67] This is consistent with the spirit and object of the NCA and it is always desirable in order to assist a magistrate in determining which orders he/she ought to grant.[68]

In this regard the Court found that the debt counsellor's role in terms of Section 86 is that of a neutral functionary who does not advance any particular party's cause.[69] The respondents sought an order that reflects the debt counsellor's role more clearly. The Court pointed out that there is no reason that the debt counsellor could not make submissions regarding his/her proposal.[70] In view of his/her investigation in

64 NCA S 3.
65 Notice of motion 3.
66 Heads para 85.
67 Heads para 90.
68 Heads para 90.
69 Declarator 313.
70 Declarator 313.

terms of Section 86, the debt counsellor will know the relevant facts and submissions necessary to explain the proposal and to assist the Court. Accordingly, the Court granted Order 8 as follows:[71]

> 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.

This order brings significant clarity with regard to the role of the debt counsellor during court proceedings. The debt counsellor has a duty to assist the Court. This implies that he/she should be available to appear, able to give evidence or make submissions, and answer any queries raised by the Court. In practice, this would apparently not be a normal application procedure, as it would not be possible for the Court to proceed when only the attorney for the applicant is present. The debt counsellor must be present or on stand by. The question is: could a debt counsellor solely appear as the applicant or is an attorney always needed? This is not common in court proceedings, but certainly possible with some experience on the part of the debt counsellor.

2.2.2 Powers of the debt counsellor in terms of Section 86(8)

In Prayer 14 of its notice of motion,[72] the Regulator seeks a declaratory order that a failure to conclude negotiations arising from a proposal or counter-proposal made by a credit provider in response to a recommendation or proposal by a debt counsellor in terms of Sections 86(7)(a) or 86(7)(b) of the NCA does not preclude such debt counsellor from exercising his/her powers under Section 86(8). In support of this prayer, the Regulator submitted that the objectives of the NCA would be defeated should a debt counsellor be obliged to engage in endless negotiations and discussions with a credit provider before he/she can refer his/her recommendation to a magistrate.[73]

71 Declarator 313.
72 Notice of motion 5.
73 Heads para 126.

The first to sixth respondents, on the other hand, adopted the view that a debt counsellor is not entitled to refer his/her recommendation to a magistrate, unless and until he/she reasonably concludes that the negotiations between a credit provider and the consumer are not in good faith, were terminated or are unlikely to result in a responsible debt arrangement.[74]

The Court pointed out that the Act provides for negotiations if a consumer is not over-indebted, but experiences or is likely to experience difficulty to satisfy all his or her obligations in time.[75] Nothing however 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. However, such negotiations are not prescribed by the Act. These are settlement negotiations.[76]

Whether the parties have agreed to a voluntary re-arrangement is a fact that has to be ascertained in each case. However, according to the Court, a debt counsellor may only refer a case of attempted voluntary debt re-arrangement to the Court, should he/she be satisfied that no agreement will be reached, either because a party has rejected the proposed re-arrangement or because there is no reasonable prospect that an agreement will be reached at all. Put differently, the debt counsellor may only refer a case of attempted voluntary re-arrangement to the Court should he/she be satisfied that negotiations have been concluded or are making no headway.[77] The Court could therefore not make an order as prayed for by the applicant.

The Court also referred to Section 86(10) in terms of which credit providers can terminate a debt review at any time at least sixty business days after the time at which the consumer applied for the debt review. Credit providers may delay the negotiation process with a view to exercising their rights under Section 86(10). Should a debt counsellor conclude that a credit provider is not negotiating in good faith, he/she may also conclude that negotiations are making no headway. Debt counsellors should however be careful before reaching such a conclusion. They are

74 Heads para 129.
75 See S 86(7)(b).
76 Declarator 317.
77 Declarator 317.

advised to inform the relevant credit provider that the debt counsellor is of the opinion that the former is not negotiating in good faith and that the matter will be referred to court.[78] Hasty and unreasonable conclusions on the part of the debt counsellor may result in adverse costs orders.

As regards the counter-application, the Court also deemed it unwise to issue such an order. It attempts 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, according to the Court.[79] As regards Prayer 14, the application and counter-application were therefore both refused.

It is regrettable that no order was made in this instance. Although the Court shows sympathy for the debt counsellor's dilemma, there is still a serious problem in practice. Some credit providers do not react either timeously or at all to proposals for restructuring. The tendency amongst debt counsellors is therefore to approach the Court directly without even trying to negotiate in case in which a Section 86(7)(c) finding has been made,[80] as they fear termination by the credit providers in terms of Section 86(10). Although the applicant's Prayer 14 states the obvious and does not address the real issue with regard to Section 86(7)(c), it is submitted that an extended order in this regard would have given more clarity. I therefore agree with Roestoff *et al*[81] that an amendment to Section 86(8) should include references to both Sections 86(7)(b) and 86 (7)(c) to provide for a possible consent order.

2.2.3 The rules with regard to costs

In Prayer 5 of its notice of motion,[82] the Regulator sought an order declaring that the Rules of Court relating to costs and principles that generally apply to the award of costs in applications do not apply to hearings conducted in terms of Section 87 of the NCA. In particular the general rule is challenged that costs should follow the

78 Declarator 318.
79 Declarator 318.
80 Slot Declarator discussion
81 Roestoff *et al* 273.
82 Notice of motion 3.

applicant, should the debt counsellor's recommendation be rejected by a Magistrate's Court.

A proper interpretation of Section 86 of the NCA and with regard to the distinction between a "referral of a recommendation" as opposed to "an application to Court", persuaded the applicant that there was no justification for rendering the full Rule 33 of the Magistrate's Courts Rules applicable to a debt counsellor.[83] Were a debt counsellor to attract an adverse costs order because of his/her recommendation to a magistrate, debt counsellors may then become very reluctant to make any recommendations to a magistrate. A debt counsellor has no personal interest in his/her referral or recommendation and it would be unfair in these circumstances to punish the debt counsellor for the role he/she plays under the NCA.[84] In addition, since an express provision in the NCA that empowers a magistrate to award costs against a debt counsellor or the debtor is absent, the applicant submitted that a magistrate has no power to do this.[85]

The Court pointed out that a debt counsellor who refers an application to the Court under Sections 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/she fulfils a statutory obligation.[86] A functionary in the process of fulfilling his/her statutory function during court proceedings is not ordinarily ordered to pay the costs of any other party. Adverse costs orders against such functionaries are usually only made if the functionary acted improperly or *mala fide.*[87] The practical difficulties that prompted the applicant to seek the order under consideration probably resulted from a failure to apply this salutary principle. Consequently, the Court made Order 5 in accordance with the counter-application of the first to sixth respondents,[88] but added some introductory words in Order 6:

83 Heads para 72.
84 Heads para 72.
85 Heads para 73.
86 Declarator 311.
87 Declarator 311.
88 Declarator 311-312.

> *Bearing in mind that the debt counsellor fulfils a statutory obligation,* Rule 33 of the Magistrate's Courts' Rules is applicable to applications under section 86 and 87 of the National Credit Act, 2005. [my italics]

In my view, the above approach is correct. Since the debt counsellor is an intermediary and not a party to the suit, he/she should be protected from unfair cost orders. The Court compromised effectively between the Rules of the Magistrate's Courts and the spirit of the NCA.

Roestoff *et al*[89] pointed out an initial concern after the commencement of the NCA, namely that the fees for debt counselling were so dismal that no one would be interested in practising as a debt counsellor. It has since been suggested by Du Plessis[90] that credit providers should also bear some of the costs involved, since the restructuring of debt repayments would enable them to recover claims.

2.2.4. Remarks

The orders made under the current prayer heading are important. It is submitted that the approach of the Court is correct. The debt counsellor as applicant differs from the normal applicant in terms of Rule 55. He/she is even protected against some cost orders because of a statutory function. Because of this special function, the following question arises: should this difference in treatment not be even greater than custom presently permits or proposes? Since this function brings great responsibility and much paper work, should it not affect the fees that a debt counsellor may charge?

2.3 Procedures of the court application

The last group of prayers concerns the arena of the Court. The orders granted in this regard affect the "business" of a debt counsellor directly. It is submitted that these orders have brought clarity with regard to some difficult issues.

89 Roestoff *et al* 265.
90 2007 *JJS* 90.

2.3.1 Service of court documents

In Prayer 6 of its notice of motion,[91] the Regulator requested an order that service of any recommendation or other documents contemplated in Sections 86 or 87 of the NCA may, with the agreement of the affected parties, be done by way of fax or e-mail. In support of this prayer,[92] the Regulator has pointed out that a speedy and easily verifiable method of providing notice would be ideal, such as by fax or e-mail. It would be time-consuming and expensive were notices to be served by the deputy sheriff on each credit provider. Were service to be effected by the deputy sheriff in accordance with the MCA and its Rules, few consumers would be able to afford an application for debt restructuring by the court. Scholtz *et al* [93] argue that the *domicilium* address given by the debtor in the credit agreement should rather be used for the address of service.

A counter-application by the first to sixth respondents suggested that Rule 9 of the Magistrate's Courts' Rules should be applicable to the service of documents for the purpose of the reference and the hearing contemplated in Sections 86(8)(b) and 87 of the NCA.[94] This proposition was accepted and accordingly the Court incorporated it into Order 7 to provide more clarity on the options of service:[95]

> Rule 9 of the Magistrate's 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.

Haupt, Roestoff and Erasmus propose a new Regulation 26(4) with regard to the issue of notification:[96]

91 Notice of motion 3.
92 Heads para 75.
93 Para 12–13.
94 Declarator 312.
95 Declarator 312.
96 Haupt, Roestoff and Erasmus (n 17) 324.

> Notification to the relevant credit providers of an application by the consumer in terms of section 86(8)(b) and 86(9) may be effected by one or more of the following mechanisms:
>
> (a) personal delivery;
> (b) registered mail to the last known address of the relevant credit provider;
> (c) fax or email, provided that the debt counsellor is able to provide satisfactory proof of successful transmission of such fax or email or an acknowledgement of receipt be obtained from the relevant credit provider.

Order 7 implies that an arrangement in respect of service by e-mail or fax be negotiated between the parties for each separate occurrence. It is submitted that a standard agreement that could apply to every document that the parties deal with at present or in future could reduce cost and time. This internal and ongoing arrangement is possibly not outside the boundaries of the Declarator's *obiter dicta*,[97] although the order does not explicitly commend it.

A proposed amendment to the Magistrate's Courts Rules providing for the serving of the application by registered post, where the creditors have not consented to service by fax or e-mail, is envisaged by Loots.[98]

2.3.2 Jurisdiction

In Prayer 8 of its notice of motion,[99] the Regulator sought an order declaring that *any* Magistrate's Court that a debt counsellor elects to refer a recommendation to, has jurisdiction to conduct such hearing. The applicant argued that Section 86(8)(b) of the NCA places no limitation upon a debt counsellor regarding the choice of court to which he/she must refer his/her recommendation.[100] It follows that the court to which a debt counsellor refers his/her recommendation is also the court that should hear the matter and that has jurisdiction to do so.

97 Declarator 312: "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."
98 (n 60).
99 Notice of motion 4.
100 According to the applicant in Heads para 93.

The Court pointed out that the relief the applicant sought was based on the contention that the MCA did not apply to the procedure under consideration. The Court already found differently in Orders 3 and 4.[101] It was held in that the Court said that the question of jurisdiction must be decided with reference to the MCA. The general rule regarding jurisdiction is *actor sequitur forum rei.* The plaintiff (or applicant) ascertains where the defendant (respondent) resides, goes to his/her forum, and serves him/her with the summons or notice of motion there.[102] Therefore, an applicant must bring his/her application in the Magistrate's Court that has jurisdiction in respect of the person of the respondent.[103] Under the debt review proceedings of Sections 86(7)(c), 86(8)(b) and 87, the Court held that the *debt counsellor* who refers the matter to the Magistrate's Court is the applicant.[104] The consumer and his/her credit providers are the respondents.

The applicant pointed out that one Magistrate's Court will not often have jurisdiction in respect of the person of all the respondents. In order to address the problem of multiple respondents and to give effect to the express purpose of the Act in respect of debt review procedures, the Court held that the term "the Magistrate's Court" 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* [my italics]".[105]

This order is surprising and somewhat revolutionary. The consumer now becomes the first respondent and therefore his person founds the jurisdiction. The address of his residence or workplace can be used to cite the respondent and set the motion procedure under way.

In my opinion, Section 86(8) should be amended, in order to address any uncertainty pertaining to the issue of geographic jurisdiction.[106] It is proposed that the debt counsellor apply to the Magistrate's Court of the district in which the consumer resides or carries on business or is employed, or should the consumer consent, that

101 See Sections 2.1.3 and 2.1.4 above.
102 Declarator 313.
103 Declarator 313.
104 Declarator 313.
105 Declarator 314.
106 Da Silva *et al* (n 52) 51.

the application be directed to the Magistrate's Court of *the district in which the debt counsellor's business is situated*. The argument for the second option is that the whole cause of action as regards the debt review process originates from the district in which the debt counsellor's business is situated.[107]

It should be noted that the Draft Regulations already defined "court" as a magistrate court established in terms of the MCA, "having jurisdiction over a consumer by virtue of such consumer's residence *or place of business or the residence or place of business of a debt counsellor,* irrespective of the monetary value involved [my italics]".[108] In this regard, it is proposed that this definition for "Magistrate's Court" be added to Section 78 of the Act to provide for this alternative.[109] If not, the part that reads "or the residence or place of business of the debt counsellor" must be deleted.

Another amendment of Section 86(8) is in my opinion needed to make it clear that the debt counsellor is the only applicant in all court proceedings under Sections 86 and 87, while the consumer is the first respondent.[110]

2.3.3 Monetary limit

In Prayer 9 of its notice of motion,[111] the Regulator sought a declaratory order that there be no monetary limit upon the jurisdiction of the Magistrate's Courts to hear a referral under Section 87 of the NCA. The Court pointed out that the NCA places no monetary limit upon the jurisdiction of a Magistrate's Court to hear a referral. The Act provides that matters be referred to the Magistrate's Court, but makes no mention of a monetary limit to the jurisdiction of that Court. In the circumstances, the Court held that there is no basis to hold 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.[112] Order 9 therefore provided as follows:

107 Roestoff *et al* 278.
108 Draft Regulations S 1, definition of "court".
109 Roestoff *et al* 279.
110 See also Sections 2.1.1 and 2.2.2 in this case note.
111 Notice of motion 4.
112 Declarator 314.

> There is no monetary limit upon the jurisdiction of the Magistrates' Courts to hear a referral under s 87 of the National Credit Act, 2005.

An additional subsection to Section 78 that states clearly that there is no monetary limitation upon the jurisdiction of the Magistrate's Court with regard to debt review matters is suggested as the Draft Regulations in its definition of "court" has provided for already in Section 1.[113]

2.3.4 In duplum *rule*

In Prayer 10 of its notice of motion,[114] the Regulator sought a declaratory order that:

> on a proper interpretation of section 103(5), read with section 101(1)(b) to (g) of the NCA:
>
> - 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;
> - once the total charges referred to in sections 101(1)(b) to (g) equal the amount of the unpaid balance at the time of default, no further charges may be levied;
> - 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.

The amounts referred to in Sections 101(1)(b) to (g) relate to initiation fees, service fees, interest, cost of insurance, default administration charges and collection costs. The applicant's interpretation is that once the total charges under Sections 101(1)(b) to (g) – which include interest – equal the amount of the unpaid balance, no further charges (again, including interest) may be levied.[115]

Section 103(5) describes the moment at which the unpaid balance of the principal debt must be fixed as "the time that [the consumer's] default occurs". Clearly, it provides that the prohibition against the accrual of amounts, in aggregate, exceeding

113 See Section 2.3.2 above.
114 Notice of motion 4.
115 Heads para 108 and 109.

that unpaid balance holds "during the time that a consumer is in default under the credit agreement". A consumer remains in default until his payments under the credit agreement are brought up to date.[116] What the words "up to date" entail is uncertain.

The first to sixth respondents argued that the Regulator's interpretation of Section 103(5) would result in hardship for credit providers. However, were all the interest, fees and charges contemplated under Section 101(1) of the NCA to commence running up again as soon as there is a purging of the default, especially by complying with a debt rearrangement order, many debtors would be unable to pay off their debts and the object of the section would be frustrated.[117] The introductory words to Section 103(5) make it clear that the legislature intended to depart from the common law *in duplum* rule. This departure is deliberate and there is no need for re-importing it into the fabric of the section under the guise of equitable considerations.[118]

All the respondents, other than the twelfth respondent, argued that Section 103(5) operates similar to the common law rule of *in duplum.* They contended that if section 103(5) is interpreted in agreement with the common law, the effect of Section 103(5) is only to create a moratorium on the payment of the cost of credit, while the consumer is in default, but it does not affect the underlying obligation to make payment. Once he/she purges the default, all the cost of credit may be levied again.[119] In contrast, hereto Scholtz *et al* [120] state that the common law rule "has now been codified and extended by the National Credit Act to provide consumers with even better protection".

The Court held that this viewpoint is contrary to the clear wording of Section 103(5). This subsection applies despite "any provision of the common law", which includes the *in duplum* rule. Furthermore, the amounts "that accrue" during the default "may not, in aggregate, exceed the unpaid balance". During the period of default, no more

116 Heads para 110.
117 Heads para 113.
118 Heads para 116.
119 Declarator 319.
120 Para 10–17.

than the stated maximum can accrue. Hence, the consumer's indebtedness in respect of the cost of credit cannot grow by more than the stated maximum. Therefore, the Court granted an Order 11 in terms of the applicant's prayer.

It is submitted that the Court's approach is correct. The order brings some clarity with respect to the interpretation of the statutory *in duplum* rule. The respondents attempted to revive the common law in their interpretation of Section 103(5). The Court rejected this and placed a cap on the total amount per agreement that can be owed, namely twice the principal debt. Unfortunately, the exact meaning of the phrase "during the time that the consumer is under default" is still not clear. The starting point of default is possibly the moment at which the consumer fails to pay his agreed instalment. The time at which this period ends is unclear. Is it the moment at which the down payments eventually cause the amount still owed to be equal to the original amount owed when the default began? And if so, can the costs in terms of Section 101(1) run up again to the amount capped by the *in duplum* rule, if he/she defaults hereafter?

Meiring[121] submits that a consumer remains in default until his payments under the credit agreements are brought up to date, and that such a default is not purged by the making of part payments or at the point at which the creditor initiates litigation. Some debt counsellors are of the view that as regards a specific credit agreement the total maximum debt to be repaid can never be more than double the amount of the debt at the moment of default.[122] However, the first and third respondent filed notices for leave to appeal to challenge Order 11 granted by the Court.[123]

The judgment of the Court in this regard also affects the term of debt review and a possible discharge of the consumer later on. It seems that a spiral of ever-escalating running costs can no longer hold the consumer ransom for the rest of his/her life. If the amount is capped at double the principal debt amount at default and does not repeatedly run up to the capped amount, it will then be possible for the consumer to pay his/her debt off in time, hopefully in not more than a few years.

121 "Respondents' story".
122 Slot Declarator discussion.
123 Stadler 2009 *De Rebus* 47.

2.3.5 Reckless credit

The Court accepted the first to sixth respondents' counter-proposal[124] to the Regulator's Prayer 11[125] with a slight correction:[126]

> 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)(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).

Order 10 sought no more than to paraphrase the relevant powers that the Act gave to the Magistrate's Court. Although the impact of this order is not dramatic, it may still clear some confusion. Structuring the types of reckless lending and the consequences thereof may assist debt counsellors, credit providers and courts to see the bigger picture with regard to reckless credit extension by the NCA.

When drafting a referral or recommendation to the Court, a debt counsellor will be well advised to pray prominently for a declaration of over-indebtedness and, if applicable, that one or more of the credit agreements be declared reckless. The kind of reckless credit extension should be pointed out, as well as a recommendation as to the finding of the Court in terms of Section 83.

2.3.6 Emoluments attachment orders

In Prayer 12 of its notice of motion,[127] the Regulator seeks a declarator that a Magistrate's Court making an order in terms of Section 87 may also issue an order of the nature contemplated in Rule 65(J) of the Rules under the MCA, attaching the

124 Declarator 315.
125 Notice of motion 4.
126 In (a) Sections 80(1) and 80(1)(b)(ii) were changed to Sections 80(1)(a) and 80(1)(b)(i).
127 Notice of motion 5.

emoluments of the consumer and obliging him or her to make periodic payments to the credit provider.[128] The Regulator, appreciating the merit of an order of the nature contemplated in Rule 65(J), envisages a magistrate to be able to, with the consent of the consumer, grant an order similar to that envisaged by Rule 65(J). This prayer is sought since some magistrates found that they are not entitled to grant such orders, even when credit providers consented thereto.[129]

The Court pointed out that the powers of the Magistrate's Court upon a referral were to be found in the Act. There is no provision in the NCA for the making of an order in terms of Section 65J of the MCA that deals with the emoluments attachment order. The order sought was accordingly refused by the Court.[130]

It is submitted that the Court's viewpoint in this regard is correct. However, the current situation is not ideal. In practice, it is important that a consolidated debt-repayment amount be paid over regularly to a payment distribution agency in one transaction. This can very effectively be arranged by means of an order against the consumer's salary and could form part of the recommendation before court to be decided in terms of Section 87(1). Haupt, Roestoff and Erasmus propose amendments to Section 87(1) to provide the Magistrate's Court with the powers to grant orders in this regard:[131]

> 87. (1) (v) an emoluments attachment order authorising the attachment in the prescribed manner of emoluments at present or in future owing or accruing to the consumer from the consumer's employer by the payment distribution agent contemplated in subparagraph (iv).
>
> (vi) an order suspending, amending or rescinding any pre-existing emoluments attachment order issued in respect of a judgment that was obtained after the relevant credit provider has taken steps to enforce a credit agreement.

A new subsection (vi) empowers the Magistrate's Court to suspend, amend or rescind any pre-existing emoluments attachment orders.[132] The aim is to give the

128 Heads para 119.
129 Heads para 122.
130 Declarator 316.
131 Haupt, Roestoff and Erasmus (n 17) 97–98.
132 Haupt, Roestoff and Erasmus (n 17) 98.

magistrate the discretion to suspend, amend or rescind emoluments attachment orders, should good cause be shown by the debt counsellor, for example in cases in which excessive interest rates are applicable.[133] A creditor who is already gaining from an existing emoluments attachment order will have the opportunity in court to oppose any rescission of this order or be joined to all the other creditors. Allowing the Magistrate's Court the power to grant an emoluments attachment order would, in my view, simplify and facilitate the debt-repayment process. Furthermore, the new proposed subsection (vi) could also ensure fair treatment of all credit providers.

2.3.7 Sections 86(2) and 129(1) of the NCA

In Prayer 13 of its notice of motion,[134] the Regulator seeks a declaratory order that the reference in Section 86(2) to *the taking of steps* refer only to the commencement of legal proceedings mentioned in Section 129(1)(b) and not include steps taken in terms of Section 129(1)(a) of the NCA. None of the respondents opposed the relief sought by the Regulator in this prayer.[135]

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(1) prescribes certain steps that a credit provider must take before a debt is enforced:

> If the consumer is in default under a credit agreement, the credit provider–
> (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

133 Memorandum para 8.
134 Notice of motion 5.
135 Heads para 124.

(ii) meeting any further requirements set out in section 130.

All the parties before court agreed that this order must be made.[136] The Court pointed out that the purpose of Section 86(2) is to ensure that consumers do not apply 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 restructuring under Sections 86 and 87.[137] The steps set out in Section 129(1)(a) are preliminary to debt enforcement. According to Scholtz *et al*,[138] the legislature "intended the debt review process to be available to a consumer as long as the credit provider does not serve a summons on him".

"In the absence of full argument, and in view thereof that there were many other persons with an interest in this order", the judge deemed it unwise to say more than the above and did not grant the order.[139] This decision is regrettable, since confusion remains as regards the moment at which enforcement begins. Van Loggerenberg, Dicker and Malan[140] submitted that enforcement of a credit agreement commences upon the issuing *and* service of a summons, after the credit provider has complied with the requirements set out in Section 129(1), read with Section 130(1) of the Act. A Section 129(1)(a) notice delivered to a consumer by a credit provider does not constitute enforcement, as the heading to Section 129 explicitly refers to "Required procedures *before* debt enforcement".[141] The legislator's reference to Section 129 in Section 86(2) is rather a reference to the commencement of legal proceedings mentioned in Section 129(1)(b), and a consumer should not be precluded from applying for debt review in respect of the specific credit agreement after receipt of a Section 129(1)(a) notice.[142]

136 Heads para 124.
137 Declarator 319.
138 Para 11–19.
139 Scholtz *et al* para 11–19.
140 2008 *De Rebus* 41.
141 Van Heerden and Otto 2007 *TSAR* 667.
142 Founding affidavit para 69–71; Scholtz *et al* para 12–16.

According to Van Loggerenberg, Dicker and Malan,[143] it does not make sense to propose that the consumer should approach a debt counsellor and at the same time preclude the consumer from applying for debt review. The interpretation that the Court attributes to Section 86(2) leads to an absurd result. In order to clarify the uncertainty regarding the moment at which enforcement for the purposes of Section 86(2) commences, it is proposed that Section 86(2) be amended by substituting "Section 129" with "Section 130".[144]

According to Monty,[145] the question still remains as to what constitutes "*steps taken to enforce the credit agreement in terms of section 129*" for the purpose of excluding certain credit agreements in terms of section 86(2) from debt review. Although this is still unclear, Otto[146] warns consumers not to ignore a notice under Section 129(1)(a), but rather to seek the advice of a debt counsellor timeously and definitely within the ten days after a Section 129 notice has been received.

2.3.8 Remarks

Debt counsellors should welcome most orders in this section, namely those that deal with the service of documents, the geographical jurisdiction and monetary limit of the court, and the *in duplum* rule. However, the Court exercised caution with respect to emoluments attachments orders and the application of Section 86(2). The lack of direction regarding whether formal debt enforcement starts with Sections 129(a) or (b), in particular, is regrettable. This could hopefully be resolved by amending the statute.

3 Conclusion

It is submitted that the declaratory order has a definite impact on debt counselling practice in South Africa.

The interaction between the NCA and the MCA has been defined more clearly.

143 Van Loggerenberg, Dicker and Malan (n 150) 40–41; Founding affidavit para 70.
144 Van Heerden and Otto (n 152) 668; Scholtz *et al* para 12–16.
145 "Section 129".
146 2009 *SA Merc LJ* 277–278.

Although the procedures that have to be followed were not what some debt counsellors had hoped for, the declaratory order did indeed bring clarity regarding many aspects. The role of the debt counsellor in court, as well as the more sympathetic treatment that he/she will receive in some instances, is illuminating. The orders dealing with the service of documents, geographical and monetary jurisdiction, and the *in duplum* rule are to be lauded.

However, the impact of the Declarator was not as great as was expected. In some instances, the Court did not go far enough, for example acknowledging an additional jurisdiction for cause of action, utilising the emoluments attachment order better and restricting the application of Section 86(2) to Section 129(b). There are also inconsistencies between the Declarator and the Draft Regulations, which the Court possibly did not take into consideration or preferred not to remark upon.

The Declarator is certainly a milestone in the history of the NCA. The orders have influenced the practice of debt review widely, and will continue to shape the credit industry. It is now for the industry, the NCR, legislators and scholars to take matters further.

Bibliography

Du Plessis *JJS*

Du Plessis MA "The National Credit Act: Debt counselling may prove to be a risky enterprise" 2007 *JJS* 32(2) 76–94.

Logan S "Presentation on the Declaratory Order (Case No. 19638/2008)"

(Unpublished paper delivered at the NCR on 27 Aug 2009 at Midrand).

Loots "Proposed changes"

"Proposed changes to the MCA" (Unpublished paper delivered at a Conference on Debt Enforcement 21 October 2009 Johannesburg).

Meiring "Respondents' story"

Meiring I "The respondents' story on the NCR Declaratory order" (Unpublished paper delivered at a Conference on Debt Enforcement 21 October 2009 Johannesburg).

Monty "Section 129"

Monty S "Section 129 of the NCA – What constitutes 'steps contemplated in terms of Section 129' ?" (Unpublished paper delivered at a Conference on Debt Enforcement 21 October 2009 Johannesburg).

Otto *SA Merc LJ*

Otto, JM "Over-indebtedness and applications for debt review in terms of the National Credit Act: Consumers beware! *FirstRand Bank Ltd v Olivier*: Case comments" 2009 *SA Merc LJ* 21(2) 272–278.

Roestoff *et al PER*

Roestoff M *et al* "The debt counselling process – closing the loopholes in the National Credit Act 34 of 2005" 2009 *PER* 12(4) 247–360.

Scholtz *et al Guide*

Scholtz JW *et al Guide to the National Credit Act* (LexisNexis Durban 2008).

Slot Declarator discussion

Slot P Discussion on the Declarator (Unpublished discussion at the University of Pretoria Law Clinic 21 September 2009 Pretoria).

Stadler *De Rebus*

Stadler, S "NCA: Debt review process in the Magistrate's Court" 2009 *De Rebus* November 46–47.

Van Heerden and Otto *TSAR*

Van Heerden CM and Otto JM "Debt enforcement in terms of the National Credit Act 34 of 2005" 2007 *TSAR* 4 655–684.

Van Loggerenberg, Dicker and Malan *De Rebus*

Van Loggerenberg D, Dicker L and Malan J "Aspects of debt enforcement under the National Credit Act" 2008 *De Rebus* January/February 40–42.

Register of legislation

Constitution of the Republic of South Africa, 1996
Magistrate's Courts Act 32 of 1944
National Credit Act 34 of 2005
Promotion of Administrative Justice Act 3 of 2000

Register of government publications

National Credit Act, 2005 Debt Counselling Regulations GN R503 in GG 32229 of 15 May 2009.
Regulations made in terms of the National Credit Act, 2005 GN R489 in GG 28864 of 31 May 2006.

Register of court cases

Old Mutual Life Assurance Co SA Ltd v Pension Funds Adjudicator and Others 2007 3 SA 458 (C).
National Credit Regulator v Nedbank Limited and Others 2009 6 SA 295 (GNP).

Register of internet resources

Da Silva *et al* www.ncr.org.za

Da Silva M *et al Debt Counselling – Principles and Guidelines* (University of Pretoria Law Clinic Pretoria 2009) http://www.ncr.org.za/pdfs/Guidelines/Principles%20&%20Guidelines/DEBT%20

COUNSELLING%20%20%20PRINCIPLES%20GUIDELINES%20%20-%20BASA%20training%202008.pdf [date of use 28 June 2010]

Haupt, Roestoff and Erasmus www.ncr.org.za

Haupt F, Roestoff M and Erasmus M 2009 *The debt counselling process: Challenges to consumers and the credit industry in general* http://www.ncr.org.za/The_debt_counselling_process.php [date of use 28 June 2010]

List of abbreviations

JJS	Journal for Juridical Science
PER	Potchefstroomse Elektroniese Regsblad (Potchefstroom Electronic Law Journal)
SA Merc LJ	South African Mercantile Law Journal
TSAR	Tydskrif vir die Suid-Afrikaanse Reg (Journal of South African Law)