

# Debt restructuring, partisan debt counsellors, costs and other important debt counselling issues. An appraisal of the legal position in view of *Firststrand Bank v Barnard* 2015 JDR 1614 (GP)

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## OPSOMMING

### **Skuldherstrukturering, partydige skuldberaders, koste en ander belangrike skuldberadingsaangeleenthede. 'n Waardering van die regsposisie in die lig van *Firststrand Bank v Barnard* 2015 JDR 1614 (GP)**

Die skuldberadingsproses wat ingelei is deur die *National Credit Act* 34 van 2005 vervul 'n belangrike rol om skuldverligting aan oorbelaaste verbruikers te fasiliteer en om daartoe by te dra dat kredietverskaffers betalings ten aansien van kredietooreenkomste ontvang. In *Firststrand Bank v Barnard* 2015 JDR 1614 (GP) het die hof, in 'n appèl teen 'n landdroshofbevel vir skuldherstrukturering ooreenkomstig artikel 87 van die *National Credit Act*, verskeie pertinente aangeleenthede in die konteks van skuldberading aangeraak. Die doel van hierdie bespreking is om op 'n aantal van hierdie aspekte te fokus, naamlik die magte van die skuldherstruktureringshof; likwidasie van bates; die omvang van openbaarmaking wat vereis word in 'n skuldherstruktureringsaansoek; die impak van veranderde omstandighede op so 'n aansoek, skuldberadersfooie en kostebevele teen skuldberaders.

## 1 INTRODUCTION

The National Credit Act<sup>1</sup> has radically changed consumer credit regulation in South Africa since it came into full operation on 1 June 2007. Probably the most profound change it introduced was its novel provisions aimed at preventing and alleviating consumer over-indebtedness,<sup>2</sup> *inter alia*, the introduction in section 86

1 34 of 2005, hereafter the NCA or Act.

2 A consumer is considered over-indebted in terms of s 79 of the NCA "if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party". Such a determination is made by having regard to the consumer's financial means, prospects and obligations; and probable propensity to satisfy in a timely manner all the obligations under all the credit agreements

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of the Act of a voluntary debt review procedure<sup>3</sup> to facilitate the restructuring of credit agreement debt.<sup>4</sup> In this regard the Act provides that its purpose is to promote responsibility in the credit market by “encouraging responsible borrowing, avoidance of over-indebtedness of consumers and fulfilment of financial obligations by consumers”<sup>5</sup> and “addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations”.<sup>6</sup> The Act further aims to provide for a consistent and harmonised system of debt restructuring “which places priority on the eventual satisfaction of all consumer obligations under credit agreements”.<sup>7</sup>

Various courts have remarked on the purpose and scope of debt review. In *Standard Bank of South Africa Ltd v Panayiotts*<sup>8</sup> the court held that the NCA does not envisage that a consumer may claim to be over-indebted whilst at the same time retaining possession of the goods which form the subject matter of the agreement and, accordingly, that such goods should be sold to reduce the consumer’s indebtedness. In *BMW Financial Services SA (Pty) Ltd v Donkin*<sup>9</sup> it was held that the object of debt review and restructuring is not to enable a consumer to continue in possession and use of the credit provider’s property after the relevant contract has been cancelled. In *Standard Bank of South Africa Ltd v Newman*<sup>10</sup> the court confirmed that a debt review is directed at a restructuring of a monetary debt with the object of the ultimate settlement of the debt. These views were endorsed in *Standard Bank of SA Ltd v Jikeka*<sup>11</sup> and *The Motor Finance Corporation (Pty) Ltd v Zyster*.<sup>12</sup>

In the context of debt review, the debt counsellor, who has been held to be a neutral functionary whose prime duty is to assist the court,<sup>13</sup> has a key role. It is to the debt counsellor that the consumer applies to have his debt situation reviewed in order to determine whether the consumer is over-indebted and if so, to assist the consumer by compiling a proposal as to how the consumer’s credit agreement debt can be restructured.<sup>14</sup> It is also the debt counsellor who, upon determining that a consumer is over-indebted, is tasked with referring the matter to court with a recommendation that the debt be restructured in accordance with the aforesaid debt restructuring proposal.<sup>15</sup>

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to which he is a party, as indicated by the consumer’s history of debt repayment. See further Scholtz *et al Guide to the National Credit Act* (2008) para 11.3.1.

3 The NCA also provides for court-ordered debt review in s 85. For more detail, see Scholtz *et al* para 11.3.3.5.

4 This procedure only applies to credit agreements that are governed by the NCA.

5 S 3(c)(i).

6 S 3(g).

7 S 3(i).

8 2009 3 SA 363 (W) 370.

9 2009 6 SA 63 (KZD) paras 78–79.

10 [2011] ZAWCHC 91 (15 April 2011).

11 Unreported WCC case nr 3430/2010.

12 Unreported WCC case nr 11977/2012.

13 *National Credit Regulator v Nedbank* 2009 6 SA 295 (GNP).

14 S 86(1). For a detailed discussion of the debt review procedure as set out in s 86 read with reg 24, see Scholtz *et al* para 11.3.3.

15 S 86(7) read with s 87.

The debt review service rendered by debt counsellors is not free. Certain aspects regarding the cost to be charged by debt counsellors for attending to debt review should be noted: section 86(3) provides that a debt counsellor may require the consumer to pay an application fee, not exceeding the prescribed amount, before accepting an application for debt review.<sup>16</sup> Payments in respect of rescheduling proposals are not made to debt counsellors, but to Payment Distribution Agents.<sup>17</sup> It was initially provided in terms of Schedule 2 of the regulations to the NCA that a debt counsellor could only charge the consumer a R50 application fee. However, there were concerns that this amount was so dismal that no one would be prepared to practise as debt counsellor. As a result, the Debt Counselling Association of South Africa (DCASA) suggested the following fee guidelines, effective from 1 August 2011, which were approved by the National Regulator:<sup>18</sup>

“1. The debt counsellor may receive the following amounts in respect of consumers who have applied for debt counselling:

- 1.1. An application fee, limited to the amount prescribed in terms of Schedule 2 (2) of the Act (i.e the R50 application fee referred to above), recoverable directly from the consumer upon receiving an application for debt review.
- 1.2. A rejection fee of R300.00 (excluding VAT) in respect of consumers whose applications have been rejected in terms of section 86(7)(a).
- 1.3. A restructuring fee of the lesser of the first instalment of the debt re-arrangement plan or a maximum of R6000.00 (excluding VAT), in respect of a consumer whose application has been accepted in terms of section 86(7)(b) or 86(7)(c). (Should a joint application be required the fee can be increased to a maximum of R6000.00 (excluding VAT).)
  - 1.3.1. 100% of the fee is payable at the first instalment.
- 1.4. Should a debt counsellor fail to submit proposals to credit providers or refer the matter to a Tribunal or a Magistrate Court within 60 business days from date of the debt review application the debt counsellor has to refund 100% of the fee paid by the consumer (excluding the application fee).
- 1.5. A monthly after-care fee of 5% (excluding VAT) of the monthly instalment of the debt re-arrangement plan up to a maximum of R400.00 (excluding VAT), for a period of 24 months, thereafter reducing to 3% (excluding VAT) of the monthly instalment, to a maximum of R400.00 (excluding VAT), for the remaining period of the debt re-arrangement plan.
  - 1.5.1. Payment of the monthly after-care fee is to commence in the 2nd month after the amount in 1.3.1 above has been paid.
- 1.6. Should the consumer withdraw from the process after completing stages 1.3 above a fee equal to 75% of the restructuring fee as per 1.3 above is payable by the consumer.
- 1.7. A legal fee for a *consent* order of R750.00.
 

The legal fee for the consent order may only be deducted in the second month after the amount in 1.3.1 above has been paid. If the consumer's affairs cannot be resolved through a consent order, and there are additional costs for further legal processes, these need to be separately negotiated with the client. The debt counsellor should be able to produce *pro forma* invoices issued to them by their lawyers for legal services, when so requested by the NCR.

16 S 86(3)(a). In terms of s 86(3)(b), a debt counsellor may not require or accept a fee from a credit provider in respect of an application for debt review.

17 See s 44A of the NCA as inserted by s 12 of the National Credit Amendment Act 19 of 2014.

18 Available at [www.ncr.org](http://www.ncr.org), accessed on 6 January 2016.

- 1.8. The applicable fees and related debt counselling services will be set out in an addendum to Form 16, which needs to be explained to the consumer and signed by him/her.”

In August 2015, a judgment that is of great significance in the context of debt counselling was handed down by the Gauteng Division of the High Court in *Firststrand Bank Ltd v Barnard*.<sup>19</sup> The purpose of this discussion is to focus on a number of aspects dealt with in this judgment, namely, the power of the restructuring court; liquidation of assets; the extent of disclosure required in a debt restructuring application; the impact of changing circumstances upon such application, the debt counsellor's fees and costs orders against debt counsellors. A few miscellaneous issues are also addressed.

## 2 FACTS OF BARNARD

The *Barnard* matter involved an appeal before the Gauteng Division of the High Court, Pretoria, against an order granted by a magistrate's court under section 87(1)(b)(ii) of the NCA, rearranging the debts of a consumer. The facts<sup>20</sup> were that on 31 January 2014, the second respondent (the consumer) applied to the first respondent (the debt counsellor) to have himself declared over-indebted as contemplated in section 86(1) of the NCA. The consumer disclosed in his application for debt review that the total amount of his indebtedness to a number of credit providers was R1 360 973. This amount included balances, all of which were due, of R919 122 owed to the first appellant (FNB) under a home loan secured by a mortgage bond over a property in Lydenburg, and R128 318 owed to the second appellant (Nedbank) in relation to a Kia Cerato motor vehicle. The consumer was a mineworker whose salary slip reflected a total earning package of R29 680 for the relevant month and which indicated that after deductions he received R20 867 in cash. The material provided by the consumer to the debt counsellor reflected a monthly payment obligation of R33 375. He disclosed no means other than his salary from which immediately to pay his debts and was the sole provider for his family.<sup>21</sup>

The debt counsellor accepted the consumer's application and proceeded to notify the credit providers listed in the debt review application that the consumer had applied for debt review. Upon evaluating the application as required by section 86(6) of the NCA, she concluded that the consumer appeared to be over-indebted. Subsequently, the debt counsellor compiled a proposal which contemplated that the home loan debt owed to FNB be restructured by reducing the monthly minimum instalment due from R9 310 to R5 551 (including an insurance premium) and maintaining the interest rate applicable at 7,4% per annum.<sup>22</sup> It was proposed that the monthly instalment of R5 695 in respect of the motor vehicle be reduced to R1 500 and that the interest rate, agreed at 15,75%, be reduced to 10%. Similar re-arrangements were proposed for the consumer's other obligations to creditors identified in the proposal.<sup>23</sup> The repayments in

19 2015 JDR 1614 (GP).

20 The facts appear from paras 1–9 of the judgment.

21 Para 9. This is relevant because for these purposes s 78(3)(b) provides that the financial means, prospects and obligations of a consumer include those of any other adult person within the consumer's immediate family, to the extent that they share their respective financial means and mutually bear their respective financial obligations.

22 Para 12.

23 *Ibid.*

terms of the proposal were based on an amount of R11 608 a month to be made available by the consumer towards his debts and, important to note, a recommendation that the terms of such repayments be extended to terms of between 18 months and 105 months. Built into the scheme was provision for increased payments to the longer proposed term creditors as the shorter term creditors became repaid in full (that is, a “cascading payment structure”).<sup>24</sup>

All the consumer’s credit providers accepted the proposal except FNB and Nedbank pursuant to which the debt counsellor referred the proposal to the magistrate’s court.<sup>25</sup> In the notice of motion, the consumer and the various creditors, including those who had accepted the proposal, were cited as respondents and the debt counsellor applied for orders, *inter alia*, declaring the consumer to be over-indebted and restructuring the consumer’s debt obligations in accordance with the proposal. The debt counsellor, as applicant, also sought an order for costs against any respondent who opposed the application.<sup>26</sup> Despite FNB and Nedbank’s opposition to the proposal, the magistrate’s court approved the proposal and made an order for costs as per paragraph 3 of the order as proposed by the debt counsellor, which read as follows: “That in terms of section 86(7)(c)(ii)(bb) the date upon which payments to the [creditor respondents] become due be postponed until after *all* Debt Counselling Fees and Legal Fees relating to this application are paid in full.”<sup>27</sup>

### 3 HIGH COURT’S JUDGMENT

The appeal court’s judgment was delivered by Tuchten J with whom Magardie AJ agreed. The court indicated that considerable time in argument before it was taken up by a debate about what a debt counsellor must establish before coming to the conclusion that a consumer is over-indebted. According to the court it was, however, not necessary or even possible exhaustively to identify what a debt counsellor must determine in this regard and it remarked that each case will turn on its own facts. However, it indicated that in its view a debt counsellor is entitled to accept the “say so” of the consumer where what the counsellor is told is supported by vouchers which appear regular and genuine. Whether the information supplied by the consumer will be sufficient for this purpose and whether the debt counsellor must go further than merely consulting with the consumer and examining the vouchers he produces and how much further she should in any given case go, will depend on the facts of the case.<sup>28</sup>

The court pointed out that a debt counsellor who has formed the opinion that a consumer is over-indebted is not obliged in all circumstances to take the matter further. However, such debt counsellor “may” issue a proposal under section 86(8)(c) recommending that the magistrate’s court make one or more of the orders specified in section 86(7)(c), as indicated below. The court cautioned that: “[N]o doubt she will decline to do so if she is unable to formulate a proposal

<sup>24</sup> Para 16.

<sup>25</sup> Para 13.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*; own emphasis.

<sup>28</sup> Para 6. The court remarked (para 7) that in the present case there did not appear to be anything that ought at this stage of the evaluation by the debt counsellor to have given rise to suspicion or to have warranted further investigation.

which, having regard to the objects and the provisions of the NCA, she considers makes *business sense*.”<sup>29</sup>

It further pointed out that the hearing of a debt restructuring application is governed by section 87<sup>30</sup> of the NCA and that a magistrate presiding in a court to which a re-arrangement proposal has been referred fulfils a judicial and not an administrative role. The magistrate’s court derives its power in this regard from the NCA and the procedure such a court must follow is set out in Magistrates’ Courts rule 55. Thus, the magistrate must apply the law of procedure and of evidence as applicable to judicial proceedings.<sup>31</sup> The court indicated that this could therefore lead to a court being confronted with disputes of fact which would then bring into operation, in an appropriate case, the procedural rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,<sup>32</sup> namely, that the starting point is that where there is a dispute as to the facts, final (as opposed to interim) relief should only be granted in motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant’s affidavits justify such an order. Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted. However, in certain instances the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact. Where the allegations or denials of the respondent are far-fetched or clearly untenable, the court is justified in rejecting them merely on the papers. The court pointed out that a debt re-arrangement order made under section 87(1)(b)(ii) is final relief<sup>33</sup> and that the position of the debt counsellor in the present circumstances has been described aptly as that of a *pro forma* applicant.<sup>34</sup>

Before dealing with the opposing affidavits by FNB and Nedbank, the court remarked that it needed to deal with two procedural aspects that were raised in the appeal. The first was the submission made on behalf of the appellants that the application lacked particularity as to the consumer’s assets and in particular documentary material which might be relevant to an assessment of the proposal.

29 Para 11. In the court’s view it was unnecessary for purposes of the present case to try to identify all the circumstances under which a debt counsellor who has made the requisite determination may decline to take the matter further and formulate a recommendation that the magistrate’s court may order.

30 S 87 provides that when the magistrate’s court conducts a hearing, it must have regard to the proposal and information before it and the consumer’s financial means, prospects and obligations. Having conducted a hearing, the magistrate’s court may then reject the recommendation or the application, as the case may be. Alternatively, it can make an order declaring any credit agreement reckless and an order contemplated in s 83(2); or an order rearranging the consumer’s obligations in any manner contemplated in s 86(7) or both such orders.

31 *National Credit Regulator v Nedbank Limited* 2009 6 SA 295 (GNP) 306H 308B 310C. The court in *Barnard* incorrectly referred to r 66 which appears to be a mere inadvertent error.

32 1984 3 SA 623 (A) 634F–635C where Corbett AJ qualified the formulation of the rule in *Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 4 SA 234 (C) 235E–G to the effect that where there is a dispute as to the facts a final interdict should only be granted in motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant’s affidavit justify such an order, or where it is clear that the facts, though not formally admitted, cannot be denied and must be regarded as admitted.

33 Para 17.

34 Para 18. *National Credit Regulator v Nedbank Limited* 2009 6 SA 295 (GNP) 309E.

The court indicated that while the founding affidavit in a debt restructuring application should demonstrate that the consumer is over-indebted and deal with the prospects for the improvement of the consumer's financial predicament, it did not regard it as necessary for a debt counsellor to attach to the application all the documents and vouchers she has obtained from the consumer. However, the debt counsellor must display good faith in the application and to that end, the debt counsellor's file should be made available to all interested parties and in her founding affidavit she should tender inspection of all documents in her possession.<sup>35</sup>

The court held that, broadly stated, the debt counsellor's application should deal with the essentials of her proposal. It cannot be expected of a debt counsellor to anticipate every objection to the re-arrangement which a creditor might raise. She need only deal, in the discharge of her duty to the court, in her founding affidavit with those issues of which she is aware or might by reasonable and diligent enquiry of the consumer become aware.<sup>36</sup> The court thus disagreed with the judgment in *Motor Finance Corporation (Pty) Ltd v Joubert*<sup>37</sup> where it was held that the obligation of disclosure on an applicant debt counsellor applying for debt relief was equivalent to that resting on an applicant for the voluntary surrender of his estate.<sup>38</sup>

The second procedural aspect arose from the fact that the appellants adduced facts in their answering affidavits which gave rise to disputes. The court indicated that the debt counsellor responded to those disputes not, as she should have, by the delivery of a replying affidavit, but by the delivery of heads of argument in which certain factual assertions were made. Thus, the appellants justifiably objected in the magistrate's court to this procedure as the general rule is that facts are placed before courts in applications through affidavits sworn by deponents with personal knowledge of that to which they depose.<sup>39</sup>

The court disagreed with the submission on behalf of the debt counsellor that it was not competent for the consumer, being a respondent in the application, to respond to the issues raised by the other creditor respondents. It indicated that such submission was wrong because it puts form above substance. The application, in substance although not in form, is the application of the consumer. He is required by law to confirm under oath the allegations made by the debt counsellor in her founding affidavit. He may go further and put before the court in his affidavit any factual material which he considers or is advised is material to the decision of the case.<sup>40</sup>

The court pointed out that while the provisions of rule 55 are applicable to proposals made by debt counsellors to the court under section 87(1), this does not mean that they must rigidly apply as if this were, for example, a claim for

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35 Para 20.

36 Para 21.

37 Para 21. Case no A629/2013 (GNP) 22 August 2013. See specifically, paras 12ff.

38 Para 21. It indicated that the wide-ranging obligation in a voluntary surrender application arises from the fact that such an application is brought *ex parte*. However, a debt review application is brought on notice to all concerned and the duties of disclosure in such a case are subject to the obligation of the debt counsellor to play open cards with other interested parties and the court, and are no higher than in any other opposed application.

39 Para 22.

40 Para 23.

payment of a specified amount on a cause of action which accrued before the application was launched. The power of the court approached under section 87(1) derives from the NCA and the procedure provided by Magistrates' Courts rule 55 should not be applied so as to defeat the purposes of the NCA. The position of a debtor such as the consumer is dynamic and may, in the time between when the application to court is launched and when it is heard, improve or deteriorate with the vicissitudes of life. The purpose of section 87 of the NCA, viewed through the prism of the measure as a whole, require that the court conducting the hearing be apprised of such relevant material as the parties may wish to put before it. For this purpose, it is a *necessary implication* of the provision that the court conducting a hearing under section 87 is empowered right up to the time it delivers its judgment to receive information additional to that provided by the founding, answering and replying affidavits conventionally encountered in an opposed application.<sup>41</sup>

The court then returned to the answering affidavits. It pointed out that, firstly, FNB attacked the proposition that the consumer should, under the proposal, remain the owner and thus in possession of the property which was the subject of FNB's bonds. The contention was that the property ought to be sold and the consumer required to buy a cheaper property or rent a property for himself and his family.<sup>42</sup> According to the court this proposition could not be dismissed on the papers as palpably without merit. It indicated that an "automated valuation report" in the papers placed the value of the property in question at about R850 000, with an "estimated lower selling price" of R700 000. It remarked that if these figures were placed in dispute, the value would have to be established as it would in any other case. Also of relevance would be the availability of cheaper sale property and rental property in the relevant area and the cost of rental. The court referred to opinions to the effect that the object of debt review and restructuring is not to enable a consumer to continue in possession and use the relevant property after the instalment sale agreement under which that property is held is cancelled<sup>43</sup> and remarked that the same can be said in regard to a claim on a home loan.<sup>44</sup>

The court further pointed out that it was fundamental to the proposal of the debt counsellor that the home loan debt owed to the consumer's major creditor, FNB, be restructured from R9 310 a month to R5 000. However, there was a dispute of fact in that regard which could not be decided on the papers and there

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41 Para 24; own emphasis. The court pointed out that such power should of course be exercised in accordance with a judicial discretion, which will usually involve a consideration of the reasons for the late provision of the new material and any prejudice to other parties affected by the hearing and the relief sought.

42 Para 25.

43 Para 26 with reference to *Standard Bank of SA Ltd v Newman* [2011] ZAWCHC 91 (15 April 2011).

44 Para 26. The court explained that the policy underlying the relationship between home loan lender and borrower is that the borrower will build up equity in his own home while repaying the loan that enabled him to buy it. When he is no longer able to meet his obligations to the lender, the question arises whether it is equitable that the defaulting borrower remains in occupation at the expense of the lender. The court remarked that "it is regrettably often overlooked that funds for home loans do not come out of a bottomless money pit and that the provision of loans to new entrants into the home loan market depends in large measure upon repayments by existing market participants".



was no request that the issue be referred to evidence. That being the case, the court held that the proposal ought not to have been approved.<sup>45</sup>

A second difficulty the court had with the proposal related to the debt due to Nedbank for the motor vehicle in respect of which the original repayment terms agreed on 1 February 2010 were R5 249 a month for 72 months. The parties therefore, initially contemplated that the debt would be discharged by 1 January 2016.<sup>46</sup> The proposal by the debt counsellor was that the instalments be reduced to R1 500 a month, that the interest rate be reduced from 15,75% to 10% per annum and the term extended to 105 months, an extension of just under three years.<sup>47</sup> In the court's view, there were insuperable problems with this proposal.<sup>48</sup> The first was that while the magistrate's court had jurisdiction to extend the term of the agreement, it had no power to reduce the interest rate applicable to the debt. The second was that no attention seemed to have been given to the complaint of Nedbank that the term extension sought would mean that in all likelihood, the value of its security, the motor vehicle itself, would depreciate to far below what was owed to Nedbank if Nedbank were precluded from exercising its rights of cancellation and repossession.<sup>49</sup>

The final difficulty the court had with the proposal was the provision for payment of the costs. It indicated that what the debt counsellor sought to achieve by this "remarkable paragraph" was the subordination of the payment scheme in the order in favour of her own fees and those of her attorney in relation to the application. However, section 86(7)(c)(ii)(bb) simply does not permit such a subordination. According to the court, a far greater problem was that these unspecified amounts might never be paid at all and that in such a case, the due dates for settlement of the claims of the creditor respondents would be postponed indefinitely.<sup>50</sup>

The court then again returned to the debt owed to Nedbank in relation to the motor vehicle: it remarked that the magistrate appreciated that the NCA, as it stands, does not permit a court, acting under section 87(1)(b), to reduce the interest rate applicable to any specific debt. But what the magistrate then did was to restore to the order the agreed interest rate, 15,75%, while leaving in the order the other integers of the calculation as they were in the proposal with the effect that the monthly payments ordered, R1 500, were not large enough to reduce any of the capital. Thus, on the order as made by the magistrate's court, Nedbank's claim would never be repaid in full and it effectively granted the consumer

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45 Para 27. The court remarked that in the case of FNB, the evidence before the magistrate's court was not such that justice permitted the supplanting of FNB's contractual rights by the proposal. It indicated that in the case of all the other creditor respondents, the knock-on effect, without any further investigation, was such that the funds proposed for the settlement of their claims would simply not be available because there would be, absent an order for re-arrangement binding on FNB, no bar to enforcement by FNB of its claim.

46 Para 28.

47 *Ibid.*

48 Para 29.

49 Para 30. The court indicated that it was established that the consumer was in possession of a total of three vehicles. It thus found it difficult to understand why the magistrate's court decided that it would be appropriate to allow all three of these vehicles to remain in the consumer's possession rather than be sold to reduce his over-all indebtedness.

50 Para 32. It remarked that this irrationality was imported uncritically into the order of the magistrate's court and was fatal to the order itself.

perpetual credit at the expense of Nedbank and violated the purpose of the legislation to achieve eventual satisfaction of the debt.<sup>51</sup>

Accordingly the court held that the order of the magistrate's court could not be supported with the result that the appeals by FNB and Nedbank had to succeed.<sup>52</sup>

With regard to costs, the court deemed it appropriate to mention two procedural developments in relation to the appeal itself. The first was that the appeals of the two appellants, FNB and Nedbank, were noted and initially prosecuted separately and only the successful applicant in the magistrate's court, the debt counsellor, was cited as a respondent on appeal. Prior to the hearing of the appeal, the point was taken on behalf of the debt counsellor that all the respondents in the magistrate's court should have been joined as respondents on appeal, prompting the court to order that the appeal be postponed and that the present appellants should notify all respondents in the court below of the pending appeal. Only the consumer gave notice that he wished to join the appeal and he thereupon became the second respondent on appeal. The costs of the hearing were reserved and remained to be decided.<sup>53</sup> The second development in the appeal related to an application brought by the debt counsellor to lead further evidence on appeal, which application was subsequently withdrawn. Although there was a tender of costs of the abortive application to lead further evidence in the notice of withdrawal of the application, the incidence of those costs was argued at the appeal and also remained to be determined.<sup>54</sup>

The court indicated that before it would deal specifically with the aforementioned two issues, it needed to say something about the "special character" of the debt counsellor as applicant in section 87(1) proceedings and any appeal arising from such proceedings and of the creditor respondents in section 87(1) proceedings. It remarked that the debt counsellor is a *pro forma* applicant who has only a professional, as opposed to a personal, interest in the outcome of the proceedings. She should not take sides with one or other of the litigants. She should not in an untoward manner advance her own interests to the detriment of those of the litigants proper. She must be available to the court at the hearing until excused. She may "explain and defend her proposal and, of course, defend herself and her reputation if personal attacks are made on her in the proceedings".<sup>55</sup> It further stated that a debt counsellor should, when asked to do so by the court and "even in some cases", offer sources of information relevant to the proceedings. For example, if she has knowledge of the property selling and renting market relevant to the case, she may offer this information to the court. This may be accepted as correct by the parties.<sup>56</sup> Similarly, the debt counsellor might offer information contained in a reputable publication as indicative of the value of a vehicle.<sup>57</sup>

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51 Para 33.

52 Para 35.

53 Para 36.

54 Para 37. The evidence she sought to have led related to abortive attempts to settle the appeal and the present financial position of the consumer.

55 Paras 38–39.

56 Para 40. The court remarked that "of course, if what the debt counsellor says in this regard is not accepted as correct, the necessary facts would have to be proved in the usual way".

57 Para 40.

The court further held that a debt counsellor may not seek to have her own fees and expenses preferred to those of the creditors and the consumer. A debt counsellor may, however, make provision for her own fees and expenses in specified amounts to be paid by instalments ranking equally with the consumer's other creditors.<sup>58</sup>

According to the court, a debt counsellor who does no more than the court had outlined should not in general be mulcted in costs if the proposal is not accepted by the court hearing the matter under s 87(1).<sup>59</sup> It indicated that the principle that costs follow the result should apply in its usual rigour in proceedings under section 87(1). The court remarked that the position of a consumer in such proceedings is much the same as a litigant who asks for an indulgence such as a rescission of a judgment, an amendment or an extension of time. Where the opposition of a creditor is reasonable, therefore, the creditor similarly should not be mulcted in costs. However, Tuchten J cautioned that a court should bear in mind, that imposing a costs obligation on a consumer whose obligations are re-arranged under section 87(1) would often defeat the purpose of the order by imposing an obligation not subject to the order on an already financially burdened consumer.<sup>60</sup>

The court was not impressed with the conduct of the debt counsellor.<sup>61</sup> It indicated that she entered the dispute between the parties when she sought the order which would give her fees and expenses preference over the claims of the creditor respondents. She perpetuated her personal involvement in the dispute in the manner in which she made the case of the consumer her own. On appeal, she adopted a partisan attitude. In bringing the abortive application to lead further evidence on appeal, she sought costs from the appellants if they opposed the application. In addition, the court remarked that the proposal made by the debt counsellor was fatally irrational.<sup>62</sup>

The court pointed out that a debt counsellor who formulates and circulates a proposal under section 86 is *bound* to refer it to the court in the circumstances described in section 86(8)(b).<sup>63</sup> It remarked that it did not think a debt counsellor who *bona fide* comes to the conclusion that her initial proposal can no longer be supported should necessarily be made to pay costs. However, in the present case exceptional circumstances were present. Not only did the debt counsellor advance a proposal which was irrational in several material respects, but she defended it in a partisan manner. In these circumstances, the court consequently held that the debt counsellor should pay the costs both in the court below and on appeal as well as the costs of the abortive application to lead further evidence on appeal.<sup>64</sup>

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58 Para 41.

59 Para 42.

60 Para 43.

61 Para 44.

62 Para 45. Had the debt counsellor appreciated that her proposal ought not to succeed and applied to withdraw it without more, the court indicated that it doubted whether it would have exercised its discretion in the same way as was done in *Absa Bank v Robb* 2013 3 SA 619 (GSJ) where a debt counsellor who appreciated that a consumer was not in fact over-indebted and withdrew the application to the court she had made under s 87(1) the day before the hearing was ordered on appeal to pay the costs of the opposing creditors.

63 Para 46.

64 Para 47.

Finally, the court pointed out that the appellants sought a punitive costs order against the debt counsellor. It remarked that in its opinion, the manner in which proceedings were conducted on behalf of the respondents on appeal was “misguided but not morally reprehensible” and thus, it found no basis for such a punitive costs order.<sup>65</sup>

#### 4 DISCUSSION

It is seldom that virtually every sentence uttered by a court in delivering its judgment is loaded and of critical import; hence the lengthy discussion of the *Barnard* case above. As indicated, the discussion below only focuses on selected aspects of the judgment.

##### 4.1 Powers of the restructuring court

The initial procedural implementation of the debt review procedure created by the NCA was problematic.<sup>66</sup> The Act introduced the novel concept of debt review but, apart from some indications regarding the process before the debt counsellor, it was, and still is, silent on the procedure that has to be followed when a debt counsellor determines that a consumer is over-indebted and opts to refer a debt restructuring proposal to court. Neither the Magistrates’ Courts Act and Rules<sup>67</sup> nor the High Court Act<sup>68</sup> (now Superior Courts Act<sup>69</sup>) and the Uniform Rules of Court provided for specific procedural rules to govern the referral and hearing of the debt counsellor’s recommendation by the court. This procedural issue was addressed by *The National Credit Regulator v Nedbank*<sup>70</sup> (and subsequently confirmed on appeal)<sup>71</sup> where it was held that the appropriate procedure for such referral was the application procedure as set out in rule 55 of the Magistrates’ Courts rules. From this it follows, as pointed out by Tuchten J, that a magistrate who hears such referral application is obliged to apply the law of procedure and evidence as applicable to judicial proceedings. This obligation, it is submitted, is of paramount importance when the magistrate deals with the debt restructuring application referred to it by the debt counsellor. It implies that the magistrate must exercise a judicial discretion in considering whether or not to grant the application and thus he is not allowed to merely “rubber stamp” it. The mere fact that the application is referred to court via section 86(7)(c) should already alert the court to the fact that not all the consumer’s credit providers agreed to the proposal (as the matter in such an instance would have been referred to court via section 86(8)(b) for purposes of confirming a consent order). Thus, the section 86(7)(c) application by its very nature requires judicial scrutiny. As pointed out by Tuchten J, a debt counsellor who finds a consumer over-indebted is not obliged to refer the matter to court with a debt restructuring proposal as appears from the use of the word “may” in section 86(7)(c): if in a specific instance the debt counsellor is not able to formulate a “businesslike” (it

65 Para 51.

66 For a detailed discussion of the initial procedural challenges posed by the enactment of the debt review process in s 86 of the NCA, see Scholtz *et al* para 11.3.3.2(m).

67 32 of 1944.

68 59 of 1959.

69 10 of 2013.

70 2009 6 SA 295 (GNP).

71 *Nedbank Ltd v National Credit Regulator* 2011 3 SA 581 (SCA).

is taken that the court has meant that it must be economically viable) proposal to address the consumer's debt situation, the debt counsellor should refrain from referring the matter. In such a situation, debt restructuring as envisaged by the NCA appears simply not to be the solution to the specific consumer's debt problem. Jurisprudence on this issue currently dictates that the court is obliged to consider the economic viability of the proposal<sup>72</sup> and also to check whether the terms of the proposal meet that which section 86(7)(c) allows, *inter alia* that one or more of the consumer's debt obligations be re-arranged by

- “(aa) extending the period of the agreement and reducing the amount of each payment due accordingly;
- (bb) postponing during a specified period the dates on which payments are due under the agreement;
- (cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or
- (dd) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6”.

As pointed out by Tuchten J, section 86(7)(c) does not allow the debt restructuring court to tamper with the interest rate originally stipulated in the credit agreement between the credit provider and consumer.<sup>73</sup>

It is by now trite that the NCA requires a balancing of the interests of the consumer as well as that of the credit provider. Debt restructuring as envisaged by the NCA also requires such a balancing approach. Its objective is the eventual satisfaction of all the consumer's responsible credit agreement debt. The fact that a court is bound by the constraints of the law of procedure and evidence when hearing a debt restructuring referral and whilst exercising its judicial discretion also implies that where credit providers oppose the application, the court is not at liberty to merely ignore such opposition in the name of consumer protection and blindly “cram down” the debt restructuring proposal before it on the disagreeing credit providers. As a court, it has to observe the specific rules and procedures that apply to opposed matters in order to allow for proper ventilation of the issues. One such very significant procedural rule that the court is obliged to observe is that which applies where opposing creditors in their opposing affidavits raise matters that give rise to a genuine dispute of facts. Because the debt restructuring referral is brought by way of application, the matter serves before the court by way of affidavits and there is no oral examination of the parties, except to the extent that the court may pose certain questions to the debt counsellor. Hence, in order to overcome the problems posed by the application procedure in the event that a dispute of facts arises, the Magistrates' Courts rules prescribe the route that a debt restructuring court, faced with a true dispute of facts, is obliged to follow. The magistrate, presiding in a court that is a creature of statute, has no option but to follow this procedure prescribed by the Magistrates' Courts rules regarding how to deal with a dispute of facts that arise in application proceedings – it simply has no discretion to follow another route.

Thus, where, for instance, there is a genuine dispute of fact, for example, regarding the amount by which the monthly instalment of a credit agreement is

<sup>72</sup> See Scholtz *et al* para 11.3.3.2.(k) and the cases discussed there.

<sup>73</sup> *SA Taxi Securitisation (Pty) Ltd v Dick Lennard* 2012 2 SA 456 (ECG); *SA Taxi Securitisation v Mongezi Manu* [2011] ZAECGHC 11 (28 April 2011); *First National Bank v Adams* 2012 4 SA 14 (WCC); *Nedbank Ltd v Norris* 2016 JDR 0355 (ECP).

to be reduced for purposes of debt in accordance with section 86(7)(c), or the value of the creditor's security, the court is bound to make an order as dictated by Magistrates' Courts rule 55(k),<sup>74</sup> namely, *not* to accept or reject the debt counsellor's proposal but to refer the dispute for oral evidence and to postpone the debt restructuring application pending the outcome of such proceedings, either *sine die* or to a specific date. Tuchten J, by pointing out the application of the rules of procedure relating to true disputes of fact, added a good measure of certainty to the jurisprudence on the procedural implications of a debt restructuring application and confirmed that in essence it still remains an application. Hence any disputes of fact that arise in the course of such application must be dealt with within the parameters of the procedural rules applicable to applications in general.

#### 4.2 Liquidation of assets to repay debt

As indicated above, various judgments have expressed the view that the purpose of debt review is not to allow a consumer to retain the credit provider's security at the credit provider's expense. The NCA has as its objective the eventual satisfaction of the consumer's credit agreement debt and a repayment plan which does not facilitate such repayment is not serving such objective. Debt review is thus generally and, unfortunately, not a safe haven for the over-indebted consumer who cannot repay his mortgage but wants to remain in possession of a house that he cannot afford or who wants to keep on driving a car that he cannot afford. The rationality of the current debt review process which makes no distinction between secured and unsecured debt is questionable unless, of course, one interprets the lack of the legislation to expressly deal with this issue as a sign that the legislature intended the process to apply only to the outstanding obligation on a secured credit agreement and not to be available where the debtor is still in possession of the creditor's security. Unfortunately, this intention is not expressly borne out by the wording of section 86, hence the phenomenon in practice that consumers in those cases where the credit agreement has not yet been cancelled by the time they apply for debt review,<sup>75</sup> use the procedure to attempt to retain assets secured by credit agreements, notably houses and motor vehicles. Where this practice is condoned, the effect is that for all practical purposes the secured creditor is stripped of his security and treated in the same manner as unsecured creditors. Actually, the secured creditor's position is worse than that of a mere unsecured creditor because the secured creditor is not only deprived of his security and required to accept a considerably smaller, sometimes even a

<sup>74</sup> Magistrates' Courts rule 55(k)(i) provides that where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. R 55(k)(ii) provides that "the court may in particular, but without affecting the generality of subparagraph (i) direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for that person or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise". The position in the high court is similar. See Uniform Rule 6(g).

<sup>75</sup> Where a consumer applies for debt review before the credit provider cancels the credit agreement, such application triggers a moratorium on debt enforcement. Whether this means that a credit provider may cancel (not enforce) the agreement during the time that the matter is under debt review, is debatable.

negligible, payment over an extended period of time, often far in excess of the original contract period but, the practical reality, as pointed out by the court, is also that, especially where an asset such as a motor vehicle is concerned, the said asset depreciates rapidly in value. The result is that where a credit provider is denied the full instalment in respect of the vehicle by virtue of a proposal which requires a largely reduced instalment to be paid over an extended period of time, the credit provider is seriously short-changed: he not only does not get the monthly amount owing to him within the shorter (and economically sensible) period as initially agreed to by the parties when the contract was concluded, but he also finds himself in the predicament that he is unable to sell the vehicle and that, should the consumer eventually default on the debt restructuring order, the credit provider will have to try and sell an asset which has substantially depreciated in value whilst knowing that chances will be slim of ever recovering the full outstanding debt from the over-burdened consumer. Clearly, in such event the consumer will also be prejudiced as the asset will not contribute to the reduction of the debt to the extent that it would have had the vehicle been returned and sold at an earlier stage. At this stage, it might also be apposite to remark on the ‘cascading payment’ technique frequently employed by debt counsellors in debt restructuring proposals. These cascading proposals often entail that the consumer will retain the credit providers security (eg a vehicle or a house) whilst making payments towards his smaller unsecured debt as well as his secured debt and that once the smaller unsecured debt is settled, the money so freed up shall be appropriated towards his larger secured debts, meaning that he will then make larger repayments towards such secured debt. Although appearing to present a noble solution in order to free up money to service secured debt better, this scheme actually creates a reverse preference in terms whereof unsecured debtors are favoured above secured debtors and stand the best chance to have their debts repaid.<sup>76</sup> Clearly, such a scheme defies the purpose of security.

As pointed out above, the orders that a debt restructuring court can make in terms of section 86(7)(c) of the NCA is limited essentially to “tweaking” the instalment amounts and periods of repayment. Section 86(7)(c) does not provide for a court to order the liquidation of assets – most probably because what the legislature envisaged was that secured assets would not form part of the debt restructuring process. It is submitted that in instances where the return and liquidation of secured assets would be the appropriate course to follow in order to come up with a “businesslike” proposal, the court should question the debt counsellor as to why such liquidation was not considered. Where retaining an asset would result in a proposal that is devoid of economic rationality, it is submitted that such failure to liquidate an asset, especially a secured asset, would constitute a ground upon which the court, in the exercise of its discretion, may refuse to accept the restructuring proposal. It is further submitted that the plight of secured creditors in the context of formal debt restructuring necessitates a

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<sup>76</sup> It is appreciated that debt review is distinct from insolvency as per the Insolvency Act 24 of 1936 and that a *concursum creditorum* as it is known in insolvency law is not established upon the consumer applying for debt review. However, it is submitted that the effect of a debt restructuring order that allows for a substantial reduction in repayments over an extended period of time whilst also allowing the credit provider’s depreciating security to remain in possession of a debtor has the potential to be just as prejudicial to a credit provider as a sequestration order.

reconsideration of the powers of the court and that these powers should be extended so that a court can specifically also order the liquidation of assets.

### 4.3 Extent of disclosure required in application for debt restructuring

The basis of a debt repayment plan turns on the consumer's outstanding credit agreement debt and the amount of disposable income he has to service such debt and should also entail considering whether possibly he has assets (secured by credit agreement or otherwise) that can be liquidated in order to reduce his debt burden. It is thus submitted that his credit providers must be apprised of sufficient detail regarding his financial position with specific regard to his debt burden and the amounts and assets available to service his debt, in order for them to make an informed decision as to whether the proposed restructuring of their debt is acceptable or not. Clearly, when a proposal is referred in terms of section 86(7)(c) the court also needs to be apprised of all the relevant facts failing which it will have no basis upon which to exercise its discretion judicially. It is submitted that a clear picture of the consumer's complete debt situation as juxtaposed against his repayment ability is essential for the proper consideration of a collective debt restructuring proposal such as that envisaged by the NCA. In principle, assets which form the basis of the credit provider's security should be liquidated in order to reduce the consumer's indebtedness. It is, however, conceded that the exercise of the discretion by the court should include a consideration of whether the consumer should be able to retain an asset such as a vehicle that he needs for his livelihood if there are special circumstances that would favour such a decision.<sup>77</sup> In this instance, it is submitted that regard should be had to the value of the item, the duration of the repayment plan and any hardship that the consumer may suffer if the item is liquidated.

However, it is also submitted that the mere complete disclosure of all the consumer's debt obligations (which could consist of various types of debt) and his means to service such debt in terms of a credit agreement debt restructuring plan does not *per se* mean the court can cram down such plan on a credit provider unless the court has thoroughly considered any reasonable objections by the credit provider and upon exercising its discretion judicially, and in the absence of any dispute of fact, determines that the terms of the proposal is economically viable and is the only method by which the consumer would be able to eventually satisfy his credit agreement debt. It should, however, be cautioned that a too literal interpretation of the word "eventual" as it appears in section 3 is clearly inappropriate as it is clear from case law that a proposal that will result in eventual satisfaction of the consumer's credit agreement debt still has to be economically viable in order to serve the balancing of the interests of the consumer and of the credit provider that the Act strives for.

As regards the level of disclosure required in the debt restructuring application, Tuchten J's opinion that the debt counsellor's application should deal with the

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<sup>77</sup> In the context of mortgage credit, s 26 of the Constitution of the Republic of South Africa, 1996, already affords protection to a consumer where the dwelling in question is his primary residence. See Van Heerden "The impact of the right of access to adequate housing on the enforcement of mortgage agreements and other credit agreements" 2012 *THRHR* 632; Brits and Van der Walt "Application of the housing clause during mortgage foreclosure: A subsidiarity approach to the role of the National Credit Act" Part 1 2014 *TSAR* 305; Part 2 2014 *TSAR* 519; Fuchs "Ingrypende ontwikkeling in die oproepingsproses van verbande op onroerende sake" 2014 *Litnet Akademies (Regte)* 221.



essentials of her proposal and that it cannot be expected of a debt counsellor to anticipate every objection to the re-arrangement which a creditor may raise, is correct, provided of course that the “essentials of her proposal” are sufficiently disclosed to enable an informed decision by credit providers and subsequently a proper exercise of its discretion by the court.

#### **4 4 The impact of changing circumstances upon a debt restructuring application**

An overview of the plethora of cases on debt review and subsequent debt restructuring applications indicates that, in many instances, considerable time elapses between a debt counsellor’s determination and referral of his recommendation and the stage at which the matter is actually heard by the debt counselling court. Since the compilation of the proposal by the debt counsellor, especially where some time has passed, a consumer’s financial and debt position may have changed – it may have become even more dismal or his ability to service his debt may have improved if, for instance, he won or inherited money or received a salary increase. The NCA requires the consumer and the credit provider to participate in good faith in the debt review process<sup>78</sup> and, it is submitted, that this good faith obligation is not limited to the initial proceedings before the debt counsellor but also applies when the matter is referred to court for purposes of obtaining a debt restructuring order and, arguably, even thereafter when the consumer and credit provider are obliged to give effect to the terms of the debt restructuring order. It is submitted that this good faith obligation implies that the consumer, via his debt counsellor, must inform the court if his circumstances had changed since the proposal by the debt counsellor was compiled and if so, how such changes may affect the restructuring proposal and his ability to service his debt. It then becomes the duty of the debt counsellor to disclose this change in circumstances to the court and to alter his proposal in accordance therewith or even withdraw the debt restructuring proposal if it is no longer economically viable. It is thus to be welcomed that Tuchten J pointed out that it is a necessary implication of section 87 that “the court conducting a hearing is empowered right up to the time it delivers its judgment to receive information additional to that provided by the founding, answering and replying affidavits conventionally encountered in an opposed application” in accordance with the court’s judicial discretion.<sup>79</sup>

#### **4 5 Debt counsellor’s fees**

The court in *Barnard* made it clear that the debt counsellor’s attempt to have payment of her debt counselling costs and fees preferred over payment of the amounts owing to creditors was not sanctioned by the NCA as section 86(7)(c)(ii)(bb) simply does not permit such a subordination. In addition, the court indicated that such a scheme would irrationally result in the due dates for settlement of claims of credit providers being postponed indefinitely. It is to be welcomed that the court has addressed this issue. Clearly, the NCA provides for the debt counsellor’s initial application fee of R50 to be paid upon applying to

<sup>78</sup> *Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga* 2011 1 SA 374 (WCC); *Wesbank Ltd v Papier* 2011 2 SA 395 (WCC); *Pottas v Firstrand Bank Ltd* [2015] JOL 32803 (ECP).

<sup>79</sup> Para 24.

the debt counsellor for debt review thus having the effect that the debt counsellor gets payment of this amount before the credit providers are paid in accordance with a debt restructuring proposal. However, when one has regard to the debt counsellor's fee guidelines issued by DCASA as set out above, it appears that these guidelines at least attempt to give some preference to the payment of the debt counsellor's restructuring fee to be fully recovered from the first instalment that the consumer has to pay. One may, of course, ask what this translates to in practice: does it mean that the first payment in terms of a debt restructuring proposal will always be inflated as it has to cater not only for repayments to credit providers but also for the payment of the debt counsellor's fee? Or does it mean that the debt counsellor's fee must be subtracted from the amount available for the first payment and that whatever is left of such first payment is then paid over to the consumer's credit providers? If the latter situation is what happens in practice, it means that the effect of the DCASA guidelines is actually to create a "preference" in respect of the debt counsellor's debt restructuring fees and thus to subordinate the payment of the credit providers claims (secured and unsecured) to payment of the restructuring fees. One may also ask what exactly is meant by the words "restructuring fees" in the guidelines – do they only refer to the debt counsellor's fees for drafting the proposal and liaising with the consumer and his credit providers or do they also include the legal fees incurred in having the restructuring proposal made an order of court? In any event, the exact status of the guidelines, although endorsed by the National Credit Regulator, is unclear but be that as it may, it is submitted that the debt counselling industry cannot use its fee guidelines to effect a preference which the Act does not permit.

#### **4 6 Costs orders against debt counsellors**

Tuchten J made a number of important statements regarding costs orders against debt counsellors. He confirmed that where the debt counsellor merely does her job and there is nothing untoward in the proposal she advances or in the way she conducts herself, she should not be mulcted in costs if the proposal is not accepted. In such instance, the general rule that the costs should follow the result should be applied which will basically entail that the costs will be awarded against the unsuccessful consumer. As unfortunate as it may seem to add another blow to the consumer's financial woes, it is submitted that it would be unjust to penalise a debt counsellor being a neutral functionary who is executing a statutory assigned duty and who is merely doing her job, with a costs order. Very few debt counsellors would be prepared to present debt counselling services if faced with the risk of costs orders in such circumstances. It is also to be welcomed that the court clarified that the mere fact that a credit provider opposes a debt restructuring order unsuccessfully does not automatically translate into a costs order against the credit provider, but that the crucial question is whether such opposition was reasonable in the circumstances. It is, however, submitted that allocating costs in the context of a debt restructuring application might not always be such a clear-cut exercise: If a credit provider's opposition was reasonable, but a court still decides to eventually sanction a debt restructuring order, one may ask what a suitable costs order should be? Or would it be sound to argue that where there is reasonable opposition by a credit provider, this will always have the effect that the debt restructuring proposal will be rejected by the court?

What the court has made clear though is that once the debt counsellor decides to go ahead with a proposal that is devoid of economic rationality or where she acts in a partisan manner, especially where she attempts to create a preference for payment of her fees above that of the consumer's other creditors, she opens herself up to costs being awarded against her. Thus, if for instance, as was the case in *Absa Bank v Robb*,<sup>80</sup> the debt counsellor proceeds with an application for debt restructuring in terms of an economically fatal proposal despite resistance by credit providers and only withdraws the matter on the day before the hearing or fails to withdraw it at all, she will have to bear the costs occasioned by her lack of good faith conduct. This will apply even more where, as in this case, the debt counsellor despite reasonable opposition, presents such fatally irrational proposal to court for adjudication. One also needs to remark on the fact that in this matter it was held that no basis for a punitive costs order existed as the manner in which the appeal was conducted on behalf of the consumer and debt counsellor was "misguided but not morally reprehensible". This creates a bit of an interpretational dilemma if one opines that the debt counsellor *in casu* did not act in good faith. When one has regard to the court's handling of this issue, it seems that there is a netherworld between lack of good faith and downright bad faith and that is comprised of the murky area of conduct which is not actually in good faith, but somehow escapes the label of being "morally reprehensible".

#### 4 7 Miscellaneous issues

A number of miscellaneous issues addressed in the judgment also deserve comment. With regard to the statement by the court that the debt counsellor must be present at the hearing of the debt restructuring order and stay in attendance until excused, it is submitted that whilst such attendance is of course ideal, the practical reality is that it is doubtful whether debt counsellors will always be able to comply with this requirement. Debt counsellors usually serve various jurisdictions and especially in the instance where a debt counsellor operates on her own, she might not have the resources to spend her days in court, unable to attract and service new and existing business. It is further submitted that the remark by the court regarding a debt counsellor being able to present evidence regarding the selling and renting market for property and the value of a motor vehicle does not elevate such evidence to that of an expert in the valuation of such assets. Where the values mentioned by the debt counsellor is disputed and expert evidence to the contrary is credibly presented, such expert evidence should be upheld. It is submitted that, in such instance, a dispute of fact does not present itself because the debt counsellor is simply not an expert valuator. If, however, the debt counsellor also happens to be a qualified valuator or makes use of an expert valuator and the opinion of such person regarding the value of the assets is contrary to that of a valuator employed by the credit provider, a dispute of fact arises which then calls for the matter to be referred so that oral evidence can be led. This case also causes one to ponder again on the wisdom of making the consumer a "respondent" in a debt restructuring application, together with his credit providers, whereas the debt counsellor is the applicant. This approach does not sit well if one considers that the consumer is actually the party desirous of obtaining the debt relief and thus, traditionally an "applicant" and that he should thus, at least be a co-applicant in such an application.

80 2013 3 SA 619 (GSI).

## 5 CONCLUSION

Debt counsellors play a pivotally important role in the context of debt review. It is important for the South African economy that the debt review process is effective as it will often be the only way in which consumers will be able to rid themselves of over-indebtedness and in which credit providers will obtain payment of money owing to them. How the debt counsellor handles a debt review matter will largely determine whether successful debt restructuring will be attained or not. In the context of debt review, the debt counsellor's role as a neutral functionary also implies that the debt counsellor should display good faith by not making and persisting with proposals that are devoid of economic rationality, not acting in a partisan manner (however emotionally involved with the plight of the consumer the debt counsellor may feel herself to be) and especially not by preferring her own financial interests to that of the parties whom the debt review process is actually intended to serve, namely, the consumer and his credit providers. Thus, it will serve the debt review process well if debt counsellors take heed of what the court has said in *Barnard*.