

Author: N Maghembe

THE APPELLATE DIVISION HAS SPOKEN – SEQUESTRATION PROCEEDINGS DO NOT QUALIFY AS PROCEEDINGS TO ENFORCE A CREDIT AGREEMENT UNDER THE *NATIONAL CREDIT ACT* 34 OF 2005: *NAIDOO v ABSA BANK* 2010 4 SA 597

ISSN 1727-3781



2011 VOLUME 14 No 2

DOI: 10.4314/pelj.v14i2.7

**THE APPELLATE DIVISION HAS SPOKEN – SEQUESTRATION PROCEEDINGS
DO NOT QUALIFY AS PROCEEDINGS TO ENFORCE A CREDIT AGREEMENT
UNDER THE *NATIONAL CREDIT ACT* 34 OF 2005: *NAIDOO v ABSA BANK* 2010
4 SA 597 (SCA)**

N Maghembe*

1 Introduction

In *Naidoo v ABSA Bank*¹ the court had to deal with the issue of whether or not a sequestration proceeding qualifies as a "legal proceeding to enforce an agreement" under section 129 read together with section 130(3) of *the National Credit Act*.² The relevant parts of these sections provide as follows:

- 129(1) 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.
 - (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) ...
- 130(3) Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that-
- (a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with ...

When sections 129(1) and 130(3) of the NCA are read together it is clear that a credit grantor who wishes to enforce a debt under a credit agreement must first issue a section 129(1)(a) notice to the consumer.³

* Ngwaru Maghembe. LLB LLM UP). Academic Associate, Department of Mercantile Law, University of Pretoria (ngwaru.maghembe@gmail.com).

¹ *Naidoo v ABSA Bank* 2010 4 SA 597 (SCA).

² *National Credit Act* 34 of 2005 - hereinafter referred to as the NCA.

³ Van Heerden and Coetzee 2009 *PER* 333; Scholtz *et al National Credit Act* para 12.4.2.

Some of the main obstacles in applying the NCA in practice are the gaps left in the statute by the legislature.⁴ An example of such a gap is illustrated in this case note.

The purpose of the NCA as set out in section 3 is, *inter alia*,

to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers.

One of the principles by which these goals are to be attained under the NCA is by encouraging consumers to fulfil the financial obligations for which they are responsible.⁵ It therefore stands to reason that the compulsory sequestration of a consumer in terms of the *Insolvency Act*,⁶ before he or she has had recourse to mechanisms such as debt review that are focused on satisfaction of the consumer's financial obligations, may conflict with some of the provisions of the NCA.⁷

There is no substantive mention of the *Insolvency Act* or its provisions in the NCA.⁸ More significantly, even in Schedule 1 of the NCA, which sets out the rules regarding conflicting legislation, no mention is made of the *Insolvency Act*.⁹ The question therefore arises if a sequestration proceeding instituted by a credit grantor qualifies as a "legal proceeding to enforce an agreement" under section 129. If this is not the case, a credit provider will be able to apply for compulsory sequestration without giving notice to the consumer of the possibility of using alternative procedures under the NCA, such as debt review, to fulfil his or her obligations. In *Investec Bank Ltd v Mutemeri*¹⁰ the High Court held that an application for sequestration is not a process whereby the creditor enforces a debt and hence does not amount to a legal proceeding to enforce an agreement under the NCA.

⁴ Roestoff *et al* 2009 *PER* 288.

⁵ Sections 3(c) and (g) of the NCA.

⁶ *Insolvency Act* 24 of 1936.

⁷ Van Heerden and Boraine 2009 *PER* 36. See this same article for a detailed discussion of the interaction between the NCA and aspects of insolvency law.

⁸ Van Heerden and Boraine 2009 *PER* 39.

⁹ Van Heerden and Boraine 2009 *PER* 39.

¹⁰ *Investec Bank v Mutemeri* 2010 1 SA 265 (GSJ).

In *Naidoo* the Appellate Division confirmed *Mutemeri* and held that a credit provider need not comply with the procedure provided for in section 129(1) of the NCA before instituting sequestration proceedings against a debtor, as such proceedings are not proceedings to enforce a credit agreement.

The facts and decision in *Naidoo* are analysed and discussed below. The questions are if the court was correct in its interpretation of the relevant provisions of the NCA, and if so, if the NCA needs to be amended to require a notice in terms of section 129 before any proceedings may be implemented. It is submitted that the real issue is whether or not being under debt review in terms of the NCA should bar sequestration proceedings in the form of an application for the compulsory sequestration of a consumer's estate.

2 The facts and decision in *Naidoo*

The case was an appeal to the Supreme Court of Appeal by the appellant who was sequestrated at the respondent's instance in the Durban High Court on 25 May 2009.¹¹ The appellant had failed to meet his payments to the respondent under instalment sale agreements relating to six motor vehicles and two home loan agreements.¹²

It appears from the judgment that the submissions of the appellant implicitly conceded that sequestration proceedings are not "legal proceedings to enforce the agreement" within the plain legal meaning of section 129(1)(b) of the NCA.¹³ The appellant, however, argued that the respondent still erred in instituting sequestration proceedings against him before issuing him with a notice as contemplated in section 129(1)(a) of the NCA.¹⁴ The appellant explained that the procedure before debt enforcement provided for in section 129(1)(a), when read together with section 130(3), should be interpreted to cover circumstances relating not only to the enforcement of a credit agreement but also to sequestration proceedings.¹⁵ This is because the un-

¹¹ *Naidoo v ABSA Bank* 2010 4 SA 597 (SCA) para 1.

¹² *Naidoo v ABSA Bank* 2010 4 SA 597 (SCA) para 1.

¹³ *Naidoo v ABSA Bank* 2010 4 SA 597 (SCA) para 4.

¹⁴ *Naidoo v ABSA Bank* 2010 4 SA 597 (SCA) para 2.

¹⁵ *Naidoo v ABSA Bank* 2010 4 SA 597 (SCA) para 5.

paid claims that are the subject of the sequestration application arise from credit agreements to which the NCA applies.¹⁶ Counsel relied on the strength of the opening passage in section 130(3) of the NCA quoted above, specifically the words "in any proceedings commenced in a court in respect of a credit agreement to which this Act applies".

On the strength of the above provision, the appellant contended that all proceedings of which the underlying cause of action is a credit agreement to which the NCA applies are subject to the NCA.¹⁷ Cachalia JA agreed that, read in isolation, section 130(3) may convey the meaning proposed by the appellant but went on to disagree in the light of the context in which this section should be read.¹⁸

The Supreme Court of Appeal made it clear from the outset that it agreed with the concession of the appellant that sequestration proceedings are not in and of themselves "legal proceedings to enforce the agreement" within the meaning of section 129(1).¹⁹ Cachalia JA agreed with and confirmed the South Gauteng High Court decision in *Mutemeri*.²⁰ In this analogous case it was found that an order for the sequestration of a debtor's estate is not an order for the enforcement of the sequestrating creditor's claim and sequestration is consequently not a legal proceeding to enforce an agreement as stated in section 129 of the NCA.²¹ The respondents in *Mutemeri* also submitted in the alternative that an application for sequestration was a proceeding in respect of a credit agreement within the meaning of section 130(3), a submission akin to that of the appellants in *Naidoo*.²² Trengove AJ held that section 130(3) did not extend the scope of the Act to include sequestration proceedings.²³

Mutemeri also dealt with the related matter where a credit provider receives a notice under the NCA that a consumer has filed for debt review.²⁴ Section 88(3) of the NCA

¹⁶ *Naidoo v ABSA Bank* 2010 4 SA 597 (SCA) para 5.

¹⁷ *Naidoo v ABSA Bank* 2010 4 SA 597 (SCA) para 5.

¹⁸ *Naidoo v ABSA Bank* 2010 4 SA 597 (SCA) para 6.

¹⁹ *Naidoo v ABSA Bank* 2010 4 SA 597 (SCA) para 4.

²⁰ *Naidoo v ABSA Bank* 2010 4 SA 597 (SCA) para 4.

²¹ *Investec Bank v Mutemeri* 2010 1 SA 265 (GSJ) 266C.

²² *Investec Bank v Mutemeri* 2010 1 SA 265 (GSJ) 266C.

²³ *Investec Bank v Mutemeri* 2010 1 SA 265 (GSJ) 266C.

²⁴ Under s 86(4)(b)(i) of the NCA when a debt counsellor receives an application from a consumer for debt counselling he or she must notify the consumer's credit providers by way of notice.

provides that a credit provider who receives such a notice may not exercise or enforce by litigation or other judicial process any right under the relevant credit agreement.²⁵ This restriction is similar to that in section 129(1)(b). It was held in this respect that an application for sequestration did not qualify as "litigation or other judicial process to enforce ... any right under a credit agreement".²⁶ As a result of this decision it appears that a credit provider may apply for compulsory sequestration while the consumer is under debt review.

Regarding the appellant's contention that section 130(3) extends the scope of section 129(1) of the NCA, Cachalia JA considered *Ex Parte Ford and Two Similar Cases*.²⁷ In this case one of the issues was whether or not section 85 of the NCA was applicable to proceedings for the voluntary surrender of an estate.²⁸ In this regard Cachalia JA pointed out that the wording of section 85 of the NCA is nearly identical to that of section 130(3).²⁹ The relevant parts of section 85 read as follows:

Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may – (a) refer the matter directly to a debt counsellor...

The court in *Ford* observed that section 85 is cast in broad terms and that the limitation of the provision to proceedings in which a credit agreement is being considered therefore did not imply that the proceedings in question were restricted to those in which the enforcement of a credit agreement is in issue.³⁰ The court therefore concluded that section 85 was applicable to proceedings for voluntary surrender under the *Insolvency Act*. This decision is in considerable contrast to *Mutemeri*, which held that section 129 of the NCA was not applicable to compulsory sequestration, which is also a procedure under the *Insolvency Act*. Cachalia JA declined to decide or comment on *Ford* and distinguished it from *Naidoo*. The court argued that section 85, with which *Ford* was concerned, deals with the alleviation of over-indebtedness

²⁵ *Otto National Credit Act Explained* para 44.2.

²⁶ *Investec Bank v Mutemeri* 2010 1 SA 265 (GSJ) 276.

²⁷ *Ex parte Ford* 2009 3 SA 376 (WCC).

²⁸ *Ex parte Ford* 2009 3 SA 376 (WCC) 380 *et seq.*

²⁹ *Ex parte Ford* 2009 3 SA 376 (WCC).

³⁰ *Ex parte Ford* 2009 3 SA 376 (WCC) 380; Van Heerden and Boraine 2009 *PER* 46.

in Chapter 4 of the NCA,³¹ while *Naidoo* deals with sections 129 and 130 of the NCA, which are concerned with debt enforcement under Chapter 6 of the NCA³² - two different areas of the Act both in location and substance.

Taking the above issues into consideration Cachalia JA concluded that section 130(3) must be interpreted in the context of the chapter in which it is situated and not in isolation or outside of its context, as argued by the appellant.³³ Upon doing so the judge held that it was clear from the language that the proceedings referred to in section 130(3) do not extend the ambit of section 129. As was held in *Mutemeri*, section 130(3) clearly provides that a credit provider may institute proceedings to enforce the agreement only after having complied with the procedure in section 129(1)(a).³⁴

Given that the appellant accepted that sequestration proceedings are not proceedings as contemplated in section 129(1)(b) read by itself,³⁵ and as section 130(3) was held not to extend the ambit of section 129, the court concluded that the appellant's assertion that the respondent had to comply with section 129 was without merit.³⁶

3 Evaluation of the decision and concluding remarks

It is submitted that Cachalia JA made the correct decision regarding the issues presented in this appeal, firstly in confirming that sequestration proceedings are not "legal proceedings to enforce the agreement" within the meaning of section 129(1) of the NCA.³⁷ In *Mutemeri*, Trengove AJ put forward two points which, it is suggested, strongly support the accuracy of the exclusion of sequestration proceedings from section 129(1) of the NCA. They are the following:

- (a) Under section 9(2) of the *Insolvency Act* an application for sequestration may be made on a claim that is not yet due or enforceable because the purpose of a se-

³¹ *Naidoo v ABSA Bank* 2010 4 SA 597 (SCA) para 6.

³² *Naidoo v ABSA Bank* 2010 4 SA 597 (SCA) para 6.

³³ *Naidoo v ABSA Bank* 2010 4 SA 597 (SCA) para 6.

³⁴ *Naidoo v ABSA Bank* 2010 4 SA 597 (SCA) para 7; *Investec Bank v Mutemeri* 2010 1 SA 265 (GSJ) para 33.

³⁵ *Naidoo v ABSA Bank* 2010 4 SA 597 (SCA) para 4.

³⁶ *Naidoo v ABSA Bank* 2010 4 SA 597 (SCA) para 4.

³⁷ *Naidoo v ABSA Bank* 2010 4 SA 597 (SCA) para 4.

questration order is not merely to enforce a claim. Its primary purpose is to bring about a concurrence of claims in an insolvent estate in an orderly manner to ensure that creditors are treated equally.³⁸

- (b) The requirement that an applicant for sequestration must have a liquidated claim is above all to ensure that applications are brought by creditors with sufficient interest in the sequestration and not because the application is for the enforcement of the claim.³⁹

Trengove AJ relied on case law to support this conclusion. The following passage from *Collett v Priest*⁴⁰ aptly describes why sequestration proceedings are not proceedings simply to enforce a singular claim by a creditor:

[S]equestration cannot fittingly be described as an order for a debt due by the debtor to the creditor. Sequestration proceedings are instituted by a creditor against a debtor not for the purpose of claiming something from the latter, but for the purpose of setting the machinery of the law in motion to have the debtor declared insolvent. No order in the nature of a declaration of rights or of giving or doing something is given against the debtor. The order sequestrating his estate affects the civil status of the debtor and results in vesting his estate in the Master. No doubt, before an order so serious in its consequences to the debtor is given the Court satisfies itself as to the correctness of the allegations in the petition. It may for example have to determine whether the debtor owes the money as alleged in the petition. But while the Court has to determine whether the allegations are correct, there is no claim by the creditor against the debtor to pay him what is due nor is the Court asked to give any judgment, decree or order against the debtor upon any such claim.

Secondly, the court in *Naidoo* correctly stated that section 130(3) does not extend the ambit of section 129. It is submitted in support of *Naidoo* and *Mutemeri* that upon reading section 130(3) with particular attention to subsection 130(3)(a), this section includes proceedings that have already been identified in section 129 only. It does not have the effect of broadening section 129 to include "all proceedings" where the object of these proceedings is credit agreements regulated by the NCA.

Although the judgment of Cachalia JA is correct from a hermeneutical point of view it raises concern as to how this precedent, that does not give the consumer the option

³⁸ *Investec Bank v Mutemeri* 2010 1 SA 265 (GSJ) para 31.

³⁹ *Investec Bank v Mutemeri* 2010 1 SA 265 (GSJ) para 31.

⁴⁰ *Collett v Priest* 1931 AD 290 299. In this case the Appellate Division had to decide if a sequestration order was appealable. The relevant law allowed appeals in "any civil suit" only, which was described as a legal proceeding in which one party sues for or claims something from another. The court held that this definition did not include an application for sequestration.

to continue with debt review when he/she is sequestered,⁴¹ will affect the efficiency of the NCA. As pointed out above, section 3(g) of the NCA states that one of the methods of fulfilling the aims of the NCA is the principle of satisfaction by the consumer of all of his or her financial obligations. An over-indebted consumer may have the financial potential to overcome his or her debt if assisted by debt restructuring, a ruling of reckless credit, or simple negotiation between herself and the credit provider. By fulfilling her financial obligations the consumer also avoids becoming insolvent and a less than useful member of the economy. Furthermore a debtor should not be forced to lose his or her assets and be subjected to the social stigma of being an insolvent without at the minimum being given a choice between insolvency and an alternative debt relief measure. Such a choice would also provide the consumer with the benefit of being able to keep his assets. It is submitted that apart from regular consumer protection this is one of the purposes of the NCA. It is suggested that the decision in *Naidoo* is inconsistent with this goal. As a result of this decision, any potential that the consumer may have to fulfil his or her financial responsibility and avoid becoming insolvent may be side-stepped by a credit provider who applies for sequestration directly.

The same is true for the problem created by section 88(3) of the NCA discussed above. Once debt restructuring has been granted credit providers should not be allowed to proceed with sequestration proceedings against the debtor. Allowing sequestration applications against a consumer under debt review is not consistent with the principle of encouraging consumers to pay off their debts. It is submitted that the following amendments should be made by the legislator to overcome the problems:⁴²

(a) Section 129 should be amended by the words in italic as follows:

- (1) 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 agree-

⁴¹ At this juncture it must be pointed out that under s 9(4A) *Insolvency Act* 24 of 1936 the respondent-debtor under an application for compulsory sequestration must receive a notice of the application and he/she therefore still has the opportunity to oppose such an application on the basis that debt review will, for example, provide a greater advantage for creditors than sequestration.

⁴² The proposed amendments to the NCA are underlined.

- ment or develop and agree on a plan to bring the payments under the agreement up to date.
- (b) may not commence *an application for sequestration or* legal proceedings to enforce the agreement before
 - (i) first providing notice to the consumer, as contemplated in paragraph (a)

- (b) Section 88(3) should be amended by the words in italic as follows:

Subject to section 86(9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86(4)(b)(i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement *or apply for the compulsory sequestration of the relevant consumer's estate until*

Bibliography

Otto *National Credit Act Explained*

Otto JM *The National Credit Act Explained* (LexisNexis Butterworths Durban 2010)

Roestoff *et al* 2009 *PER*

Roestoff M *et al* "The debt counselling process - closing the loopholes in the National Credit Act 34 of 2005" 2009 *PER* 246-305

Scholtz *et al National Credit Act*

Scholtz JW *et al Guide to the National Credit Act* (LexisNexis Butterworths Durban 2006)

Van Heerden and Coetzee 2009 *PER*

Van Heerden CM and Coetzee H "*Marimuthu Munien v BMW Financial Services (SA) (Pty) Ltd* Unreported case no. 16103/08 (KZD)" 2009 *PER* 332-360

Van Heerden and Boraine 2009 *PER*

Van Heerden CM and Boraine A "The interaction between debt relief measures in the National Credit Act 34 of 2005 and Aspects of Insolvency Law" 2009 *PER* 22-161

Register of legislation

Insolvency Act 24 of 1936

National Credit Act 34 of 2005

Register of court cases

Collett v Priest 1931 AD 290

Ex parte Ford 2009 3 SA 376 (WCC)

Investec Bank v Mutemeri 2010 1 SA 265 (GSJ)

Naidoo v ABSA Bank 2010 4 SA 597 (SCA)